# Judicial Review of Integrity Bodies

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The remit of integrity bodies involves consideration and application of both values and law. By "integrity bodies" I mean here loosely to refer to anti-corruption commissions, ombudsmen, ad hoc commissions of inquiry and the like. Such bodies seek not only to expose legal wrongdoing but more broadly they seek to uphold community and public sector values, for example by exposing maladministration or "corrupt conduct", where those notions are commonly defined in broad terms.[2] Integrity bodies can do much good. That the lack of a federal anti-corruption commission became a significant issue in the last federal election suggests that they are also popular. They are bodies commonly granted significant legal powers by statute. Such powers must themselves be exercised within their due limits.

These bodies are usually led by people of integrity and goodwill. Yet they are human institutions. Even such people may err in fact or law or become over-zealous in their pursuit of what they perceive to be wrongdoing. In what follows I seek to offer some high-level observations on the context and significance of the findings of such bodies, why people may seek to challenge their decisions, and the limitations of such challenges.

## The legal context of holding inquiries and expressing opinions

I have long had an affection for the High Court's decision in *Clough v Leahy*, decided 120 years ago. It makes a point clearly which is counter-intuitive at one level and obvious at another. Chief Justice Griffith, speaking for the Court, held that the power of inquiry is not a prerogative right, in the sense of being a special power distinct to the Crown. He explained:[3]

> The power of inquiry, of asking questions, is a power which every individual citizen possesses, and, provided that in asking these questions he does not violate any law, what Court can prohibit him from asking them?

Anyone can inquire into anything. Similarly, anyone can express an opinion, including on whether someone within government has engaged in maladministration or corrupt conduct. Indeed, the High Court said in *Clough v Leahy* that such an inquiry can extend even "into the question of the guilt or innocence of an individual", subject to the limitation that "[a]ny interference with the course of the administration of justice is a contempt of Court".[4]

A non-statutory inquirer can reach their opinion however they like, including by holding public hearings and asking for submissions. They can subject witnesses to questioning. In 2008, for example, the then Premier of New South Wales appointed a barrister, Chris Ronalds SC, to investigate allegations of misconduct by a Minister. She exercised no statutory powers. Her

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[2] See eg the Hon James Spigelman, "The Integrity Branch of Government" (2004) 78 ALJ 724 at 725-726.

[3] [1904] HCA 38; (1904) 2 CLR 139 at 156-157.

[4] Ibid at 159-161.

report led to litigation in the Court of Appeal.[5] Very occasionally a private body or group will produce a report after some kind of inquiry. The thoughtful report produced by Peter Shergold and others into the response of Australian governments to COVID-19, funded by three philanthropic foundations, is a recent example.[6] That report was followed by a federal government inquiry and report on the topic.[7] What non-statutory inquirers cannot do, as the Chief Justice noted in *Clough v Leahy*, is compel any witness to appear and answer questions.[8] Nor can they require the production of documents, let alone tap telephones or seize hard drives. And any opinions they express may be actionable for defamation.

These points have dual significance for integrity agencies. First, such bodies *do* in general have the compulsive powers and the legal protections that ordinary people lack. Second, just as for private inquirers, commonly the findings they reach and conclusions they express are matters of evaluation or opinion, being matters on which reasonable people might reach different conclusions. These two points are important in understanding the significance of the conclusions reached by such agencies and the limits of judicial review of such matters.

**The consequences and significance of conclusions reached**

It is rare for the conclusions reached by integrity agencies to have direct legal effect. Their function generally is to investigate, make findings of fact, express conclusions and make recommendations.

The conclusions of such bodies may lead to further decisions by others which may have legal effect. A person the subject of adverse comment may be dismissed or may choose to resign. There is the possibility of the information gathered and the conclusions reached being referred to and acted upon by police, prosecutors, a professional disciplinary body, or other government agencies. Occasionally, an adverse report may lead to legislative measures. An example of that was the Act passed by the O'Farrell government in New South Wales to cancel without compensation a coal exploration licence held by NuCoal Resources Ltd – a publicly listed company with some 3,000 shareholders – because the Independent Commission Against Corruption ("ICAC") had reached a conclusion that the grant of the licence to its original holder had been affected by corrupt conduct.[9]

Whether or not further legal consequences follow, reputational harm might be caused to those the subject of adverse comment.

Given the usual absence of direct legal effect, a key aspect of the significance of the reports of integrity agencies generally lies in the perceived weight and moral authority of their conclusions. It is worth reflecting on why the conclusions and opinions they express tend to carry greater weight than those of other persons or bodies, who may equally have opinions about, for example, whether a local councillor or public servant has engaged in corrupt conduct. Those reasons might be thought to include that such bodies commonly have, and are seen to have, the following characteristics:

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[5] *Stewart v Ronalds* [2009] NSWCA 277; (2009) 76 NSWLR 99.
[6] Peter Shergold AC, Jillian Broadbent AC, Isobel Marshall, Peter Varghese AO, "Faultlines: An Independent Review into Australia's Response to COVID-19", published on 20 October 2022.
[7] Commonwealth of Australia, *COVID-19 Response Inquiry Report*, 25 October 2024.
[8] At 157.
[9] *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW).

1. They have information gathering powers and resources not available to others.

2. They are subject to some requirements of fairness which may be thought to reinforce the significance of their conclusions.

3. They are typically led by persons of perceived neutrality and integrity.

4. It is they who are tasked within the framework of government to carry out such inquiries.

5. In general their conclusions will be set out in reasoned written reports.

For some people the subject of criticism by integrity bodies, an adverse finding will have ongoing consequences even if no legal action is taken against them as a result. It can impede employment opportunities, for example, reflecting the perceived force and authority that conclusions of such bodies can have. Others seem to bounce back. It is interesting to note the position of one person who unsuccessfully sought to injunct publication of a report of the Acting New South Wales Ombudsman, arguing that "the reputational harm caused will not be able to be undone even if he subsequently succeeds in one of more of his claims".[10] He was then unsuccessful in judicial review proceedings about the report.[11] He went on, a few years later, to lead a royal commission himself.[12]

**Judicial review proceedings**

Because integrity bodies are exercising statutory powers they can be subject to legal challenges arguing that they are acting or have acted inconsistently with the laws which govern them. Such challenges are not generally open against ordinary persons acting under their own steam.[13]

Why are such judicial review challenges brought? Some challengers do not wish to be subjected to the compulsive processes that may be involved – for example, an order for production of documents or to appear to give evidence.[14] More usually, it is because the person fears that they may suffer or have suffered harm from the results of the inquiry, whether that be reputational harm or harm from the actions that others might take or have taken in light of the conclusions of the inquiry. If the inquiry is not yet complete, or not yet published, then commonly the relief sought will be injunctive in nature. If the inquiry is complete and published then usually the only relief available is declaratory in nature because of the general absence of direct legal consequences.[15]

The fact that a concern about reputation is the usual motivation to litigate in this context may explain why there are more judicial review challenges to reports of anti-corruption bodies than there are to those of ombudsmen.[16] The former are more likely to single out particular individuals for criticism than the latter, and it tends to be criticism of a more stinging kind. In that context John McMillan said in 2010 that, having been Commonwealth Ombudsman for

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[10] *Kaldas v Barbour* [2016] NSWSC 1880 at [41].
[11] *Kaldas v Barbour* [2017] NSWCA 275; (2017) 107 NSWLR 341 ("*Kaldas CA*").
[12] The federal Royal Commission into Defence and Veteran Suicide, final report released 9 September 2024.
[13] Though cf the discussion in *Stewart* (n 5) at [59]-[75], [108]-[114] and [130]-[137].
[14] Eg *A v Independent Commission Against Corruption* [2014] NSWCA 414; (2014) 88 NSWLR 240.
[15] See *Ainsworth v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 580-582.
[16] Cf Anita Stuhmcke, "Ombudsman Litigation: The Relationship between the Australian Ombudsman and the Courts", being ch 9 in Greg Weeks and Matthew Groves, *Administrative Redress in and out of the Courts* (Federation Press, 2019).

seven years, the notion of having "the judge over your shoulder" was to him "quaint but illusory".[17] I note that John's record of avoiding public law litigation later came to an end when he was Acting Ombudsman of New South Wales.[18]

Judicial review offers relatively limited scope for those wishing to preserve or salvage their reputation. To repeat an Australian legal truism, judicial review is not merits review. Courts do not consider whether the findings or conclusions reached by integrity agencies are right or wrong, compelling or weak. Judicial review is not the same thing as an appeal. That a court rejects a judicial review challenge does not mean that it agrees with the agency's conclusion. If a court upholds a challenge that does not necessarily mean that it disagreed with the ultimate conclusion. Whether or not the court agrees or disagrees is simply not to the point. The issue for the court is whether or not the agency has acted within the legal limits of its powers.

It is useful to differentiate three broad types of judicial review challenge which may be made in this context.

The first relates to the jurisdiction of the agency, in the sense of whether or not it is authorised to engage in the type of inquiry in question with respect to the persons or topics the subject of the inquiry. Such challenges tend to face an uphill battle because the modern trend is for wide and encompassing grants of jurisdiction to these agencies. But there are still limits and there will be cases at or beyond the borders. Such cases may well arise where the investigation relates to persons outside government or for alleged conduct outside the scope of a person's government employment.

The challenge of Margaret Cunneen SC, then a Deputy Senior Crown Prosecutor, to the proposed investigation into alleged aspects of her personal conduct by ICAC in New South Wales succeeded in persuading majorities of the Court of Appeal and High Court that the Commission's jurisdiction did not extend to such conduct.[19] In contrast, the Hon Jeff Shaw, a former Attorney General and judge of the New South Wales Supreme Court, failed to prevent a proposed investigation by the then Police Integrity Commission into the sad aftermath of a suburban parking accident whilst he was under the influence of alcohol.[20]

The issues which arise at this stage generally involve construction and application of the terms of the constitutive statute of the agency in question. As for many legal questions, the answers may be reasonably contestable, as the split decisions in the *Cunneen* case illustrated. Nevertheless, they are legal questions of a kind commonly addressed by the courts; they are not evaluative questions of fact or opinion.

The second type of challenge relates to the manner in which the inquiry has been undertaken. Significantly, the statutory inquirer is generally subject to a duty to accord procedural fairness to any person whose interests or reputation may be harmed by the agency's conclusions.[21] That means that the agency must accord such a person a fair opportunity to be heard before adverse conclusions are recorded in a report. However, it is important to note that such inquiries are not held to the standards of a court. That reflects the fact that these bodies are investigators, not

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[17] John McMillan, "Re-thinking the Separation of Powers" (2010) 38 *Federal Law Review* 423 at 427.
[18] *Kaldas CA* (n 11).
[19] *Cunneen v Independent Commission Against Corruption* [2014] NSWCA 421; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1.
[20] *Police Integrity Commission v Shaw* [2006] NSWCA 165; (2006) 66 NSWLR 446.
[21] See eg, recently, *AB v Independent Broad-based Anti-corruption Commission* [2024] HCA 10; (2024) 98 ALJR 532 at [25]-[26].

bodies determining legal rights in a conclusive way. Thus, for example, there is no general right of a person who is a subject of an inquiry to cross-examine witnesses.[22] The person heading the inquiry may be a former judge but they are not required to act judicially. They may, for example, participate in questioning of witnesses in a fashion which would not survive appellate review if they had been sitting in a court. And the principle of "open justice" does not apply.

Despite these limits, the right to be heard is one of importance. Thus, for example, Len Ainsworth and his company successfully obtained a declaration from the High Court that the Criminal Justice Commission of Queensland had failed to observe the requirements of procedural fairness in making comments adverse to them in a report on gaming machines.[23]

The other key requirement of procedural fairness is the absence of actual or apprehended bias. Apprehended bias was made out in two cases of note. In the first, Tony Morris QC had been appointed lead commissioner, with two deputies, under the *Commissions of Inquiry Act 1950* (Qld) to inquire into concerns raised with respect to Dr Jayant Patel at the Bundaberg Base Hospital. After publication of an interim report two hospital managers brought proceedings against the commissioners. Justice Moynihan of the Queensland Supreme Court held that Mr Morris had manifested ostensible bias in displaying a "contemptuous or dismissive" approach to the two managers, in "stark contrast" with his treatment of other witnesses; in challenging cross-examination by one of the manager's counsel in an "aggressive" and "hostile" manner; in issuing an interim report for an improper purpose of seeking "to 'flush out' Patel"; and in having private meetings with interested persons which only "came to notice" of the legal teams for the managers through press reports.[24]

The other case of note is the decision of Acting Justice Kaye in the challenge brought by Shane Drumgold SC relating to the final report of a Board of Inquiry appointed under the *Inquiries Act 1991* (ACT) constituted by Walter Sofronoff KC.[25] His Honour held that the conduct of Mr Sofronoff was such that certain of his conclusions were infected by a reasonable apprehension of bias against the plaintiff; that one conclusion had been reached without affording the plaintiff the right to be heard; and another was affected by legal unreasonableness. He granted declaratory relief reflecting those conclusions.

It is important to note the significance of a finding that an integrity body has acted contrary to the requirements of procedural fairness. Put simply it means the report of the body is, in legal terms, worthless. That is so because the conclusions reached were made beyond power in that the body in question breached the fundamental requirements of conducting a fair, unbiased process. The legal significance of a bias finding is powerfully illustrated by the High Court's decision in another context (not relating to integrity bodies) in the *Oakey Coal* case in 2021.[26] In that case the Queensland Land Court undertook an inquiry relating to the extension of a coal mine. It was exercising administrative power for the purpose of making a recommendation to a Minister under a statutory scheme. The original hearing of the Court lasted some 100 days but was found to be infected by apprehended bias. The High Court held that not only that decision but the subsequent decisions that built upon it had to be set aside and the process started again.

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[22] See eg *National Companies and Securities Commission v News Corp Ltd* [1984] HCA 29; (1984) 156 CLR 296 at 314 and 323-326.
[23] *Ainsworth* (n 15).
[24] *Keating v Morris* [2005] QSC 243; quotations from [91], [107], [112], [116], [130] and [157].
[25] *Drumgold v Board of Inquiry (No 3)* [2024] ACTSC 58.
[26] *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2; (2021) 272 CLR 33.

Further, beyond the legal worth of such a report, the very reason that courts may grant declaratory relief in such cases is to afford some *practical* justice after a misuse of public power. The plurality in *Ainsworth* explained that the report there "has already had practical consequences for the appellants' reputations", and the "consequences may extend well into the future", stating that granting a declaration "may redress some of the harm done".[27] As I indicated earlier, the reasons we attribute significance to the conclusions of integrity agencies include that they are subject to some limited requirements of fairness, and they are typically led by persons of perceived neutrality and integrity. At least the former, and potentially the latter, will have been undermined by a conclusion that procedural fairness has not been provided.

A different type of dispute about the manner in which an inquiry has been undertaken was manifest in the first of thirteen grounds in the recent challenge by former Premier Gladys Berejiklian to the adverse conclusions reached by ICAC with respect to certain conduct.[28] Hearings in that inquiry had been conducted by the Hon Ruth McColl AO whilst acting in the role of Assistant Commissioner. The public hearings finished on 1 November 2021 but Ms McColl did not provide a full draft report to ICAC until 8 February 2023. By that time her appointment as an Assistant Commissioner had expired but she had been retained as a "consultant" authorised under the ICAC Act to provide the Commission with "services, information or advice".[29] At no stage had she been delegated the function of "making a report" under the Act. The Commission adopted important conclusions Ms McColl had reached as to the credibility of witnesses. A majority of the Court of Appeal, Bell CJ and Meagher JA, held that Ms McColl's appointment as a consultant extended to "providing 'information' or 'advice' as to her assessments of the credibility of witnesses"; Ward P, in dissent, held that the provision and adoption of credibility findings could not be characterised in that way.[30] The dispute turned on issues of statutory construction.

Like the first category I identified, challenges relating to the manner in which an inquiry has been undertaken commonly involve application of well-established legal requirements, albeit that issues of degree may arise to perhaps a greater extent for this category than the first, in particular when dealing with procedural fairness issues.

The third category of review relates to challenges to the conclusions reached by the agency. Error of fact is not, of course, itself a ground of review.[31] In some instances the challenger may seek to establish that the agency misdirected itself on some legal principle. The other twelve grounds raised in the *Berejiklian v ICAC* case – which were dismissed unanimously – were of this kind. As some of those grounds illustrate, issues may arise as to the meaning of rather amorphous statutory terms. For example, two grounds in that case related to the meaning of a part of the definition of "corrupt conduct" which was "any conduct of a public official or former public official that constitutes or involves a breach of public trust".[32] These grounds raised issues of statutory construction, albeit where the Parliament has used language with a significant normative element. The need to construe such normative notions is not necessarily a comfortable one for courts but this type of task is not unknown to the law.[33]

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[27] At 582.
[28] *Berejiklian v Independent Commission Against Corruption* [2024] NSWCA 177.
[29] *Independent Commission Against Corruption Act 1988* (NSW) ("ICAC Act"), s 104B.
[30] At, respectively, [86] and [339].
[31] Eg *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 340-341 per Mason CJ.
[32] ICAC Act, s 8(1)(c); see discussion in *Berejiklian* at [163]-[185].
[33] See eg *Taikato v The Queen* [1996] HCA 28; (1996) 186 CLR 454 at 464-466.

A similar sort of issue arose in *Greiner v ICAC* in 1992 relating to the question of what the statutory phrase "reasonable grounds for dismissing" meant with respect to the possible dismissal of a Premier or Minister. As Gleeson CJ said, "[v]ague and uncertain though the standards referable to the application of [the provision] to Premiers and Ministers may be, it is for the Commission to identify and apply the relevant standards, not to create them".[34] As Priestley JA put it, the statutory reference to dismissal did not exclude "the requirement that it be based on standards established by law".[35] Because ICAC had not correctly grappled with that issue, the majority of the Court of Appeal granted a declaration that the determination that Mr Greiner had engaged in corrupt conduct "was made without or in excess of jurisdiction, and is a nullity".

Unless the challenger can raise such issues of legal principle, to challenge the conclusions reached they must rely on grounds such as "no evidence" or legal unreasonableness. Such challenges rarely succeed. The partial success of the plaintiff in the *Drumgold* case in that regard is a rare exception. More typical is the result in *D'Amore v ICAC*, where the NSW Court of Appeal rejected such attacks put in a range of ways. As Beazley P explained there, "ICAC's state of satisfaction that the appellant had engaged in corrupt conduct had to be reasonable in the sense that it was a state of satisfaction that could be reached by a person with an understanding of the nature of the statutory function being performed", and "had to be based upon facts or inferences supported by logical grounds".[36] However, "disagreement with a conclusion of an administrative decision-maker does not constitute jurisdictional error", even if that disagreement is "emphatic".[37]

**The limited role of judicial review**

The difficulty for challengers on judicial review reflects one of the points I started with. The conclusions reached by integrity agencies commonly involve matters of evaluation or opinion on which reasonable people might reach different conclusions. The courts no more rule on whether they consider those opinions are right or wrong than they do for private inquirers such as Professor Shergold and his colleagues. As Gibbs J said in *Buck v Bavone* with respect to a discretionary power of an administrative decision-maker, having referred to various grounds of review of administrative conclusions:[38]

> where the matter of which the authority is required to be satisfied is a matter of opinion or policy or taste it may be very difficult to show that it has erred in one of these ways, or that its decision could not reasonably have been reached. In such cases the authority will be left with a very wide discretion which cannot be effectively reviewed by the courts.

As a result, persons the subject of adverse findings by an integrity agency have limited recourse in the courts. Unless they can make out that the agency exceeded its investigational remit, acted unfairly, manifested some procedural error, misdirected itself in law, acted unreasonably or without any evidence, they are unlikely to succeed in any judicial review proceeding.

It has sometimes been suggested that the detrimental consequences to reputation from adverse findings of integrity bodies can be of such significance that there should be a right of merits

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[34] (1992) 28 NSWLR 125 at 147.
[35] Ibid at 191.
[36] *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242 at [91].
[37] Ibid at [191].
[38] *Buck v Bavone* [1976] HCA 24; (1976) 135 CLR 110 at 118-119.

review. Yet that would simply lead to another evaluative conclusion or opinion reached by someone else, again of no direct legal effect, which does not seem an efficient use of resources. A partial form of redress may be found in a right of complaint to some inspector or the like of the integrity agency.[39] More generally, the weight of the conclusions of such a body are always open to criticism simply on the basis of the reasoning employed.[40]

Any governmental process has limits, potential flaws, and may not get everything right. As in all things, a balanced perspective is required. Integrity agencies have great advantages in potentially being able to expose maladministration, corrupt conduct or other wrongdoing. But they are also human institutions which are not above reproach. The courts have some role to play in keeping such agencies within legal limits. That role is, however, a relatively limited one.

[39] See eg ICAC Act, Pt 5A.
[40] Note *King v Ombudsman* [2020] SASCFC 90; (2020) 137 SASR 18 at [101].