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THE COURTS AND INTEGRITY BODIES: CONSTITUTIONAL  
CONUNDRUMS

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INTEGRITY INSTITUTIONS: STRENGTHS, WEAKNESSES, OPTIONS

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**Introduction**

1. There have been various challenges in the courts to the activities and reports of state based integrity bodies, which have thrown up difficult legal questions. This is partly because these bodies, whose prolific existence is a relatively recent phenomenon, do not neatly fit into traditional tripartite constitutional structures. This paper deals with some of the cases the New South Wales Supreme Court has dealt with and considers how these issues might arise in the federal context in relation to a national integrity body.

**The New South Wales integrity system**

2. New South Wales has a plethora of bodies which fulfil integrity functions,<sup>1</sup> including the Ombudsman,<sup>2</sup> Information and Privacy Commission,<sup>3</sup> the Auditor-General,<sup>4</sup> the Law Enforcement Conduct Commission<sup>5</sup> and, of course, the Independent Commission against Corruption, or ICAC.<sup>6</sup>

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<sup>1</sup> Defined as “investigating impropriety, corruption and maladministration in governmental functions and ... handling citizen’s complaints about administrative decision-making”: see TF Bathurst, ‘New Tricks for Old Dogs: The Limits of Judicial Review of Integrity Bodies’ in Neil Williams (ed), *Key Issues in Public Law* (Federation Press, 2017) 40, 41.

<sup>2</sup> See *Ombudsman Act 1974* (NSW).

<sup>3</sup> *Government Information (Information Commissioner) Act 2009* (NSW); *Privacy and Personal Information Act 1998* (NSW).

<sup>4</sup> *Public Finance and Audit Act 1983* (NSW).

<sup>5</sup> The Law Enforcement Conduct Commission (LECC) replaced the Police Integrity Commission (PIC) and the Police Compliance Branch of the NSW Ombudsman in 2017. See *Law Enforcement Conduct Commission Act 2016* (NSW).

<sup>6</sup> *Independent Commission against Corruption Act 1988* (NSW) (“ICAC Act”). Note also the NSW Crime Commission, though not strictly an accountability watchdog does tend to play a role in anti-corruption work due to the links between official corruption and organised crime: see AJ Brown and B Head, ‘Ombudsman, Corruption Commission or Police Integrity Authority? Choices for Institutional Capacity in Australia’s Integrity Systems’ (Paper

3. In relation to ICAC, its functions are broadly to investigate and expose corrupt conduct in the New South Wales public sector, prevent corruption through advice and assistance and educate about corruption and its effects.<sup>7</sup> Corrupt conduct is defined very broadly in the ICAC Act, incorporating “any conduct of any person (whether or not a public official) that adversely affects, or that could adversely affect, either directly or indirectly, the honest or impartial exercise of official functions by any public official”.<sup>8</sup> This definition is limited by a subsequent section which states that conduct that would fall within that definition only amounts to corrupt conduct if it could constitute or involve a criminal offence, a disciplinary offence, reasonable grounds for termination of employment of a public official, or a “substantial” breach of a code of conduct by a Minister or MP.<sup>9</sup>
4. It has extraordinary powers of investigation, including the ability to obtain information from public authorities,<sup>10</sup> enter public premises and take copies of documents,<sup>11</sup> conduct compulsory examinations,<sup>12</sup> summons witnesses to attend and give evidence or produce documents,<sup>13</sup> issue warrants for the arrest of witnesses who fail to attend in answer to a summons,<sup>14</sup> issue search warrants<sup>15</sup> and prepare reports on its investigations.<sup>16</sup> It is also able to undertake covert activities such as obtaining telecommunications interception warrants and warrants to use listening, tracking, and data surveillance devices.<sup>17</sup>
5. The Commission can conduct a public inquiry if it is satisfied that it is in the public interest to do so, taking into account the benefit of exposing the

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<sup>7</sup> This being the NSW ICAC’s summary of its own functions as provided for by the *ICAC Act* s 13(1): NSW ICAC, ‘Functions of the ICAC’ <<https://www.icac.nsw.gov.au/about-the-icac/overview/functions-of-the-icac>>.

<sup>8</sup> *ICAC Act* s 8.

<sup>9</sup> *Ibid* s 9(1).

<sup>10</sup> *Ibid* s 21.

<sup>11</sup> *Ibid* s 23.

<sup>12</sup> *Ibid* s 30.

<sup>13</sup> *Ibid* s 35.

<sup>14</sup> *Ibid* s 36.

<sup>15</sup> *Ibid* s 40(4).

<sup>16</sup> *Ibid* s 74.

<sup>17</sup> *Ibid* s 19.

corruption to the public, the seriousness of the complaint and any risk of undue prejudice to reputation.<sup>18</sup> Although the Commission has broad powers to obtain information and documents and to summon people to give evidence, that evidence given is not admissible in any civil or criminal proceedings.<sup>19</sup>

6. The New South Wales Ombudsman, which has jurisdiction to investigate complaints about New South Wales public authorities,<sup>20</sup> similarly has the power to force witnesses to give evidence,<sup>21</sup> even where to do so might incriminate them<sup>22</sup> – but again, such statements are inadmissible in later proceedings against them.<sup>23</sup>

### **The Courts and integrity bodies**

7. Before considering some of the issues arising from the interaction of integrity bodies with the courts, it is important to note that there is debate in the legal community about where these bodies fit into our existing tripartite constitutional structure, and whether there needs to a revision of the existing model of the separation of powers to accommodate integrity bodies as a fourth branch of government.<sup>24</sup> This paper does not deal with this debate, as it is likely to remain somewhat academic in circumstances where the separation of powers is strictly entrenched at the federal level by a written constitution which can only be amended by referendum. The balance of this paper is

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<sup>18</sup> Ibid s 31.

<sup>19</sup> Ibid s 37, or in disciplinary proceedings, except as provided for by the *ICAC Act*: see s 114A.

<sup>20</sup> *Ombudsman Act 1974* (NSW) s 26, with certain exceptions: see sch 1.

<sup>21</sup> Ibid s 18. See also *Royal Commissions Act 1923* (NSW) s 11 as applied by *Ombudsman Act 1974* (NSW) s 19(2).

<sup>22</sup> Ibid s 36.

<sup>23</sup> Ibid.

<sup>24</sup> The concept of a fourth integrity branch was most famously described in Bruce Ackerman, 'The New Separation of Powers' (2000) 113 *Harvard Law Review* 633. In Australia, it is most commonly attributed to James Spigelman, 'The Integrity Branch of Government' (2004) 78 *Australian Law Journal* 724. Chief Justice Wayne Martin has noted that "I am not so sure that the Chief Justice was advocating the notion of an additional branch of government, but rather was drawing attention to the integrity functions performed by various agencies of government, including the recognised branches of government constituted by Parliament and the courts": Wayne Martin, 'Forewarned and four-armed: Administrative law values and the fourth arm of government' (2014) 88 *Australian Law Journal* 106, 111. See also WMC Gummow, 'A Fourth Branch of Government' (Speech delivered to the National Administrative Law Conference, Adelaide, 19 July 2010) and recent consideration by AJ Brown, 'The Fourth, Integrity Branch of Government: Resolving a Contested Idea' (Australasian Political Studies Association 2018 Presidential Address, Brisbane, July 2018).

therefore based on the assumption that any such integrity body will remain within the executive branch of government, be subject to the scrutiny of parliament and the laws passed by parliament, and its compliance or otherwise with those laws will be enforced by the courts.<sup>25</sup>

## Judicial power

8. The separation of powers is one of the most significant constitutional limitations on the design of a federal integrity agency. At the federal level, only courts referred to in s 71 of the *Constitution* can exercise judicial power.<sup>26</sup> This separation exists in a diluted form at the state level.<sup>27</sup> There is no “exclusive and exhaustive”<sup>28</sup> definition of the concept of judicial power, but its core characteristic is the conclusive settlement of a dispute between parties as to their existing rights,<sup>29</sup> as opposed to the creation of new rights.<sup>30</sup> The process of making an enforceable decision by applying principles of law to facts is exclusively judicial. This always includes the adjudgment and punishment of criminal guilt, a function which a federal executive body could never exercise.<sup>31</sup>
9. While investigatory bodies such as royal commissions have always been understood to be exercising executive and not judicial power, the waters can start to muddy when considering commissions that investigate offences and misconduct.<sup>32</sup> This was the case, for example, in the case of *Brandy v Human Rights and Equal Opportunity Commission*, in which decisions of the Commission were registrable in the Federal Court, and thereby became enforceable as if an order of that Court.<sup>33</sup> The binding and conclusive effect of

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<sup>25</sup> Martin, above n 24, 124.

<sup>26</sup> *Waterside Workers' Federation of Australia v JW Alexander Ltd* (1918) 25 CLR 434.

<sup>27</sup> *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51.

<sup>28</sup> *R v Davison* (1954) 90 CLR 353, 366.

<sup>29</sup> James Stellios, *Zines's The High Court and the Constitution* (Federation Press, 6<sup>th</sup> ed, 2015) 221. See *Huddart, Parker & Co Pty Ltd v Moorehead* (1909) 8 CLR 330, 357 (Griffith CJ).

<sup>30</sup> Stellios, above n 29, 222.

<sup>31</sup> *Chu Kheng Lim v Minister for Immigration, Local Government and Ethnic Affairs* (1992) 176 CLR 1, 27.

<sup>32</sup> Bathurst, above n 1, 42.

<sup>33</sup> (1995) 183 CLR 245 ('*Brandy*').

registration meant the Commission was impermissibly exercising judicial power, and the legislation found constitutionally invalid.<sup>34</sup>

10. An analogous issue arose in relation to ICAC, in the case of *Balog v ICAC*.<sup>35</sup>

Mr Balog, who was the subject of an ICAC investigation, sought a declaration that the Commission was not entitled to make a finding that an individual was guilty of a criminal offence. The Court held, as a matter of statutory construction, that this was not permitted by the ICAC Act at the time, and commented on how “inappropriate it would be” for a “Commission intended to be primarily an investigative body” to “report a finding of guilt or innocence”.<sup>36</sup> As a result the *ICAC Act* was amended,<sup>37</sup> and now explicitly provides that the Commission is not authorised to include an opinion that a person has committed a criminal offence, but that an opinion or finding that a person has engaged in corrupt conduct is not a finding of such a nature.<sup>38</sup> Notwithstanding, the definition of corrupt conduct, to the extent it extends beyond public officials, requires a finding of conduct of a nature which could involve certain types of criminal offences.<sup>39</sup>

11. However, it does not appear to be constitutionally impermissible for an executive body to make findings that corrupt conduct has occurred, provided the legislation does not take that extra step of binding enforceability in *Brandy*.<sup>40</sup> This much was confirmed in the case of *Australian Communications*

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<sup>34</sup> Ibid 269 (Deane, Dawson, Gaudron and McHugh JJ).

<sup>35</sup> (1990) 169 CLR 625.

<sup>36</sup> Ibid [17] (Mason CJ, Deane, Dawson, Toohey and Gaudron JJ).

<sup>37</sup> *Independent Commission Against Corruption (Amendment) Act 1990* (NSW).

<sup>38</sup> See *ICAC Act* ss 13, 74A, 74B.

<sup>39</sup> Ibid s 8(1)(a).

<sup>40</sup> (1995) 183 CLR 245: “However, if it were not for the provisions providing for the registration and enforcement of the Commission’s determinations, it would be plain that the Commission does not exercise judicial power. This is because, under s 25Z(2), its determination would not be binding or conclusive between any of the parties and would be unenforceable. That situation is, we think, reversed by the registration provisions”: at 269 (Deane, Dawson, Gaudron and McHugh JJ). See also *Lockwood v The Commonwealth* (1954) 90 CLR 177, where Fullagar J stated: “It was said, in the first place, that the legislation under which the commission was appointed conferred judicial power otherwise than in accordance with the provisions of c. III of the Constitution. I consider this argument untenable. The duties of the commission are to inquire and report. It has, in order that it may effectively perform the duty of inquiry, certain powers which normally belong to judicial tribunals. But the function which is primarily distinctive of judicial power — the power to decide or determine — is absent. The commission can neither decide nor determine anything

*and Media Authority v Today FM (Sydney) Pty Ltd*,<sup>41</sup> where the High Court held that it was not unconstitutional for ACMA to make a finding that a provider of commercial radio broadcasting services had used the service in the commission of an offence, as a pre-condition to ACMA taking enforcement action which could include the suspension or cancellation of the provider's licence.<sup>42</sup> The Court held that "none of the features of the power conferred on the Authority ... support the conclusion that it is engaged in the exercise of judicial power".<sup>43</sup>

12. What this probably means for any integrity body at the federal level is that it may be capable of making a finding that a person has engaged in corrupt conduct. The lesson from *Balog v ICAC*,<sup>44</sup> and one which repeats itself throughout the integrity body cases, is that legislative design is key, and attention should be focused on exactly what kind of findings the body is authorised to make. However, it should be noted that *Balog v ICAC* turned on construction of the statute, and no issue of the constitutionality of such a provision arose in the case.<sup>45</sup>

13. It will also be important to consider how, to the extent that federal judicial officers are subject to investigation, this does not infringe on the separation of powers by impermissibly interfering with the exercise of federal judicial power. On that point, it should be noted that there has never been a suggestion that the *Judicial Officers Act 1986* (NSW), which provides for the Conduct Division of the New South Wales Judicial Commission to investigate complaints about judicial officers, impermissibly interferes with the separation of powers at the state level. If the Conduct Division decides that a complaint is wholly or partly substantiated and forms an opinion that the matter could justify parliamentary consideration of the removal of the judicial officer from office, it must present

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and nothing that it does can in any way affect the legal position of any person. Its powers and functions are not judicial": at 180-181.

<sup>41</sup> (2015) 255 CLR 352.

<sup>42</sup> *Broadcasting Services Act 1992* (Cth) s 143.

<sup>43</sup> *Australian Communications and Media Authority v Today FM (Sydney) Pty Ltd* (2015) 255 CLR 352, [59] (French CJ, Hayne, Kiefel, Bell and Keane JJ).

<sup>44</sup> (1990) 169 CLR 625.

<sup>45</sup> *Ibid.*

to the Governor a report setting out its findings of fact and that opinion.<sup>46</sup> In New South Wales, a judicial officer cannot be removed from office in the absence of such a report being made by the Division.<sup>47</sup> It also has the power to refer complaints to any other body, if the Division considers it appropriate in the circumstances.<sup>48</sup> In the case of *Bruce v Cole*<sup>49</sup> involving a judge of the New South Wales Supreme Court, the Court noted that while the reasoning in *Kable v Director of Public Prosecutions*<sup>50</sup> indicates that “the legislative power of the State may not be used to alter fundamentally the independence of a Supreme Court judge, or the integrity of the State judicial system”, “no submission has been made that any part of the *Judicial Officers Act 1986* or the *Constitution Act 1902* ... has any such effect”.<sup>51</sup>

14. One other matter which may be of significance is that the “public officials” to whom the *ICAC Act* applies includes judges, whether exercising judicial, ministerial or other functions.<sup>52</sup> The New South Wales Judicial Commission is a body which falls within the definition of a “public authority” in the *ICAC Act*.<sup>53</sup> The principal officer of a public authority is obliged by s 11(2) of the *ICAC Act* to report to ICAC any matter the person suspects on reasonable grounds concerns, or may concern, corrupt conduct. The validity of the inclusion of judges as public officials and the obligation on the Judicial Commission to report such conduct has never been tested. Such provisions may well be challenged if introduced into the federal sphere, where there is a stricter separation of powers.

### **The obligation to afford procedural fairness**

15. A common issue that may result in an integrity body finding itself before a court relates to its obligation to afford procedural fairness. There are two questions that arise: first, to what extent must an integrity body give a fair

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<sup>46</sup> *Judicial Officers Act 1986* (NSW) s 29.

<sup>47</sup> *Ibid* s 41.

<sup>48</sup> *Ibid* s 35(1).

<sup>49</sup> (1998) 45 NSWLR 163, 167.

<sup>50</sup> (1996) 189 CLR 51.

<sup>51</sup> *Bruce v Cole* (1998) 45 NSWLR 163, 167 (Spigelman CJ, Mason P, Priestley, Sheller and Powell JJA agreeing).

<sup>52</sup> *ICAC Act* s 4.

<sup>53</sup> See *ibid*.

hearing to someone who might be subject to an adverse finding, and second, what does a “fair” hearing look like in this context?

16. These questions arose in relation to ICAC in the matter of *Glynn v ICAC*.<sup>54</sup>

ICAC was investigating whether corrupt conduct had occurred in relation to the use and development of land in the Northern Rivers Regions of New South Wales. The directors and representatives of certain companies claimed that the Assistant Commissioner had denied them procedural fairness. The Court held that “there can be no doubt that the commissioner was bound to observe the rules of natural justice, the content of which is variable according to the requirements of each case, but hinges on the notion of fairness”.<sup>55</sup> The allegations were varied but included that the Commissioner gave insufficient notice of the areas in which adverse findings might be made. The Court held that in this context procedural fairness did not require ICAC to formulate precise but tentative conclusions at the commencement of the inquiry.<sup>56</sup> The Court noted that the *ICAC Act* suggested that the legislature did not intend that its inquiries should be “shackled by all the formal rules that attend adversary proceedings in a court of law,”<sup>57</sup> but the parties were entitled to a fair and unbiased hearing and to be sufficiently informed of the matters they should expect to meet if they were to be subject to adverse findings.<sup>58</sup>

17. There are a few points that arise when considering the implications for a federal integrity body. First, it is clear that the common law will imply a condition that the powers conferred on such a body be exercised with fairness to those whose interests might be affected.<sup>59</sup> One relevant “interest” is a person’s reputation. This was established in *Ainsworth v Criminal Justice Commission*, where a report prepared by the CJC was tabled in the

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<sup>54</sup> (1990) 20 ALD 214.

<sup>55</sup> *Ibid* 215.

<sup>56</sup> *Ibid* 218. The requirements of procedural fairness are not fixed, but “must depend on the circumstances of the case, the nature of the inquiry, the rules under which the tribunal is acting, the subject-matter that is being dealt with, and so forth”: *Mobil Oil Australia Pty Ltd v Federal Commissioner of Taxation* (1963) 113 CLR 475, 504 (Kitto J) citing *Russell v Duke of Norfolk* [1949] 1 All ER 109 (Tucker LJ).

<sup>57</sup> *Ibid*.

<sup>58</sup> *Ibid* 215.

<sup>59</sup> *Plaintiff S10/2011 v Minister for Immigration and Citizenship* (2012) 246 CLR 636, [97] (Gummow, Hayne, Crennan and Bell JJ).



Queensland Parliament containing adverse recommendations about certain persons involved in the poker machine industry, without any notice having been given to those mentioned in the report of its existence or contents.<sup>60</sup> The plurality stated that “reputation is an interest attracting the protection of the rules of natural justice”,<sup>61</sup> including one’s “business or commercial reputation”.<sup>62</sup>

18. Secondly, however, it is also well-settled that in this context the legislature can exclude the requirements of procedural fairness “by plain words of necessary intendment”.<sup>63</sup> To the extent that policy-makers think it is desirable that there should be limitations on the obligation of a federal integrity body to afford procedural fairness, it is necessary that it be clearly manifested in the relevant statute, using language, as described by the High Court, of “irresistible clearness”.<sup>64</sup>

19. Finally, it should be noted there has in recent times been criticism of the manner in which ICAC has conducted its inquiries. Three separate claims, all relating to the granting of certain mining tenements, have been brought in the Supreme Court. The first was on the ground of apprehended bias,<sup>65</sup> the second for want of procedural fairness<sup>66</sup> and the third claimed that ICAC officers committed the tort of misconduct in public office during the course of

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<sup>60</sup> (1992) 175 CLR 564.

<sup>61</sup> Ibid 578 (Mason CJ, Dawson, Toohey and Gaudron JJ).

<sup>62</sup> Ibid.

<sup>63</sup> *Plaintiff M61/2010 v Commonwealth* (2012) 243 CLR 319, [74] citing *Annetts v McCann* (1990) 170 CLR 596, 598.

<sup>64</sup> *Potter v Minahan* (1908) 7 CLR 277, 304 (O'Connor J) cited in *Saeed v Minister for Immigration and Citizenship* (2010) 241 CLR 252, [15] (French CJ, Gummow, Hayne, Crennan and Kiefel JJ). The necessity of clear language is evident in the long line of migration cases in which the legislature has attempted to exclude procedural fairness, or provide an exhaustive code for its exercise. For example, *Re Minister for Immigration and Multicultural Affairs; Ex parte Miah* (2001) 206 CLR 57 involved legislation with “extensive procedures governing refugee decision making”: see Mark Aronson, Matthew Groves and Greg Weeks, *Judicial Review of Administrative Action and Government Liability* (Lawbook Co, 6<sup>th</sup> ed, 2017) 465-6. The Explanatory Memorandum described it as a “procedural code” that was intended to “replace the uncodified principles of natural justice with clear and fixed procedures”. The High Court held that Parliament had not manifested an intention to exclude procedural fairness, with McHugh J stating that “the use of the term “code” was too weak a reason to conclude that Parliament intended to limit the requirements of natural justice”: at [131].

<sup>65</sup> *Duncan v Ipp* [2013] NSWCA 189.

<sup>66</sup> *Duncan v ICAC* [2016] NSWCA 143.

their investigation.<sup>67</sup> These claims were all dismissed by the Court. Notwithstanding this, there has been concern by some sections of the media as to whether the ICAC process is fair, and suggestions that the power of the Commission to order a public hearing be limited and the courts provide merits review of findings of corrupt conduct. It is inappropriate for this paper to comment on the first matter. As to the second, there are at least two problems. At a functional level, it would impose extensive burdens on the court. Second, it may be argued that reviewing the question of whether a person has engaged in “corrupt conduct”, including of whether he or she may have been guilty of a criminal offence, may not be a judicial function.<sup>68</sup> This may be of constitutional concern at the state level,<sup>69</sup> and this is even more likely at the federal level.

### **The privilege against self-incrimination**

20. Similar issues again arise in relation to legislative decisions to abrogate the privilege against self-incrimination, being a common law rule that a person cannot be obliged to answer any question or produce any document if this would tend to incriminate them.<sup>70</sup> It is related to the principle that the prosecution is to prove the guilt of an accused person.<sup>71</sup> The New South Wales Supreme Court has been asked to deal with cases where someone has been compelled by an integrity body to answer questions which tend to incriminate them, and have subsequently been charged with a criminal offence, with the DPP having access to the evidence they were compelled to give.<sup>72</sup> Other cases have arisen where someone has been charged but not

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<sup>67</sup> *Obeid v Lockley* [2018] NSWCA 71.

<sup>68</sup> See Murray Gleeson and Bruce McClintock, ‘Independent Panel – Review of the Jurisdiction of the Independent Commission Against Corruption’ (Report to the Department of Premier and Cabinet, 30 July 2015) x.

<sup>69</sup> Under the principles articulated in *Kable v Director of Public Prosecutions (NSW)* (1996) 189 CLR 51, “neither the Parliament of New South Wales nor the Parliament of the Commonwealth can invest functions in the Supreme Court of New South Wales that are incompatible with the exercise of federal judicial power”: at 116 (McHugh J). See also *Fardon v Attorney-General (Qld)* (2004) 223 CLR 575.

<sup>70</sup> See *Pyneboard Pty Ltd v Trade Practices Commission* (1983) 152 CLR 328, 335.

<sup>71</sup> *Lee v The Queen* (2014) 253 CLR 455, [32]. See also *Woolmington v The Director of Public Prosecutions* [1935] AC 462; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477.

<sup>72</sup> See, eg, *Macdonald v R; Maitland v R* (2016) 93 NSWLR 736. See also *A v Maughan* (2016) 50 WAR 263.

yet tried, and a crime commission has used its powers to examine them with respect to those offences.<sup>73</sup> The Court is asked either to grant a permanent stay on those criminal proceedings, or after the fact to find that a miscarriage of justice has occurred and overturn the conviction.

21. The Court of Criminal Appeal heard a case in 2016 involving ICAC and former state Minister Ian Macdonald. Mr Macdonald and his associate, John Maitland were examined by ICAC and gave evidence subject to objection taken under s 37 of the ICAC Act, the result being it was inadmissible in evidence against them in any later proceedings.<sup>74</sup> Transcripts of the examination were uploaded to the ICAC website, and the barrister and DPP solicitor involved in providing advice as to whether they should be charged both downloaded that transcript and read portions of that evidence. In the Court of Criminal Appeal, Messrs Macdonald and Maitland sought a temporary stay to the criminal charges which were eventually brought, until persons who had access to the evidence were no longer involved in the prosecution. The Court ultimately dismissed the appeal, finding that as a matter of construction, the *ICAC Act* necessarily abrogated the accusatorial principle, so that the protections were limited to what the legislature has provided for in ss 18 and 112 of the Act.<sup>75</sup> Those sections provide that ICAC can make a direction that the evidence should not be published and conduct inquiries in private to the extent necessary to ensure a fair trial. Earlier in 2016, the High Court had rejected a similar argument in relation to the Victorian Independent Broad-based Anti-corruption Commission.<sup>76</sup>

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<sup>73</sup> See, eg, *XY v Australian Crime Commission* (2013) 248 CLR 92.

<sup>74</sup> *Macdonald v R; Maitland v R* (2016) 93 NSWLR 736.

<sup>75</sup> *Ibid* [107] (Bathurst CJ, R A Hulme and Bellew JJ agreeing).

<sup>76</sup> See *R v Independent Broad-Based Anti-Corruption Commission* (2016) 256 CLR 459. In that case two police officers were summonsed by IBAC to be examined concerning an alleged assault. After being summonsed the police officers were suspended from duty on the basis that they were reasonably believed to have been involved in the assault. However, they had not been charged. The plurality concluded that neither the “fundamental principle” (namely, that the onus of proof of a criminal charge rests upon the prosecution) or the “companion principle” (namely, that the prosecution cannot compel an accused to assist in the discharge of its onus of proof) had application in such a case: at [41]-[51]. The effect of the case is that, in circumstances where both an examination and the provision of its contents to a prosecuting authority occur prior to the examinee being charged, neither the accusatorial principle nor the companion principle is engaged: *Macdonald v R; Maitland v R* (2016) 93 NSWLR 736, [85] (Bathurst CJ, R A Hulme and Bellew JJ agreeing).

22. In the matter of *X7 v Australian Crime Commission*, the High Court was faced with a situation where an individual had been charged with three drug trafficking offences.<sup>77</sup> While in custody before trial, the Crime Commission sought to examine him on matters related to the charges. The Court found that the *Australian Crime Commission Act 2002* (Cth) did not permit a person who had been charged to be compulsorily examined on the subject matter of the offence.<sup>78</sup> In a later case in the High Court of *Lee v The Queen*,<sup>79</sup> convictions were quashed where transcripts of a compulsorily examination were provided to the DPP, because the New South Wales Crime Commission's legislation (at the time) stated the Commission had to make a declaration prohibiting publication of material which might prejudice the fair trial of a person.<sup>80</sup>

23. There are two matters which emerge from these cases. The first is that although the privilege and the accusatorial rule it relates to have been described as "fundamental", courts have maintained that they can be overridden by legislation, provided that legislation is sufficiently clear in its intent to do so.<sup>81</sup>

24. However, a case in the New South Wales Court of Appeal last year shows there is a limit to the constitutionality of provisions affecting the privilege. While there is little doubt that examinations prior to charge are constitutional, there may be a problem where such examinations occur after criminal charges have been laid. This arose for consideration by the New South Wales

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<sup>77</sup> (2013) 248 CLR 92.

<sup>78</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92, [69]-[70], [87] (Hayne and Bell JJ), [157] (Kiefel J).

<sup>79</sup> (2014) 253 CLR 455.

<sup>80</sup> See *ibid* [3]. The law at the time, the *New South Wales Crime Commission Act 1985* (NSW) has since been replaced by the *Crime Commission Act 2012* (NSW), although section 45 of that Act is in similar terms to the relevant provision under the 1985 Act. Note that the NSW Parliament amended the Act in response to the decisions in *X7* and *Lee* by the passage of the *Crime Commission Legislation Amendment Act 2014* (NSW) which, *inter alia*, inserted new ss 45A-C.

<sup>81</sup> See, eg, *Lee v New South Wales Crime Commission* (2013) 251 CLR 196 where Crennan J, for example, stated it was "undoubtedly within the power of the legislature of New South Wales to alter the common law in relation to answering incriminating questions": at [125] citing *Sorby v The Commonwealth* (1983) 152 CLR 281, 299, 308-309; *Hamilton v Oades* (1989) 166 CLR 486, 494; *Environment Protection Authority v Caltex Refining Co Pty Ltd* (1993) 178 CLR 477, 503, 533; *Azzopardi v The Queen* (2001) 205 CLR 50, [7].

Court of Appeal in *Commissioner of Australian Federal Police v Elzein*, where it was argued that provisions of the *Proceeds of Crime Act 2002* (Cth)<sup>82</sup> permitting a compulsory examination where criminal proceedings were on foot were unconstitutional.<sup>83</sup> There was a suggestion of this kind from Justice Kiefel, as her Honour then was, in *X7*,<sup>84</sup> where her Honour stated that “the concept of an accusatorial trial where the prosecution seeks to prove its case to the jury has a constitutional dimension”.<sup>85</sup>

25. The individuals concerned were charged with offences under the *Customs Act 1901* (Cth) and subsequently issued with examination notices under the *Proceeds of Crime Act*. The Court stated that a procedural scheme which constituted a “substantial interference with the fairness of a criminal trial would not be constitutionally valid”.<sup>86</sup> This was based on Chapter III of the *Constitution*, and particularly a comment made in the case of *Condon v Pompano Pty Ltd*,<sup>87</sup> that a Court in Australia cannot constitutionally be required to adopt an unfair procedure, as procedural fairness is an “immutable

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<sup>82</sup> Sections 180, 39(1).

<sup>83</sup> (2017) 94 NSWLR 700.

<sup>84</sup> *X7 v Australian Crime Commission* (2013) 248 CLR 92.

<sup>85</sup> *Ibid* [160]. Her Honour cited *R v Snow* (1915) 20 CLR 315, 323, where Griffith CJ stated in relation to s 80 of the *Constitution*, which provides for trial by jury in relation to indictable Commonwealth offences, that “this provision ought prima facie to be construed as an adoption of the institution of ‘trial by jury’ with all that was connoted by that phrase in constitutional law and in the common law of England”. It is difficult to reconcile this with cases such as *Nicholas v The Queen* (1998) 193 CLR 173 which give Parliament significant leeway to regulate rules of evidence to be applied in the exercise of judicial power. In that case, Brennan CJ stated that it was open to parliament to alter the burden of proof in a criminal case: at 190. This was noted by French CJ and Crennan J in their judgment in *X7 v Australian Crime Commission*: “As has been stated in the context of abrogation of the privilege, the plaintiff’s argument that an accused’s rights to due process (including the right to refrain from giving evidence at trial) are entrenched by Ch III was too broadly stated. For example, the choice of the standard or burden of proof, at least in relation to specific issues, can be regulated by Parliament, and the rules of evidence may be regulated, provided, as Hayne J remarked in *Nicholas v The Queen*, that any law effecting such a change does not “deal directly with ultimate issues of guilt or innocence”. This Court has also rejected arguments that an alteration by Parliament of a substantive right usurps the judicial power of the Commonwealth. Furthermore, legislatures commonly require pre-trial disclosure from an accused person, as exemplified by provisions in the *Criminal Procedure Act 1986* (NSW) requiring the giving of an alibi notice, the disclosure of expert reports relied on to support a defence of “substantial mental impairment” and other disclosures relating to the case management of a criminal trial.”: at [48].

<sup>86</sup> *Commissioner of Australian Federal Police v Elzein* (2017) 94 NSWLR 700, [128] (Basten JA, Beazley P and Simpson JA agreeing).

<sup>87</sup> (2013) 252 CLR 38.

characteristic of a Court”.<sup>88</sup> However, in that case, the Act did not fall into such a category, as the Court retained the ultimate power to take steps to protect the integrity of the criminal process, such as prohibiting disclosure of the information.<sup>89</sup> What this suggests for any federal body is that while the privilege against self-incrimination can be abrogated, there is a constitutional limit at the point that this abrogation forces a Court to eventually conduct a trial that is unfair.

### **Parliamentary privilege and “exclusive cognisance”**

26. Disputes have also arisen in relation to the execution of search warrants by ICAC on the offices or homes of members of parliaments. This is not an issue confined to integrity bodies – the AFP, for example, in investigating Commonwealth parliamentarians’ conduct has had to manage claims of privilege.

27. For example, in the matter of *Crane v Gething*, Commonwealth Senator Winston Crane brought a case before the Federal Court after police executed search warrants at his home address, electorate office and parliamentary office.<sup>90</sup> Justice French, as his Honour then was, noted the constitutional basis for the privilege in s 49 of the *Constitution*, from which the Senate and House of Representatives derive the full powers, privileges and immunities of the House of Commons at the time of Federation, until Parliament otherwise declares.<sup>91</sup> Parliament did so in 1987, with the *Parliamentary Privileges Act 1987* (Cth), but this Act expressly does not narrow the scope of the power.<sup>92</sup> Justice French held that the issue of the search warrant was an executive, not judicial act.<sup>93</sup> Whether the privilege was to be asserted by the Senate therefore had to be resolved between police and the Parliament, not in the courts.<sup>94</sup> This is because of the fundamental principle, that while “it is for the

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<sup>88</sup> Ibid [194] (Gageler J). See also *Bass v Permanent Trustee Co Ltd* (1999) 198 CLR 334, 459 (Gleeson CJ, Gaudron, McHugh, Gummow, Hayne and Callinan JJ).

<sup>89</sup> *Commissioner of Australian Federal Police v Elzein* (2017) 94 NSWLR 700, [128]-[134] (Basten JA, Beazley P and Simpson JA agreeing).

<sup>90</sup> *Crane v Gething* (2000) 97 FCR 9, [3].

<sup>91</sup> Ibid [39].

<sup>92</sup> *Parliamentary Privileges Act 1987* (Cth) s 5.

<sup>93</sup> *Crane v Gething* (2000) 97 FCR 9, [45].

<sup>94</sup> Ibid [45].

courts to judge of the existence in either House of Parliament of a privilege ... it is for the House to judge of the occasion and of the manner of its exercise”.<sup>95</sup>

28. The practical operation of this principle was seen in the matter of the Honourable Peter Breen MLC, following ICAC’s execution of a search warrant on his Parliament House office in 2003. The Standing Committee on Parliamentary Privilege and Ethics reported on the matter.<sup>96</sup> It was an issue before the Committee as to whether the mere seizure of the documents by ICAC amounted to a breach of parliamentary privilege.<sup>97</sup> ICAC’s position was that the seizing of material under a warrant did not amount to an “impeaching or questioning”<sup>98</sup> of parliamentary proceedings – thus ICAC could seize documents but just not use them later in Court. The Committee concluded, contrary to that submission, that an ICAC investigation is a “place out of Parliament” within the meaning of Article 9, and the seizure of the documents involved a breach.<sup>99</sup> That this fell to be resolved by Parliament and not a Court flows from the judgment of French J in *Crane v Gething*<sup>100</sup> – the question of the application of the privilege in particular cases is one that only the Parliament can resolve.<sup>101</sup>

29. This leads into the second class of cases, which have involved members charged with criminal offences claiming that matters of misconduct are within

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<sup>95</sup> *R v Richards; ex parte Fitzpatrick and Browne* (1955) 92 CLR 157, 162.

<sup>96</sup> Legislative Council Standing Committee on Parliamentary Privilege and Ethics, Parliament of New South Wales, *Parliamentary privilege and seizure of documents by ICAC Report No 25* (2003).

<sup>97</sup> Note that in NSW, Article 9 of the *Bill of Rights 1689* (1 Will & Mar sess 2 c 2) applies by virtue of s 6 and sch 2 of the *Imperial Acts Applications Act 1969* (NSW): see *Egan v Willis* (1998) 195 CLR 424, [129]. Article 9 provides “That 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”.

<sup>98</sup> Legislative Council Standing Committee on Parliamentary Privilege and Ethics, Parliament of New South Wales, *Parliamentary privilege and seizure of documents by ICAC Report No 25* (2003) 26-7.

<sup>99</sup> *Ibid* 37.

<sup>100</sup> (2000) 97 FCR 9,

<sup>101</sup> It should be noted that there is a memorandum of understanding and AFP guidelines governing the execution of search warrants in the premises of Commonwealth senators and members, which provide that “any executions of search warrants in the premises of senators and members are to be carried out in such a way as to allow claims to be made that documents are immune from seizure by virtue of parliamentary privilege and to allow such claims to be determined by the House concerned”: see Harry Evans, *Odgers’ Australian Senate Practice* (14<sup>th</sup> ed, 2016) 63.

the “exclusive cognisance” or jurisdiction of Parliament, flowing from Parliament’s power to punish for contempt.<sup>102</sup> This was raised twice before the New South Wales Court of Criminal Appeal on behalf of Mr Edward Obeid, first in his application for his indictment on the count of misconduct in public office to be quashed or stayed,<sup>103</sup> and then in his appeal against conviction.<sup>104</sup> In that matter, both times, the Court made clear that the House of Commons, and thus the New South Wales Parliament, does not have an exclusive jurisdiction to deal with criminal conduct, even where this relates to the internal proceedings of the House.<sup>105</sup>

30. A related issue is whether proceedings should be stayed if a party would be precluded from raising a defence because of parliamentary privilege. As was said in *Prebble v Television New Zealand Ltd*, “there may be cases in which the exclusion of material on the grounds of parliamentary privilege makes it quite impossible fairly to determine the issue between the parties”.<sup>106</sup> In this context it is important to remember that the privilege belongs to the relevant House, it is not that of any individual member – so unlike legal professional privilege for example, it cannot be “waived” by the member concerned.<sup>107</sup> Mr Obeid also raised this argument, namely that he would be unable to properly defend himself because of the operation of parliamentary privilege. It was rejected by the Court, as the relevant communication which amounted to misconduct had no connection with parliamentary proceedings.<sup>108</sup>

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<sup>102</sup> See *Parliamentary Privileges Act 1987* (Cth) s 4.

<sup>103</sup> *Obeid v R* [2015] NSWCCA 309.

<sup>104</sup> *Obeid v R* [2017] NSWCCA 221.

<sup>105</sup> *Obeid v R* [2015] NSWCCA 309, [35]-[55] citing *R v Chaytor* [2010] UKSC 52; [2011] 1 AC 684. The leading judgments were those of Lord Phillips PSC and Lord Rodger JSC. Both dealt in terms with the overlapping criminal jurisdiction of the courts and the House of Commons. Lord Phillips stated “The House [of Commons] does not assert an exclusive jurisdiction to deal with criminal conduct, even where this relates to or interferes with proceedings in committee or in the House”: at [83].

<sup>106</sup> [1995] 1 AC 321, 338.

<sup>107</sup> *Ibid* 335.

<sup>108</sup> *Obeid v R* [2015] NSWCCA 309, [131], where the Court rejected the argument for the reasons given by the primary judge, which were as follows: “It is at this point that the argument breaks down. It elides the distinction between the function of an MLC in communicating with the Executive and its employees on the one hand and whether a particular communication had the requisite nexus with proceedings in Parliament on the other. ... In this case the relevant action is not communicating with the [E]xecutive generally but communicating with Mr Dunn about the renewal of the leases in particular. There is



31. However, much like the question of self-incrimination, there is significant constitutional leeway. Section 49 of the *Constitution* expressly preserves the question of the extent of the privilege to Parliament. The question is very much one of design, and it is preferable that these questions be worked out in the design stage, rather than later resolved in time consuming and costly litigation or parliamentary inquiries.

### **Privative clauses**

32. The interaction between courts and integrity bodies comes into sharp focus when considering privative clauses and the question of judicial review. An important feature of the *Ombudsman Act 1974* (Cth) is that it contains a privative clause, being a clause that restricts access to the Courts for review of the actions of the Ombudsman.<sup>109</sup> Section 35A provides that the Ombudsman is not liable on any ground to civil or criminal proceedings, “in respect of any act, matter or thing done or omitted to be done for the purpose of executing this or any other Act”, unless the act was done, or not done, in bad faith.<sup>110</sup> Section 35B, however, provides that an application can be made for the Supreme Court to decide whether the Ombudsman has the jurisdiction to conduct an investigation or proposed investigation, notwithstanding s 35A.<sup>111</sup>

33. Privative clauses such as this one raise issues about the lawful conduct of integrity bodies and the extent to which their conduct can be challenged in a court. This in turn reflects the looming question of who, if not the courts, is responsible for holding integrity bodies to account – who guards the guardians?<sup>112</sup> An anterior question is perhaps whether such oversight is

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nothing to suggest that particular communication had any connection to Parliamentary proceedings much less that denying it privilege was likely to impact adversely on the core business of Parliament”: *R v Obeid (No 2)* [2015] NSWSC 1380, [132]-[133]. See also *Obeid v R* [2017] NSWCCA 221, [139] (Bathurst CJ, Lemming JA, R A Hulme, Hamill and N Adams J agreeing).

<sup>109</sup> See *Ombudsman Act 1974* (NSW) ss 35A-B.

<sup>110</sup> *Ibid* s 35A(1).

<sup>111</sup> *Ibid* ss 35B(1), 35B(4).

<sup>112</sup> See Bathurst, above n 1, 42. For a discussion of some of the issues, see Sarah Withnall Howe and Yvonne Haigh, ‘Anti-Corruption Watchdog Accountability: The Limitations of Judicial Review’s Ability to Guard the Guardians’ (2016) 75 *Australian Journal of Public Administration* 305.

necessary, and given the existence of privative clauses, it is evidently the view of parliament that, at least in some cases, it is not. In one case involving the Ombudsman, *Kaldas v Barbour*, it was submitted on behalf of the Ombudsman that litigation would undermine the efficiency and effectiveness of the statutory scheme.<sup>113</sup> It has also been argued that judicial review will expose these bodies to harassment and interfere with their functions through “unmeritorious claims designed to frustrate or stifle a legitimate inquiry”.<sup>114</sup>

34. There are countervailing considerations that, in the authors’ opinion, outweigh these concerns by some measure. First, is that the powers exercised by integrity bodies are “coercive and intrusive” in a manner open to abuse.<sup>115</sup> Secondly, these bodies are not free from controversy – the decision of ICAC to investigate Crown Prosecutor Margaret Cunneen being one prime example – and whether or not criticisms are well-founded, independent judicial review of their actions maintains public confidence in them.<sup>116</sup> Finally, even though reports may merely “express an opinion” to be considered in other processes, and thus do not directly affect legal rights, they certainly affect a person’s interest in their reputation and commonly act as a precursor to further acts such as criminal prosecution, which will affect such rights.<sup>117</sup>

35. At the federal level, section 75(v) of the *Constitution* vests in the High Court original jurisdiction in all matters “in which a writ of Mandamus or prohibition or an injunction is sought against an officer of the Commonwealth”. This provision means that the jurisdiction of the High Court to grant relief for jurisdictional error by an officer of the Commonwealth cannot be removed by the Parliament.<sup>118</sup> This is also entrenched at the state level, as the High Court has held that a State Supreme Court cannot be deprived of its “supervisory jurisdiction” to enforce the limits on the exercise of State

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<sup>113</sup> [2017] NSWCA 275, [71].

<sup>114</sup> Bathurst, above n 1, 45.

<sup>115</sup> *Ibid* 44.

<sup>116</sup> *Ibid*.

<sup>117</sup> *Ibid* 45.

<sup>118</sup> See *Plaintiff S157/2002 v Commonwealth* (2003) 211 CLR 476, [103] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ). See also Gummow, above n 24, 23.

executive and judicial power, as to do so “would be to create islands of power immune from supervision and restraint”.<sup>119</sup>

36. In the matter of *Kaldas v Barbour*, however, the New South Wales Court of Appeal found that the privative clause in the *Ombudsman Act* did validly preclude review of the Ombudsman’s conduct.<sup>120</sup> This was largely because of the nature of a remedy that a Court can give in relation to a report. As reports have no legal consequences of themselves, they cannot be quashed.<sup>121</sup> If the affected person gets to court before a report is released, the Court might be able to issue an injunction or prohibition stopping the publication of the report – but in a case where procedural fairness has been denied, the person affected may not know until such a time as the report is published.<sup>122</sup> What this generally leaves is a declaration – which the Court has done in a number of cases involving ICAC. In the Cunneen matter, for example, the Court made a declaration that ICAC had “no power to investigate the allegation”.<sup>123</sup> However, the entrenched supervisory jurisdiction of State Supreme Courts seems to have been determined by the High Court as that which existed at the time of federation, and at the time of federation the Court did not issue declarations as a public law remedy in the absence of an effect on legal rights.<sup>124</sup> The Court of Appeal held the privative clause in the *Ombudsman Act*

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<sup>119</sup> *Kirk v Industrial Court of New South Wales* (2010) 239 CLR 531, [99]. See also *Public Service Association of South Australia Inc v Industrial Relations Commission (SA)* (2012) 249 CLR 398.

<sup>120</sup> *Kaldas v Barbour* [2017] NSWCA 275, [346]-[361] (Basten JA, Macfarlan JA agreeing); [150]-[198].

<sup>121</sup> *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, 595 (Brennan J).

<sup>122</sup> As was pointed out by Basten JA in *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446, [66].

<sup>123</sup> See *Cunneen v Independent Commission against Corruption* [2014] NSWCA 46, [124].

Although note that the High Court has held that certiorari could issue to quash a report where the only legal force was that the Minister had to consider it before coming to his or her own decision: *Hot Holdings v Pty Ltd v Creasy* (1996) 185 CLR 149. Cf *Parker v Anti-Corruption Commission* (unreported, Western Australia Supreme Court, Full Court, 31 March 1999) where the Court held that certiorari was available to review the report even where it was not a pre-condition for further action, because it was something that an appropriate authority could use as a basis for disciplinary action against the report’s subjects. As Aronson, Groves and Weeks note, the decisions are not easy to reconcile: see above n 64, 868. Nevertheless, cases like *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125 show that courts are willing to issue declarations that such reports are a “nullity” even though not amenable to certiorari: at 148-9. See also *Police Integrity Commission v Shaw* (2006) 66 NSWLR 446, [65] (Basten JA).

<sup>124</sup> See *Kaldas v Barbour* [2017] NSWCA 275, [177]-[197] (Bathurst CJ), [356]-[357] (Basten JA).

was not invalid to the extent it meant Mr Kaldas was not entitled to a declaration, even though this meant that he was left without a remedy.<sup>125</sup>

37. This raises interesting questions for the judicial review of a federal integrity agency, if Parliament sought to limit the ability for aggrieved persons to bring proceedings against such a body. At the federal level it has generally been assumed that such a provision would be invalid because of s 75(v) of the *Constitution*.<sup>126</sup> However, that section does not include the remedy of a declaration.<sup>127</sup> In circumstances where the only remedy available might be a declaration, would the Court have the power, regardless of any privative clause, to grant relief? The answer may lie in the High Court's decision in *Plaintiff S157*,<sup>128</sup> where it noted that Parliament cannot confer on a non-judicial body the power to conclusively determine the limits of its own jurisdiction, because this would be an exercise of judicial power.<sup>129</sup> As explained above, judicial power can only be conferred on courts pursuant to Ch III of the *Constitution*.

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<sup>125</sup> Ibid [196].

<sup>126</sup> See, eg, Gummow, above n 24, 20.

<sup>127</sup> Note also that s 75(v) does not explicitly mention certiorari, however, it may issue in the exercise of an implied ancillary or incidental authority of s 75(v) jurisdiction: *Edwards v Santos* (2011) 242 CLR 421, [53] (Heydon J) citing *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, 90-91 [14] approved in *Bodruddaza v Minister for Immigration and Multicultural Affairs* (2007) 228 CLR 651, 673 [63]. In *Re Refugee Review Tribunal; Ex parte Aala* (2000) 204 CLR 82, Gaudron and Gummow JJ stated the following in relation to s 75(v): "The power of this Court to issue certiorari is not stated in Ch III of the Constitution. Rather, in a matter such as the present, the conferral of jurisdiction to issue writs of prohibition and mandamus implies ancillary or incidental authority to the effective exercise of that jurisdiction. In the circumstances of this matter, that includes authority to grant certiorari against the officer of the Commonwealth constituting the Tribunal": at [14]. See also *Pape v Commissioner of Taxation* (2009) 238 CLR 1, where the defendants submitted that the plaintiff did not have standing to challenge the payment of a tax bonus to anyone but himself. Gummow, Crennan and Bell JJ stated in relation to declaratory relief that "The disposition of the controversy between the plaintiff and the Commissioner and the Commonwealth does not turn solely upon facts or circumstances unique to the plaintiff. If the plaintiff succeeds in establishing, as a necessary step in making out his case for relief, that the Bonus Act is invalid, then the reasoning of the Court upon the issue of invalidity would be of binding force in subsequent adjudications of other disputes. Hence the very great utility in granting declaratory relief in the plaintiff's action. In this way the resolution pursuant to Ch III of the *Constitution* of the plaintiff's particular controversy acquires a permanent, larger, and general dimension. The declaration would vindicate the rule of law under the *Constitution*. The fundamental considerations at stake here were recently affirmed and explained in *Plaintiff S157/2002 v The Commonwealth*": at [158].

<sup>128</sup> *Plaintiff S157/2002 v The Commonwealth* (2003) 211 CLR 476.

<sup>129</sup> Ibid [73] (Gaudron, McHugh, Gummow, Kirby and Hayne JJ).

## Judicial review and access to information

38. It is clear from the foregoing that there is a minimum provision for judicial review, in both state and federal jurisdiction. The final question which arises is whether there is a minimum *content* of judicial review. This was an issue that arose before the New South Wales Court of Appeal in *A v ICAC*.<sup>130</sup> The Commission had summoned a company employing a journalist to attend a compulsory examination and produce its journalist's e-calendar and everything within his or her email accounts. The Act obliged ICAC to disclose the nature of the allegation or complaint being investigated, but it did not have to do so until the commencement of the hearing. This meant that the company had no way of seeking judicial review of the summons before the hearing, because it could not make out a challenge on the ground of relevance without knowing what ICAC was investigating.
39. The company argued that s 111 – which provided that officers of ICAC were not required to produce documents or divulge information relating to the exercise of their functions in court – deprived the court of an important aspect of its constitutionally entrenched jurisdiction. The Court found that s 111 did not meet the required threshold, as while it may create evidentiary difficulties for a party, it did not wholly deprive the Court of its jurisdiction.<sup>131</sup>
40. The situation may be different for integrity bodies operating at the Commonwealth level due to the High Court's entrenched jurisdiction under s 75(v). In the decision last year of *Graham v Minister for Immigration*,<sup>132</sup> a majority of the Court held that the question of whether a law transgressed constitutional limitations required examination of both its legal and practical operation.<sup>133</sup> Section 503A(2)(c) of the *Migration Act 1958* (Cth) provided that the Minister could not "be required to divulge information which was relevant to the exercise of his

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<sup>130</sup> (2014) 88 NSWLR 240.

<sup>131</sup> *Ibid* [52] (Basten JA), [184] (Ward JA), (Bathurst CJ agreeing at [7]).

<sup>132</sup> [2017] HCA 33.

<sup>133</sup> *Ibid* [48].

power ... to any person or to a court if that information was communicated by a gazetted agency on condition that it be treated as confidential".<sup>134</sup> The High Court held that this provision prevented it from obtaining access to information which was relevant to the exercise of power by the Minister, operating to shield the "exercise of power from judicial scrutiny"<sup>135</sup> and striking "at the very heart of the review for which s 75(v) provides".<sup>136</sup> The provision was held invalid to the extent it did so.<sup>137</sup>

41. The decision has important implications for the design of a federal integrity body. Many of the statutes governing integrity bodies contain secrecy provisions which prevent disclosure of operational information, including to courts. There are good reasons for confidentiality, particularly in anticorruption investigations, but it is a fine balance to strike which weighs the effectiveness of an investigation against the transparency of the body itself.<sup>138</sup> It may be even finer when questions of constitutionality come into play.

### **The head of power**

42. At the outset of this paper it was stated that one of the most significant limitations on the design of a federal integrity body is the separation of powers. However, it should also be noted that the most significant limitation is the legislative power of the Commonwealth. The federal government only has the power to legislate on the areas given to it by the *Constitution*. The Commonwealth Parliament cannot give a federal executive body coercive powers with respect to matters about which it cannot legislate.<sup>139</sup> It could not seriously be questioned that the Commonwealth Parliament has the power to legislate with respect to the Commonwealth public service – it is given the exclusive power to do so under s 52(ii) of the *Constitution*. It may be that the

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<sup>134</sup> See *ibid* at [3].

<sup>135</sup> *Ibid* [53].

<sup>136</sup> *Ibid* [65].

<sup>137</sup> *Ibid* [66].

<sup>138</sup> Bathurst, above n 1, 58.

<sup>139</sup> *Ross v Costigan* (1982) 41 ALR 319, 330 citing *AG (Cth) v Colonial Sugar Refining Co Ltd* (1913) 17 CLR 644. See also *Lockwood v Commonwealth* (1954) 90 CLR 177.

question with respect to both parliamentarians and judicial officers is found in Parliament's incidental power in s 51(xxxix), but this is an issue that deserves future critical attention.<sup>140</sup>

## Conclusion

43. This paper has sought to raise potential problems which may well arise if integrity bodies such as ICAC or perhaps the New South Wales Judicial Commission are introduced into the federal sphere. However, it must be remembered that there are many existing integrity bodies in the Commonwealth sphere, including the Commonwealth Ombudsman, Australian Commission for Law Enforcement Integrity, Australian National Audit Office and the Australian Public Service Commission, to name just a few.<sup>141</sup>

44. Those bodies seem to be operating effectively, and without challenge to their constitutionality or to their area of operation. To the extent that bodies such as ICAC raise different issues, these will be dealt with by federal courts. Notwithstanding it is not appropriate for this paper to express a definitive view on any of the issues. It merely seeks to emphasise that solutions to problems in the state sphere will not necessarily translate into the federal arena. What it

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<sup>140</sup> Section 51(xxxix) gives the Commonwealth Parliament the power to legislate with respect to "matters incidental to the execution of any power vested by this Constitution in the Parliament or in either House thereof, or in the Government of the Commonwealth, or in the Federal Judicature, or in any department or officer of the Commonwealth".

<sup>141</sup> The Australian Senate's 2017 Report also defines the following agencies as comprising part of the existing "multi-agency" framework: the Attorney-General's Department, the Australian Federal Police, the Inspector General of Intelligence and Security, the Australian Electoral Commission, the Australian Securities and Investment Commission and AUSTRAC: see Senate Select Committee on a National Integrity Commission, Parliament of Australia, *Select Committee on a National Integrity Commission*, (2017) 16. It further notes that "Other agencies referred to as playing 'a role safeguarding the integrity of government administration' include: the Australian Prudential Regulation Authority; the Department of Human Services; the Department of Defence; the Department of Foreign Affairs and Trade; Treasury; the Australian Taxation Office; the Fair Work Ombudsman; the Australian Competition and Consumer Commission; the Inspectors-General of Taxation, Intelligence and Security and Defence; the Australian Electoral Commission, the Department of Finance; the Office of National Assessments; and the Parliamentary Service Commissioner. In addition, individual agencies are responsible for implementing internal policies to prevent, detect, investigate and respond to corruption and misconduct under the Commonwealth's fraud control policy, the Australian Public Service (APS) values, the APS Code of Conduct and the *Public Service Act 1999*": at 15.

is important is that those responsible for considering the establishment and scope of a federal integrity body such as ICAC consider these issues at the outset, and how they can be accommodated in the federal sphere within the bounds of the Australian *Constitution*.