



ABN 22 870 745 340

Our ref: 22934/13

23 March 2010

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

*Marr-Louise
Bathillan*

Dear Mr Tree,

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

I refer to the Commission's further submission dated 9 February 2011 (our ref 22934/3) to the five yearly review of the *Police Integrity Commission Act 1996* ("the Act") in relation to authorising Commission officers who are not legal practitioners to conduct an examination or cross examination of a witness on behalf of the Commission in a Commission hearing. You will recall advice obtained from the Crown Solicitor doubted whether that practice was legally permissible under the Act in its current form.

The matter of *Regina v Stuart Vos* was before the District Court of New South Wales on 7 March 2011 to hear a motion to stay charges of give false or misleading under s 107 of the Act. Mr Errol Ryan, the Commission officer conducting the examination the subject of the charges, was not a legal practitioner at the material time. The Crown Solicitor's advice had been made available to the Director of Public Prosecutions and Mr Vos's legal representatives.

On 10 March 2011, the Court granted the motion. A copy of the judgment is enclosed.

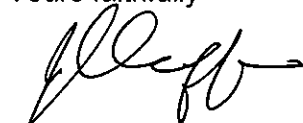
On 16 March 2011, the Director of Public Prosecutions lodged an appeal against the decision to grant a permanent stay of the charges.

I provide this information to you in support of the submission made on behalf of the Commission on 9 February last that the Act should be amended to permit officers of the

Commission who are not legally qualified to examine witnesses in appropriate cases when authorised by the Commissioner.

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:



R V STUART VOS

HEARING DATE(S): 7 March 2011
DATE: 10 March 2011
JURISDICTION: Criminal
JUDGMENT OF: Syme DCJ
PARTIES: The Crown
Stuart Vos
FILE NUMBER(S): 2009/00211708
COUNSEL: Mr M. Hobart (Crown)
Ms C. Ronalds AM SC/ Mr S. Wilkinson (Accused)
SOLICITORS: Ms D. Ramchun for Director of Public Prosecutions
Mr K. Madden for Walter Madden Jenkins

Notice of Motion dated 24 February 2011

1. By Notice of Motion dated 24 February 2011 the applicant seeks there be a permanent stay in respect to Counts 4 to 11 of the indictment. In total there are 11 serious offences charged against the accused, a NSW police officer: They involve serious police misconduct, alleging false admission was made by a defendant, including a fabricated admission in official police documentation, and then lying about it at two hearings of the Police Integrity Commission.



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2. It is the evidence before the Commission on 9 and 17 December 2008 that is the subject of this motion.
3. Commissioner Pritchard was the Commissioner for these hearings. There is no suggestion he was not validly appointed and the hearings were otherwise validly constituted. He purportedly gave Mr Errol Ryan leave to appear at the hearings and to examine the witness (es), pursuant to (he said) s 37 of the Police Integrity Commission Act. 1996. (PIC Act)
4. In this matter there is no suggestion of deliberate or reckless disregard of the law by Commissioner Pritchard at the PIC hearings.
5. Relevant sections of the PIC Act state:

3 Principal objects of Act

The principal objects of this Act are:

- (a) to establish an independent, accountable body whose principal function is to detect, investigate and prevent police corruption and other serious police misconduct, and
- (b) to provide special mechanisms for the detection, investigation and prevention of serious police misconduct and other police misconduct, and
- (c) to protect the public interest by preventing and dealing with police misconduct, and
- (d) to provide for the auditing and monitoring of particular aspects of the operations and procedures of the NSW Police Force.

S 37 states: Examination and cross-examination of witnesses

(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.

6. S 37(2) therefore enables the commissioner to grant leave, but that right is limited to the granting of leave to an Australian legal practitioner.
7. Other sections of the act dealing with representation do not appear relevant. S34 deals with the Right of appearance of affected person. It is not suggested that Mr Ryan was this person. S 35 legal representations relates to representation for that person. These sections do not appear relevant.
8. **S 12 of the PIC Act states:**
"The Commissioner may appoint an Australian legal practitioner to assist the Commission as counsel, either generally or in relation to ... matters".
9. Mr John North legally represented the applicant. At no point during the examination of the accused nor afterwards was any complaint or issue taken with the examiner, or the manner in which the examination was conducted generally. In particular, no issue of unfairness was or has ever been raised that might have resulted from the fact the examination was conducted by a Commission investigator who was not an Australian legal practitioner.
10. The applicant says that Mr Errol Ryan examined the applicant and he was not an Australian Legal Practitioner, therefore proceedings were a nullity, therefore any "evidence" given is incapable of being considered as evidence before another court. They say, in short, the PIC hearings for the days in question were void due to a jurisdictional error, which cannot be corrected.
11. The Crown say that there is some ability to grant leave to someone other than an Australian practitioner, and if that person was best placed to assist the Commission and if there is no injustice done, and no objection taken, then the hearing was validly conducted. In the alternative, the Crown submit that even if there was no power to grant leave for Mr Ryan to ask questions, the irregularity goes to a question of procedure only. The Crown argue instead, that a procedural error such as this, if it occurred should only be excluded as evidence if it cannot be admitted pursuant to s 138 of the Evidence Act.



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12. Mr Ryan, a Senior Investigator with PIC is and was not an Australian legal practitioner. There is not another part of the Act that seems to directly relate to the ability of a commissioner to allow anyone else, or to validly delegate to anyone else, the right of appearance or a right to examine witnesses in the course of a hearing. Mr Pritchard must have thought that some power was required to allow Mr Ryan to examine a witness, as he went to the trouble of making a statement about leave, however, I can find none that would have been relevant. It would appear then that Mr Ryan should have had no formal part in the proceedings.

13. It was submitted by the Crown that in Local Courts in NSW leave is granted by the presiding Magistrate for Police Prosecutors to appear for the police in matters before them. However in the Local Court, pursuant to s 36 and 37 Criminal Procedure Act and S 57 and 58 of the Local Court Act Police Prosecutors are specifically given a right to prosecute. "*A prosecutor who is a police officer may appear ...*". Both Acts specifically allow for and anticipate the granting of leave for persons other than Australian legal practitioners to appear, where empowered, presumably by leave of the court, or otherwise. No such provision is contained in the PIC Act. This is also a relevant consideration when considering the intention of Parliament.

14. The statutory power given to the PIC to appoint counsel assisting pursuant to s 37 or s 12 of the PIC Act was exercised invalidly and therefore was of no effect. It is clear that Commissioner Pritchard did not have the power, either direct or by implication or by any permissible delegation to authorise the appearance (and therefore active participation in the proceedings) by Mr Ryan.

15. The question is whether this failure to observe the requirements of the Act constituting the Commission and the hearings pursuant to it amount to a jurisdictional error, such as to make the entire proceedings a nullity, or whether the error is a procedural one which would then allow the court to examine the admissibility of the proceeding at the hearing pursuant to the Evidence Act.



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16. Counts 4 to 11 inclusive that appear on the indictment are offences under s 107 of the PIC Act. It is a central element of an offence under s 107 of the PIC Act that a person gives evidence that is to the knowledge of that person, false or misleading in a material particular. It is submitted that as the proceedings before the PIC were a nullity there is no evidence upon which to base the charges.
17. The nature of proceedings before PIC is coercive. Witnesses have the ability to object to answering questions, but are never the less required to answer. If they answer (as is alleged here) untruthfully, they commit an offence.
18. In the June 2003 review, pursuant to s 146 of the PIC Act, The Honourable Morris Ireland QC reported
- “Control over the placing of evidence cannot fall outside the control of the Presiding Officer and/ or Counsel assisting. The gatekeepers of the evidence in an inquiry are Counsel Assisting and the Presiding Officer. There can be no comparison between the exercise of these duties in an investigation and the conduct of curial proceedings. The very nature of a PIC inquiry, which is freed by statute from the constraints of the rules of evidence; of formality and of adversarial confrontation, requires the Presiding Officer, together with Counsel Assisting, to maintain a firm grip on the course of the evidence elicited during the hearing. Without this firm stewardship the practices and procedures of the PIC are open to abuse by counsel who are unable or unwilling to recognise that PIC investigations are not curial proceedings”*
19. Practice guidelines were also recommended. The practice directions that are before me, issued in 2010, are stated by counsel to be the procedures in operation in 2008, when this offence is alleged to have occurred. The current practice directions observe that the rules of :*“ practice or evidence do not bind the commission, and it may inform itself on any matter any way it thinks fit. Practice note 15 points out that “rules of procedural fairness have different application to some other court proceedings”. Practice Note at 10.10: “The Commission, with the assistance of Counsel Assisting, has full control of the hearing, the witnesses to be called and their order, the documents and things to be tendered, and the matters and issues to be covered by evidence.” Practice Note 11: “Documents and statements are only tendered by Counsel Assisting. Other legal representatives have no right to directly tender*



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documents of statements and no right to call for the production of documents."

20. The nature of the PIC hearing is inquisitorial, not adversarial. Counsel properly appointed to assist are bound by the rules of conduct applicable to legal practitioners. Parliament intended the PIC to have wide ranging coercive powers. Many hearings before the Commission are conducted in private, including this one. 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).

21. Ensuring that witnesses who do not usually have the scrutiny of the public eye are examined and cross-examined by counsel with legal qualification appointed by the Commission ensures that counsel are accountable to the Commission, and must abide by legal professional rules and obligations.

22. It is abundantly clear from the statute that the person authorised to perform the role of Counsel Assisting must be an Australian legal practitioner. There is no discretion given to the PIC to authorise a person not so qualified to assist the PIC in performing its functions at a hearing. There is no common law right as exists in a residual sense in for example the Local Court.

CONNOR v PETELO [2005] NSWSC 1025

23. **Craig v The State of SA (1995) 184 CLR 163**, was a case concerning whether a jurisdictional error was committed as a result of a misunderstanding of a legal principle. The High Court found it not to be jurisdictional error (nor an error on the face of proceeding) the High Court identified a number of errors, which are characterised as being jurisdictional in nature:

"If such an administrative tribunal falls into an error of law which causes it to identify a wrong issue, to ask itself a wrong question, to ignore relevant material, to rely on irrelevant material or, at least in some circumstances, to make an erroneous finding or to reach a mistaken conclusion, and the tribunal's exercise or purported exercise of power is thereby affected, it exceeds its authority or powers. Such an error of law is jurisdictional error which will invalidate any order or decision of the tribunal which reflects it." It went on "... In contrast, the ordinary jurisdiction of a court of law



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encompasses authority to decide questions of law as well as questions of fact. Involved in matters, which it has jurisdiction to determine. The identification of issues,.....are all routine steps. Demonstrable error is able to be appealed and corrected". Not only did the High Court define what might be jurisdictional error, it also pointed to some differences in administrative tribunals, and courts of law. The PIC apparently is neither. It has in many ways powers more coercive than a court, it is an investigative body, and it is different in many ways from an administrative body.

24. **R v Ashby (2010) VSC 14** concerned a hearing before a similar type of body set up by statute to oversee Police integrity in Victoria. The case concerned the ability of the director to delegate a hearing. While not directly on point, as the delegation concerned a delegation to a person taking the place of a commissioner, not advocate, the principles are similar. The delegation was found not to be valid. The evidence given before a tribunal which lacked competence could not constitute perjury. The reasoning of the court was that the powers being delegated were significant powers under the Act. The powers were of the highest public importance and were powers extensive. Relating those principles to the present case:

- i. The powers being exercised, that of questioning a person in relation to a commission hearing is a significant duty;
- ii. The requirement of having questions conducted by a properly qualified person, with attendant duties and obligations is of high public importance;
- iii. In this case, even if witnesses object to answering questions, they are compelled to do so by statute constitute extensive powers.

25. **Project Blue Sky Inc and others v ABC (1998) 194 CLR 355.** referred to jurisdictional errors thus:

"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 there can be discerned 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,



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and the consequences for the parties of holding void every act done in breach of the condition." And ... "Whether it was a purpose of the legislation that an act done in breach of the provision should be invalid."

26. **R v Janceski (2005) 64 NSWLR 10** involved an appeal against a conviction where the indictment presented at trial upon which the appellant was tried and convicted was signed by a barrister at the private bar who was not authorised to do so under the provisions of the Criminal Procedure Act 1986 (NSW).

In considering the validity of the indictment, Spigelman CJ stated:

"The issue of statutory interpretation that arises in this case turns on the purpose or intention of Parliament. Parliament always intends that its procedural stipulations will be complied with. That does not mean that it intends that every failure to comply with such a stipulation has the consequence that events subsequent to the failure are invalid." The issue in this case concerned whether the person who signed the indictment was authorised by the Act to do so. She was not. It was a criminal proceeding.

"... Punctilious compliance with legal formalities which have any substantive purpose, before the State imposes the stigma of a criminal conviction on any citizen."

Howie J held:

"In my opinion, the defect in the Trail indictment was not that a person signed the document without authority to do so, but rather that the indictment was not signed by a person authorised to do so....."

It seems to me to be an area where certainty is a distinct advantage. If it were the case that validity depends upon the circumstances surrounding the breach of the statutory requirement, then a person could sign an indictment aware that he or she had no authority to do so but on the basis that the act would be ratified by the surrounding circumstances. I cannot believe that this could have been the intention of Parliament."

The lack of authority on the face of the indictment because it was signed by a person without proper authority to do so, invalidated the indictment and all the



proceedings that flowed from it without need for further error, not with standing no prejudice was suffered by the appellant.

27. Attorney General of NSW v World Best Holdings Ltd and others (2005)

63 NSWLR 557 held that the participation in the adjudication by the non-judicial members of the ADT ... was an exercise of a statutory power by persons with no authority to do so. The majority found that this was a jurisdictional error of a fundamental kind and not a procedural irregularity. In my view this case can be distinguished, as it is not suggested that Mr Ryan participated in the actual decision.

28. In Cassell v The Queen (2000) 201 CLR 189... the issue was whether the

District Court Judge, had erred in holding that the evidence was sufficient to prove that there had been a hearing, validly conducted under the ICAC Act.

The majority found that an administrative arrangement could, if necessary, be cured by the "de facto officer rule". The de-facto officer rule does not apply in this case, in the light of the PIC Act's very clear and specific provisions. The appointment of a person other than a legal practitioner to appear to assist the PIC and to examine witnesses amounts to significantly more than an administrative arrangement.

29. In considering whether the breach of a condition is to be considered a breach that nullifies the exercise of the statutory power, the Court also has had regard to:

(a) Whether there can be discerned a legislative purpose. In this case the purpose of requiring an Australian legal practitioner must only be to require that Counsel assisting be bound by the rules of conduct applicable to legal practitioners. If it were intended that Parliament intended that persons who were experienced in a particular prosecution or investigation, they could have made that clear, as they did in both the Local Courts Act 2007 and the Criminal Procedure Act 1986.

(b) The existence of the purpose of the PIC Act. The objects of the Act are as set out above. Notwithstanding this investigative purpose, s 107 is provision that creates an offence. The sanction is of a serious kind.



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- (c) The consequences for the parties of holding void every act done in breach of the condition. In considering this provision it is of concern to this court, that an act done by the commission apparently in the belief it was acting properly could result in a very serious infraction, by a police officer going unpunished. The irony of requiring strict compliance to the laws of the statute in a case where a police officer is alleged to have flouted proper procedure is not lost on me. Never the less, the statutory provisions creating the PIC must be strictly observed.
- (d) The intention of parliament. I have had regard to the position in the Local Court as referred to above. Parliament is obviously capable of discerning the difference between an Australian legal practitioner and other persons who may be granted leave. The fact that the wording in the PIC Act is so precise militates against this requirement being anything other than a strict one. The provision by parliament of ss 36 and 37 of the Criminal procedure Act and ss 57 and 58 of the Local Court Act show that Parliament is capable of considering such legal niceties as the difference between police and other prosecutors and the requirements or otherwise to have a person described and qualified as an Australian legal practitioner appear and question witnesses.
30. The Crown must prove that the proceedings before the PIC were valid or not invalidated by the authorisation of Mr Ryan by Commissioner Pritchard purportedly pursuant to s 37 of the PIC Act.
31. If the hearing was not valid, then the hearing was a nullity, and any "evidence" given simply not evidence.
32. PIC fell into jurisdictional error in authorising Mr Ryan to appear and examine Mr Vos. This gives rise to a fundamental flaw to the hearings, which is unable to be cured.
33. The Motion therefore is granted.