Mount Erebus to Ann Street: Forty years of judicial supervision of ad hoc and permanent commissions of inquiry and the intersection with parliamentary privilege and doctrines of mutual respect

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Abstract: This paper examines the nature of and the public interest in establishing both ad hoc and permanent commissions of inquiry, the evolving application of the principles of procedural fairness in the last forty years, the public policy issues that are consequent upon judicial supervision of commissions, including the effects of such supervision on the functions and purpose of commissions and the effect on the information made available to the public and parliament. It details the background to and ruling in the recent High Court case of *CCC v. Carne*,[1] and considers the doctrines of mutual respect and parliamentary privilege.

INTRODUCTION

On my library shelf, I am lucky to have a copy of book titled *Royal Commissions and Boards of Inquiry* written by Leonard Hallett and published in 1982.[2] This was the first comprehensive Australian text outlining the legal and procedural issues associated with commissions of inquiry.

Of course, Hallett's work is now showing its age. The publication of Hallett's work was coinciding with the rapid growth of the field of administrative law in Australia and the

[1] *Crime and Corruption Commission v Carne* [2023] HCA 28.

[2] Leonard Arthur Hallett, *Royal Commissions and Boards of Inquiry*. Sydney: Law Book Company, 1982.

development of the principles and increasing application of procedural fairness (natural justice) to administrative decisions in Australia. The work pre-dates the rise of permanent, independent commissions of inquiry in Australia.

This paper examines the nature of and the public interest in establishing both ad hoc and permanent commissions of inquiry, the evolving application of the principles of procedural fairness in the last forty years, the public policy issues that are consequent upon judicial supervision of commissions, including the effects of such supervision on the functions and purpose of commissions and the effect on the information made available to the public and parliament. It details the background to and ruling in the recent High Court case of *CCC v Carne*,[3] and considers the doctrines of mutual respect and parliamentary privilege.

ROYAL COMMISSIONS

Hallett notes that Royal Commissions are one of the oldest institutions of government, generally reserved for particularly important inquiries.[4] They are tools of the executive branch of government, but have powers normally only associated with the judicial branch of government.[5] They do not decide issues, make decisions or affect the legal status of persons as do courts, but in conducting some inquiries they act in a manner similar to courts.[6] It is the exclusively 'informative function' that gives them their special character. The primary function of a Royal Commission is to inform government.[7] Commissions make reports and do not make determinations which alter legal relationships.[8] Investigatory Royal Commissions are concerned about finding and exposing the facts, rather than settling disputes between parties.[9]

[3] *Crime and Corruption Commission v Carne* [2023] HCA 28.

[4] Hallett, *Royal Commissions and Boards of Inquiry*, pp.16-18.

[5] Hallett, *Royal Commissions and Boards of Inquiry*, pp.22-23.

[6] Hallett, *Royal Commissions and Boards of Inquiry*, pp.22-25 and 179-182.

[7] Hallett, Royal Commissions and Boards of Inquiry, pp.8-16.

[8] Hallett, *Royal Commissions and Boards of Inquiry*, pp.22-25 and 179-182.

[9] Hallett, *Royal Commissions and Boards of Inquiry*, pp. 12-14.

THE RISE OF THE PERMANENT COMMISSION OF INQUIRY

Hong Kong's Independent Commission of Inquiry (ICAC), established in 1974 was the model for permanent, independent commissions. The trend to establish such bodies started in Australia in the late 1980s, and two examples will suffice for current purposes. Community concern about integrity in the New South Wales (NSW) public sector and the exposure of corruption among government ministers, within the judiciary and at senior levels of the police force led to the creation of the NSW ICAC in 1988,[10] which began operating in March 1989.[11] Revelations of police misconduct, ministerial misconduct and maladministration in government by the Fitzgerald Inquiry in Queensland led to its report recommending the creation of Queensland's Criminal Justice Commission (CJC) and that body came into existence on 31 October 1989.[12]

Prasser, writing in 2021, identifies that every State and Territory in Australia has a permanent anti-corruption body but notes that there is considerable variance between the form and functions of those bodies.[13]

The reasons for Permanent Commissions of Inquiry

The reasons for Permanent Commissions of Inquiry focussed on anti-corruption (and sometimes organised crime) largely lays in the failure of our system of government to adequately deal with misconduct or corruption.

History demonstrates that they have almost always arisen out of revelations of misconduct and corruption that existed and flourished because of the inadequacies of our system of government. They are established to address what former Australian

[10] Independent Commission Against Corruption, New South Wales, 'History' Accessed 20 September 2023, at: <https://www.icac.nsw.gov.au/about-thenswicac/overview/history>.

[11] *Independent Commission Against Corruption Act 1988* (NSW).

[12] *Criminal Justice Act 1989* (Qld).

[13] Scott Prasser, *Royal Commissions and Public Inquiries in Australia.* 2nd Edition. LexisNexis Australia 2021.

Chief Justice, Sir Harry Gibbs, has been attributed in describing as: 'the symptoms of a … general illness of the body politic'[14]

In my submission, they have been established to address the deficiencies of the Westminster system of government inherent in small, largely government dominated parliaments in Australia with strong party discipline (which I call the 'Westminster paradox') and which leads to inadequate oversight of government.

Of course, permanent commissions of inquiry bring about issues that are not inherent in ad hoc commissions. These issues include the problem of incumbency and the development of their own culture,[15] clashes with parliamentary oversight bodies and being increasingly held by courts to be acting outside of jurisdiction or their statute.

The architect of the CJC, Tony Fitzgerald QC, recently sat as a commissioner reviewing the Crime and Corruption Commission (CCC), the CJC's successor. The report of which he co-authored made it clear that a body such as the CCC still has relevance today:

> *While the form and function of the Crime and Corruption Commission (CCC) have changed over the past three decades, the organisation still has the central role in Queensland's integrity landscape envisaged in the 1989 Fitzgerald Report and remains fundamental to combating major crime and corruption in the state.*
>
> *For that reason, the CCC must remain an independent, fair and impartial body trusted by the public to achieve its important statutory functions.*[16]

The report further stated:

> *A principal recommendation of the 1989 Fitzgerald Report was the creation of a body, outside the QPS and independent of it, to oversee and undertake*

[14] Sir Harry Gibbs as cited in Colleen Lewis, Janet Ransley and Ross Homel, 'The Fitzgerald Legacy: Reforming Public Life in Australia and Beyond' Australian Academic Press, 2010, p. 1.

[15] Prasser, *Royal Commissions and Public Inquiries in Australia*, pp.85-97.

[16] Gerald Edward (Tony) Fitzgerald and Alan Wilson, *Report: Commission of Inquiry relating to the Crime and Corruption Commission*, Queensland, 9 August 2022, p.6.

an array of activities focused upon crime and official misconduct — a permanent embodiment of elements of the work of the Fitzgerald Inquiry.

That Inquiry involved a long and deep examination of what a former Australian Chief Justice, Sir Harry Gibbs, described as: 'the symptoms of a … general illness of the body politic'. Its final report sought, as Sir Harry also remarked: '… not merely to reform the system of criminal justice and to combat corruption, but also to improve the standards of public administration, and to render the workings of Parliament more democratic.[17]

THE RISE OF ADMINISTRATIVE LAW

Hallett's 1982 work of 363 pages, devoted just 15 pages to the topic of procedural fairness.[18] Hallett identified two rules of natural justice: the 'hearing rule' – a person must be given a right (opportunity) to be heard before an adverse finding; and the impartial rule – those who conduct the hearing must be above any reasonable suspicion of bias.[19] However, Hallett also noted previous cases where the strict view of commissions not making decisions or affecting rights led to the view that judicial remedies were not available in respect of Commissions of Inquiry.[20]

Mahon's case

A case from New Zealand was set to change things for Royal Commissions. On 28 November 1979, Air New Zealand Flight 901 crashed into Mount Erebus, a volcano of 12,500 feet on Ross Island, Antarctica. All 237 passengers and 20 crew on board were killed. An investigation by the Chief Inspector of Air Accidents found that the probable cause of the accident was pilot error. Even prior to the Chief Inspectors report being

[17] *Commission of Inquiry relating to the Crime and Corruption Commission*, 9 August 2022, p.6.

[18] Hallett, *Royal Commissions and Boards of Inquiry*, pp.182-183.

[19] Hallett, *Royal Commissions and Boards of Inquiry*, pp.179-193.

[20] *Testro v Tait* (1963) 109 CLC 353; Hallett, *Royal Commissions and Boards of Inquiry*, pp.182-190.

delivered, public dissatisfaction led to the establishment of a Royal Commission of Inquiry into the crash, presided over by Justice Peter Mahon QC. Justice Mahon's report exonerated the captain and crew, laid blame at the feet of Air New Zealand which he accused of presenting to his inquiry 'a litany of lies' and against whom he made an order of costs.[21]

Two years of litigation followed, with the New Zealand Court of Appeal,[22] finding that the judge, in making the order for costs, had acted in breach of the rules of natural justice. The Judicial Committee of the Privy Council in a landmark decision (*Mahon v Air New Zealand*),[23] upheld the Court of Appeal's finding and established that the rules of natural justice (procedural fairness) applied to Commissions of Inquiry. These rules were expressed to include: (a) that findings are based upon material that logically tended to show the existence of facts consistent with those findings; (b) reasons are not self-contradictory; (c) that natural justice required a commission to ensure that any person that might be affected adversely by a finding should know of the risk of such a finding being made, and be given an opportunity to adduce additional material that might deter the commission from making that finding.[24]

Kioa v West

Shortly after the *Mahon* case, In December 1985 the High Court handed down the landmark decision in *Kioa v West*,[25] regarding the extent and requirements of natural justice and procedural fairness in administrative decision making. That decision led to a rapid growth of administrative law in Australia because it established that all administrative decisions which affect rights, interests and legitimate expectations carry with them a duty to act in accordance with procedural fairness. According to Justice Mason in that case:

[21] New Zealand History, 'Erebus disaster', 1 August 2023, Accessed at: <https://nzhistory.govt.nz/culture/erebus-disaster>.

[22] *Re Erebus Royal Commission; Air New Zealand Ltd v Mahon* (No 2) [1981] 1 NZLR 618.

[23] [1984] 3 All ER 201.

[24] *Mahon v. Air New Zealand* [1984] AC 808, 821.

[25] (1985) 159 CLR 550.

> *The critical question in most cases is not whether the principles of natural justice apply. It is: what does the duty to act fairly require in the circumstances of the particular case?*[26]

APPLICATION OF PRINCIPLES TO ROYAL COMMISSIONS

We must now turn our attention to the application of the above principles of procedural fairness to Royal Commissions. In *Carruthers v Connolly*[27] there was overwhelming evidence[28] of ostensible bias against Commissioner Connolly with respect to matters that his Commission had to consider. Justice Thomas, in dealing with the effects of an inquiry upon people, stated:

> *It is true that the Commissioners' Report will of itself have no direct legal effect upon any person. However the performance of a recommendatory function has not been regarded by the courts as activity of so mean a character that it should not be the subject of judicial review. Indeed, the functions that have been entrusted to this particular Commission are of considerable importance and the investigation and report of the Commission is capable of having extensive consequences both of a public nature and upon reputations.*[29]

The court made a declaration that the Commissioners were disqualified from further proceeding with the subject Inquiry and an injunction was granted restraining them from proceeding.

In *Keating v Morris & Ors; Leck v Morris & Ors*[30] Moynihan J upheld the applicants' claim that the Bundaberg Hospital Inquiry was tainted by the apprehension of bias by the Commissioner. The claim was founded upon the conduct of the Commissioner in

[26] (1985) 159 CLR 550, 585.

[27] [1998] 1 Qld R 339; [1997] QSC 132.

[28] [1997] QSC 132, [57] per Thomas J.

[29] [1997] QSC 132, [66].

[30] [2005] QSC 243.

calling and interrogating the applicants. His Honour held that 'it is now well established that the application of the rules to investigative bodies such as the Inquiry differs from their application to litigation'.[31] His Honour went on to say that it was of fundamental importance 'that parties and the general public have full confidence in the fairness of decisions and the impartiality of decision makers to whom the rules of procedural fairness apply.'[32] According to His Honour,

> *Condemnation without a proper hearing or by an apparently biased tribunal is unacceptable; exoneration by such a tribunal may be worthless.*[33]

The issue according to Moynihan J is 'not whether the decision maker is in fact biased but whether a fair minded observer might reasonably apprehend that the decision maker might not bring an impartial or unprejudiced mind to bear on the task'.[34] His Honour was at pains to stress that an inquiry's inquisitorial and reporting function allowed commissioners to take a 'more active, interventionary and robust role in ascertaining the facts and a less constrained role in reaching conclusions than applies in litigation' but it did not dilute or diminish the 'expectation that an impartial and unprejudiced mind will be applied'.[35]

Justice Moynihan was 'satisfied that each of the applicants has made out a case of ostensible bias in respect of matters arising under the Inquiry's terms of reference. The circumstances established by the accumulated weight of evidence would give rise, in the mind of a fair minded and informed member of the community, to a reasonable apprehension of lack of impartiality on the Commissioner's part in dealing with issues relating to each of the applicants.'[36]

[31] [2005] QSC 243, [33] per Moynihan J.

[32] [2005] QSC 243, [36] per Moynihan J.

[33] [2005] QSC 243, [36] per Moynihan J.

[34][2005] QSC 243, [36] per Moynihan J.

[35] [2005] QSC 243, [46].

[36] [2005] QSC 243, [158]-[160].

APPLICATION OF PRINCIPLES TO PERMANENT COMMISSIONS

In *R v Criminal Justice Commission; ex parte Ainsworth & Anor*[37] the CJC had prepared a report on the introduction of poker machines for a cabinet sub-committee.[38] Later, this was presented as a report to Parliament.[39] The report was critical of the Ainsworth group of companies. The applicants were not provided a right to be heard. The report was written by a journalist engaged by the CJC and was based on secondary evidence. The applicants sought orders of Mandamus and Certiorari.

The Full Court of the Supreme Court of Queensland (McPherson, Lee and Mackenzie JJ) held (i) that the course adopted by the Commission was not one which attracted a duty of fairness under the Act (ii) there was no duty of fairness under the general law because the report did not affect any right, interest or legitimate expectation of the appellants (iii) even if there was a duty of fairness, the case was not appropriate for the grant of relief, whether by way of certiorari, mandamus or, as was sought in the course of argument, by way of declaration.

This case also raised the issue of parliamentary privilege. The fact that the report had already been tabled was particularly troubling for McPherson J:

> *The Report is presumably now in the possession of the Speaker, or perhaps it is of the Clerk of Parliament. For the Court to order a writ to issue against either the Speaker or the Clerk of Parliament would be accounted a gross breach of privilege. To attempt to enforce it by apprehending either of those individuals so as to bring them before the Court to face charges of contempt would be an act without a parallel since Charles I tried to arrest the Five Members in 1642. The constitutional distribution of power in a democracy proceeds on the footing of mutual respect by legislature and judiciary for the integrity of their respective functions. We should be overstepping the*

[37] *Queen v. The Criminal Justice Commission Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported).

[38] *Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported) p.27 per McPherson J.

[39] *Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported) p.6 per McPherson J.

> *proper limits of our responsibilities by a wide margin if we were to order a writ of certiorari to issue to bring up a record that now forms part of the proceedings of Parliament.*[40]

The High Court held, on appeal, that the CJC in 'compiling its report' on Poker Machines in Queensland had not afforded the appellant procedural fairness and made a declaration to this effect.[41] Chief Justice Mason, Dawson, Toohey and Gaudron JJ rejected the notion that a duty of natural justice did not arise:

> *The nature and purposes of the Commission and its organizational units are such that it is unthinkable that it might, in any circumstance whatsoever and whether discharging its functions or responsibilities or merely taking some step in the course of or in relation to them, proceed in a way that is partial or contrary to the public interest.*[42]

Later the joint judgement stated:

> *… a body established for purposes and with powers and functions of the kind conferred on the Commission and its organizational units is one whose powers would ordinarily be construed as subject to an implied general requirement of procedural fairness, save to the extent of clear contrary provision. That is because it is improbable that, though it did not say so, the legislature would intend that a body of that kind should act unfairly.*[43]

At this point it is worth noting that the report in *Ainsworth* was prepared for a cabinet sub-committee and preceded the *Parliament of Queensland Act 2001* (Qld) provisions that will be discussed in more detail below.

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[40] *Ex Parte Leonard Hastings Ainsworth and Ainsworth Nominees Pty Ltd* [1990] OSC No 28 of 1990 (unreported) p.27, per McPherson J).

[41] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564.

[42] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [18].

[43] *Ainsworth v Criminal Justice Commission* (1992) 175 CLR 564, [21].

Narrow interpretation of statutes

Although not a doctrine stated by any court, an examination of cases involving challenges to the jurisdiction and reports of permanent commissions reveals a tendency for courts to narrowly construe their statutes. For example, in *Balog v ICAC*[44] the High Court found that the ICAC was:

> *…primarily an investigative body whose investigations are intended to facilitate the actions of others in combating corrupt conduct. It is not a law enforcement agency and it exercises no judicial or quasi-judicial function. Its investigative powers carry with them no implication, having regard to the manner in which it is required to carry out its functions, that it should be able to make findings against individuals of corrupt or criminal behaviour …*[45]

The court construed the statute such that that the only finding which the ICAC may properly make in a report concerning criminal liability is whether there is or was any evidence or sufficient evidence warranting consideration of the prosecution of a specified person for a specified offence.[46]

In another example, in *Greiner v ICAC (No 2)*[47] the majority of the NSW Court of Appeal (Gleeson CJ and Priestley JA), held that the determination by the ICAC in its report, that Greiner had engaged in corrupt conduct within the meaning of the ICAC Act, was made without or in excess of jurisdiction.

More recently in *Independent Commission Against Corruption v Cunneen*[48] the majority of the High Court restricted the jurisdiction of the ICAC to investigate the conduct of third parties in connection with the discharge of official functions by public officials. Justice Gageler (in dissent) noted that the interpretation adopted by the majority would mean that third party conduct such as endemic collusion among tenderers in

[44] (1990) 169 CLR 625.

[45](1990) 169 CLR 625, 636.

[46] (1990) 169 CLR 625, 635.

[47] (1992) 28 NSWLR 125.

[48] [2015] HCA 14.

tendering for government contracts, or serious and systemic fraud in the making of applications for licences, permits or clearances issued under NSW statutes, could not be investigated by the ICAC.[49]

THE INTERSECTION WITH PARLIAMENTARY PRIVILEGE *(CRIME AND CORRUPTION COMMISSION V CARNE)*

As can be seen from the above, it is not uncommon for the activities of ad hoc and permanent commissions of inquiry to be the subject of judicial review. However, the series of decisions that culminated in the very recent High Court decision of *Crime and Corruption Commission v Carne*[50] requires special attention as they deal with the intersection of judicial review of a permanent commission of inquiry's report provided to its parliamentary oversight committee, thereby potentially raising issues of parliamentary privilege.

Statutory Background

The Crime and Corruption Commission (CCC) and its oversight committee, the Parliamentary Crime and Corruption Committee (PCCC) are established by the *Crime and Corruption Act 2001* (Qld) (CCC Act). Section 64(1) of the CC Act provides under the heading 'Commission's reports—general' that the 'commission may report in performing its functions'. Section 69 of the CC Act provides that the section 'applies to the following commission reports — (a) a report on a public hearing; (b) a research report or other report that the parliamentary committee directs be given to the Speaker.' The section goes on to indicate that s69 reports are provided to the Chair of the PCCC, the Speaker and the Minister and then tabled in the Assembly.

Section 8 of the *Parliament of Queensland Act 2001* (POQ Act) provides that 'the freedom of speech and debates or proceedings in the Assembly cannot be impeached or questioned in any court or place out of the Assembly'. The section essentially repeats and reinforces the historical protection of Article 9 of the *Bill of Rights 1688* (UK).

[49] [2015] HCA 14, [92].

[50] [2023] HCA 28.

Section 9(1) and (2) of the POQ Act provides a statutory definition of the term 'proceedings in parliament'.

Section 55 of the POQ Act provides for the issuing of certificates by an authorised person (including a committee chairperson), to evidence various matters, including that documents were prepared, presented to or made or published under the authority of the Assembly, a committee.

Factual background

Peter Carne was the Public Trustee of Queensland (located in Ann Street Brisbane) from March 2009 until March 2014 and again from March 2016 until his resignation effective from 31 July 2021. By email on 17 June 2019, a police officer attached to the CCC notified Carne of its investigation of a complaint and requested an opportunity to conduct: (i) a formal disciplinary interview to allow the appellant to hear the allegations against him and to provide comment; and (ii) a separate criminal interview concerning matters related to the use of resources of the Public Trust Office.[51]

Between June 2019 and January 2020, the Commission and Carne's solicitors exchanged correspondence about the subject matter of the investigation, and the process for proposed interviews. Meanwhile, the CCC investigation continued. On 27 November 2019, Carne was served with a show cause letter under the hand of the Attorney-General. On 28 January 2020, the Carne was examined by a psychiatrist. On 13 February 2020, Carne's solicitors advised the CCC that the appellant was unable to participate in any interview at that time because of the state of his mental health. Carne did not participate in an interview with the CCC during the period from June 2019 to January 2020 in relation to the CCC's investigation.

On 19 June 2020, the PCCC held a private meeting at which the CCC was giving evidence. In response to an enquiry from the Chairperson of the PCCC, the Chairperson of the CCC advised that the CCC had not made a final decision on whether to prepare a report in relation to the Carne investigation matter, but he thought the CCC should

[51] This summary of facts is taken from the dissenting judgment in *Carne v Crime and Corruption Commission* [2022] QCA 141, [84], [89]-[90] per Freeburn J, except where otherwise noted.

do so 'because it is high profile and it has been in the media'. He said that after the show cause process had taken its course, the CCC 'probably should articulate some of the concerns that [it] had'.[52]

On 31 July 2020, Carne resigned from the position of Public Trustee, bringing the show cause proceedings to an end. On 11 September 2020, at a meeting of the PCCC, the Chairperson of the PCCC asked whether the CCC would be seeking a direction under s 69 of the CC Act for the tabling of the report, to which the Chairperson of the CCC responded in the affirmative. He added that he did not see 'why we should not publicly report in a matter that has so much public interest and is such an important matter in terms of workplace culture, corruption risks and so forth'.[53]

Sometime prior to 6 October 2020, the CCC prepared a report on certain allegations against Carne (the report). On 6 October 2020, the CCC forwarded the report to the PCCC and requested that, under s 69(1)(b) of the CC Act, the PCCC direct that the report be given to the Speaker of the Queensland Parliament for tabling in the Legislative Assembly.

Carne applied to the Supreme Court of Queensland for: (a) a declaration that the document styled 'An investigation into allegations relating to the former Public Trustee of Queensland: Investigation Report' is not a report for the purposes of s 69(1); (b) a mandatory injunction, pursuant to s 332 of the CC Act that the CCC retract its resolution of 6 October 2020 to approve the seeking of a direction from the PCCC to enable tabling of the report and advise the PCCC of the same.[54]

Trial

At trial Davis J dismissed the application by Carne.[55] Justice Davis found that the preparation of the report was authorised by s 64 of the CC Act and was protected by parliamentary privilege. Justice Davis considered the scheme set up by the CC Act. According to Davis J, the CCC has statutory obligations to achieve the purposes of the

[52] *Crime and Corruption Commission v Carne* [2023] HCA 28, [8].

[53] *Crime and Corruption Commission v Carne* [2023] HCA 28, [11].

[54] *Carne v Crime and Corruption Commission* [2021] QSC 228.

[55] *Carne v Crime and Corruption Commission* [2021] QSC 228.

Act, which includes to reduce the incidence of corruption and improve the integrity of the public sector. The CC Act also provides that powers of the CCC are to be exercised in a way which promotes public confidence in government. The CCC fulfils its functions by various means, including conducting investigations and reporting its findings.[56]

Davis J found that a report prepared by the CCC as a result of an investigation pursuant to the powers vested in it by the CC Act, where it is intended by the CCC to supply the report to the PCCC, is a document prepared for 'presenting or submitting a document to the Assembly' and 'for the purposes of or incidental to, transacting business of the [PCCC]'.[57] Davis J found that there was 'no doubt' that the CCC, in preparing the report and delivering it to the PCCC, was acting under the authorisation in s 64 of the CC Act.[58] Further, the PCCC had accepted the report for the purpose of transacting the business of the PCCC.[59]

In terms of evidence, Davis J relied on the certificate of the Chairperson of the PCCC under s 55 of the POQ Act that stated that the report was a document prepared for the purposes of, or incidental to, transacting business of the PCCC. Davis J noted that the certificate is not absolute proof of the matters certified. It is only evidence of those matters. But in Davis J's view the other evidence supported rather than contradicted the certificate, as did the provisions of the CC Act.[60]

Davis J also noted that a finding that the report is not a report for the purposes of s 69 did not necessarily mean that privilege did not attach to the report. According to Davis J it was, as a matter of fact, prepared with the intention of delivery to the PCCC and was in fact delivered to the PCCC. As it was prepared for the purposes of, or incidental to, transacting business of the PCCC it would likely still be protected by the POQ Act.[61]

[56] *Carne v Crime and Corruption Commission* [2021] QSC 228, [117].

[57] *Carne v Crime and Corruption Commission* [2021] QSC 228, [120].

[58] *Carne v Crime and Corruption Commission* [2021] QSC 228, [121].

[59] *Carne v Crime and Corruption Commission* [2021] QSC 228, [122].

[60] *Carne v Crime and Corruption Commission* [2021] QSC 228, [123]-[129].

[61] *Carne v Crime and Corruption Commission* [2021] QSC 228, [141].

Court of Appeal

On appeal to the Queensland Court of Appeal, the majority of the court (Mullens and McMurdo JJ)[62] found that, having investigated a complaint of corruption, the task of the CCC was to decide whether proceedings or disciplinary action should be considered. If the CCC decides that proceedings should be considered, it may report, not publicly, but to a prosecuting authority, a head of jurisdiction or the chief executive officer of the relevant unit of public administration.[63] Otherwise, there is no provision under the CC Act by which it is to report.[64]

Having found the CCC was not empowered or required to make the report, the majority found that the report was not a report to which s 69 applies.[65] The majority then held that parliamentary privilege could not be conferred upon a document made and delivered to the PCCC in purported, but not actual performance of the CCC's functions. In the majority's view, the preparation and delivery of the report, without the operation of s 69, were not 'acts done in transacting the business of the Assembly or its committee'.[66] At this stage it is noted that the majority only deals with the CCC Act, and does not deal with the POQ Act, which does not require that a document prepared or submitted be not tainted by illegality or unlawfulness or alternative is made pursuant to some lawful authority. (Such a limitation would affect the Parliament's ability to fulfil its functions, including that of oversight).

Justice Freeburn dissented and held that the CCC had the statutory power to prepare the report and that the report was subject to parliamentary privilege. His reasoning was similar to the trial Judge. His Honour's recitation of facts is the most comprehensive of the five separate judgements at the three levels. On the interpretation of s 64 of the CCC Act, His Honour stated:

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[62] *Carne v Crime and Corruption Commission* [2022] QCA 141.

[63] *Carne v Crime and Corruption Commission* [2022] QCA 141, [56].

[64] *Carne v Crime and Corruption Commission* [2022] QCA 141, [56].

[65] *Carne v Crime and Corruption Commission* [2022] QCA 141, [68-69].

[66] *Carne v Crime and Corruption Commission* [2022] QCA 141, [80-81].

> *... to interpret s 64(1) as only permitting reports whilst there remains a potential for criminal charges, or for disciplinary action, would be to read down the section too far.*[67]

Justice Freeburn agreed with the trial judge that the report here was brought into existence for the purpose of being submitted to the PCCC and was actually submitted to the PCCC with a request that the PCCC direct that the report be given to the Speaker.[68] Justice Freeburn also had difficulties with the relief sought. According to His Honour the 'core of the relief sought by the appellant is a desire to stop the PCCC from directing that the report be given to the Speaker'.[69] His Honour stated that in his view 'orders to that effect would be contrary to the principle that parliamentary proceedings are immune from outside examination by other organs of the state and would be to trespass inadvertently into the legislature's province'.[70]

Issues before the High Court

The first ground of appeal was essentially the privilege issue. The CCC argued that the Court of Appeal was precluded from making the declaration by the prohibition in s 8(1) of the POQ Act on 'proceedings' in the Legislative Assembly being 'impeached or questioned' in any court. The CCC argued that its preparation and presentation of the report were brought within the scope of 'proceedings' in the Legislative Assembly by operation of s 9 of the POQ Act. The second ground of appeal went to the construction of the CC Act. The CCC argued that the conclusion of the Court of Appeal, that the report is not a report for the purposes of s 69(1) of the CC Act, was erroneous.

Decision of the High Court

There were two joint judgements, both dismissing the appeal. The majority of the plurality (Kiefel CJ, Gageler and Jagot JJ.) found the CCC's argument that its preparation

[67] *Carne v Crime and Corruption Commission* [2022] QCA 141, [134].

[68] *Carne v Crime and Corruption Commission* [2022] QCA 141, [176-183].

[69] *Carne v Crime and Corruption Commission* [2022] QCA 141, [199].

[70] *Carne v Crime and Corruption Commission* [2022] QCA 141, [200].

and presentation of the report were brought within the scope of 'proceedings' in the Legislative Assembly by operation of s 9 of the POQ Act must be rejected on the facts. In the view of the joint judgement, s 9 of the POQ Act was not satisfied because the report was not prepared for, or presented to, the committee for purposes of transacting business of the committee. Rather, it was prepared by the CCC and presented to the PCCC for the CCC's own purposes.[71] In respect of the second ground of appeal the majority of the plurality held that the report is not a report to which s 69(1) of the CC Act applies. Further, there is no provision of the CC Act which authorises a report of this nature.[72]

The minority of the plurality (Gordon and Edelman JJ.) found that the Court of Appeal was correct to find that the October draft was not a report for the purposes of s 69(1) of the CCC Act. In the view of the minority of the plurality, parliamentary privilege does not present any obstacle to the declaration made by the Court of Appeal because, on the facts, no question of parliamentary privilege arose; no act was done in the course of, or for the purposes of or incidental to, transacting business of the PCCC to which parliamentary privilege could attach.[73] In particular, the October draft report was not prepared 'for the purposes of or incidental to, transacting business' of the PCCC, but rather for the purposes of the CCC.[74]

Observations on Carne

As to the second ground, which related to whether the report was one contemplated by s 69 of the CC Act, the High Court's interpretation of the CC Act was not surprising given the increasing tendency of the courts to read statutes narrowly regarding the jurisdiction and powers of permanent commissions of inquiry.[75] The CC Act is an overly complex piece of legislation, one result of the CCC's 'one stop shop' model. The interpretation by the CCC over many years (26 years) was not unreasonable and

[71] *Crime and Corruption Commission v Carne* [2023] HCA 28, [23].

[72] *Crime and Corruption Commission v Carne* [2023] HCA 28, [26-27].

[73] *Crime and Corruption Commission v Carne* [2023] HCA 28, [78].

[74] *Crime and Corruption Commission v Carne* [2023] HCA 28, [31] and [78].

[75] See for example: *Greiner v ICAC No 2* [1992] 28 NSWLR 125; *Balog v ICAC* (1990) 169 CLR 625; *Independent Commission Against Corruption v Cunneen* [2015] HCA 14.

supported through the litigation by two justices of the Supreme Court. However, the High Court's interpretation was equally open and reasonable as a matter of statutory construction.

The High Court's decision on the first ground and the application of the provisions of the POQ Act is much more difficult to reconcile. Both judgements avoided the issue of parliamentary privilege by findings 'on the facts' that the issue of privilege did not arise, because the relevant acts done did not satisfy the requirements of s 9 POQ Act. That is, that the CCC's report was not prepared and submitted 'for the purposes of the committee'.[76] The fact a document was prepared for a committee's consideration and provided to the committee was itself insufficient to trigger the statute.

In argument before the High Court, Bret Walker SC, counsel for the Speaker of the Legislative Assembly of Queensland put that the motivations or purpose of both the person who produces the document and the person who receives it are irrelevant to the question of whether a document is prepared for the purposes of the Assembly or a committee.[77] On behalf of the Speaker, Walker submitted that it is the functional connection, objectively considered, of the document with the Assembly or committee which must be considered.[78] The majority of the plurality explicitly accepted this proposition and then stated that 'the mere preparation' of a document for the Assembly or a committee, or presentation of a document to the Assembly or committee, by a third party will not suffice if there is no other connection to the work of the Assembly or a committee at the time the document was prepared.[79]

Three points need to be made about this issue. First, it is hard to escape the conclusion that the court in identifying various statements made by the CCC in the material before it, was in fact identifying the motivations for the report and ascribing those motives to the CCC.

[76] *Crime and Corruption Commission v Carne* [2023] HCA 28, [31].

[77] *Crime and Corruption Commission v Carne* [2023] HCATrans 74 (6 June 2023); *Crime and Corruption. Commission v Carne* [2023] HCA 28, [35].

[78] *Crime and Corruption Commission v Carne* [2023] HCA 28, [35].

[79] *Crime and Corruption Commission v Carne* [2023] HCA 28, [36].

Secondly, the majority of the plurality appeared to adopt the notion of the 'appropriative act' for parliamentary privilege to apply. That is, privilege is not attracted to a document until the Assembly, committee, member or their agent does some act with respect to it for purposes of transacting business. The majority plurality seem to have embraced[80] this concept as enunciated by McPherson JA in *Rowely v O'Chee*[81] who in turn referred to cases like *Rivlin v Bilainkin*[82] and *Grassby*.[83] The embracement of this doctrine will have implications for people like whistleblowers who unilaterally disclose material to committees and members. Further, it is unclear what appropriative act is required to activate the privilege. In *Carne*, the preparation of the report was anticipated by the PCCC, it was prepared for the PCCC's consideration, was presented to the committee and was under consideration when the action was taken in the Supreme Court. In a demonstration of adherence to principles of mutual respect, the committee suspended its consideration of the matter, which it need not have done.

Thirdly, the majority of the plurality did not address the issue that there may be concurrent purposes for the creation and submission of documents to a committee. That is, both submitters and the committee may have differing or the same concurrent purposes.

Similarly, the minority of the plurality stated that the 'current case may be distinguished from one where a parliamentary committee, upon receiving a document unrelated to the business of the parliamentary committee, elects to retain it for the purpose of transacting its business'. According to the minority plurality, 'in such cases, the application of ss 8 and 9 of the POQ Act would have the result that the document would be privileged'.

It is difficult to comprehend how the report in *Carne* was not related to the business of the PCCC within the description stated by the minority of the plurality. Again, the preparation of the report and the intention to present to the committee was discussed in two separate properly constituted proceedings of the PCCC. It was prepared for the PCCC, provided to the PCCC and under consideration by the PCCC.

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[80] *Crime and Corruption Commission v Carne* [2023] HCA 28, [36].

[81] [2000] 1 Qd R 207, 221.

[82] [1953] 1 QB 485.

[83] (1991) 55 A Crim R 419.

Finally, both High Court judgements turned on a question of fact. Both judgements' findings of fact are clearly different to that of the trial judge. The trial judge's view of the facts were not in issue in the Court of Appeal, the majority's reasoning resting on the interpretation of the Act. Indeed, the dissent by Freeburn J takes a view of the facts in concurrence with the trial judge. In order to come to its view of the facts the High Court rejected the propositions in the s 55 certificate and substituted its view of the facts. The majority of the plurality stated:

> *This conclusion is not altered by the certificate issued under s 55 of the POQ Act, by which the Chairperson of the Committee certified that the Report was prepared for and presented to the Committee for its purposes. Section 55(2)(d) provides that a certificate stating that a document was prepared for the purposes in s 9(2)(a) or (c) is evidence of that fact. It does not, however, provide that it is conclusive. The s 55 certificate may be rebutted by other evidence. The Commission's statements as to its purpose for preparing the Report do just that.*[84]

The judgements appear to ignore the fact that on a routine basis a Committee may have a purpose (for example, to obtain information to make the most appropriate recommendation) and a submitter may likely have a different but concurrent purpose (for example, to influence the matter under consideration to be favourable to the submitter's position).

Let us 'Bell the Cat'. Courts do not like to be ousted from jurisdiction. Parliamentary privilege is an effective ouster from jurisdiction. The High Court have in *Carne* case chosen the facts that did not trigger the application of the statute that applied the privilege. The Court ignored other inconvenient facts.

The public policy issues

It is very important that there is judicial supervision of Commissions of Inquiry and Permanent Commissions of Inquiry. For example, in *Ainsworth*,[85] the CJC ignored any

[84] *Crime and Corruption Commission v Carne* [2023] HCA 28, [40].

[85] *Ainsworth v Criminal Justice Commission* [1992] HCA 10.

form of natural justice. The Commissioners in *Carruthers*[86] were found to have demonstrated ostensible bias and in *Keating v Morris & Ors; Leck v Morris & Ors*[87] the Commissioner's conduct of proceedings and interrogations were found to raise a reasonable apprehension of bias.

The courts have made it very clear that they will interpret statutes regarding permanent commissions of inquiry very narrowly. It is now incumbent on legislatures to ensure that the statutes creating those bodies are extremely clear as to jurisdiction, power and reporting authority. If the legislature wants commissions to be able to report and make findings, it is evident that the court will require clear statutory authority to allow reports that make findings against individuals.

In my submission, it is not necessary for independent commissions to make findings of corrupt conduct or criminal behaviour against individuals in a public report. Such matters can be decided by other more appropriate bodies. However, Commissions should be able to report a narrative of facts, expose broad behaviour and corruption risks and advise that they have referred matters to the appropriate body. It is necessary for the public to be appraised of the wider facts of a matter and the behaviours of public officials and an appreciation of the mischief at hand.

To avoid conflict between the courts and parliament, it would be best to avoid provisions such as the current s 69 if the CC Act, where a report is provided to a Committee to determine whether a report of a commission should be tabled. There are numerous reasons why the approach set out in s 69 is flawed policy.[88]

In the *Carne* case, the High Court's interpretation of the statute means at least 32 commission reports and 256 media releases over 26 years would never have occurred.[89] The significance of the decision and its poor policy implications for the

[86] [1997] QSC 132.

[87] [2005] QSC 243.

[88] For further information re history and policy issues relating to the section see Neil Laurie, Submission, Parliamentary Crime and Corruption Committee, Five-year review of the Crime and Corruption Commission's activities, Queensland, 27 April 2021.Accessed on 20 September 2023 Accessed at <https://documents.parliament.qld.gov.au/com/PCCC-8AD2/RCCC-21CB/submissions/00000036.pdf>.

[89] Letter from the Chair of the Crime and Corruption Commission to the Chair of the Parliamentary Crime and Corruption Committee, Parliament of Queensland, dated 20 October 2022. Accessed at: <https://documents.parliament.qld.gov.au/com/PCCC-8AD2/C-A72F/221020%20-%20IN%20-

future operation of the CCC lays in the examination of that list. Public information about the outcomes of numerous matters of high public importance and interest are at stake.

In the Court of Appeal, Freeburn J warned about a narrow interpretation of the CC Act, stating:

> *It would prevent the Commission from reporting on a matter relevant to the standards of integrity and conduct in units of public administration, or assessing the appropriateness of systems and procedures, or on a matter of public confidence in the integrity of units of public administration, and public confidence in the way in which corruption is dealt with. Reading s 64(1) in that narrow way would mean that the Commission's only power to so report would be if there were a potential for criminal charges, or for disciplinary action.*[90]

That warning has come to pass.

Without statutory amendment, the public will remain 'in the dark' about the outcomes of a large number of corruption investigations where a decision does not result in criminal proceedings but nonetheless contain lessons for, and usually recommendations to reduce the incidence of corruption or misconduct in, Queensland's public sector. Also, the very real benefit in some people under investigation, who may have been wrongly accused or slurred, to have a public report clearing their name cannot also be understated.

Should we be so protective of individual rights (reputation) that it keeps the public in the dark about matters of corruption and misconduct by public officials? Should the public not be able to judge for themselves the conduct of public officials by knowing the factual circumstances of an issue and the behaviours that occurred?

%20Crime%20and%20Corruption%20Commission%20-%20Data%20on%20investigations%20reports_media%20releases%20in%20relation%20to%20CCC%20investigations.pdf>.

[90] *Carne v Crime and Corruption Commission* [2022] QCA 141, [134].

One result of the litigation in *Mahon v Air New Zealand*[91] was that it took 20 years for the reports of the Chief Inspector of Air Accidents and the Mahon Commission to be tabled in the New Zealand Parliament. It took 40 years, for New Zealand's Prime Minister, on behalf of the New Zealand government, to apologise for the actions of the airline, then in full state ownership, and which according to the apology 'ultimately caused the loss of the aircraft' and the loss of life.[92] Judicial supervision is important, but it also risks public confidence in public institutions if it results in secrecy.

The CCC may be regarded as a permanent commission of inquiry, in that it can inquire into matters, but unlike a commission of inquiry that is expected and able to publicly report 'the truth of a matter', the CCC has largely been silenced. It is a watchdog that still has some bite, in that it has powers of investigation and can refer matters to others to prosecute. But it is a watchdog without a bark. It has been muzzled.

It has long been alleged that the CCC has been used by governments as a 'clearing house'. Issues of public concern are sent for investigation and when no criminal conduct is found, governments then imply there was no wrongdoing -even though wrongdoing that falls short of criminal conduct is often revealed.

Aristotle said:

> *To say of what is that it is not, or of what is not that it is, is false, while to say of what is that it is, and of what is not that it is not, is true.'*[93]

Until the statute is remedied, for anyone to say 'the CCC has investigated and no outcome has occurred, therefore there was no wrongdoing', is not necessarily speaking the truth. The public is capable of handling the truth.

[91] [1984] 3 All ER 201; [1983] NZLR 662.

[92] New Zealand Government Website, 'Prime Minster Delivers Erebus Apology', 20 November 2019. Accessed at <www.beehive.govt.nz>.

[93] David Marion 'Correspondence Theory of Truth' in *Stanford Encyclopedia of Philosophy*, Stanford University, 2005. Available at https://plato.stanford.edu/contents.html.