Judicial Review of Integrity Bodies

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The topic of this conference – difficult conversations about values and administrative law – readily calls to mind the role of integrity bodies, the remit of which involves 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] They can do much good. That the lack of a federal anti-corruption commission became a significant issue in the last 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.

In my time as a barrister I appeared in, for and against integrity agencies. Such 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 significance of the findings of such bodies, why people may seek to challenge their decisions, and the limitations of such challenges.

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]

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[1] Judge, New South Wales Court of Appeal.
[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.

> 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 NSW Premier appointed a barrister, Chris Ronalds SC, to investigate allegations of misconduct by a Minister, which 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]

What such non-statutory inquirers cannot do, as the Chief Justice noted in *Clough v Leahy*, is compel any witness to appear and answer questions.[7] 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. Secondly, 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.

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[4] Ibid at 159-161.
[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] At 157.

It is rare for the conclusions reached by such agencies to have direct legal effect. Their function generally is to investigate, make findings of fact, and express conclusions and make any 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, a DPP, a professional disciplinary body, or other government agencies such as the ATO. Occasionally, an adverse report may lead to legislative measures. An example of that was the Act passed by the O'Farrell government in NSW to cancel without compensation a coal exploration licence held by NuCoal Resources Ltd – a publicly listed company with some 3,000 shareholders – because ICAC had reached a conclusion that the grant of the licence to its original holder had been affected by corrupt conduct.[8]

Whether or not further legal consequences follow, reputational harm might be caused to those involved.

Given the usual absence of direct legal effect, 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:

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

2. They are subject to some, limited, 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. They 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.

[8] *Mining Amendment (ICAC Operations Jasper and Acacia) Act 2014* (NSW).

Because such 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.[9]

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, the recipient of an order for production of documents or to appear to give evidence.[10] 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.[11]

The fact that a concern about reputation is the usual motivation to litigate in this context explains why there are more judicial review challenges to anti-corruption bodies than there are to investigations of ombudsmen.[12] The former are more likely to single out particular individuals for criticism than the latter. In that context John McMillan said in 2010 that, having been Commonwealth Ombudsman for seven years, the notion of having "the judge over your shoulder" was to him "quaint but illusory".[13] I note that John's record of avoiding public law litigation later came to an end when he was Acting Ombudsman of NSW.[14]

What is important to understand is that judicial review offers relatively limited scope for those wishing to preserve or salvage their reputation. As this audience will well understand, 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 appeal. That a court rejects a judicial review challenge does not mean that it agrees with the agency's conclusion. The issue for the court is simply whether or not the agency has acted within the legal limits of its powers.

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[9] Though cf the discussion in *Stewart* (n 5) at [59]-[75], [108]-[114] and [130]-[137].
[10] Eg *A v Independent Commission Against Corruption* [2014] NSWCA 414; (2014) 88 NSWLR 240.
[11] See ***Ainsworth*** *v Criminal Justice Commission* [1992] HCA 10; (1992) 175 CLR 564 at 580-582.
[12] Cf Anita Stuhmcke, "Ombudsman Litigation: The Relationship between the Australian Ombudsman and the Courts", ch 9 in Greg Weeks and Matthew Groves, *Administrative Redress in and out of the Courts* (Federation Press, 2019).
[13] John McMillan, "Re-thinking the Separation of Powers" (2010) 38 *Federal Law Review* 423 at 427.
[14] *Kaldas v Barbour* [2017] NSWCA 275; (2017) 107 NSWLR 341.

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 NSW succeeded in persuading majorities of the Court of Appeal and High Court that the Commission's jurisdiction did not extend to such conduct.[15] In contrast, Jeff Shaw, a former Attorney General and judge of the NSW 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.[16]

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 essentially *legal* questions, not evaluative questions of fact or opinion.

The second type of challenge relates to the manner in which the inquiry has been undertaken. Most 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.[17] That means that the agency must accord such a person a fair chance 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 bodies determining legal rights in a conclusive way. Thus, for example, there

[15] *Independent Commission Against Corruption v Cunneen* [2015] HCA 14; (2015) 256 CLR 1.
[16] *Police Integrity Commission v Shaw* [2006] NSWCA 165; (2006) 66 NSWLR 446.
[17] See eg, recently, *AB v Independent Broad-based Anti-corruption Commission* [2024] HCA 10; (2024) 98 ALJR 532 at [25]-[26].

is no general right of a person subject of the inquiry to cross-examine witnesses.[18] The person heading the inquiry may be an ex-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. There is, for instance, no generic right to make closing oral submissions even after a public inquiry has been held.

Despite these limits, the right to be heard is one of importance. Thus, for example, Mr 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.[19]

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.[20]

The other case of note is the recent decision of Acting Justice Kaye relating to the final report of a Board of Inquiry appointed under the *Inquiries Act 1991* (ACT) constituted by Mr Walter Sofronoff KC.[21] 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

[18] See eg *National Companies and Securities Commission v News Corp Ltd* [1984] HCA 29; (1984) 156 CLR 296 at 314 and 323-326.
[19] *Ainsworth* (n 11).
[20] *Keating v Morris* [2005] QSC 243; quotations from [91], [107], [112], [116], [130] and [157].
[21] *Drumgold v Board of Inquiry (No 3)* [2024] ACTSC 58.

conclusion had been reached without affording the plaintiff the right to be heard; and another was affected by legal unreasonableness.

Like the first category I identified, challenges relating to the manner in which an inquiry has been undertaken 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.

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 in the *Oakey Coal* case in 2021.[22] 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.

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".[23] 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, may be undermined by a conclusion that procedural fairness has not been provided.

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.[24] In some instances the challenger may

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[22] *Oakey Coal Action Alliance Inc v New Acland Coal Pty Ltd* [2021] HCA 2; (2021) 272 CLR 33.
[23] At 582.
[24] Eg *Australian Broadcasting Tribunal v Bond* [1990] HCA 33; (1990) 170 CLR 321 at 340-341 per Mason CJ.

be able to establish that the agency misdirected itself on some legal principle, as in effect was held in *Greiner v ICAC* in 1992.[25] Otherwise, a challenger 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 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".[26] However, "disagreement with a conclusion of an administrative decision-maker does not constitute jurisdictional error", even if that disagreement is "emphatic".[27]

The difficulty for challengers here reflects one of the points I started with. The conclusions reached by integrity agencies are 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 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 or technical error, misdirected itself in law, acted unreasonably or without any evidence, they are unlikely to succeed in any judicial review proceeding.

For some, 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 has sometimes been suggested that the consequences can be such that there should be a right of merits 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

[25] (1992) 28 NSWLR 125.
[26] *D'Amore v Independent Commission Against Corruption* [2013] NSWCA 187; (2013) 303 ALR 242 at [91].
[27] Ibid at [191].

or the like of the integrity agency.[28] More generally, the weight of the conclusions of such a body are always open to attack simply on the basis of the reasoning employed.[29]

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. As I have sought to show, however, that role is a relatively limited one.

[28] See eg *Independent Commission Against Corruption Act 1988* (NSW), Pt 5A.
[29] Note *King v Ombudsman* [2020] SASCFC 90; (2020) 137 SASR 18 at [101].