Submission by the Hon DP Drummond QC - 8 April 2014

I thank the committee for its invitation to make a submission on the CMOLA Bill.

It may be a pointless exercise for me to respond: the Attorney-General, Mr Bleijie, is reported in the Courier Mail (2 April 2014) as saying of the submission to the Committee by Mr Needham, a former Chairman of the CMC, that criticised the proposal to remove the requirement for bipartisan support for appointment as a commissioner: "Our reforms will enable the CMC to do what it was always meant to do, which is independently tackle serious crime and corruption".

Nevertheless, in the perhaps naïve hope that Mr Bleijie will not simply disregard submissions to the Parliamentary Committee and the Committee's report, if it should recommend changes to the Bill, I make the following points:

[1] My experience as a part-time commissioner of the CMC convinced me that many in it lacked commitment to implementing competent management practices and were resistant to attempts to improve the commission's efficiency in discharging its functions. Many of the managerially-focussed recommendations, particularly of the Keelty review, are desirable.

The restructured commission may do some good work in dealing with organised crime. It may also do some good work in dealing with corruption so long as it does not involve members of the government or its cronies.

But an efficiently operating commission that will protect the government from criticism is of little value. Pretty clearly, this is a major object of the changes the Bill will make to the CMC. It is an extraordinary exercise for the Newman Government to engage in at the very time ICAC in Sydney is exposing how corrupt politicians of both major parties will work hand in hand with opportunistic businessmen to plunder public assets.

[2] **Destruction of public confidence.** The abandonment of the requirement of bipartisan support for the appointment of commissioners including the chairman will, by itself, guarantee that the Commission is unable to do "what it was always meant to do", namely to tackle serious corruption independently of government control.

The removal of this requirement will ensure that each appointment by the Newman government will be rightly seen by a large part of the Queensland public as tainted by political partiality. The new process, limited to public advertising for expressions of interest in being appointed and to consultation by the Attorney-General, will not be likely to alter this perception[i]. Each new commissioner will very probably be seen as having been handpicked by the Government in the expectation that each will be sensitive to the political interests of the government in performing their duties.

The Newman government has demonstrated its capacity to engage in this kind of manipulation. In November last, it sacked the cross-party Parliamentary Crime and Misconduct Committee while it was investigating the independence of the government's appointee as acting chairperson of the CMC and stacked the new Committee with a majority

of government members. (The appointment of that chairperson did not have bipartisan support because it was a temporary one).

The ALP, when it eventually returns to power, can be expected to embrace the proposed unilateral power to stack the commission. But perhaps that may be of no concern to the current government which is looking forward to several terms in office.

[3] **A one-man band.** Under sec 7 of the current Act, the ultimate power of control of the commission is vested in the full-time chairperson and the four part-time commissioners. They exercise this control by acting together, by majority decision, as a board of management[ii]. The chairperson is also the commission's chief executive officer. But he must perform his role as CEO "subject to the commission": sec 251.

The Bill leaves sec 7 untouched. But the Bill transfers all authority of any significance to the performance of the commission's corruption functions to the chairman and frees him of any control by the commission. The commission's corruption functions will essentially be governed by a one-man band.

It is against this background of the transfer of power over the corruption function from the commission as a whole to the chairperson alone that the removal of the requirement for bipartisan support for the appointment of commissioners has special significance.

The chairman alone will have control over the key anti-corruption activities of the commission. His power will be absolute. All the critical powers for dealing with corruption will be delegated to him personally by the new sec 269 of the Act itself. He will not be subject to direction by the commission about how he exercises any of them: new sec 252(3). He can determine for himself whether a particular complaint of corruption is investigated and whether an ongoing investigation should be terminated and the complaint dismissed. The other commissioners can "help the chairman" here, but only if he asks for their help: new section 251(3).

At the moment, there is an Assistant Commissioner, Misconduct, who is "responsible to the chairperson" for the proper performance of the commission's misconduct functions, which include its anti-corruption functions. That official will be replaced by by a "senior officer". He will also be "responsible to the chairman for the proper performance of the commission's corruption functions". But even that formula is not thought to be a tight enough leash on the senior officer: new section 245 (4) expressly makes what he does with respect to corruption matters "subject to the direction and control of the chairman". Even where an important function touching on the commission's anti-corruption activities is delegated by the Bill to the new CEO rather than the chairman, eg, new sec 35A, the CEO must still act subject to direction by the chairman.

The Bill rejects good public governance. It is no answer to say that it only takes control of the commission back to the pre-1997 position. The vesting by the Bill of such extensive power over critically important matters in a single person is contrary to modern principles of good institutional governance: "Good governance will impose an appropriate limitation on power ... It will ensure there is not a concentration of power vested in a single individual, allowing actions to be taken other than in the interests of the entity itself and its owners."[iii] (It is of course the Queensland public, not the government, which are the "owners" of the CMC[iv]).

[4] **A government protection commission?** It is one thing for the government to say that it has accepted the Callinan/Aroney recommendation that the commission should focus on the investigation of serious cases of corrupt conduct. But the proposed changes to the CMC appear designed to ensure that the restructured Commission will not investigate corruption by Queensland politicians and public officials if that might embarrass the government.

There are a series of filters likely to achieve that:

i] Only improper conduct of considerable gravity has to be reported to the commission. For conduct to be reportable because it might amount to corrupt conduct, it must, if proved, constitute a criminal offence or disciplinary misconduct sufficiently serious to warrant dismissal: sec 15(1)(d).

ii] Then, before a public official must notify the commission, he must reasonably suspect that there is corrupt conduct. This is a new requirement. Whether a reasonable suspicion of corrupt conduct exists involves a highly subjective judgment. Further, new sec 216A places the threat of prosecution over a person, including a public official, who makes a complaint to the commission if the chairman considers it to be vexatious. As a practical matter, a public official is unlikely to decide that he has a reasonable suspicion of corrupt conduct and so must take on the potentially career-destructive role of whistleblower required by sec 38, unless he is practically certain of the existence of corrupt conduct. This is especially likely if exposure of the conduct would reflect badly on the government. A lot of corrupt conduct is likely to go unreported to the commission[v].

iii] Even if the suspect conduct satisfies paragraph [i] and is reported, the commission will still not investigate it unless it amounts to "serious corruption": Bill, sec 5(3). This too is a new requirement.

iv] The Bill does not help the public or anyone else to identify what additional features criminal offences and serious disciplinary misconduct must have to amount to "serious corruption". It leaves it to the CEO, but "subject to the direction and control of the chairman", to give directions binding on commission's staff to determine that: new secs 35A and 269(1)(a) and (2) This CEO direction need not be published (though other directions by the CEO must be published: sec 35B) and any commission staff member who discloses it will be guilty of an offence: sec 213. Corrupt conduct amounting to a criminal offence or sufficient to justify the dismissal of an official involved in it will not be investigated unless it falls within the CEO's uncontrolled and secret test of "serious corruption" that must have the chairman's approval.

v] Even if the conduct the subject of a complaint provided to the commission satisfies the CEO's test for "serious corruption", it can still be dismissed at any time between receipt of the complaint and completion of its investigation if "the commission" is satisfied that "dealing with the complaint would not be in the public interest": new sec 46(2)(g)(ii)(A).

This is a new and extraordinary power.

Firstly, "the commission" will never get to make a decision about whether or not to dismiss a complaint capable of amounting to serious corruption on this ground. New sec 269(1)(b) of the Bill itself delegates this decision-making power to the chairman acting alone and without any oversight by the commission: new sec 252(3). Further, the Bill leaves it entirely to the

chairman to exercise an extremely broad and what will in practice be a legally uncontrollable discretion to refuse to deal with a complaint, even though it may involve "serious corruption" as defined by the CEO and the chairman.

If the chairman does not want the commission to investigate a particular matter or decides that a continuing investigation should be stopped, no matter how strong the indications are that serious corruption has occurred, he can kill the investigation. His decision to stop an investigation will be final and unreviewable and he need not provide any explanation to anyone for what he has done[vi]. Further, if the public is told about it, the decision will be described as a decision of the entire commission, not just the personal decision of the chairman: see new sec 252(4).

vi] The Bill then completes this scheme for stifling politically embarrassing investigations by providing for the appointment of a chairman without bipartisan agreement ie for the key appointment, who will have absolute control over what matters involving serious corruption are investigated, to be handpicked by the government[vii]. All the government needs, as an insurance against ever being politically embarrassed by the commission, is a "reliable" chairman.

The changes proposed by Newman government in this Bill will mean not only that the commission's corruption functions will be performed by a one-man band, but that, in cases of potential embarrassment to the government, the tune played will very likely be one pleasing to it.

DP Drummond

Special Prosecutor 1989 – 1991

Federal Court Judge 1991 – 2003

Part-time Commissioner CMC 2005 -2008

Acting Judge, Western Australian Court of Appeal 2010 – 2012

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[i] Mr Bleijie has said that there is no need for bipartisan support because that is not required for the appointment of judges. But judges cannot be compared with CMC commissioners. The Fitzgerald Report explains why:

"Independent Commissions Against Corruption are powerful bodies, which cannot be fully supervised in the same way as other parts of the criminal justice system. They are extremely controversial. Invariably setting one up has been accompanied by cogent and trenchant criticism. Control immediately becomes controversial. The government has a natural wish to control the appointment, resourcing and activities of an ICAC, whilst opposition and other interest groups have demanded that policy formulation and the overseeing of operational activities should be the domain of Parliamentary committees."

Judges are rarely required to give decisions about possible corrupt behaviour by politicians or public officials. Investigating allegations of corruption by officials is the daily bread of the CMC. Its 35 year history is littered with investigations conducted in an atmosphere of intense political controversy. Commissioners appointed with bipartisan support have frequently left either or both the political targets of such investigations and their political opponents unsatisfied. But over the entire history of the CMC until now, all political parties have accepted that bipartisan appointments offer the best hope of maintaining public confidence in the integrity of Commission investigations into politically charged conduct.

[ii] CMC Act secs 223 and 266

[iii] Uhrig in his Review of the Corporate Governance of Statutory Authorities and Office Holders carried out for the Commonwealth Government in 2003 at pp24-5. See also Chapters 6 and 7 of Ford's Principles of Corporations Law 13th Ed and the ASX Corporate Governance Council's Principles of Good Corporate Governance (2003) and the ASX Corporate Governance Council's Review of the Principles of Good Corporate Governance (2006).

[iv] Other than for budgetary and related performance, the commission is accountable under Chapter 6, part 3 of the Act for how it discharges its functions to the parliament, not to the government of the day. See also sec 57.

[v] Even allowing for the whistleblower protection provisions in The Public Interest Disclosure Act.

[vi] The chairman has a duty under new sec 252(3) to report to the commission on the performance of the commission's functions. This is duty to report in a general way. The section does not require the chairman to report to the commission about specific complaints or about any specific class of complaint.

[vii] The government will also retain a check on the chairperson in so far as the extension of his initial five year term of appointment for a further five years will depend on whether he has performed to the government's satisfaction.