

Submission to Parliamentary Crime and Corruption Committee.

Preliminary 1

I was a part time commissioner, CMC, from 2008 to 2013. On a number of occasions during that period I acted as chairperson of the CMC.

I agree there should be a review of the CCC Act. All I have done in this submission is (i) expand on arguments in a joint submission by past commissioners of the CMC when the CCC amendments were before the Legal Affairs and Community Safety Committee and on a paper delivered by me at an accountability conference in February 2015, and (ii) signpost some urgent areas of the CCC Act that need legislative reform. I note one of the predictions in the joint submission on the CCC amending Bill – that the commission would become less relevant and meet less frequently - is what has happened since the amendments have come into force.

Preliminary 2

I note that Mr Seeney is a member of the Parliamentary Committee¹. I believe it is inappropriate for him to sit as a member of the Committee on a review of the CCC as the review entails an examination of the jurisdiction, responsibilities, functions and powers of the CCC, and a review of the changes to the CMC made by the LNP government in the Crime and Misconduct and Other Legislation Amendment Act 2014 (the CCC amending Act)² for the following reasons:

(i) An important aspect of the CCC's jurisdiction over public sector misconduct (corruption) is its jurisdiction over executive government. In these circumstances it is inappropriate for a member or former member of the executive to sit on the Parliamentary Committee. As Seeney was the Deputy Premier, and Minister for State Development and Minister for Infrastructure and Planning in the former government, it is inappropriate he has responsibility for monitoring the CCC as a member of the Parliamentary Committee.

(ii) The changes to the CMC brought about by the CCC amending Act (the Crime and Misconduct and Other Legislation Amendment Act 2014) represented the intent of the former executive³; and as a key member of the LNP leadership group Seeney is in a conflict of interest position as he is identified with those changes; expressed more succinctly, the changes he is called upon to pass judgment on as a member of the Committee are his changes.

(iii) Effective Parliamentary oversight of the CJC/CMC/CCC is dependent on members of the Committee acting, as far as possible, in a bipartisan spirit. I believe that over a long period of time members from the major political parties have worked together on the Parliamentary Committee in a bipartisan spirit in the interests of the community and the Parliament as a whole. The reported refusal by LNP members of the Committee to consider the A/G's nomination for chairman because of an unrelated party political issue affecting Seeney puts into question whether there is a willingness to place party political agendas aside and work in a genuinely cooperative spirit with all the other members of the Committee.

Introduction

¹ And, according to the media, he has been nominated as chair of the Committee by the leader of the Opposition.

² Media Release, 9 June 2015, PCCC.

³ Sosso, the chair of the Implementation Panel, said in evidence to the Legal Affairs and Community Safety Committee, that the finished Bill reflected the intent of the executive.

The LNP amendments to the CMC were calculated to limit the independence and capacity of the CMC/CCC to investigate executive government for misconduct⁴.

The abandonment of the principle of bipartisan appointment of commissioners (including the chairperson) in the CCC amending Act was part of a group of changes calculated to centralise control within the CCC in the hands of a government appointed chairman and government appointed CEO⁵.

Following the result in the Stafford by-election the Newman-Seeney government publicly acknowledged the attack on the CMC's independence was wrong and partially reversed provisions which removed the bipartisan requirements in the CMC Act.

Notwithstanding the partial restoration of the principle of bipartisan appointments, the governance arrangements put in place for the CCC breach both the independence principle and the governance principle⁶.

While the CMC's governance framework drew from accepted standards, with the relationship between the commission⁷ and the CMC corresponding to the relationship in the private sector between a board and its CEO (management)⁸, the governance arrangements set in place for the CCC abandoned that model for one where all control is effectively concentrated in the two managers (the new chairman and the new CEO) and where few if any checks and balances exist within the CCC. As part of the new arrangements the commission was stripped of the core function of any board of supervising and monitoring the performance of management.

For the purposes of this submission I adopt my earlier analysis of the present governance arrangements for the CCC in a paper presented at a conference on Accountability and the Law⁹ held in February this year with three additional observations. Firstly the comments in the paper on the membership of the commission will be expanded, secondly I will make some, necessarily brief, comments on the new CEO position and the Assistant Commissioner positions, and thirdly, an additional argument will be developed that the current governance arrangements make it more difficult for the Committee to carry out its responsibility to oversee the activities of the CCC.

The definition of 'corrupt conduct' in the CCC Act should also be discarded and replaced. The definition is to some extent taken from a definition of 'corrupt conduct' in the Independent Broad-based Anti-corruption Commission Act 2011 (Vic). However, there is wide agreement now in Victoria that the definition is unsatisfactory¹⁰.

Finally I propose to discuss briefly the provisions in the LNP amending Act which prevent the CCC from acting on complaints unless supported by a statutory declaration. I argue that building bridges to disadvantaged communities and supporting whistle-blowers when possible is a more sensible approach than to set out with the aim of discouraging complaints.

⁴ See the submissions by Fitzgerald and by Drummond to the Legal Affairs and Community Safety Committee when reviewing the Crime and Misconduct and Other Legislation Amendment Bill 2014; see also the provision in the Bill which downgraded the misconduct jurisdiction to secondary importance to the crime jurisdiction, thus demonstrating the desire of the former government to downgrade the CMC's misconduct jurisdiction.

⁵ This is clear from the evidence of Mr Sosso, the chair of the Implementation Panel, when he gave evidence to the before the Legal and Community Affairs Committee: p10, Transcript of evidence, 16 April 2014.

⁶ The independence and governance principles as they are found in the CJC/CMC Acts are explained in a paper delivered at a conference on 9 February 2015. Accountability and the Law – Safeguarding Against Corruption in Queensland.

⁷ The term 'commission' is used to refer to the five person commission; the terms CMC or CCC are used to refer to the statutory entity.

⁸ This model was accepted by the Parliamentary Committee, and the PCMC's recommendation that a CEO be appointed was intended to strengthen that model: PCMC report No 90, April 2013.

⁹ Accountability and the Law – Safeguarding Against Corruption in Queensland, 9 February 2015, Brisbane.

¹⁰ See Parliamentary Research Brief No 10 Oct 2014 Integrity Legislation Amendment Bill 2014.

Discussion: governance

The paper *Governance and the CCC* contains an analysis of the governance arrangements for the CCC. A copy of the paper is attached to this submission (attachment 1) and is to be read as part of this submission. The new governance arrangements are not consistent with accepted principles of governance and breach both the independence principle and the governance principle

The commission

Some 25 years ago Fitzgerald hoped the part time members of the commission would be able to make a positive contribution to the CJC. The CJC Act contained a sweeping statement that each “member of the Commission shall, to the utmost extent that is practicable, play an active role within the field of the member’s competence in advising and assisting the chairperson and staff of the Commission in relation to the proper discharge of the Commission’s functions and responsibilities”¹¹.

By the time of the LNP amendments to the CMC the commission had developed a sophisticated set of governance rules¹² consistent with accepted standards of governance. The role of the commission was set out explicitly in the CMC’s governance documents. The two key components of its role, like any board of directors, were to give high-level and effective guidance to the organisation’s activities and to effectively supervise and monitor the performance of management.

In a submission to the Legal Affairs and Community Safety Committee the bar association argued the changes in the CCC amending Act to the composition and qualifications of the part time commissioners removed one of the safeguards in the CMC Act. I agree with the bar association that these structural changes take away the informed community expertise input into the Commission's operation and that “The removal of the community requirements, including the civil liberties position, takes away one important safeguard against the appointment of people (by a government) who are less independent and less questioning of government partisan outlook...”.

There are clear advantages in a commission which possesses not only an independent outlook but also a broad range of skills and experience in research, corporate governance, law and relevant social science or community service¹³.

The CEO and Assistant Commissioner positions.

In my respectful opinion:

- (i) The statutory delegations of the commission’s functions and powers effected by the CCC amending Act should be unwound;
- (ii) The chairperson/chairman should be responsible for the administration of the commission and the proper performance of the commission’s functions **subject** to the commission (s251 CMC Act was in these terms);

¹¹ S24 (1) CJC Act; there was no similar provision in the CMC Act.

¹² Governance and the CMC, (a CMC governance document): a copy of this document is attachment 2.

¹³ This is the view of Professor Uhrig in the Commonwealth publication, *Review of the Corporate Governance of Statutory Authorities and Office Holders* by John Uhrig. In discussing the appointment process Uhrig says¹³ that when an appointment is being considered by a Minister, the Minister should be briefed by the chairperson, and advised by the relevant Department on ‘the profile of appropriate characteristics, attributes and experience that would benefit the Board prior to making a decision’. Although the comments are directed at Government appointed Boards they are equally applicable to the commission (CMC).

(iii) The CEO position, and the two A/Commissioner positions¹⁴ should all report to the chairperson/chairman;

(iv) The primary expertise of the CEO should be in corporate governance (presumably the CEO will work under delegations from the chairperson/chairman);

(v) The A/Commissioner positions in crime and misconduct/corruption require qualified legal practitioners with high level experience in the law and practice of criminal and other investigations. This expertise is essential for two reasons:

(a) because the A/Commissioner positions have the direct superintendence of the CCC investigative work, and

(b) in order to provide high level legal advice to the commission (and when necessary, the Parliamentary Committee)¹⁵;

(vi) The CEO position should not be appointed by executive government. The power of hire-and-fire should rest with the commission; who should be responsible for monitoring the CEO's performance as well as the performance of the A/Commissioner positions.

One of the LNP amendments is a provision which empowers the CEO to "issue a direction about how commission officers are to decide whether a complaint involves, or may involve, a more serious case of corrupt conduct or a case of systemic corrupt conduct within a unit of public administration" (s 35A CCC Act)¹⁶. On its face the provision muddles up the roles of the CEO, the chairman, and the A/Commissioner (misconduct) position and ignores any possibility of a role for the commission. The particular decision, involving the development of a test to be applied to investigations, has the character of a legal test and falls naturally within the province of the A/Commissioner (misconduct) position and the chairman/chairperson. One may ask why the power is given to the CEO, whose area of highest skill is corporate governance, and not to the A/Commissioner (misconduct) and chairman/chairperson positions¹⁷, whose areas of special skill are engaged in the exercise?

And, one may ask, why it was thought necessary to fix a power to issue guidelines in the legislation when the CMC had established procedures for determining which matters it investigated and which matters it did not?

The rationale behind the part time deputy chairman position is also difficult to understand. I assume the intent is that the part time deputy chairman will act as a full time chairman in the absence of the chairman whenever and as needed. Under the CCC Act (and the CMC Act before it) for operational reasons it is necessary for the chairman, or for someone acting as the chairman, to be available at all times. If the part time deputy chairman is not to act as the chairman whenever necessary, and some other person is to act as chairman, then the work of the 'deputy chairman' is undistinguishable from the work of the other part time commissioners and the title is an unnecessary oddity. The title 'deputy chairman' obviously appealed to the Implementation Panel for a reason that is not clear.

The commission and the Parliamentary Committee

The independent (part time) commissioners were both a shield for the CMC and a check on its use of the powers vested in it by Parliament. As community representatives placed at the heart of the CMC, the commission played a critical role in its governance.

¹⁴ Renamed senior executive (corruption) and senior executive (crime) in the LNP amendments.

¹⁵ Both these qualifications appear to have been removed for the present incumbent of the A/Commissioner position.

¹⁶ In issuing any direction the CEO is subject to the direction of the chairman (s35A (2)).

¹⁷ This is not to say the CEO might not have something useful to say, but criminal and misconduct investigations are not the area in which the CEO will be working.

Under the CCC Act by way of contrast the independent (part time) commissioners are less relevant to the CCC, and therefore less able to act as a shield or as a restraint on the abuse of its powers¹⁸, indeed, as the supervision and monitoring of management is no part of the commission's functions it is unlikely to act as one of the intended community safeguards.

This leads to a final observation. The CCC amending Act, in stripping the commission of its oversight role, has made the oversight task of the Parliamentary Committee more difficult. Because of the principle of independence and the bipartisan appointment of commissioners the Minister (and executive government) has a limited role in the governance of the CCC. The absence of Ministerial control in turn increases the importance of the oversight responsibility of the Parliamentary Committee.

The following is an attempt to explain this argument. The first step is to attempt to identify the practical changes brought about by the CCC amending Act. The commission under the CMC Act consisted of the chairperson and 4 part time commissioners (one of whom was the civil liberties commissioner¹⁹). In understanding our duties as (part time) commissioners we drew by analogy on the duties cast on company directors by the general law²⁰. The duty to be informed is one of the key duties on a director. The commission was set up so that so that relevant information flowed into the fortnightly commission meetings. The commission was also the final decision maker for many decisions. When that was the case the decision would normally be covered by an explanatory memorandum. The minutes (with attached memoranda) constituted a paper trail for many issues affecting the CMC. Copies of the minutes were forwarded to the Parliamentary Committee.

Additionally, to fulfil the obligation to keep informed, a part time commissioner was normally a member of each of the governance committees and of some of the more important operational committees²¹. The minutes of each governance committee were forwarded to the commission and in turn forwarded on to the Parliamentary Committee with the commission's minutes. And, finally, the part time commissioners were present at the joint meetings between the Parliamentary Committee and the commission and their knowledge accordingly was available to the Committee.

The destruction of the commission as an effective instrument of governance by the CCC amendments means that a source of information for the Parliamentary Committee may be lost to it.

If the argument put in this submission is correct it should be possible to confirm its correctness by reference to records in the Committee's possession. The CCC commission, over the last period of Levy's long acting tenure was constituted only by two full time managers (Levy as acting chairman, and his acting CEO) and two part time commissioners (The deputy commissioner and an acting ordinary commissioner). If the commission over the latter period of Levy's tenure met only once a month without receiving reports from (the managers of) the various operational areas, then, prima facie the part time commissioners' role was limited. A comparison between the minutes taken during, say, Moynihan's time as chairperson of the CMC and between the minutes taken towards the end of Levy's tenure as acting chairman at the CCC could provide an objective indication of the different role of each commission and the relative assistance each type of commission is able to give to the Parliamentary Committee.

The definition of "corrupt conduct" in the CCC Act

The immediate inspiration for a definition of misconduct with a higher threshold was the Callinan Aroney review of the CMC. Callinan Aroney thought the CMC received too many complaints compared with other anti-corruption agencies, and that a narrower definition of official misconduct could assist reduce the

¹⁸ Remembering that misuse of powers may consist in a failure to use powers.

¹⁹ A person chosen from 4 persons nominated by the bar association and the Law Society of Queensland.

²⁰ The duties and responsibilities resting on commissioners were arguably greater than directors duties at common law since the general functions and powers of the CMC were vested in the commission.

²¹ The governance committees included the audit and risk committees, for example, and the operational committees included, for example, the committee with oversight of all major misconduct investigations.

number of complaints. In thinking about the issue of definition Callinan Aroney looked towards a definition of “corrupt conduct” in IBAC (The Independent Broad Based Anti-Corruption Commission).

The correctness of Callinan/Aroney’s view the CMC received too many complaints is now disputed²², and there is a wide view in Victoria that the IBAC definition of corrupt conduct is limiting IBAC’s ability to investigate corruption²³.

This is an area of the Act in need of urgent reform

The Statutory Declaration and other obstacles placed in front of complainants

A raft of changes were brought in by the CCC amending Act to discourage complaints. The whole area should be reviewed. At the time of the Callinan/Aroney report the CMC prepared a detailed commentary on these (at that stage) proposed changes. The Commentary was forwarded to the Parliamentary Committee (PCMC) and should be available to the Committee.

While I do not wish to discuss this area in detail it is signposted as an area that should receive urgent attention.

Philip Nase

²² See the submission by *The Hon Tim Smith QC on behalf of the Accountability Round Table* to the Legal Affairs and Community Safety Committee on its inquiry into the *Crime and Misconduct and Other Legislation Amendment Bill 2014*

²³ Parliament of Victoria, Research Brief No 10, Oct 2014, Integrity Legislation Amendment Bill 2014; and a paper by Stephen Charles QC *Victoria needs better tools to fight corruption* published May 13, 2015, Accountability Round Table.

APPENDIX 1

Paper: Governance and the CCC

1.1 Some guiding Principles

On 21 May 2014 the LNP government amended the CMC Act by the Crime and Misconduct and Other Legislation Amendment Act 2014 (the amending Act). The amending Act radically alters the governance arrangements to apply to the amended CMC, the CCC.

The purpose of this section is to suggest a number of principles that may be used to evaluate the governance arrangements executive government believed it was necessary to put in place for the CCC.

The starting point for an anti-corruption agency in a Parliamentary democracy is the requirement of independence from executive government. In the CCC's case this is because its anti-corruption mandate lies in the investigation of misconduct by public officials, including misconduct by executive government. To enjoy the confidence of the community as a whole in carrying out its anti-corruption mandate it is important that the CCC is independent of the executive it may be required to investigate.

A second imperative is that the governance arrangements for the CCC are both appropriate and effective. This requirement is in part a consequence of the need for independence from executive government and in part a consequence of the extraordinarily wide and intrusive powers exercised by the CCC.

In order to achieve both independence from executive government and an appropriate and effective set of governance arrangements for the CMC (and before it the CJC) three key principles were written into the CMC Act (and before it, the CJ Act), which, over a long period of time, have enjoyed the support of the community. They are:

I. The Independence Principle. The CMC is an independent body that is at arms-length from and operates, as far as possible, independently of the government of the day. Independence is achieved by those parts of the CMC Act which require bipartisan support for the appointment of the chairperson and the part time commissioners, and by:

II. The Accountability-Oversight Principle. The CMC is accountable to Parliament through a bipartisan committee of Parliament, the PCMC. Conversely, the PCMC has responsibility for oversight of the CMC; and

III. The Governance Principle. The five person commission is responsible for setting the strategic direction of, and for monitoring and assessing the performance of, the CMC.

There are well established standards of corporate governance for both the private and public sectors²⁴ which provide a standard for evaluating the sufficiency of the governance arrangements introduced by the amending Act.

2.1 The new governance arrangements²⁵

In this section the new governance arrangements are summarised.

The declared purpose of the amending Act was to implement recommendations of the Callinan/Aroney review and the PCMC report²⁶ into the CMC's handling of remaining Fitzgerald documentation.

Apart from a recommendation the CMC not be permitted to undertake any research without the approval of the Attorney General, the Callinan/Aroney review did not recommend the existing governance arrangements be changed or that the principle of bipartisan appointment be ended²⁷. The PCMC report did recommend a new position of CEO be created (recommendation 19), however the intent of the recommendation was to strengthen the central role of the commission within the existing governance framework²⁸.

The amending Act, however, went far beyond the Callinan/Aroney and PCMC recommendations to radically alter the governance arrangements for the CCC.

The CMC's governance framework drew from accepted standards of governance. In this section the former CMC's governance arrangements are briefly sketched, looking closely at the roles and powers of the commission and management. Then the changes introduced by the amending Act are set out, before commenting briefly on some of the implications of the new governance arrangements.

Most anti-corruption agencies are ineffective²⁹. The argument developed in this paper is that the new governance arrangements weaken the CCC in two ways. Firstly, the changed arrangements compromise the capacity of the CCC to carry out its anti-corruption mandate against executive government; and secondly, the new governance arrangements are internally inconsistent and are not consistent with accepted standards of governance

2.2 The existing governance arrangements (CMC Act)

The CMC Act generally speaking³⁰ vested the CMC's powers and functions in the commission (that is, the five-person commission). The chairperson was the CEO as well as the chair of the commission. While the CEO (the chairperson) was responsible for the administration of the CMC and the performance of its functions (s.251 CM Act) his/her authority was not uncontrolled. "If it were, that would conflict with the principle of proper corporate governance, which requires the extensive executive authority of the CEO be

²⁴ In particular Uhrig, 2003, Review of the corporate governance of statutory authorities and office holders, Australian Government, Canberra; Australian Stock Exchange Corporate Governance Council 2003, Principles of good corporate governance, ASX, Canberra; and Australian Stock Exchange Corporate Governance Council, 2006, Review of the principles of good corporate governance, ASX, Canberra.

²⁵ In the discussion the term 'commission' will be reserved for the 5 person commission in whom the powers and functions of the CMC are vested by the CMC Act.

²⁶ PCMC report No 90, April 2013.

²⁷ The reviewers may not have adverted to the governance issues implicit in the research recommendation as there is no explanation why it was thought appropriate for the Minister to exercise a power of veto over research carried out by the CMC.

²⁸ See the discussion about the creation of a new position of CEO: PCMC report No 90, April 2013 at pp 78-80.

²⁹ Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption? By John R. Heilbrunn
2004 World Bank Institute.

³⁰ Some powers are vested directly in particular officials: for example the power to conduct public hearings is vested in the Chairperson, as is the statutory obligation to notify the Parliamentary Committee of suspected misconduct.

subject to appropriate checks and balances. The CMC Act established such a check, in that the CEO's authority was exercised 'subject to ... the commission' [s251 (2)].³¹

The four part time members of the commission were intended to be community representatives. Three were to possess a relevant social science background or a community service background (s225), and one was to be a practicing lawyer with a demonstrated interest in civil liberties chosen from a panel of 4 persons nominated by the Bar Association and the Queensland Law Society (ss 225,227(3)). At least one of the commissioners was to be a woman (s230).

The role of the commission was set out explicitly in the CMC's governance documents. The two key components of its role, like any board of directors, were to give high-level and effective guidance to the organisation's activities and to effectively supervise and monitor the performance of management. Those functions imply a separation between management and the commission. In the case of the CMC the separation between the five-person commission and high-level management was blurred because the chairperson was both the chair of the board (the commission) and the CEO. This is the issue discussed by the Parliamentary Committee (PCMC) in its report on the Fitzgerald documents³² and the subject of its recommendation 19.

2.3 The governance arrangements in the amending Act³³

The amending Act changes the governance arrangements as follows:

- (a) The position of chairperson is split into two statutory positions: the chairman, and the CEO;
- (b) Both the new chairman and the new CEO are members of the 5 person commission, the chairman as the chair of the commission; so that the commission is constituted by two full time members (the new chairman and the new CEO), a part time deputy chairman, and two part time commissioners³⁴;
- (c) By the device of a series of statutory delegations, powers and functions vested in the commission by the CMC Act are transferred to and divided up between the new chairman and the new CEO³⁵;
- (d) While the chairperson was subject to the commission under the CMC Act³⁶ (s. 251 CMC Act), the new chairman is not subject to direction by the commission (252(3)). The position of the new CEO is less clear. While the CEO is generally subject to the direction of the commission (s253 CCC Act), the statement of the commission's role in the Act does not include any supervisory or management function (s251 CCC Act).
- (e) The two statutory positions of assistant commissioner misconduct and assistant commissioner crime are replaced by a senior executive misconduct and a senior executive crime respectively, appointed by the CEO pursuant to a statutory delegation of the commission's power. They are responsible to the chairman.
- (f) The role of the commission is embedded in the Act. The new provision is set out in full below:

"251 Role of commission

(1) The commission is responsible for providing strategic leadership and direction for the performance of the commission's functions, and the exercise of the commission's powers, by the chairman, chief executive officer and commission staff.

³¹ Governance and the CMC, p 7 (a CMC governance document)

³² And in the commission's governance documents (the Jameson report).

³³ As further amended by the Stafford by-election amendment.

³⁴ s223 CCC Act.

³⁵ S269 CCC Act

³⁶ Apart from some statutory functions vested in the chairperson.

(2) The commission is also responsible for—(a) the preparation of the commission’s strategic and business plans; and (b) the establishment of internal management committees and their charters; and (c) the preparation of the internal audit charter prepared for the Financial Accountability Act 2009.

(3) If asked by the chairman, the commission may help the chairman in the performance of the commission’s functions or exercise of the commission’s powers delegated to the chairman under section 269.”

(g) The powers of the new CEO are substantial: (i) the CEO may issue directions on what kinds of complaints of corrupt conduct or police misconduct need or need not be notified to the CMC (s 40); (ii) the CEO may issue a direction “about how commission officers are to decide whether a complaint involves, or may involve, a more serious case of corrupt conduct or a case of systemic corrupt conduct”(s35A). On its face this gives the CEO the power to prevent particular types of investigations/inquiries from proceeding³⁷; (iii) the CEO has the power to appoint all senior officers including the two most senior officers, the senior executive officer (crime) and the senior executive officer (corruption) (s245); (iv) in addition the CEO is responsible for the appointment of all staff (s254), and for the engagement of all agents (s256). The CEO therefore can draw up a list of counsel that may (or may not) be briefed by the CCC; (v) the amending Act also ushers in a strict disciplinary system for senior officers and staff at the CCC (Division 9, ss273A-273F). Under the disciplinary provisions the CEO may discipline senior officers, employed staff, and agents for breaches of discipline; (vi) the CEO is to report to the Minister, when and in the way required by the Minister, on the efficiency, effectiveness, economy and timeliness of the CCC and its systems and processes, including operational processes (s260).

(h) The amending Act removed the necessity to obtain bipartisan support for the appointment of the commissioners (including the chairman). Following the Stafford by-election in July 2014 the government partially restored the principle of bipartisan appointment of the members of the commission (Criminal Law Amendment Act 2014 s23B) with four of the five commissioners to be bipartisan appointments. In the Stafford by-election amendment a distinction was drawn between the CEO and the other members of the commission. The appointment of the CEO does not require bipartisan support, instead the appointment of a CEO may be vetoed by the Parliamentary Committee³⁸. A statutory safeguard that is likely to be illusory once party politics is injected into the deliberations of the Parliamentary Committee³⁹.

2.4 Comment

The CMC’s governance framework drew from accepted standards with the relationship between the commission and the CMC corresponding to the relationship between a board and its CEO (management) which prevails in the private sector. This model was accepted by the Parliamentary Committee, and the PCMC’s recommendation that a CEO be appointed was intended to strengthen that model⁴⁰.

The governance arrangements set in place by the amending Act abandoned that model for one where all control is effectively concentrated in the two managers (the new chairman and the new CEO) and where

³⁷ The power to give a direction under the section (35A) is subject to the direction and control of the chairman (but not the commission):s35A(2).

³⁸ S228 CCC Act

³⁹ An example of the injection of party politics by the Newman government into the deliberations of the (removed) PCMC is described in a Statement of Reservation by certain members in PCMC Report no 90 at p227: “.....Additionally, the members undersigned express deep concern that the Premier felt it acceptable to interrupt the Committee on numerous occasions via direct contact with the PCMC Chairman, Mrs Liz Cunningham MP. It is particularly concerning that on occasion the Premier saw fit to express his strong views in relation to bi-partisan media comments made by the Chair in response to his attacks against the PCMC”.

⁴⁰ PCMC report No 90, April 2013

few if any checks and balances exist within the CCC. As part of the new arrangements the commission was stripped of the core function of any board of supervising and monitoring the performance of management.

The comment may be made at this point that in a body like the CMC/CCC – which exercises extraordinary powers over citizens, often in secrecy – it is of additional importance that appropriate internal checks and balances are in place to detect and prevent the abuse of power.

A feature of the CCC therefore is that the extensive executive authority of the chairman and CEO are not subject to appropriate corporate checks and balances. It is doubtful the commission has the capacity to hold the chairman or the CEO to account. The commission cannot give directions to the chairman (yet ironically everything done by the chairman or CEO is done in the name of the commission). Although technically the commission has a power to issue directions to the CEO, it does not have the usual power of dismissal enjoyed by a board.

Even if the commission had the legal capacity to give directions to the chairman it would, in any case, struggle to assert itself over management. The circumstances that the number 1 manager (the chairman) will lead the commission as its chair, and the number 2 manager (the CEO) will also sit on the commission, make it difficult to see how the remaining 3 part time members would be able to hold the chairman and CEO to account, even if those functions were any part of the commission's statutory role. The impotence of the commission, and the CCC as a whole, is aggravated by the government's policy of making acting appointments (which do not need bipartisan support) rather than appointments under the normal provisions of the Act (with the result, for example, that the commission is presently composed of an acting chairman, an acting CEO, a part time deputy chairman, and an acting ordinary commissioner, with one position vacant).

There is no obvious rationale for a different method of appointment for the CEO position. Direct executive appointment is not consistent with either the independence principle or the governance principle. The assumption must be that the executive believes it is in its own self-interest to retain the power to insert its selection into one of the top two positions at the CCC.

From another perspective a power to appoint the CEO without the necessity of bipartisan agreement will be a continuing inducement to executive government to parachute one of its 'own people' into one of the top two positions at the CCC.

3.1 Application of the Independence and Governance principles

The independence principle is breached by:

(i) the fact executive government retains the power to appoint the CEO without bipartisan agreement. The CEO is the second most powerful figure in the CCC and appoints the most senior officers of the CCC. The CEO has the power to give directions to investigators which may determine what investigations proceed and what investigations do not proceed;

(ii) by the need to obtain the Attorney General's approval before undertaking any research. This was a recommendation of the Callinan/Aroney review; the reviewers, however, did not provide any reasons for handing the Attorney General power to control what research is carried out by the CMC and it is unclear why the reviewers considered it appropriate to hand this power to the Attorney General⁴¹;

⁴¹ In the absence of any reasoned explanation a possible explanation is found in the Attorney General's statements at the Estimates Hearings, 2012. On the same day that he announced the Callinan/Aroney review he spoke out against a research paper published by the CMC on political donations. He said (in a passage preserved on YouTube at <http://youtu.be/4O-Y8bWYI-8>) "I don't think it is in the interests of the top crime fighting body in Queensland the CMC to be doing a review of political donations....I don't think we have major corruption in donations in Queensland". That is, the possible explanation is that the executive wanted the power.

(iii) the independence principle is undermined by the practice of using the power to make acting appointments (which do not require bipartisan support) to fill positions on the commission, including the position of chairman, instead of using the normal appointment processes in the Act. Thus the LNP government has made only one bipartisan appointment since March 2012, and the commission currently consists of an acting chairman, an acting CEO, a deputy chairman, and one acting commissioner, with one position vacant;

(iv) by the extension of the maximum tenure of commissioners to two terms, each of 5 years, which has the capacity to undermine the independence principle since all commissioners (including the chairman) will be dependent upon the government's nomination for a second term.

The new governance arrangements are not consistent with accepted standards of governance for public bodies (and for corporate entities) in a number of respects:

(v) the transfer of power from the commission to the new chairman (and new CEO) and the decision to remove the task of supervising and monitoring the performance of management from the commission leaves the extensive executive authority of the chairman (and CEO) without appropriate checks and balances;

(vi) the task of effectively supervising and monitoring the performance of management is a core function of any board, and the failure to provide for any mechanism for those functions sets in place an ineffective system of governance;

(vii) the new CEO position is not consistent with accepted standards of governance. The Parliamentary committee in recommending the creation of a CEO accepted a corporate model of governance. On this model the CEO should be appointed by the commission ('the board') and in turn it should be the commission's responsibility to hold the CEO accountable for the performance of his/her functions. A situation where a third person appoints the CEO and the commission does not have the capacity to terminate the CEO's employment is, in addition, not consistent with the Parliamentary Committee's recommendation;

(viii) the composition of the new commission is not consistent with effective governance. Under the CMC Act the commission was constituted by the chairperson and 4 part time commissioners. The commission, so constituted, was identified by the Bar Association as one of the safeguards written into the Act⁴². That safeguard is lost by the changes to the composition and qualifications made to the new commission;

(ix) and, finally, the power of a third person (the Attorney General) to prevent the CCC undertaking any particular research is inconsistent with the governance principle (as well as the independence principle). Under the CMC Act the responsibility for decisions about what research should be undertaken ultimately fell on the commission. And in turn the commission was accountable to Parliament through a bipartisan committee of Parliament, the PCMC. Conversely, the PCMC had responsibility for oversight of the CMC. Simply because the Attorney General might be unhappy the CMC undertook some research on political donations does not provide a principled reason for setting aside the existing governance arrangements and giving himself a secret veto⁴³ over any research the CMC/CCC might believe it is necessary or desirable to undertake.

4.1 What was the purpose of the amendments?

The amendments have resulted in a potentially dysfunctional governance structure, a strange Frankenstein creature that is neither the one thing nor the other. In it the No 1 manager (the chairman) is to be appointed by a bipartisan process at some unknown time in the future while the No 2 manager (the CEO) is

⁴² Submission to the Legal and Community Affairs Parliamentary Committee on the Crime and Misconduct and Other Legislation Amendment Bill 2014.

⁴³ The new amendments do not provide for the provision or publication of reasons by the Attorney General.

the executive government's choice. In exercising their choice the executive can parachute anyone at all they want into the CEO position: a crony, someone they think thinks like them, someone they hope will look after their back against any investigation. And both will sit on an impotent governing board (the commission) that has no power to direct the No 1 manager, and no power to hire or fire its CEO.

In these circumstances the question unavoidably poses itself: what really was the intent of the changes to governance? The question may ultimately not be possible to answer with a high degree of confidence. Indeed, there may be conflicting motives or intents at work.

In all probability the communications between the Implementation Panel and executive government would shed light on the real intent of the changes, but the communications are not available because of the claim of cabinet confidentiality: not available even to the Legal and Community Affairs Parliamentary Committee when it was considering the proposed changes. In the absence of direct information where can we start our inquiry? The government must still be a starting point. The changes are after all the government's changes. What has the government said publicly about the changes?

In announcing the changes to the CMC in a media release the government said the CMC would continue to be 'strong' and 'independent'. The media release ended with the sentence: 'This will be a period of change but it will make the CMC stronger and more effective'⁴⁴.

Of all the changes to governance the most incisive changes are the elimination of the bipartisan appointment of commissioners, completely or partially, and the concentration of control in the hands of the chairman and CEO. It is the purpose of these critical changes that is elusive. In these circumstances one approach to the issue is to eliminate what was not the intent of the changes from consideration.

Were the changes merely to implement the the Callinan/Aroney research recommendation, and the PCMC recommendation to create a statutory CEO? It is true the changes did include the Callinan/Aroney research recommendation, and the PCMC recommendation to create a statutory CEO, but those recommendations do not explain the two incisive changes of the elimination of bipartisan appointments and the concentration of control in the two new officials. And, in any case, the changes as a whole are inconsistent with the intent of the PCMC recommendation that the creation of the CEO position strengthen the central position of the commission. Overall we can be confident the intent was not merely to enact the Callinan/Aroney and PCMC recommendations.

What else was not the intent of the changes? An intent to strengthen the independence and governance of the CMC was not the intent since, we have seen, the changes breach or are inconsistent with both the independence principle and the governance principle.

Another possibility is that the changes were the product of an independently minded Implementation Panel. Callinan/Aroney had recommended the Implementation Panel consist of the Public Service Commissioner, the chairperson of the CMC, and two others (not being a current or former public servant, but one of the two being a senior lawyer). The government instead assembled 4 bureaucrats including the acting chairperson of the CMC⁴⁵. Mr Sosso, Director-General, Department of Justice, who was the chair of the Panel, made it clear in his evidence that ..."our remit" (was)" to implement those recommendations accepted by the government. It was not a forensic exercise to determine the validity of the recommendations. Our role as public servants was to implement them"⁴⁶. Perhaps we should accept Mr Sosso's evidence that there were no independent minds on the Implementation Panel.

⁴⁴ Media release by Attorney General Bleijie July 4, 2013.

⁴⁵ Consisting of the Director-General, Department of Justice and Attorney-General (Chair); Director-General, Department of the Premier and Cabinet; Commission Chief Executive, Public Service Commission; and the Acting Chairperson, CMC.

⁴⁶ P10, Transcript of evidence, 16 April 2014, Legal and Community Affairs Committee.

Mr Sosso was a source of some information. He said the decision to eliminate bipartisan appointments to the commission was a policy decision of government⁴⁷ ; and, he said, it was the government who wanted control concentrated in the chairman⁴⁸. Taking Mr Sossos's evidence at face value the changes must be accepted as the changes the government itself wanted. What is unclear is the extent to which the executive was informed or aware of the issues of governance and independence compromised by the new governance arrangements.

5.1 Conclusion

Are there any useful conclusions to be drawn from the discussion to this point? While the changes themselves are not consistent with the declared purpose of the changes (that is, merely to implement the Callinan/Aroney research recommendation, and the PCMC recommendation to create a statutory CEO) or with the policy objective of a strong and independent CMC/CCC, the real intent of the government is as elusive as the policy development process of the Implementation Panel is secretive⁴⁹.

From the perspective of law reform however the question of intent is immaterial as the changed governance arrangements can be seen to be bad law. The new arrangements are inconsistent with the principles of independence and governance that were written into both the CMC Act and the CJ Act, and which I argue have enjoyed the support of the community over an extended period of time. In addition the changes undoubtedly weaken the ability of the CCC to carry out its anti-corruption mandate. As we have seen the changes weaken the CCC in two ways. Firstly, the capacity of the executive to insert its own CEO into the CCC, and the research veto possessed by the executive, compromise the ability of the CCC to carry out its anti-corruption mandate against executive government. Secondly, the new governance arrangements are dysfunctional and not consistent with accepted standards of governance.

One of the first tasks of the new government should be to attend to the governance issues at the CCC, and immediately appoint an acting chairman who does enjoy bipartisan support (and any other acting commissioners) until the parts of the CCC Act in conflict with the three principles identified in the paper are repealed and other necessary legislative changes are made.

⁴⁷ P10, Transcript of evidence, 16 April 2014, Legal and Community Affairs Committee.

⁴⁸ This is how I interpret his evidence: "...the government's policy intent of the amendments to provide the chairman being able to effectively govern this new CCC...", p3, transcript of evidence, Legal and Community Affairs Committee.

⁴⁹ Mr Sosso, in his evidence before the Parliamentary Committee, asserted the claim.

APPENDIX 2

GOVERNANCE AND THE CMC

From the Commissioners

This CMC governance framework is intended to help us better to focus on our statutory responsibilities. This framework incorporates role and responsibility statements for Commissioners and other CMC staff. It has been developed from an earlier version of this paper and suggestions made in consultations with a large number of staff.

Executive Summary

The Commission

Its role is to:

- set the strategic direction of the organisation and approve its strategic plan; this includes input into the development by management and final approval of the strategies (and policies to be followed by staff in implementing those strategies) that will best enable the Commission to fulfil its statutory functions and meet its portfolio performance indicators
- oversee and have input into the development by senior management of the CMC's budgetary activities, to ensure those activities reflect the strategic objectives and priorities set by the Commission
- oversee, have input into and approve significant initiatives involving human resources and their allocation
- oversee the development of, and monitor, risk management and business continuity arrangements across the CMC and regularly review the agency's corporate risks and corporate risk register
- monitor management performance and operational results and effectiveness

- establish a system for the appropriate delegation of its powers, and periodically review the continuing utility and effectiveness of these delegations
- establish, as part of its strategic activities, committees of the CMC, to consider committee reports, and periodically review the continuing utility and effectiveness of each committee
- establish a system by which management (and staff) report to the Commission the information necessary to enable the Commission to fulfil its role
- perform its non-delegable statutory duties.

The Chairperson

The Chairperson has a unique dual role, as the only full-time Commissioner and chief executive officer of the CMC. As CEO, the Chairperson has extensive powers, but is in most cases subject to the oversight of the Commission.

Assistant Commissioners

The Chairperson directly supervises the Assistant Commissioners who are responsible for the proper performance of the CMC's Crime and Misconduct functions. In performing their functions, the Assistant Commissioners, while accountable to the Chairperson, must keep all Commissioners informed, and report in a manner that allows the Commission to fulfil its governance role.

Directors, CMC staff and the CMC Police Group

Directors, managers and CMC staff are employed by the Commission, which can issue directions for the performance of their duties. However, all staff are subject to the direction and control of the Chairperson, not of individual Commissioners.

The general authority of each of the Commission and the Chairperson to direct staff is qualified for members of the CMC Police Group: their efficient deployment is the joint responsibility of the Chairperson and the QPS Assistant Commissioner in charge of the Police Group

Future activity

The Commission will review delegations, committee structures and reporting requirements to ensure they are consistent with the governance framework.

Introduction

Under section 7 of the *Crime and Misconduct Act 2001*, the Commission (i.e. the five Commissioners) has primary responsibility for achieving the Act's purposes. In order to better discharge this statutory obligation, the Commission has decided to develop a formal policy dealing with the governance of the CMC.

There are other reasons why the Commission needs to adopt a clearly stated governance policy. John Uhrig, in his *Review of the corporate governance of statutory authorities and office holders*, carried out for the Commonwealth Government in 2003, says:

The greater an organisation's independence [from government control], the greater is the need for robust governance mechanisms as a means of ensuring that it is discharging its delegation [of power from the Government] appropriately. To the extent that independence is combined with power, that need is heightened. ... Robust governance provides assurance, not only to government, but also to the Parliament and the public, that those in the community affected by the activities of an authority are protected from the inappropriate exercise of power.

These comments apply to the Commission, which has considerable autonomy and exercises very considerable power.

General governance principles

Like the boards of many corporations, the Commission cannot, of course, manage all aspects of the CMC's business. To conduct its business, the CMC must operate through its executive and staff. Yet it is the Commissioners who are accountable for all the CMC's activities. It is this organisational characteristic that is at the heart of concerns about the proper governance of such a corporate organisation.

Ford's principles of corporations law, 13th edition says: 'Corporate governance is about the management of business enterprises organised in corporate form, and the mechanisms by which managers are supervised'. Uhrig says the benefits of an appropriate governance framework for a statutory authority include:

- improving the transparency and accountability of statutory authorities through:
 - clear and transparent lines of accountability
 - clear understanding of roles
 - clearly articulated and publicly available objectives and strategies
- improving efficiency of statutory authorities by ensuring:
 - there is effective supervision of management
 - management is accountable for its performance
 - the effort of [statutory] authorities is directed towards the achievement of well-understood objectives.

As Ford notes, there has been an intense debate on corporate governance issues in Australia and many other developed countries in the past decade. Key issues in this debate are: What is the proper role of the board of a corporation? What are the personal responsibilities of the individual board members? How should the board supervise and control management?

All these issues are relevant to the proper governance of the CMC.

Uhrig says that many of the concepts of governance are similar across the private and public sectors. There is a sufficient analogy between the structure and operations of the CMC and those of business corporations (other than corporations small enough to operate essentially as partnerships) to make the work done on the governance of commercial corporations of assistance in determining the proper governance of the CMC.

The broad consensus that has now been arrived at is summarised in Chapters 6 and 7 of Ford. Even more useful sources for present purposes are the Australian Stock Exchange (ASX) Corporate Governance Council's *Principles of good corporate governance* (2003) and the *Review of the principles of good corporate governance* (2006), and the Executive Summary and Chapter 2 of the Uhrig review.

The ASX *Principles of good corporate governance* include the following:

Principle 1: Lay solid foundations for management and oversight

- The roles and responsibilities of the board and management should be recognised and published. This published framework should be designed to:

- enable the board to provide strategic guidance for the corporation and effective oversight of management
- clarify the respective roles and responsibilities of board members and senior executives in order to facilitate board and management accountability to both the corporation and its stakeholders
- ensure a balance of authority so that no single individual has unfettered powers.

Principle 2: Structure the board to add value

An effective board is one that facilitates the efficient discharge of the duties imposed by law on the directors and adds value in the context of the particular company circumstances. This requires that the board be structured in such a way that it:

- has a proper understanding of the current and emerging issues of the business
- can effectively review and challenge the performance of management and exercise independent judgment.

The *ASX Principles of good corporate governance* say that the responsibilities of the board will usually comprise:

- overseeing the company, including its control and accountability systems
- providing input into and final approval of management's development of corporate strategy and performance objectives
- reviewing and ratifying systems of risk management and internal compliance and control, codes of conduct, and legal compliance
- monitoring senior management's performance and implementation of strategy, and ensuring appropriate resources are available
- approving and monitoring the progress of major capital expenditure, capital management, and acquisitions and divestitures
- approving and monitoring financial and other reporting.

The board of a corporation is responsible for the high-level guidance of the organisation's activities. But another core responsibility of the board is the effective supervision of management. This latter responsibility can be fulfilled in two ways. Firstly, the board can establish a system by which management reports to it on appropriate matters. Secondly, individual directors can, in a discriminating way, seek out from managers and, on occasion, from other staff, the information they need to ensure that the board as a whole is kept informed of significant activities engaged in by management.

The Commission

The Commission is a body corporate (CM Act, s. 220). It consists of five government (i.e. Governor in Council) appointees, a full-time Commissioner who is the Chairperson, and four part-time Commissioners, who are community representatives (s. 223). It has primary responsibility for achieving the CM Act's purposes (s. 7). The Act's main purposes are combating major crime and reducing misconduct in the public sector (s. 4).

It is "the Commission", not the CMC staff, that is required by the CM Act to perform its crime and misconduct functions by exercising the powers conferred on it by sections 26 and 35, respectively, of the CM Act. Special responsibility is imposed by sections 252 and 253 on the Assistant Commissioners, Crime

and Misconduct, to enable the Commission to perform these two functions. The Commission performs the witness protection function and the civil confiscation function conferred on it by section 56 of the CM Act, by running witness protection programs (*Witness Protection Act 2000*, s. 5) and by administering the civil confiscation scheme [*Criminal Proceeds Confiscation Act 2002*, s. 4(5)].

The Commission is given many powers and responsibilities under the CM Act and other Acts, and there are some powers and functions that can only be exercised by the Commission itself. For example, only the Commission can make the decision whether a hearing is to be open to the public (CM Act, s. 177). And it is the Commission that must adopt and submit an annual budget to the minister (s. 259) and that must report (i.e. approve reports) to the minister when required (s. 260). These powers and functions cannot be delegated.

However, in order to carry out its role, the Commission must in general act through its executive and other staff, including staff who provide essential assistance to officers holding Commission delegations but who do not themselves have formal delegations of authority.

Many of the Commission's powers are exercised by the Chairperson or other officers under delegations from the Commissioners (s. 269) and from the Chairperson and the Assistant Commissioners (ss. 270, 271). For example, it is the Commission that is empowered by sections 254 and 245 to employ the staff necessary to enable it to perform its functions, including senior officers; but engagements of other than the most senior staff are made by delegated officers.

The Commission has also established a number of committees to assist it in better performing its role.

It is not the role of the Commission to be involved in day-to-day decision-making. The Commission's focus is on strategic decision-making and on "significant matters" ie matters which are likely to have strategic implications for the CMC. The intention is to see properly supported staff exercising greater responsibility, while the Commission focuses on the strategic and significant.

The Commission's role is to:

- set the strategic direction of the organisation and approve its strategic plan; this includes input into the development by management and final approval of the strategies (and policies to be followed by staff in implementing those strategies) that will best enable the Commission to fulfil its statutory functions and meet its portfolio performance indicators
- oversee and have input into the development by senior management of the CMC's budgetary activities, to ensure those activities reflect the strategic objectives and priorities set by the Commission
- oversee, have input into and approve significant initiatives involving human resources and their allocation
- oversee the development of, and monitor, risk management and business continuity arrangements across the CMC and regularly review the agency's corporate risks and corporate risk register
- monitor management performance and operational results and effectiveness
- establish a system for the appropriate delegation of its powers, and periodically review the continuing utility and effectiveness of these delegations
- establish, as part of its strategic activities, committees of the CMC, to consider committee reports, and periodically review the continuing utility and effectiveness of each committee
- establish a system by which management (and staff) report to the Commission the information necessary to enable the Commission to fulfil its role

- perform its non-delegable statutory duties.

Refer to the Appendix I for a more detailed description of these roles and the activities involved.

As to the second dot point above, section 259(1) of the CM Act states that: ‘the Commission must develop, adopt and submit to the Minister a budget ...’

It is not appropriate for the full Commission to be involved at every stage of the development of budgetary proposals but it is important that the Commissioners give attention to the impact that financial resources and constraints may have on the strategic direction of the Commission. For the Commission to properly discharge its statutory duty to develop as well as adopt a budget, it must be involved in the significant steps in budget-related decision-making activities. In meeting its budgetary commitments the Commission has a role to ensure all business units have their claims heard and considered in a transparent way.

Delegations and committees are two of the key means by which the Commission fulfils its statutory responsibilities.

Uhrig says:

Governance should ensure there is a system to delegate power to appropriately skilled individuals, and the system is subject to regular review to ensure performance meets the requirements of the delegation... As all activities involve an element of risk, a well-governed organisation will recognise that not all decisions will lead to successful outcomes. However, an appropriate provision and limitation of power should ensure that the impact of poor decisions will not cause serious damage. In this regard, governance should have a strong focus on the management and oversight of risk, particularly in areas that are essential to the success of the entity.

And:

It is important for entities to establish power-sharing frameworks that enable them to achieve their purpose in an efficient and effective manner. The supervision of staff in the performance of their duties, including the exercise of power, is a management rather than a governance issue. However, governance should ensure that there is a system to delegate power to appropriately skilled individuals, allowing them to make decisions consistent with the purpose of the organisation. Additionally, governance requires that there be systems and reviews established to ensure that power is limited and exercised in a responsible manner and decision-makers have clear lines of accountability.

Just as development of the governance policy will require a review of all delegations, so will the Commission need to conduct a review of its committees. The Commission (with the assistance of Corporate Governance) will review current administrative and other delegations, management committees and reporting processes to ensure they are consistent with the Commission’s objectives.

Reporting to the Commission

It is of critical importance that the Commissioners have adequate access to the information they need to perform their role.

The relevant Assistant Commissioner or Director will report to the Commission on issues they consider are, or could be, of strategic importance to the Commission in discharging its legislative responsibilities, both in the present and in the long term.

A strategically significant matter is one that relates to the ability of the Commission to fulfil its mandate, as set out in sections 4, 7 and 56 of the CM Act — namely, ‘to combat and reduce the incidence of major crime and continually improve the integrity of and reduce the incidence of misconduct in the public sector’ and to perform its witness protection function and its civil confiscation function

The Commission will obtain this information by refining the existing system of reporting. Reporting to the Commission will take two forms:

- Firstly, there will be a formal system of regular reporting by all business units and committees. The discussion paper, ‘Crime and Misconduct Commission’s reporting framework and processes’, prepared by the Commission’s Corporate Governance group and appended to this paper, raises a number of issues for consideration in relation to this first level of reporting.
- Secondly, in order to ensure that the Commission is able to effectively oversee the CMC’s activities, Assistant Commissioners and Directors are each obliged to report to the Commission on significant matters that are not covered in the reports required by the formal reporting system.

A “significant matter” is defined as:

- (1) any matter so specially contentious that the relevant Assistant Commissioner or Director considers that the Commissioners would be likely to want to consider how it should be dealt with it before it is finalised by staff;
- (2) any other matter not requiring decision by the Commission but which the relevant Assistant Commissioner or Director considers is of sufficient sensitivity that the Commissioners either would be likely to want to know about it while it is under consideration by CMC or agency staff (in the case of devolved matters) or would be likely to want to know how the matter has been finalised by staff.

Reporting is a core responsibility of staff: the Commission must rely on effective reporting to be able to discharge its own statutory obligations.

The Commission has an obligation to ensure that formal reporting requirements impose the minimum burden on staff, and will consult with staff as part of the process of reviewing the formal reporting system.

Though it is for the relevant Assistant Commissioner or Director to decide what matters are to be reported to the Commission, all staff have a responsibility to bring any “significant matter” to the attention of their supervisor or manager.

The Chairperson

The Chairperson is the CMC’s chief executive officer (CM Act, s. 251). Section 251 the Act continues:

Without limiting the chairperson’s responsibilities, functions or powers, the chairperson, subject to this Act and the commission, is responsible for the administration of the commission and the proper performance of the commission’s functions.

The Chairperson has a dual role as a Commissioner and as chief executive officer of the CMC.

As a Commissioner

The Chairperson, like each of the other Commissioners, is a constituent element of the Commission (CM Act, s. 223). As such, he or she has the same powers and responsibilities as the other Commissioners. They exercise those powers and responsibilities as a collegiate board.

In his or her role as one of the five Commissioners, the only respects in which the Chairperson's authority differs from that of the other Commissioners is that, when present, he or she presides at all Commission meetings (s. 265) and, in the event of a tied vote at a Commission meeting, has a casting vote (s. 266). As the person who presides at meetings of the Commission, the Chairperson has the usual function of a chairperson, namely to ensure effective meetings by facilitating Commission discussions and ensuring that key issues are critically examined and addressed.

As CEO

The Chairperson's other role is as CEO, with responsibility for administration of the CMC and the proper performance of its functions. [s. 251] As CEO the Chairperson is the public spokesperson for the CMC. He or she will ordinarily manage all its external communications about the activities of the Commission with media, government departments, the minister and parliament.

The CM Act confers on the Chairperson specific powers and functions in his or her role as CEO. For example, it is the Chairperson who, subject to his or her power of delegation, exercises the coercive powers of the Commission under Chapter 3 of the Act. The Assistant Commissioners for Crime and Misconduct are responsible to the Chairperson for the proper performance of the CMC's crime and misconduct functions (ss. 252, 253). Further, the Chairperson must set the performance standards that Assistant Commissioners and senior officers are required to meet under the terms of their contracts of employment with the CMC, and the Chairperson can terminate any such employment by signed notice (s. 248). While it is the Commission that employs all staff (other than the two Assistant Commissioners), those staff are subject to the direction and control of the Chairperson [s. 254(6)] The Chairperson may authorise an officer or employee of the CMC to exercise the powers of an authorised CMC officer under a provision of the Act (s. 272).

The CEO has a wide authority; but it is not uncontrolled. If it were, that would conflict with the principle of proper corporate governance, which requires the extensive executive authority of the CEO be subject to appropriate checks and balances. The CM Act establishes such a check, in that the CEO's authority is exercised 'subject to ... the Commission' [s.251(2)].

This gives the Commission a reserve power, not a power of day-to-day direction of the Chairperson. How it operates can be illustrated by three hypothetical examples.

1. The Assistant Commissioners are responsible to the Chairperson, not the Commission, for the proper performance of the CMC's crime and misconduct functions. That does not mean that the Chairperson is the sole arbiter of whether these functions are being properly discharged. It is the Commission that has primary responsibility for the achievement of the Act's purposes, including the crime and misconduct functions. Suppose the Commission were to consider that an Assistant Commissioner was not properly discharging his or her duty in respect of the crime or misconduct function, although the Chairperson was satisfied. The Commission could, under its reserve power in relation to the Chairperson, give a direction to the Chairperson as to what should be done to ensure that the Assistant Commissioner performed the particular function properly.
2. It is not for the Commission to determine the performance standards for Assistant Commissioners; that authority is vested in the Chairperson. But, if the Chairperson were to exercise his or her

authority to set performance standards that the Commission considered inappropriate, it could review the Chairperson's determination and direct the Chairperson to alter it.

3. The Chairperson will routinely give directions relating to many staff members. Other Commissioners might be aware of a particular direction and disagree with it, but that would not be sufficient reason for the Commission to exercise its reserve power to review the Chairperson's direction. Nor is the Chairperson required to report every such direction to the Commission to give the Commissioners the opportunity to review it. The Commission could properly intervene only if the Chairperson had given a direction of special consequence.

It follows that, if the Commission is to effectively exercise this reserve authority in relation to the Chairperson, there must be a reporting system for keeping the Commission informed of the Chairperson's relevant actions.

Such a process already exists on an informal basis. This reporting obligation on the Chairperson can be stated in formal terms as follows:

The Chairperson will inform the Commission of all actions the Chairperson takes that he or she reasonably believes the Commission would want to be told about.

While the Chairperson is, in general, subject to the reserve authority of the Commission, the CM Act makes the Chairperson personally responsible for performing certain designated and non-delegable functions. For example, public hearings and hearings, public or private, in relation to the conduct of judicial officers must be conducted by the Chairperson (ss. 58, 178). Section 329 imposes a duty on the Chairperson to notify the Parliamentary Crime and Misconduct Committee (PCMC) of improper conduct by a CMC officer, and the Chairperson must be consulted by the minister about appointments of part-time Commissioners and Assistant Commissioners (ss. 228, 243). The Commission has no role in respect of the discharge by the Chairperson of these special functions.

Further, the Chairperson is personally designated in a number of other statutes as the person to perform certain functions under each of those Acts. These functions include those of a member of the Controlled Operations Committee (*Police Powers and Responsibilities Act 2000*, s. 232) and as a member of the Prostitution Licensing Authority (*Prostitution Act 1999*, s.102) and those with respect to the appointment and removal of the Commissioner of Police (*Police Service Administration Act 1990*, ss. 4.3, 4.4) The Commission has no role in relation to the discharge by the Chairperson of these functions either.

The paper on the role of the Chairperson prepared in 2007 by Jan Speirs, the CMC's General Counsel, is a valuable resource. It is appended to this paper.

Part-time Commissioners

Ford notes that company law contemplates that directors will act collectively as a board. So must the part-time Commissioners. Nothing in the CM Act gives an individual part-time Commissioner or any informal group of part-time Commissioners authority to exercise any of the powers or functions of the Commission. This is confirmed by provisions such as sections 261, 264 and 266 of the CM Act.

Part-time Commissioners are expected to bring a specific range of skills and experience to the Commission (CM Act, s. 225). The fact that they are part-time suggests that their position is analogous to that of a non-executive, rather than an executive (i.e. employee-director), of a business corporation. Even so, their governance responsibilities are extensive.

Ford says that, in carrying out functions as a member of the board, each director is individually subject to statutory and common law duties to act in good faith in the best interests of the company, to act for a

proper purpose, and to act with reasonable care and diligence. It can readily be inferred from the CM Act that Commissioners are each subject to similar duties.

All directors of a corporation must be proactive if they are to fulfil their duties. Uhrig says:

To ensure directors competently discharge their duties, the board must act on a fully informed basis by having adequate access to and interaction with management as well as access to relevant information. It is the responsibility of directors to ensure they have accurate and sufficient knowledge on which to base their decisions.

What follows is taken from *Ford's principles of corporation law*, *Daniels v. AWA Ltd* (1995) 37 NSWLR 438, and *ASIC v. Adler* [2002] NSWSC 171.

- Directors must take reasonable steps to place themselves in a position to guide and monitor the management of the company.
- A director should become familiar with the fundamentals of the business in which the corporation is engaged.
- While it would be unreasonable to expect every director to have equal knowledge and experience of every aspect of the company's activities, the same standard of care applies to non-executive as to executive directors.
- The old law, according to which a director is justified in delegating to and trusting the officers of a company unless he or she is aware of circumstances so plain that no one with any degree of prudence would rely on the judgment, information or advice of the officer concerned, does not accurately state the duty of directors, whether non-executive or not in modern company law.
- Directors are under a continuing obligation to keep informed about the activities of the corporation. This requires general monitoring of corporate affairs and policies rather than a detailed inspection of day-to-day activities. Particular circumstances may, however, require directors to seek detailed information about a particular matter.

These propositions are a good guide to how part-time Commissioners should go about ensuring they are in a position to fulfil their duties. As individuals, they cannot exercise any of the powers of the Commission. But they are entitled, if not actually obliged, to seek out the information from anyone in the CMC that may be necessary to enable them to fulfil their responsibilities. To further ensure that the CMC is governed by an informed body of Commissioners, it is desirable that a part-time Commissioner take part in the work of each CMC committee. This may involve each part-time Commissioner taking on a small portfolio of business units and committees and meeting regularly with those committees.

Further, but subject to keeping the Commission informed of his or her involvement, a part-time Commissioner can participate in such operational activities of the CMC as the Commissioner considers appropriate. There will, however, be operational activities, particularly in Crime, Witness Protection and Intelligence, in which a Commissioner should not take part without prior authorisation by the Commission.

All such participation should be in an advisory or observing capacity only: as already noted, part-time Commissioners have no executive authority as individuals, or as a group, and cannot issue directions to staff, unless authorised by the Commission or the Chairperson.

Assistant Commissioners

The CM Act (ss. 239, 240, 244) provides for the appointment by the Governor in Council of two Assistant Commissioners, one for Crime and the other for Misconduct. They are not constituent members of the Commission itself.

The Assistant Commissioners for Crime and Misconduct are responsible for the proper performance of the Commission's crime and misconduct functions. Their responsibility is directly to the Chairperson (ss. 252, 253); but, in performing their functions, the Assistant Commissioners must keep the other Commissioners informed, by reporting in accordance with the reporting system outlined above.

The Assistant Commissioners may attend Commission meetings, but are not entitled to vote (s. 262). Though it can be expected they will usually attend, they do not have the right to insist on attending the whole of every Commission meeting. The Commission can conduct its business, including its meetings, in the way it considers appropriate (s. 261). The Commission determines all questions arising at a meeting by majority of the votes of the Commissioners present (s. 266).

The two assistant commissioners have by statute executive responsibility in the performance by the Commission itself of its crime and misconduct functions. There is no similar statutory structure for the performance by the Commission of its witness protection and civil confiscation functions.

Under delegations from the Commission, the Assistant Commissioner for Crime is responsible for the proper performance of the Commission's civil confiscation function. The QPS Assistant Commissioner in charge of the CMC Police Group also holds the position of Director, Witness Protection and Operations Support and is responsible for the proper performance of the Commission's witness protection function.

Directors

Directors are responsible for the effective operation of their work areas including the achievement of the agreed goals and outcomes and outputs. In addition they have responsibilities for the preparation of reports to the Commission on the operation of their work areas. This includes ensuring that significant matters are reported to the Commission.

In addition to his or her other duties, the QPS Assistant Commissioner in charge of the CMC Police Group has administrative responsibilities for police in this Group that are, for all other staff, discharged by the Executive Director and the HR Director.

CMC staff

Apart from government appointments (who include the Assistant Commissioners, Crime and Misconduct) and staff seconded from other units of public administration, all staff, including 'senior officers', who are necessary to enable the CMC to perform its functions, are employed by the Commission (CM Act, ss. 245, 254). The Commission can issue directions for the performance of duties by CMC officers [s. 257(2)]. But, subject only to any Commission directions, all staff are subject to the direction and control of the Chairperson, not individual part-time Commissioners. [s. 254(6)]

A substantial number of police are seconded to the Commission. The general authority of each of the Commission and the Chairperson to direct staff is qualified for these police officers: their efficient deployment is the joint responsibility of the Chairperson and the QPS Assistant Commissioner in charge of the CMC Police Group [s.255(4)]

Staff have a responsibility to keep their supervisor or manager informed in relation to the operation of their area of responsibility. In particular, they have a responsibility to bring any 'significant matter' to the attention of their supervisor or manager.

In order to properly discharge their own responsibilities, individual part-time Commissioners can seek information on any matter from staff members. In the unlikely event of a staff member being asked by an individual part-time Commissioner for information that the staff member considers should not be provided, the staff member should promptly raise the matter, through their manager, with the Chairperson. As a general rule, the Chairperson will refer the matter to the Commission for resolution.

The minister, the PCMC and the Public Interest Monitor

The CM Act imposes certain governance obligations on the Commission, such as the duty to submit its budget to the minister and to report to the minister on its performance, as already mentioned.

In addition, the Act establishes the PCMC, which, aided by the Parliamentary Crime and Misconduct Commissioner, has as the primary function of monitoring and reviewing the performance of the CMC (s. 292). The Public Interest Monitor also has a role in the governance of the CMC, in that he or she monitors compliance with the CM Act (s. 326) in relation to surveillance and covert search warrants and other related functions.

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Strategic direction	Financial management	Human resources management	Risk Management	Performance of management	Delegation of powers	Committees	Management reporting	Statutory duties
Set the strategic direction of the organisation – includes approval of strategies and policies followed by staff to implement those strategies	Oversee and have input into the development by senior management of the Commission's budgetary activities to ensure that those activities reflect the strategic objectives and priorities set by the Commission	Oversee, have input into and approve significant initiatives involving human resources and their allocation	Oversee the development of, and monitor, risk management and business continuity arrangements across the CMC and regularly review the agency's corporate risks and corporate risk register.	Monitor management performance and operational results and effectiveness	Establish a system for the appropriate delegation of its powers, and periodically review the continuing utility and effectiveness of these delegations	Establish , as part of its strategic activities, committees of the CMC, to consider committee reports, and periodically review the continuing utility and effectiveness of each committee	Establish a system by which management (and staff) report to the Commission the information necessary to enable the Commission to fulfil its role	Perform its non-delegable statutory duties
Provide guidance on and approve annual strategic planning process	Decide on new initiatives which will require supplementary funding (in line with agreed strategic direction)	In conjunction with annual financial planning, consider and decide on new initiatives which have human resource implications (in line with agreed strategic direction)	Overview risk management and business continuity strategies and policies	Assess the effectiveness of management in achieving its strategic goals.	Oversee a project to review delegations and determine delegations as appropriate	Oversee a project to review the existing committee structure for utility and effectiveness	Oversee a project to define and streamline reporting requirements	Consider the merits of public hearings – s. 177(3)
Participate in annual strategic planning process culminating in approval of strategic plan	Determine allocation of base budget by considering submissions from functional areas for significant additional funding	In conjunction with annual financial planning, determine annual allocation of human resourcing by considering submissions from functional areas for additional resources	Monitor functional area risk reports, monitor corporate risks and review the corporate risk register annually	Monitor and assess the extent to which the Commission complies with its legislative responsibilities including OH&S, anti-discrimination, EEO, risk management	Consider submissions for interim and permanent delegation changes as required and determine these	Determine appropriate committee structure and establish new committees as required	Review reporting arrangements and content on a regular basis	Consider and adopt s. 69 reports
Consider and approve annual functional area business plans	Approve final budget (after government decision on any new initiative funding)	Approve final annual human resource allocation (after government decision on any new initiative funding)		Receive reports in relation to the effectiveness of management including results of organisational climate and morale, harassment survey, exit interviews, turnover data, etc.	Regularly Review Commission delegations	Consider regular committee reports	Revise reporting arrangements as necessary	Report to PCMC— ss292, 293, 295
Consider responses to major operational and administrative issues	Monitor expenditure against budget estimates	Consider and approve annual workforce management plan		Consider, approve and monitor the workforce management plan		Regularly review committee performance and utility		Report to Minister— s260
Receive briefings on major projects and operations	Decide on any mid-year (CBRC) request for supplementary funding after considering functional area mid-year submissions	Monitor progress of and initiate necessary action on workforce management plan activities		Participate in governance committees as determined				Refer reports to the DPP – s49

Approve policies and procedures having impact across the organisation	Approve significant budget modifications by considering mid-year review submissions from functional areas	In conjunction with the mid-year budget review, agree on (CBRC) requests for supplementary human resource funding after considering functional area mid-year submissions						Issue directions about how notifications to the CMC are to be made by public officials – s40
		Decide on reallocation or realignment of human resources on an as-needs basis in the course of the financial year, in particular at mid-year review						Consider and decide matters outside policy

