

**COMMENTS ON THE PAPER OF EDMONDO BRUTI LIBERATI
RE: "PROSECUTING POLITICAL CORRUPTION – JUDICIAL INDEPENDENCE
AND PUBLIC OPINION"**

(By Justice J W Shaw of the Supreme Court of NSW)

Judge Liberati's comments coming from the Deputy Prosecutor General of Milan about judicial independence are stimulating and valuable, conveying to us a perspective of the European course of events in relation to the interaction between the political system, the judicial system and allegations of corruption. We are grateful for his presence and for his presentation.

The solutions which have been adopted in the State of New South Wales in relation to corruption, incompetence or incapacity are twofold. In relation to judges, there has been established a Judicial Commission which can deal with allegations of misconduct, although any such allegations which have been found to be sustainable are to be put to both houses of the New South Wales Parliament and the dismissal of the judicial officer (with a judge or magistrate) requires a vote in favour of the dismissal in both houses of the New South Wales Parliament, Legislative Assembly and Legislative Council. This pre-requisite is constitutionally entrenched as a manner and form requirement entrenched by referendum of 1995. The enactment was controversial when it was first introduced in the early 1990's. However, it has come to have been accepted as a reasonable means whereby delinquency or misbehaviour of judicial officers can be dealt with in a civilised and objective manner. Only one occasion has there been a formal motion before the Parliament for dismissal of a judge of a court has been entertained and that was defeated by a vote in the Legislative Council. The somewhat curious background of that motion lay in the fact that the Judicial Commission was divided and that there was a powerful dissenting voice (Justice Mahoney) which suggested that the requisite incapacity or misbehaviour had not been demonstrated. In other cases, matters put to the Judicial Commission have led to a quiet and polite resignation by the judicial officer in question.

Although controversial at the time, this method of dealing with allegations about judicial misconduct has been accepted in New South Wales, although not replicated in other jurisdictions in Australia.

In terms of corruption more generally the approach in New South Wales under the Government led by Mr Greiner, then the Premier, was to constitute an Independent Commission Against Corruption (ICAC) which had and has wide powers to declare the conduct of a public officer to be corrupt. It was implicit in this enactment of 1988 that the ordinary court process was insufficient to deal with corruption in the public sector in this State. Obviously, there are criminal offences which could attract a prosecution in the discretion of the Police and/or the Director of Public Prosecutions in relation to specified acts. But it seems that the Parliament found that traditional approach, grounded in the criminal justice system, to be inadequate. Legitimate criticisms can be made of the scope of the definition of corrupt conduct and processes contemplated by the enactment, which are of an inquisitorial kind. Nevertheless, the Act has been accepted and the present Premier, Mr Carr, ensured that the then Labor opposition supported the model which was propounded by Mr Greiner's Government. And so that enactment passed through the Parliament without any serious dissent.

Despite the initial controversy, it seems that ICAC has had a salutary effect in combating corruption in public office in this State. The 2002 Annual Report of ICAC records that they had received and assessed 1,505 complaints, conducted 8 corruption resistant reviews of public sector agencies and otherwise performed an educative function to impress upon the occupants of public office the need for probity and integrity in dealing with matters that were before them.

In short, despite some controversies, I think it can be said that ICAC has been successful. My view is that my former colleague and former minister Mr Langton was harshly dealt with. There are others who it can be said got off too lightly. But that is the way of controversies before tribunals and courts. There is always an element of luck and adversity. We are dealing with a human institution, with all of its faults and virtues.

There is no doubt that the powers of ICAC are vast. In *Balog v ICAC* (1998) 18 NSWLR 356 it was held by the Court of Appeal that ICAC had power to report to the Parliament and to other authorities its findings of fact concerning the circumstances implying, or the allegations of, corrupt conduct which is or has been the subject of an investigation. In particular, and this exemplifies the extent of the power, it was held that ICAC could express a conclusion notwithstanding whether the conduct constituted or might constitute, a criminal offence.

However, the powers of ICAC were circumscribed by the Court of Appeal in *Greiner v ICAC* (1992) 28 NSWLR 125. The circumstances there concerned an allegation that a member of Parliament had been induced to resign from Parliament by the offer of another public office in the public service. In *Greiner v ICAC* the Court of Appeal held that ICAC had erred in making the declaration of corruption in relation to Mr Greiner, in particular because there must be “objective standards” that represent a prerequisite for that finding. Gleeson CJ held that there was no suggestion of a criminal offence and that what was done was believed to be lawful in all respects and where it could not be concluded that it would be seen by a notional jury as contrary to known and recognised standards of honesty and integrity (page 148) that the finding of corruption could not be sustained.

Prior to that judicial finding, Mr Greiner had resigned from office. Some might say that he was vindicated **ex post parte**.

In currently difficult times, it is easy for governments to disregard traditional rights and processes in the criminal justice system. But even in the face of indefensible terrorism it is, in my view, vital to defend basic human rights: the presumption of innocence, an onus of proof on the prosecution, proceedings conducted before an independent court, no long term detention without a specified trial, the right to access legal advice. These concepts are being undermined, and lawyers and other well informed observers should combat that subversion.

In short, ICAC seems to have worked in a relatively balanced way. It has avoided embarrassments of the judiciary in dealing itself with such blemishes. Some might think that its powers are draconian, but nevertheless it seems to have provided a

useful role in dealing with and deterring corrupt conduct in the public sector in this State. It might provide a model for other jurisdictions to follow.