

## **Accountability and the Law – Safeguarding against Corruption in Queensland**

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**Paper: Governance and the CCC**

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### **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 sectors<sup>1</sup> which provide a standard for evaluating the sufficiency of the governance arrangements introduced by the amending Act.

## **2.1 The new governance arrangements<sup>2</sup>**

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 report<sup>3</sup> into the CMC's handing 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 ended<sup>4</sup>. 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 framework<sup>5</sup>.

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 ineffective<sup>6</sup>. 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)**

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<sup>1</sup> 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.

<sup>2</sup> 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.

<sup>3</sup> PCMC report No 90, April 2013.

<sup>4</sup> 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.

<sup>5</sup> See the discussion about the creation of a new position of CEO: PCMC report No 90, April 2013 at pp 78-80.

<sup>6</sup> Anti-Corruption Commissions: Panacea or Real Medicine to Fight Corruption? By John R. Heilbrunn 2004 World Bank Institute.

The CMC Act generally speaking<sup>7</sup> 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 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)]."<sup>8</sup>

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 documents<sup>9</sup> and the subject of its recommendation 19.

### **2.3 The governance arrangements in the amending Act<sup>10</sup>**

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 commissioners<sup>11</sup>;
- (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 CEO<sup>12</sup>;
- (d) While the chairperson was subject to the commission under the CMC Act<sup>13</sup> (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).

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<sup>7</sup> 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.

<sup>8</sup> Governance and the CMC, p 7 (a CMC governance document)

<sup>9</sup> And in the commission's governance documents (the Jameson report).

<sup>10</sup> As further amended by the Stafford by-election amendment.

<sup>11</sup> s223 CCC Act.

<sup>12</sup> s269 CCC Act

<sup>13</sup> Apart from some statutory functions vested in the chairperson.

(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.

(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 proceeding<sup>14</sup>;

(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 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

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<sup>14</sup> 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).

Committee<sup>15</sup>. A statutory safeguard that is likely to be illusory once party politics is injected into the deliberations of the Parliamentary Committee<sup>16</sup>.

## 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 model<sup>17</sup>.

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 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.

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<sup>15</sup> S228 CCC Act

<sup>16</sup> 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".

<sup>17</sup> PCMC report No 90, April 2013

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 General<sup>18</sup>;

(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

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<sup>18</sup> 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.

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 Act<sup>19</sup>. 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 veto<sup>20</sup> 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 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?

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<sup>19</sup> Submission to the Legal and Community Affairs Parliamentary Committee on the Crime and Misconduct and Other Legislation Amendment Bill 2014.

<sup>20</sup> The new amendments do not provide for the provision or publication of reasons by the Attorney General.

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 period of change but it will make the CMC stronger and more effective'<sup>21</sup>.

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 CMC<sup>22</sup>. 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"<sup>23</sup>. Perhaps we should accept Mr Sosso's evidence that there were no independent minds on the Implementation Panel.

Mr Sosso was a source of some information. He said the decision to eliminate bipartisan appointments to the commission was a policy decision of government<sup>24</sup>; and, he said, it was the government who wanted control concentrated in the chairman<sup>25</sup>. 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

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<sup>21</sup> Media release by Attorney General Bleijie July 4, 2013.

<sup>22</sup> 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.

<sup>23</sup> P10, Transcript of evidence, 16 April 2014, Legal and Community Affairs Committee.

<sup>24</sup> P10, Transcript of evidence, 16 April 2014, Legal and Community Affairs Committee.

<sup>25</sup> 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.



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 secretive<sup>26</sup>.

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.

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<sup>26</sup> Mr Sosso, in his evidence before the Parliamentary Committee, asserted the claim.

