



ABN 22 870 745 340

Our ref: 22934/3

9 February 2010

Mr Les Tree
Deputy Director General
Law Enforcement and Security Coordination
Department of Premier and Cabinet
GPO Box 5341
SYDNEY NSW 2001

Dear Mr Tree,

Re: Review of the Police Integrity Commission Act 1996 — Request for amendment to authorise PIC officers to examine witnesses

Further to the submission made in August 2010 by former Commissioner Pritchard for the purposes of the five yearly review of the *Police Integrity Commission Act 1996* ("the Act"), I write to request that consideration be given to amending the Act to permit the Commission to authorise a Commission officer who is not an Australian legal practitioner to conduct an examination or cross examination of a witness on behalf of the Commission in a Commission hearing.

Section 37 of the Act sets out the persons who may or may be authorised to examine or cross-examine a witness in a Commission hearing:

- (1) *A person authorised or required to appear at a hearing, or a person's Australian legal practitioner authorised to appear at a hearing, may, with the leave of the Commission, examine or cross-examine any witness on any matter that the Commission considers relevant.*
- (2) *An Australian legal practitioner appointed by the Commission to assist it may examine or cross-examine any witness on any matter that the Commission considers relevant.*
- (3) *Any witness examined or cross-examined under this section has the same protection and is subject to the same liabilities as if examined by the Commissioner or an Assistant Commissioner.*

In the past, the Commission has relied upon subs 37(1) to authorise officers of the Commission who are not legally qualified to appear on the Commission's behalf at private hearings for the purpose of examining witnesses summoned to such hearings.

In response to a recent request for advice, the Commission has been advised by the Crown Solicitor that subs 37(1) deals exclusively with persons external to the Commission. As a result, subs 37(2) is the sole provision by which the Commission might be assisted in a hearing by a person appearing on the Commission's behalf. Accordingly, the Commission must appoint a person to assist it as counsel assisting, and such a person must be an Australian legal practitioner appointed in accordance with s 12 of the Act. I enclose a copy of the advice.

In practice, the Commission generally engages members of the private bar to appear on the Commission's behalf at Commission hearings, appointing such pursuant to s 12 of the Act as counsel assisting the Commission. On occasion, the Commission has also appointed an officer of the Commission who is an Australian legal practitioner as counsel assisting to conduct an examination or cross-examination of a witness.

Nevertheless, there have been circumstances in which it seemed useful and convenient to authorise one of the investigating officers involved in a matter, not being an Australian legal practitioner, to examine or cross-examine a witness. The Commission wishes to continue this practice and seeks amendment of the Act to permit it to do so in light of the advice of the Crown Solicitor.

The Commission conducts its investigations using multidisciplinary investigation teams comprising investigators, analysts and associated support staff. Legally qualified officers of the Commission are assigned to such teams as the need arises to provide advice as and when required, including in relation to the exercise of powers under the Act, and the propriety of the exercise of same. As stated above, legal officers have on occasion performed the role of counsel assisting the Commission.

In the context of a fast moving inquiry where time is of the essence, circumstances may necessitate the holding of a hearing at quite short notice. Invariably hearings conducted in such circumstances would be conducted in private so as not to compromise the ongoing investigation.

In such circumstances, it is crucial that the person conducting an examination or cross-examination be intimately familiar with the details of the evidence gathered to that point and, more importantly, the direction the hearing and the investigation might take as a result of the particular evidence elicited. The investigator leading the team, being responsible for directing the investigation on a daily basis, generally has the most detailed and intimate knowledge of the evidence, the particular factual issues to be explored and the direction that an investigation may take.

Given that hearings are conducted for the purposes of an investigation, it seems sensible that it at least be open for an examination or cross-examination to be conducted by the lead investigator in appropriate circumstances.

Although it might appear to be suggested that a non-legally qualified Commission officer examining or cross-examining a witness might increase the potential of unfairness to the

witness or risk the Commission's powers being exercised in an oppressive or unfair fashion, a closer examination of the conduct and structure of Commission hearing should allay any such concerns.

The person presiding at a Commission hearing must be either the Commissioner or an Assistant Commissioner (s 32(2) of the Act). The Commissioner must have special legal qualifications whereas an Assistant Commissioner conducting a hearing may, but need not, hold such qualifications. All Assistant Commissioners appointed to conduct a hearing in the past have had special legal qualifications, and the Commission considers this to be appropriate as a general rule.

The person presiding at a Commission hearing is charged with the proper conduct of the hearing, including ensuring procedural fairness in the course of a hearing. All examinations and cross-examinations, whether undertaken by counsel assisting the Commission or a person otherwise granted leave to examine or cross-examine a witness, are conducted subject to the scrutiny and control of the person presiding at the hearing. As such, it is with the person presiding, and not counsel assisting or a person authorised to conduct an examination or cross-examination, that responsibility and power lies for ensuring the proper exercise of the Commission's hearing powers and that a witness is treated fairly.

The Commission is obliged to give a reasonable opportunity for a witness to be legally represented and it is rare that a witness in a Commission hearing has not been represented. It might reasonably be expected that a witness's legal representative is a far surer safeguard in ensuring procedural fairness for the witness than the legal qualifications of the examiner.

The question of whether the Commission might authorise a Commission officer, not being legally qualified, to conduct an examination or cross-examination was raised recently by the Inspector of the Commission. Concerns were expressed that such a course might not be legally permissible. Whilst it seems suggested that an examination by an officer of the Commission who was not legally qualified might occasion some unfairness to a witness, there has been no occasion identified in which unfairness resulted by reason of the lack of legal qualifications of the examiner.

Given the foregoing, it is difficult to discern any significant prejudice that might be occasioned to a witness by permitting the Commission to authorise one of its officers who is not an Australian legal practitioner to conduct an examination or cross-examination on the Commission's behalf. In light of the circumstances in which the Commission might wish to do so, the Commission is of the view there is much to recommend it in terms of enhancing the effectiveness of Commission hearing powers.

Should there be any reservations concerning the potential for unfairness to a witness by the unlikely combination of a lay Assistant Commissioner and an examiner who is not legally qualified, this could be adequately addressed by mandating the Commission's practice of appointing persons with special legal qualifications to conduct a Commission hearings. For self-evident reasons, the Commission would have no objection to restricting the delegation

of its powers in or in connection with a hearing to an Assistant Commissioner with special legal qualifications which, after all, embodies the practice of the Commission to date.

Should you need to discuss this matter further, the Commission's contact officer is Mr David Wong, lawyer with the Commission, who may be contacted on (02) 9321 6700 or via email at david.wong@pic.nsw.gov.au.

Yours faithfully



**The Hon Jerrold Cripps QC
Acting Commissioner**

Encl:



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CROWN SOLICITOR
NEW SOUTH WALES

Advice

Conduct of Commission Hearings - Authorisation of Persons to Examine Witnesses

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Prepared for: PIC566 Police Integrity Commission

Date: 2 February 2011

Client ref: 21347/30 MM O'Brien

CSO ref: 201003739 T01 John McDonnell



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1. Summary of advice

- 1.1 You have sought my advice as to the power of the Commission to authorise persons who are not legally qualified to appear and cross-examine witnesses on behalf of the Commission at a Commission hearing.
- 1.2 In my view, s. 37(1) of the *Police Integrity Commission Act 1996* ("the Act") does not permit the Commission to authorise an officer of the Commission who is not an Australian legal practitioner to appear on behalf of the Commission and examine or cross-examine witnesses in a Commission hearing.
- 1.3 In my view, the Act does require that an officer of the Commission authorised to appear and conduct an examination or cross-examination in a hearing be a person appointed as counsel assisting the Commissioner pursuant to s. 12 of the Act.
- 1.4 In my view, the Act does not otherwise permit the Commission to authorise an officer of the Commission to appear and examine or cross-examine a witness in a hearing for the purposes of assisting the investigation.
- 1.5 In my view, it was not the intention of the Act that any hearing in which an unauthorised Commission officer conducted an examination or cross-examination for the purposes of an investigation would be wholly unauthorised or otherwise improperly constituted.
- 1.6 In my view, there are unlikely to be any consequences in relation to a prosecution and conviction for an offence of false evidence pursuant to s. 107 of the Act where the false evidence is given during the course of examination or cross-examination by a Commission officer unable to be authorised to conduct such an examination or cross-examination.
- 1.7 Please note this is a summary of the central issues and conclusions in my advice. Other relevant or significant matters may be contained in the advice, which should be read in full.

2. Background

- 2.1 You instruct that in July 2010, the Commission commenced an investigation pursuant to s. 23 of the *Police Integrity Commission Act 1996* ("the Act"). The purpose of the investigation declared by the Commissioner was: "To investigate whether Constable Michael Hugh John McCrory, Senior Constable Paul Anthony Tingay, Steven Angelo Sherry, Steven Mark Boese or any person or persons associated with them, have been, or are currently involved in serious police misconduct or criminal activity."



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- 2.2 For the purposes of the investigation, it was recommended that a series of hearings be conducted. That course was accepted by the Commissioner in November 2010. The Commissioner also considered it appropriate that the hearings should be held in private. Pursuant to s. 38(1) of the Act, summonses were duly issued and served on the intended witnesses.
- 2.3 The principal case officer is a Senior Investigator and an officer of the Commission ("the investigator"). The investigator is not and has never been a legal practitioner, and does not hold any legal qualifications. It was proposed by the investigator and agreed to by the Commissioner that the investigator could perform the role of counsel assisting the Commission.
- 2.4 In subsequent correspondence, the Inspector for the Police Integrity Commission relayed his concerns that it was inappropriate for an officer of the Commission who was not a lawyer to be appointed as counsel to assist the Commission. The Inspector also questioned whether the Act would permit an officer of the Commission to be appointed as counsel to assist the Commission or given leave to appear and examine or cross-examine a witness where that officer was not legally qualified.
- 2.5 The Commission confirmed to the Inspector that its intention was not to actually appoint the investigator as counsel assisting but to authorise the investigator to appear and, with leave, examine or cross-examine the witnesses pursuant to s. 37(1) of the Act. The Commission indicated it considered s. 37(1) of the Act permitted the Commission to authorise a person, such as a Commission Investigator, to appear at a hearing and, with leave of the Commission, examine or cross-examine a witness. It also indicated that the Independent Commission Against Corruption ("ICAC") had taken a similar approach in the past to authorising persons such as ICAC investigators who were not lawyers to conduct an examination or cross examination, where leave to do so had been granted. The provisions of the *Independent Commission Against Corruption Act 1988* in this respect are relevantly similar to the Act.
- 2.6 When authorising an investigator at the commencement of a private hearing, the Commissioner adopts the following form of words "Pursuant to section 37 of the Act, I authorise [the investigator] to appear at this hearing and I give him leave to examine the witness."
- 2.7 On four previous occasions the Commission has considered it appropriate to authorise an officer who was not legally qualified to appear and conduct an examination or cross examination in private hearing. The investigator conducted the examination in two of those matters. In the cases where an investigator who was not legally qualified conducted an examination, the Commissioner authorised the officer to do so in the same terms as the foregoing:



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2.8 In all four cases, the witness was legally represented. In two cases, charges of giving false evidence to the Commission during the examination were prosecuted. In both cases, the defendants pleaded guilty and were convicted and sentenced. The defendants were legally represented in the criminal proceedings. This information was provided to the Inspector.

2.9 You have provided to me correspondence between the Inspector of the Commission in which he expresses the view that the Act does not permit the Commission to authorise an officer of the Commission who is not an Australian legal practitioner to conduct an examination or cross examination of a witness in a hearing.

3. Advice sought

3.1 3.1 You seek my advice as to:

1. Whether s. 37(1) of the Act permits the Commission to authorise an officer of the Commission who is not an Australian legal practitioner to appear on behalf of the Commission and examine or cross-examine a witness in a Commission hearing.
2. Whether the Act requires an officer of the Commission authorised to appear and conduct an examination or cross-examination in a hearing to be appointed as counsel assisting the Commission pursuant to s. 12 of the Act.
3. Whether the Act otherwise permits the Commission to authorise an officer of the Commission or other person to appear and examine or cross-examine a witness in a hearing for the purposes of assisting an investigation.
4. Whether, if a Commission officer conducted an examination or cross-examination for the purposes of an investigation and that officer could not have been authorised under the Act to do so, the hearing as a whole is unauthorised or otherwise improperly constituted (such as in relation to questions asked by the Commissioner).
5. The significance and consequences arising in relation to a prosecution and conviction for an offence of give false evidence pursuant to s. 107 of the Act, where the false evidence is given during the course of an examination or cross-examination by a Commission officer unable to be authorised to conduct such an examination or cross-examination.

3.2 Please note that the text of relevant legislation is set out in the Appendix to this advice.



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4. Advice

Advice as to question 1.

- 4.1 In *Project Blue Sky v Australian Broadcasting Authority* (1998) 194 CLR 355 [1998] HCA 28 the High Court said at [69]:
- "The primary object of statutory construction is to construe the relevant provision so that it is consistent with the language and purpose of all the provisions of the statute. The meaning of the provision must be determined 'by reference to the language of the instrument viewed as a whole'. In *Commissioner for Railways (NSW) v Agallanos*, Dixon CJ pointed out that 'the context, the general purpose and policy of a provision and its consistency and fairness are surer guides to its meaning than the logic with which it is constructed'. Thus, the process of construction must always begin by examining the context of the provision that is being construed." (footnotes omitted).
- 4.2 In my view, the language of the Act suggests that this question must be answered in the negative.
- 4.3 As a matter of language, the use of the past participle "authorised" make plain that s. 37(1) cannot be construed as itself conferring the power to authorise a person to appear at a hearing; rather, it operates to confer a discretion on the Commissioner to grant leave to persons otherwise authorised to appear to examine or cross-examine witnesses.
- 4.4 The reference to a "person authorised...to appear at a hearing" in s. 37(1) is a reference to a person authorised to appear at a hearing in ss. 34 and 36 and neither, in my view, includes Commission staff. (Section 37(1) distinguishes such a person from "a person...required to appear at a hearing" and "a person's Australian legal practitioner authorised to appear at a hearing").
- 4.5 Section 34 provides that the Commission "may authorise a person to appear at [a] hearing". As noted above, s. 37(1) would apply to such a person. As I understand it, the Commission is of the view that s. 37(1) authorises it to authorise an investigator to appear and to examine witnesses. However, to be "authorised to appear" for s. 34 purposes, the person must satisfy the Commissioner that he or she "is substantially and directly interested in any subject-matter of a hearing". Although not part of the Act (s. 35(2)(a), *Interpretation Act 1987*), the heading of s. 34 ("right of appearance of affected person") is extrinsic material providing confirmation of the ordinary meaning of s. 34. (s. 34(1)(a), *Interpretation Act*). It could not, in my view, apply to a member of staff of the Commission in that capacity.
- 4.6 The language of s. 36 also refers to groups and unincorporated associations being "authorised to appear at a hearing or authorised or required to give evidence at a hearing". Insofar as they are "authorised to appear at a hearing", s. 36 confers (s. 34)



- "affected person" status on them. Again, a Commission investigator could not be a "person authorised to appear" under s. 36.
- 4.7 On the other hand, s. 35(1)(a) refers only to a "person giving evidence at a hearing". Such a person would not be a "person authorised... to appear at a hearing" within the meaning of s. 37(1).
- 4.8 A "person ... required to appear at a hearing" in s. 37(1) would be a person summoned to appear at a hearing to give evidence or produce documents under s. 38(1)(a) or (b). Again, although not part of the Act, the heading ("power to summon witnesses and take evidence") would, in my view, provide extrinsic confirmation that s. 38, properly construed, applies only to witnesses - it would not lightly be inferred that the Commissioner would be required to issue a summons to procure the attendance of Commission staff. In any event, the Commission does not rely on this argument.
- 4.9 The structure of the Act, like its language, would, in my view, tend to lead to the same conclusion. Part 2 of the Act deals with the constitution of the Commission, which comprises "officers of the Commission", defined to mean the Commissioner (s. 7), the Assistant Commissioner (s. 8) and other members of staff including consultants, secondees from other departments and jurisdictions, including the Police (s. 10). Part 2 also provides for delegation of functions (s. 11) and s. 12 authorises the Commissioner to "appoint an Australian legal practitioner to assist the Commission as counsel, either generally or in relation to a particular matter or matters". Part 3 deals with the Commission's functions. Division 1 (ss. 13-22) provides for the Commission's general functions; Div. 2 (ss. 23-24) deals with investigations; Div. 3 (ss. 25-31) deals with obtaining information, documents and other things; and Div. 4 (ss. 32-38) deals with hearings.
- 4.10 Structurally, therefore, Pt. 2 is concerned with the constitution of the Commission and its internal arrangements including how it may be represented whereas Pt. 3 Div. 4 is concerned with arrangements for the appearance and representation of external or non-Commission persons. It would be unlikely that the general reference to a "person authorised to appear at a hearing" in Pt. 3 Div. 4 would include a member of the Commission's staff provided for in Pt. 2.
- 4.11 There is a principle of statutory interpretation that where a statute makes express reference to one matter, it intends that other matters be excluded ("expressio unius est alterius exclusio"). Although the rule is to be applied cautiously (*Houssein v Under Secretary, Department of Industrial Relations and Technology (NSW)* (1982) 148 CLR at 94), Pearce & Geddes in *Statutory Interpretation in Australia* 6th edition, note that the related principle, "expressum facit cessare tacitum", can be useful so that "where a particular procedure is designated to achieve something, other



procedures are thereby excluded" (p. 142) citing *Anthony Hordern & Sons Ltd v The Amalgamated Clothing and Allied Trades Union of Australia* (1932) 47 CLR 1 at 7.

- 4.12 Applied here, s. 12 makes express provision for the Commissioner to appoint an Australian legal practitioner to assist the Commission as counsel. Section 35(3) expressly provides that an Australian legal practitioner, appointed by the Commission (that is, under s. 12) to assist it, may appear before the Commission. Section 37(2) expressly provides that an Australian legal practitioner, appointed by the Commissioner to assist it, may examine or cross-examine any witness on any matter that the Commission considers relevant. Section 33(2) authorises an Australian legal practitioner assisting the Commission as counsel to make closing submissions. Those provisions, in my view, were intended to constitute the exclusive means by which the Commissioner is to be represented or "assisted" at Commission hearings. In these circumstances, s. 37(1) would not therefore be construed as authorising a person other than an Australian legal practitioner to appear at the hearing and/or examine or cross-examine witnesses or make closing submissions. (As noted above, properly construed, s. 37(1) does not authorise or require anyone to appear at a hearing - it presupposes a person has already been authorised or required to appear).
- 4.13 The expressio unius maxim can only be applied if it is not inconsistent with the other provisions of the Act and is otherwise permitted by the ordinary rules of construction (see *Wentworth v New South Wales Bar Association* (1992) 106 ALR 624 at 628). The objects of the Act suggest that it was the intention of the Parliament that the Commissioner appoint counsel in accordance with the provisions of the Act referred to in the previous paragraph if it is to use a person other than the Commissioner or Assistant Commissioner to examine or cross-examine the parties. One of the objects of the Act, as stated in s. 3, is to establish an "independent, accountable body". The importance of "accountability" is affirmed in the second reading speech delivered on 4 June 1996 by Minister Whelan. As most hearings are conducted in private, the legislature has put in place some statutory procedures that must be followed at the hearings which are directed to ensuring a measure of procedural fairness (see s. 32). Ensuring that witnesses who do not usually have the scrutiny of the public eye are examined and cross-examined by counsel with legal qualifications appointed by the Commission ensures that counsel are accountable to the Commission, and must abide by legal professional rules and regulations. A purposive construction therefore suggests that s. 37(2) operates expressio unius.
- 4.14 It follows, in my view, from the language, structure and purpose of the Act, that s. 37(1) does not permit the Commissioner to authorise an officer of the Commission who is not an Australian legal practitioner to appear on behalf of the Commission and examine or cross-examine a witness in a Commission hearing.



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Advice as to question 2.

4.15 This question seems to address ss. 37(2) and 35(3). In my view, the reference in s. 37(2) to an Australian legal practitioner "appointed" by the Commissioner to "assist" it is a reference to an Australian legal practitioner "appointed" to assist the Commissioner as counsel under ss. 12 and 33(2) and a reference to an Australian legal practitioner "appointed" by the Commissioner to "assist" it by appearing before the Commission (s. 35(3)). Section 33(2) authorises that Australian legal practitioner assisting the Commission as counsel to make closing submissions. The language of the four provisions is consistent. Section 12 is a general provision authorising the Commissioner to appoint an Australian legal practitioner to assist the Commission as counsel. Section 35(3) authorises that Australian legal practitioner to appear before the Commission at a Commission hearing. Section 37(2) authorises that Australian legal practitioner to examine or cross-examine any witness on any matter that the Commission considers relevant at such a hearing.

4.16 It follows from the reasoning in relation to question 1 above that Parliament did not intend to authorise any other person to appear at a Commission hearing to assist it nor to examine or cross-examine witnesses at such hearing. (As noted above, s. 37(1) does not authorise or require a person to appear at a hearing – it assumes such authorisation or requirement and confers another authority, with leave, that is, to examine or cross-examine witnesses.)

Advice as to question 3.

4.17 This question seems to focus on the function of assisting an investigation. As noted above, Div. 2 of Pt. 3 deals with investigations and Div. 4 of Pt. 3 deals with hearings, albeit "for the purposes of an investigation" (s. 32(1)). Even though all hearings under Div. 4 are "for the purposes of an investigation", in my view, Div. 4 should be regarded as a code for the conduct of Commission hearings so that the Act does not otherwise permit the Commission to authorise an officer of the Commission (other than an Australian legal practitioner appointed under s. 12) to appear and/or examine or cross-examine witnesses at a hearing, even acknowledging that the hearing is for the purpose of assisting an investigation.

4.18 The Act does permit the Commissioner to give leave to other persons, being persons affected under s. 34 or s. 36, to appear and examine or cross-examine witnesses at a hearing (s. 37(1)) and, in my view, permits an Australian legal representative of a person giving evidence at the hearing (s. 35(1)(a)) to appear at the hearing and examine or cross-examine witnesses (s. 37(1)). As noted above, an officer of the Commission is neither an affected person within the meaning of s. 34 nor a witness under s. 35(1)(a). In my view, where the Act expressly provides for the Commissioner to be assisted by an Australian legal practitioner as counsel (s. 12) who can appear before the Commission (s. 35(3)) and examine or cross-examine



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witnesses (s. 37(2)), it cannot be suggested that an officer of the Commission, even if such person could be "a person giving evidence at the hearing" (s. 35(1)(a)), would be entitled to representation under s. 35(1) or authorised to examine or cross-examine witnesses under (s. 37(1)). Again, it would not lightly be inferred that a member of staff of the Commission as a witness would be authorised by the Commission to have legal representation nor be able to examine or cross-examine witnesses, given that the Act contemplates the Commission itself conducting the hearing, assisted by an Australian legal practitioner.

Advice as to question 4.

- 4.19 The High Court in *Project Blue Sky* considered whether failure to comply with a statutory procedure will render an act invalid. The High Court stated at [91]:

"An act done in breach of a condition regulating the exercise of a statutory power is not necessarily invalid and of no effect. Whether it is depends upon whether a legislative purpose to invalidate any act that fails to comply with the condition. The existence of the purpose is ascertained by reference to the language of the statute, its subject matter and objects, and the consequences for the parties of holding void every act done in breach of condition"

- 4.20 Discarding the mandatory/directory distinction, the Court said at [93]:

"A better test for determining the issue of validity is to ask whether it was a purpose of the legislation that an act done in breach of the provision should be invalid. This has been the preferred approach of courts in this country in recent years, particular in New South Wales. In determining the question of purpose, regard must be had to the language of the relevant provision and the scope and object of the whole statute"

and at [97]:

"Courts have always accepted that it is unlikely that it was a purpose of the legislation that an act done in breach of a statutory provision should be invalid if public inconvenience would be a result of the invalidity of the act. Having regard to the obligations imposed on the ABA by s. 160, the likelihood of that body breaching its obligations under s. 160 is far from fanciful, and, if acts done in breach of s. 160 are invalid, it is likely to result in much inconvenience to those members of the public who have acted in reliance on the conduct of the ABA." (footnotes omitted).

- 4.21 The Court of Appeal followed *Project Blue Sky* in *Attorney General of New South Wales v World Best Holdings Ltd and Others* [2005] NSWCA 261 in which the Court held that the members of the Administrative Decisions Tribunal Retail Leases Division exceeded their authority in making decisions. The Attorney General submitted that Parliament did not intend that a breach of this kind would render a decision invalid. The Court of Appeal rejected this argument, finding that (at [97]):



"What happened in this case was that a statutory power was exercised by persons who had not authority of any character to do so. This is jurisdictional error of a fundamental kind. It is not a procedural irregularity."

4.22 Relevantly, the Court said at [104] that the:

"Parliament always intends that its procedural stipulations should be complied with. That does not mean that it intends that every failure to comply with such a stipulation has the consequence that the ultimate decision is invalid. It is necessary to identify a legislative intent that that be so."

Essentially, every case must be decided according to the particular circumstances of the breach.

4.23 The Court of Appeal again applied *Project Blue Sky* in *R v Jancevski* [2005] NSWCCA 281 in holding that an indictment which was not signed by an authorised person was invalid and the trial and conviction nullified. The Court cited the High Court passage from [91] quoted above and commented to similar effect as the passage in *World Best* in the previous paragraph (at [44]). The Court also noted that "the criminal law is one of the last areas of the law in which a technical point is still a good point" at [90].

4.24 In *Avillon Group Pty Ltd v Commissioner of Police, New South Wales Police* (2009) 74 NSWLR 514, the Court of Appeal held that a decision made by an ADT Appeal Panel which was not properly constituted (the President sat alone) was invalid.

4.25 However, the circumstances of this matter are distinguishable from *Jancevski*, which involved the criminal law, and from cases such as *Avillon* and *World Best Holdings* in which the Tribunal was not properly constituted. In *Police Integrity Commission and Another v Shaw* [2006] NSWCA 165, Giles J (Hodgson JA agreeing) clarified the role of assisting counsel in Commission hearings stating that "counsel assisting was not the Commission and counsel's submission was not a finding of the Commission". Counsel is separate from, not a part of the Commission. Thus, at the hearing, the Commission was validly constituted notwithstanding that counsel was not lawfully authorised to examine and cross-examine witnesses under s. 37(1).

4.26 Here, the Commission is authorised to make findings based upon evidence gathered through its own investigations and at hearing. The fact that the evidence obtained at hearing was adduced by an officer of the Commission who was not authorised to do so in accordance with the Act is less serious than a procedural non-compliance in the criminal context or where the Commission is exercising the power to make a decision or act without any statutory power to do so at all. The Commission remains properly constituted under the Act.



- 4.27 Furthermore, the broad discretion conferred on the Commission to "take all necessary steps" to carry out its functions (s. 22) and the provisions which provide that the normal rules of evidence do not apply (s. 20) support the argument that it is not the intention of the Parliament to render a non-compliance with s. 37(1) invalid. An officer of the Commission has an extremely broad discretion in the way in which he or she carries out investigations and collects evidence. To render a decision completely invalid due to a failure to appoint assisting counsel properly would seem to be contrary to the broad power to conduct investigations as it sees fit.
- 4.28 Accordingly, in my view, a court would not find the hearing wholly invalid. It may, however, be argued that, because the examination and cross-examination by the Commission investigator was unauthorised, any witness was not examined or cross-examined "under s. 37" so that they lose the protection of s. 37(3) but not be subject to the same liabilities as if examined by the Commissioner or an Assistant Commissioner. However, it is at least arguable that it is unlikely that it was a purpose of the Act that an act done in breach of s. 37(1) should be invalid given the likely public inconvenience resulting from the invalidity of the examination and cross-examination of witnesses.

Advice as to question 5.

- 4.29 Section 107 provides:

"False or misleading evidence

- (1) A person who, at a hearing before the Commission, gives evidence that is, to the knowledge of the person, false or misleading in a material particular is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

- (2) Sections 331 and 332 of the *Crimes Act 1900* apply to proceedings for an offence under this section in the same way as they apply to proceedings for an offence under section 330 of that Act."

- 4.30 The main elements of s. 107 are, first, that a person gives evidence and, secondly, that this evidence is given at a hearing before the Commission. I have concluded above that the Commission was still properly constituted and that the hearing was not wholly unauthorised and was still a hearing within the meaning of s. 32.
- 4.31 If I am correct in my preferred view that the non-compliance with s. 37(1) did not render the investigator's examination and cross-examination invalid, it would seem that, as a matter of construction, the elements of the offence are made out. I note that there is no requirement in s. 107 that the evidence be given in response to a "lawful question".



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4.32 It might be argued that the reference to "evidence" in s. 107 does not include unlawfully obtained evidence and that evidence obtained under examination or cross-examination by the Commission investigator was unlawfully obtained as the investigator was not lawfully authorised to examine or cross-examine witnesses. However, unlawfully obtained evidence is not automatically excluded and there are a number of considerations suggesting that this argument would not be successful. First, as noted above, the rules of evidence do not apply to a Commission hearing (s. 20). Secondly, if they did, even a court in a prosecution for an offence has a discretion to admit unlawfully obtained evidence. Here, considerations relevant to a favourable exercise of such a discretion would include: the Commissioner formally announcing the purported authorisation under s. 37 of the investigator to appear at the hearing and "examine" (my instructions do not mention "cross-examining") witnesses; the fact that all the witnesses had legal representatives; and the failure of the witnesses or their legal representatives object to examination by the Commission investigator.

4.33 Accordingly, in my view, there are unlikely to be any consequences in relation to a prosecution and conviction for an offence of give false evidence pursuant to s. 107 of the Act, where the false evidence is given during the course of an examination or cross-examination by a Commission officer unable to be authorised to admit such an examination or cross-examination

Signed:

John McDonnell
Assistant Crown Solicitor
for Crown Solicitor



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Appendix: Relevant legislation

Police Integrity Commission Act 1996

12 Counsel assisting Commission

The Commissioner may appoint an Australian legal practitioner to assist the Commission as counsel, either generally or in relation to a particular matter or matters.

Part 3 Division 4 Hearings

32 Hearings

(cf ICAC Act s 30)

- (1) For the purposes of an investigation, the Commission may hold hearings.
- (2) A hearing must be conducted by the Commissioner or by an Assistant Commissioner, as determined by the Commissioner.

33 Public and private hearings

(cf ICAC Act s 31)

- (1) A hearing may be held in public or in private, or partly in public and partly in private, as decided by the Commission.
- (2) Without limiting the above, the Commission may decide to hear closing submissions in private. This extends to a closing submission by a person appearing before the Commission or by an Australian legal practitioner representing such a person, as well as to a closing submission by an Australian legal practitioner assisting the Commission as counsel.

34 Right of appearance of affected person

(cf ICAC Act s 32)

If it is shown to the satisfaction of the Commission that any person is substantially and directly interested in any subject-matter of a hearing, the Commission may authorise the person to appear at the hearing or a specified part of the hearing.

35 Legal representation

(cf ICAC Act s 33)

- (1) The Commission may, in relation to a hearing, authorise:
 - (a) a person giving evidence at the hearing, or
 - (b) a person referred to in section 34, to be represented by an Australian legal practitioner at the hearing or a specified part of the hearing.
- (2) The Commission is required to give a reasonable opportunity for a person giving evidence at the hearing to be legally represented.
- (3) An Australian legal practitioner appointed by the Commission to assist it may appear before the Commission.

37 Examination and cross-examination of witnesses

(cf ICAC Act s 34)

- (1) A person authorised or required to appear at a hearing, or a person's Australian legal practitioner authorised to appear at a hearing, may, with the leave of the Commission, examine or cross-examine any witness on any matter that the Commission considers relevant.



- (2) An Australian legal practitioner appointed by the Commission to assist it may examine or cross-examine any witness on any matter that the Commission considers relevant.
- (3) Any witness examined or cross-examined under this section has the same protection and is subject to the same liabilities as if examined by the Commissioner or an Assistant Commissioner.

38 Power to summon witnesses and take evidence

(cf ICAC Act s 35)

- (1) The Commissioner may summon a person to appear before the Commission at a hearing at a time and place named in the summons:
 - (a) to give evidence; or
 - (b) to produce such documents or other things (if any) as are referred to in the summons, or both.

107 False or misleading evidence

(cf ICAC Act s 87)

- (1) A person who, at a hearing before the Commission, gives evidence that is, to the knowledge of the person, false or misleading in a material particular is guilty of an indictable offence.

Maximum penalty: 200 penalty units or imprisonment for 5 years, or both.

- (2) Sections 331 and 332 of the *Crimes Act 1900* apply to proceedings for an offence under this section in the same way as they apply to proceedings for an offence under section 330 of that Act.