

**JOINT STANDING COMMITTEE ON THE
CORRUPTION AND CRIME COMMISSION**

**TRANSCRIPT OF EVIDENCE TAKEN
AT PERTH
WEDNESDAY, 27 FEBRUARY 2008**

SESSION TWO

Members

**Hon Ken Travers (Chairman)
Mr John Day (Deputy Chairman)
Hon Ray Halligan
Mrs Judy Hughes**

<013> M/4

Hearing commenced at 11.20 am

MCCUSKER, MR MALCOLM

Parliamentary Inspector, Corruption and Crime Commission, examined:

ALDER, MR MURRAY COLIN

Principal Legal Officer,

Parliamentary Inspector of the Corruption and Crime Commission, examined:

The CHAIRMAN: Thank you very much for appearing before the committee. The committee hearing is a proceeding of Parliament and warrants the same respect that proceedings in the house itself demand. Even though you are not required to give evidence on oath, any deliberate misleading of the committee may be regarded as a contempt of Parliament. I ask both witnesses to indicate whether they have completed the “Details of Witness” form and have read and understood the notes attached. I also ask the witnesses whether they have received and read an “Information for Witnesses” briefing sheet regarding giving evidence before parliamentary committees.

The Witnesses: Yes.

The CHAIRMAN: Thank you and welcome. It is nice to see that the parliamentary inspector has finally had a principal legal officer appointed to assist him. The committee looks forward to that; it will certainly help with processing a number of matters. As I say, this is a public hearing. I think it was mentioned in the letter inviting you here that if there is evidence you wish to be taken in private, you should indicate that when a member asks a question and we will consider it at the end of the hearing. I should also note that unfortunately we will be very time-limited, because we will need to finish at 11.55 to allow a couple of the members to get back to the Assembly for the commencement of the sitting day, and the committee obviously cannot sit at the same time as the lower house. I invite you to make any opening comments you would like to make, Mr McCusker.

Mr McCusker: My only opening comment, really, is to formally introduce Mr Murray Alder, the Principal Legal Officer. He took up duties on 4 February, so it is a comparatively recent appointment. He does have a permanent office, which has been located for him, and necessary equipment. There is also an office for me to attend, which I do at least once a week. We have arranged to have regular weekly meetings, which we have had, and in addition to that there is communication via either telephone or email. I should also mention the audit function. This committee—both the present membership and the previous constitution—has in the past been very anxious or enthusiastic to ensure that the audit function includes the audit of telephone intercepts conducted by the commission under the commonwealth act. We have run into something of a snag there, and I refer to it in a letter which I have written; I am not sure if it has been tabled. It is on its way. In terms of the jurisdictional issue, we are still trying to resolve that. In the meantime, Mr Alder has carried out the parliamentary inspector’s audit function in relation to the Surveillance Devices Act, and he satisfactorily concluded that yesterday. He will now conduct an audit of the Surveillance Devices Act and its use by the commission for the previous financial year. We intend to have a full coverage of the use of that. Telephone intercepts are a jurisdictional issue, and may possibly only be resolvable by amendment of the legislation. However, I should mention, as I have said in the letter I wrote, that it is possible that the committee may wish to reconsider whether the parliamentary inspector should be involved in auditing the telephone intercepts because there is

provision in the state act for the Ombudsman to carry out inspections and to report on any irregularities he may see. It may be simply overdoing it, but that is a matter that we have not quite resolved. Mr Alder has been in touch with the Deputy Ombudsman and discussed it with him. Whether the parliamentary inspector takes over this function or not, the Ombudsman wishes to remain involved, so there has to be an administrative set-up to do that. That is a matter I thought I should, in general terms, report on.

The CHAIRMAN: I must say, we do not have a copy of the letter at the moment. Just to clarify, is that under the commonwealth act?

Mr McCusker: Yes.

The CHAIRMAN: The legislative issues arise under the commonwealth act?

Mr McCusker: That is right. It is a question of the interplay of the commonwealth act and the state act. It may be curable simply by an amendment to the regulation made under the state act.

The CHAIRMAN: I suspect that one of the other things that will be interesting over time will be to see the attitude of the new federal Attorney-General. As you are probably well aware, with regard to issues such as the public interest monitor, previous Attorneys-General have in the past refused the proposal outright. I am not sure, but at one point I think Queensland did not have telecommunications intercepts because of that ongoing debate. We will look forward to having a look at that in due course. Could you briefly outline what you see as the duties of the principal legal officer and what you will be delegating to him?

Mr McCusker: I have discussed this in some detail, of course, with Mr Alder. The audit function, in terms of whether the audit of the telephone intercepts and surveillance devices can be done, will be his province. He will of course report to me, but it is really his province. A similar situation exists in Queensland, where there is a legal officer who carries out the same function. In fact, the officer there was kind enough to provide me with material that he uses for the purpose of his audits. Clearly, that audit function is a comparatively limited one and will not take the PLO's full time. I am in the process, as I have said in my letter, of delegating to him for review and report, and then action, files relating to complaints made to the parliamentary inspector about the commission. I have dealt with that in my letter, which you may now have, and I have set out in that letter the status of a number of matters that you, Mr Chairman, raised with me in your letter of 22 February. Some of those matters are closed—at least, as closed as one can be with some of them, because they sometimes have a habit of coming back. You will see in the list I have provided that in several instances I have delegated the review of the file to Mr Alder and I expect that by the end of the current financial year, which is not that far away, we will have completed a review of every complaint and either closed the file or at least actioned the file. I do not know whether it is appropriate to deal with the individual complainants in a public session. The letter explains the situation.

The CHAIRMAN: I appreciate that, and I think it is important in a public session for the committee to understand that you are now dealing with a number of those outstanding matters that have been out there for some time, and your timeline for being able to bring them to a conclusion. The additional resources are very positive.

Mr McCusker: It is definitely something that was needed for some time. We tried to remedy the situation last year and nearly got there, but then at the last minute the appointed person could not continue.

The CHAIRMAN: In light of some of the evidence we heard in the previous session I might go straight to the issue of how you see the powers, the role and the function of the parliamentary inspector.

Mr McCusker: Certainly.

The CHAIRMAN: By way of background—obviously you did not have the benefit of it—in the previous hearing we had quite a lengthy discussion with the commissioner in which he expressed his concerns about what your function and role is. I invite you to explain what you see as your function and role, and your powers under section 195, in particular.

Mr McCusker: You have probably seen the exchange of correspondence between me and the commission on that question, and it has really arisen out of the fact that I have taken the view that part of my audit function includes the review, examination and ultimately—possibly—reporting of investigations conducted by the commission and any reports the commission may make as a result of that investigation. It is there that we have, I think, reached a difference in views. The commission apparently initially took the view that the audit function did not enable me to even consider the commission's reports. I think it has now stepped back a little from that—although I am not quite certain—to the point of saying, “Well, the parliamentary inspector is not within his function to consider the report and then be critical of conclusions by reason of his taking a different view of the evidence or having a different opinion”.

[11.30 am]

My view is that where there is a reasonable basis for the commission's conclusions, the fact that I would have taken a different view is irrelevant. I would simply leave it at that. But there are two aspects of the commission's investigations and reports that I consider should be reviewed by the commissioner and by the parliamentary inspector, certainly on complaint if not of his own volition, and they are the adequacy of the investigation. If on a review I would conclude, as I have in fact in some instances, that there has been an inadequate investigation, that in turn affects, of course, the report of the outcome of that investigation. To determine whether it has been adequate, the first step is to consider what witnesses were examined by the commission before it concluded its report; and if there are any witnesses whose evidence is obviously self-evidently relevant and who were available and not examined, then that could be, and would be in my view, one of the indicia of an inadequate investigation. So that is one. And if that flows through, that inadequacy, to the report or the result of the report itself, then I consider it is my function to report on that so as to rectify any false conclusion or wrong conclusion that the commissioner may come to. The second is that even if there is not an inadequacy in the investigation itself, then the inspector may take the view, after very careful consideration of course, that the evidence that was before the commission does not warrant the conclusion that it reached; simply, it is not arguable that the conclusion reached was open on the evidence available. If I can just, without getting into the detail of particulars, give an instance. If the commission were to reach a conclusion adverse to a particular individual, by reason of something said about that individual or that individual's activities in a conversation between two other parties, which is of course hearsay, I would take the view that if that were the basis of an adverse finding, it was wrong and should be pointed out. In the first instance my approach is and always will be to go back to the commission with any perceived inadequacies or wrong conclusions and raise them with the commission for its comments. And that is the process I have taken in recent times in the case of Mr Frewer, which resulted in a report, which by happy or unhappy coincidence, reached the same conclusion as the independent investigation conducted by the appointed investigator of the Director General of the Department for Planning and Infrastructure, and that was that there was no basis upon which the commission could reasonably have reached a conclusion of misconduct in respect of Mr Frewer. But I do take the view that unless the parliamentary inspector has that function, then a very large part of the importance of the inspector as so-called watchdog of the commission will be lost. Indeed, to some extent it would mean, to a very large extent, the result would be that the commission would have an unfettered right to criticise very adversely and make findings of misconduct without any concern that the individual the subject of those findings would be likely to have any redress, because the only possible recourse—and Mr Cox has taken that step—then would be the court. Now it is all very well to say that that course is open to a person who considers that a finding is unjustified, but there are several problems for the individual with that.

First, the expense and, second, that the remedies available in court, a declaration, are comparatively limited and there is always the question of whether the court will step in or whether a parliamentary privilege attaches to the report of a commission when tabled; so that is yet to be determined of course by the court in Mr Cox's case as that case proceeds. So my view is that it is very important in the public interest that the commission knows that the inspector may review and will review reports if there are complaints made about the findings. It will serve as some check, as audits do, on the commission's very, very extensive powers. So that, I have got to say in short but probably at length, is my view about the functions of a parliamentary commissioner. I should add that although I am very, very much aware that the commission takes issue with the conclusions I reached, and presumably those that Ms Judge in her independent investigation reached regarding the Frewer matter, I have had comments both in written form and by telephone, and face-to-face, from a number of members of the public, which were to the effect that it is a relief that the parliamentary inspector is taking this kind of stance so as to check the otherwise unfettered powers of the commission.

The CHAIRMAN: I guess, obviously, once you have raised those issues, do you still see that there is a role for the commission to re-look at those matters, and they may, having re-looked at those matters, arrive at a conclusion, but looking at that evidence again in light of your comments about it? I mean, it is still possible for them to reach the same conclusion, but is it your view then that they would also need to do a further report that outlines that? Because the evidence that they have given to us is that they still hold the view that they have, having reviewed that evidence, because of both evidence that they have previously disposed—and even in one case this morning I think they indicated that they had further evidence. Although they had alluded to it, they had not given expression to exactly what was in one of the further taped phone conversations that they had, and that that led them to still hold the view that they had.

Mr McCusker: Is this in the case of Mr Frewer?

The CHAIRMAN: Yes.

Mr McCusker: Well, that is surprising to me, because the commission was given every opportunity by me to comment on the proposed adverse comments, and if they had some additional evidence which they say justified the position they took, I would have thought that they would provide it to me.

The CHAIRMAN: I think the evidence they certainly had previously referred to the phone conversation. What they had not done was to detail previously in their reports what the exact terms of that conversation were. It relates to a phone call, I think, on 23 May, and there were some more details. Without getting into the details of that, I guess it is more about the process of how would you envisage the process working? Because I think one of the problems we have got at the moment is they have a very strongly held view based on having reviewed the evidence, even in light of your report. We have your report. The public has—you know, as a member of Parliament I find difficulty reconciling the two reports, so for an ordinary member of the public —

[11.40 am]

Mr McCusker: It is absolutely impossible to reconcile. They are two quite different views or conclusions. Now, in reaching the conclusion that I did in respect of Mr Frewer, I took into account everything the commission had said, all the evidence that it had, and remained of the view that there was no basis for a misconduct finding. If the commission were to agree, and I invited it to agree—in fact, I should say that before publishing and tabling the report, I suggested to the commission that it should concede that it had erred, as in the end it would be more likely to induce public confidence in the commission, and to publicly state that it was in error, but it refused to do that. Coming to your question, Mr Chairman, in my view the process should stop here. If the commission is not prepared to publicly acknowledge that it was in error, then it is obviously a situation where the general public will know that it has not chosen to apologise or admit its error. It then becomes a question for

members of the public. It is unfortunate for Mr Frewer because he has still got that tabled report of the commission, but at least he is comforted by the fact that the parliamentary inspector has delivered a report, which has been, I must say, very, very carefully considered, referring to all the evidence that was available, which exonerates him, and separately from that, he has been exonerated by a very full investigation and carefully reasoned report of Ms Judge.

The CHAIRMAN: But is it your role to exonerate him or is your role to highlight the inadequacies of the CCC's investigation and then for the CCC to reconsider that matter?

Mr McCusker: I consider that where the CCC has reached a conclusion which is demonstrably in error, then it is my role to point that out. I grant you, it is not my role to exonerate him, as such, but it is, nevertheless, my role to point out that the commission has erred, which comes to the same thing in practical terms.

The CHAIRMAN: I guess the question then, too, is whether or not you have become effectively an appellate court in that process.

Mr McCusker: Yes. In fact, certainly we are not an appellate court; no, we are not. Put that aside, because it tends to obscure the issue. The question really is: is it the function of the parliamentary inspector to review what the commission has done and report the results of that review? If the commission has, by reason of an inadequate investigation or a lack of any evidentiary basis, reached a conclusion that a person has been guilty of misconduct, I think it is the duty of the parliamentary inspector to point that out.

Mrs J. HUGHES: In relation to your investigation into their operation, as far as evidence given, were you afforded all of the evidence from the commission in order for you to do that investigation? Was any withheld?

Mr McCusker: That is a hard question to answer, but, to the best of my knowledge, all of the evidence which was available to the commission was made available to me. Certainly, all of the evidence which is referred to in its report was made available to me, and a lot of it was available anyway on the internet—public examinations—but everything that I requested was certainly made available. To the best of my knowledge and belief, it provided everything upon which it relied. Certainly, it should have been provoked into doing so when I wrote to the commission, saying, “These are the proposed adverse comments, these are the reasons why” and asking for its comments in return—its representations. One would expect then, if there were any evidence that had not previously been provided, it would have provided it. That does lead me to another issue; that, in my view, one of the problems in the reports that I have seen to date is an inadequate discussion by the commission of the evidence upon which it has relied in reaching its conclusions. There is very, very little contained in the reports by way of reference to specific evidence before the very damaging conclusions are reached. I regard that as a very, very dangerous practice, because it leads quickly to the statement, the almost ex cathedra announcement, “We think you are guilty of misconduct. We are not telling you why.” It is not quite that, but it is very close to it.

The CHAIRMAN: Have you raised that with the commission at all?

Mr McCusker: Not in those terms, but I intend to.

Mr J.H.D. DAY: Is that a general observation about reports that have been produced, in the plural, or does it relate to Smiths Beach in particular?

The CHAIRMAN: Three specific reports in particular, but there have not been all that many reports. I do intend, I should say, to raise that point with the commission. In fact, I will be raising it in a report that I will be tabling by the end of this week. The commission ought to state fully the reasons and the evidence upon which those reasons are based, rather than simply state conclusions.

Mr J.H.D. DAY: We discussed with the commission earlier the issue of the Smiths Beach investigation being started under Commissioner Hammond. It was then Acting Commissioner

McKerracher. Commissioner Roberts-Smith is now having to deal with the follow on from it, and it is not exactly an ideal situation. I just wondered whether you thought that might have been a factor at all.

Mr McCusker: It may have been, although it is conjecture. I did, in my first letter on the Frewer matter to Mr Roberts-Smith, express my sympathy, in effect, that he had got this position. He got the job which was in relation to something that he had nothing to do with. Nevertheless, as they say, the buck stops there. He would accept that.

Mr J.H.D. DAY: In relation to the respective powers of the CCC and your powers, it would seem, if there has not been already, that there will be some discussion or opinion sought from the Solicitor General. Is that something you have had any involvement with or is it something you can make any comment on as to whether you regard that as an appropriate process?

Mr McCusker: I was not aware that there was to be some approach to the Solicitor General. I have certainly no objection whatever to it. Obviously, I would read with interest any opinion that the Solicitor General produced, but I would not necessarily be persuaded—I might be, but I would not necessarily be persuaded by an opinion or a view expressed by the Solicitor General. That is without any disrespect to him, but my firm view at the moment is as I have stated.

The CHAIRMAN: Do you believe there is a need to maybe redefine sections 195 and 196 to make it very clear what your functions and roles are, because I think there is still a grey area, as well as highlighting the inadequacies as to how far you can effectively go—I think you used the term “exonerate” and then backtracked a little from there—as to where does your role end and where does it go back to the commission to go through a new process? I would assume that you would accept that once they went through that due process, they would have to re-follow section 86, again as part of that second process.

Mr McCusker: Yes.

The CHAIRMAN: Do you think there is a need to amend the act at all to clarify and make clearer your roles and the commission’s roles in each of those areas?

Mr McCusker: It would be helpful. I do not see that it is a need, because my view is that the functions of the parliamentary inspector are clear enough. You have seen my exchange of correspondence. The commission started out on this track by suggesting that the definition of “audit” in the Macquarie Dictionary meant that I was confined to examining accounts, which, of course, is absurd. It backtracked from that proposition, but I wondered why it threw it in. The commission will remain, I think, intransigent in its view that I should not be looking at its reports. So, although I consider it is clearly within the audit function and investigative powers of the inspector to do so, for that reason it would be helpful if section 195 were amended to make that explicit.

The CHAIRMAN: Any other questions on that matter? If not, in view of the time, I did want to just go to the issue about public versus private hearings and whether you have any comments you wish to make. Again, that is an issue that we touched on this morning. Maybe I will just ask you if you have views and you wish to make any comment about the role and how that can be better articulated and explained and understood by people.

[11.50 am]

Mr McCusker: I welcome that suggestion, because I have grown increasingly concerned about the use of public hearings by the commission. The concern I have is that the only criterion—the act provides that the commission may hold public hearings if it, having balanced the interests of the individuals to privacy and prejudice against the public interest, decides that the public interest outweighs the other considerations. That is easily said, but there are no criteria stated as to how you determine what is more in the public interest. It has been said in the past in a different context that public policy, which is one of the issues that arises sometimes in contract, is a very unruly horse,

and public interest is—how do you determine what public interest is? There have been a number of complaints made to me, both by individuals directly affected and by others who have been observers, that there seems to be little justification for having some people called to a public examination where, even though they are not even accused of anything, the fact that they are called to a public examination seems to carry with it a stigma. I have discussed this with both the previous commissioner and the current commissioner. The current commissioner so far has held no public examinations. He does definitely, I think—well, he certainly expressed to me the view that one must be very cautious about the holding of public examinations. I am aware that in the ACC, the Anti-Corruption Commission, there was criticism of that commission because it held its hearings all in private. In some cases it may well be desirable—there are particular instances where it may well be desirable for there to be a public hearing, but before there is a public examination, in my view, there should be first a private examination of the individual to be questioned—if there are going to be some accusations made of that individual, to put the accusations to that person, give that person the opportunity to respond to them and perhaps direct the investigators to other evidence, and if at the end of the day, having gone through that process, there is a reasonable view taken that there should be a public hearing, then at that point, but not before, do it. Another problem with the public examinations that I have discerned, looking through some of the transcript, is the accusatory way in which the so-called investigation is being conducted. An investigation is supposed to be a reasonably objective approach, but I have noticed that in many cases witnesses have been subjected to accusations, sometimes without proper foundation. So they are all the dangers inherent in a public examination.

The CHAIRMAN: I just want to clarify, too, because I guess in those comments you have been, I think, fairly critical of some of the past public examinations.

Mr McCusker: Yes.

The CHAIRMAN: And you have outlined a process, and I think you outlined that process in your report on the Frewer matter. Are you suggesting then, for instance—and there was some media comment around the time of the Neale Fong report—are you suggesting that they should have then re-held some of their hearings in public in respect to the Fong report, or are you comfortable with the way that they dealt with the Fong matter?

Mr McCusker: I have not dealt with the Fong matter at all. There has been no complaint to me about it and I have left it —

The CHAIRMAN: Just in terms of public versus private hearings.

Mr McCusker: Yes. I think the problem in public perception is the danger that the public may think, “Well, special treatment is being given to Mr Fong because he has had a private hearing, not in public”, whereas other people who might be thought to be in a category where there is no need for a public hearing have nevertheless been held up to sometimes public ridicule.

The CHAIRMAN: I think that may be more about a—that is what I was trying to understand. Is that more of a criticism of some of the public hearings in the past —

Mr McCusker: Yes.

Hon KEN TRAVERS: — than a criticism of the private hearings for Mr Fong?

Mr McCusker: It is. I think that many of the public hearings in the past ought not to have been held, quite candidly.

Mrs J. HUGHES: Just in relation to public hearings and the balance of public interest and so forth, whether they should be held in public or in private, if it is discerned that they should become a public hearing, one of the things that you raised in your report was the lack of conferring with the counsel who was actually questioning the witness and that all of the evidence is not necessarily presented to that person while, in effect, he is actually asking the questions.

mccu: Yes.

Mrs J. HUGHES: Will there be, from your office, some indication as to process or accountability regarding those issues in order for the public also to have a balanced view of the witness as well as the commission?

Mr McCusker: Yes. It is very important. To directly answer your question—I do intend to make some comment on that—the problem is—it is simply another problem related to it—that a person is publicly examined, and then off that person goes, and then someone else is called, and that person has perhaps had played to him or her telephone intercepts of discussions that that person has had with someone else about the previous witness, and it all then becomes very dangerous and prejudicial to the first person. If I am sitting in the witness box and I go through a public examination and nothing is said to me about some telephone discussion that has taken place and been intercepted between two other persons but about me, it is wrong, in my view, for me to be the subject of those telephone discussions played publicly when I have got no opportunity to answer it and say, “Look, what they said is wrong.” But there is a further question as to whether that kind of evidence should be played publicly at all where it relates to a third person who has got no opportunity to counter it.

The CHAIRMAN: In view of the time, I did just want to finally touch on an issue. We previously as a committee raised the issue of guidelines, and just quickly looking at your letter, I think you have covered that.

Mr McCusker: I have.

The CHAIRMAN: Are there any brief comments you want to make with respect to guidelines with respect to conflicts of interest? I guess that also then leads very quickly to the issue of workload for the parliamentary inspector and whether or not there is a need for an additional acting parliamentary inspector to be able to both manage the workload and, when conflicts do arise, manage conflicts.

Mr McCusker: Under the act, I do not think that I can delegate or refer work to an acting parliamentary inspector simply because the workload is too heavy. It is only where there is, I think, a conflict that that arises. But I think it is desirable to have an acting parliamentary inspector—and at the moment there is none because Mr Scott’s term has expired—simply to be there in case a conflict does arise, because if a conflict arose tomorrow, then there is nowhere to refer it to, so I need to be able to do that. Even if the acting parliamentary inspector does nothing for the whole year, at least he or she is there.

Mr J.H.D. DAY: When will a reappointment be made?

Mr McCusker: I do not know. I have raised this question, but I do not know. I think it is with the Solicitor-General at the moment.

The CHAIRMAN: Maybe that is something that the committee can follow up. Are there any other questions, members, or are there any final comments that you wish to make, Mr McCusker?

Mr McCusker: No, thanks, Mr Chairman.

The CHAIRMAN: I suspect there was a whole range of issues that members would like to have dealt with, and we may need to reschedule another meeting.

Mr McCusker: I would be happy to do that.

The CHAIRMAN: Our apologies about the time. I do appreciate your contribution this morning, but we need to complete the hearing. Once again, we welcome Mr Alder on board and look forward to having a good working relationship with both of you.

Hearing concluded at 11.57 am