

**THE PARLIAMENTARY JOINT STANDING COMMITTEE ON INTEGRITY MET
IN COMMITTEE ROOM 2, PARLIAMENT HOUSE, HOBART ON THURSDAY
6 NOVEMBER 2014**

Mr DARYL COATES, ACTING DIRECTOR OF PUBLIC PROSECUTIONS, WAS CALLED, MADE THE STATUTORY DECLARATION AND WAS EXAMINED.

CHAIR (Mr Dean) - Daryl, thank you very much for being here today. You understand that parliamentary privilege applies whilst you are here, but once you leave it no longer applies. If we get to a stage at any time where you believe some information you might want to pass on to the committee should be protected, should you ask for us to consider it we will address that at the time if evidence needs to be taken in camera. This is a public hearing and is being recorded.

Daryl, you have provided a submission to us and thank you very much for doing so. At this stage if you want to expand on any part of the submission or there is any additional information you would like to pass on to the committee, please feel free to do so.

Mr COATES - I suppose my major concern is the duplication of investigation. In my role as DPP general code of conduct investigations is not really my concern, but even there if there has been an investigation by the commission it has to be reinvestigated by the head of agency. I think it is requirement number 5 under the State Service Act. The other concern I have is if there is an investigation of a criminal matter the process will take a long period of time and invariably it will have to be reinvestigated by Tasmania Police.

The most the commission can do, under section 57, would be to send their report to me or to other bodies, but specifically to me for action. The report does not have to be based on the rules of evidence. The likely result if it was forwarded to me would be that I would write to the Commissioner of Police and say, 'There has been this allegation and you may wish to investigate it', and I may put what I think the merits of it are based on the report. I would also add that if they do investigate it and make a file, not to put anything on the file that has been compulsorily acquired from the suspect because if a prosecutor sees that it may lead to either a stay for abuse of process or a successful appeal, given the recent decision of *Lee v The Queen*.

The procedures for investigating criminal matters is quite different to the procedure set out here under the Integrity Commission Act.

Ms GIDDINGS - With your DPP colleagues in other states where there are ICACs and other bodies that have arguably stronger powers than the Integrity Commission, my understanding is that if an ICAC there makes a finding that somebody has misused their power or had corrupt behaviour the same problem exists for the police and the DPP in those states as well.

Mr COATES - It certainly does. There are two problems that exist. Firstly, these bodies are not bound by the laws of evidence. I am not saying they should be but that is no good for us; we are bound by the rules of evidence so generally speaking it would have to be sent back to the police to be investigated in any event. Secondly, the problem with *Lee v the*

Queen is a very large problem. I understand there are numerous stay applications being made in New South Wales at the moment. How wide it is we are not certain yet but it is certainly a problem for DPPs around the country.

Ms GIDDINGS - This is off the back of the ICAC investigation.

Mr COATES - Yes. What happened there was an ICAC investigation. Their rules are a little bit different to the ones here. There was a provision that it should not be released to anybody unless ICAC ordered it. They did not order it, it was given to the prosecutor. It was not used in the trial but High Court found it was unfair because the prosecutor knew what the accused was going to say so she could prepare a cross-examination and so on beforehand. The interesting thing about the judgment was that they just did not limit it to the provisions of the ICAC, they said that part of common law to do with fairness of trial is that the accused person does not have to do anything to assist the prosecution and where they had been forced to and the prosecution had been assisted, it can lead to an unfair trial.

CHAIR - In relation to the submission and the comments you have made, if the Integrity Commission was to continue in this state moving forward, what changes do you think ought to be made to cover off on those areas you raise, such as the admissibility of evidence and reinvestigation of matters? Have you a view on that, Daryl?

Mr COATES - My view would be if that if it is a criminal matter it should be dealt with and investigated by the police because they are the experts in the area. It would be done quicker and they do not have this lengthy procedure that is currently under the act. It seems to me we are a small population but we have numerous bodies investigating and it overlaps.

Ms GIDDINGS - We lived through that time from 2005 onwards where there was a lot of politicking, right or wrong, and reputations damaged through that period up until 2010 when this framework was developed to say that the other avenues open in the system have failed to deal with these matters appropriately or there was a gap in the system that was identified that the Integrity Commission was built to try to fill.

Mr COATES - Firstly, going back before 2005, back to 1990, in my experience investigations of senior public service, politicians and police officers have been conducted vigorously and fairly. If some of those cases arose again, even with the Integrity Commission, it would seem to me they would go back to Tasmania Police to investigate, so I don't think that is not going to resolve that.

The Integrity Commission has a lengthy procedure of making assessments, conducting an investigation, making the person subject to the investigation compulsorily answer questions and give up documents, and then he or she is given a right to comment on the report. The report is not bound by the rules of evidence and they can forward it to one of those bodies. If it is forwarded to me, the likely result would be I would be either saying there is no suggestion of criminal conduct here at all, so I would not forward it to anyone, or if there is, I would be forwarding it to the police for a proper criminal investigation. From a strategic point of view, conducting many criminal cases by going through the Integrity Commission you have forewarned the suspect of the investigation and so on.

On the mainland, the most useful thing for these bodies is where there is systemic corruption and it can reveal that, but it is not necessarily a useful tool to prosecute people.

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Mr McKIM - Daryl, the current DPP, Mr Ellis, is of the very firm view that Tasmania Police are not independent.

Mr COATES - I knew you were going to ask that question.

Mr McKIM - He provided a long submission to the original parliamentary committee that recommended establishing the Integrity Commission. Sir Max Bingham agreed with his assessment. First, I should do you the courtesy of asking whether you have a view on whether Tasmania Police is independent of the minister and the Government?

Mr COATES - As to Mr Ellis and Mr Bingham, I do not dispute their legal minds. It is something that people can differ on, but I am of the view that they are independent. In schedule 1 of the Police Service Act they have an oath, not to the Government or to the minister, but to the people to apply the law, enforce it and do their duty without fear or favour. Section 83 of the Police Service Act provides the police officers with all the common law duties of a police officer. Common law states clearly that police officers on operational matters are independent from the minister. The provision in the Police Service Act, I have forgotten the section -

Mr McKIM - It is section 12, from memory.

Mr COATES - that says the Commissioner of Police is subject to the minister in charge of the superintendents and so on has been interpreted in a number of cases not to deal with operational matters but the general administrative nature of the police. I am of the view that the Commissioner of Police is independent from the minister, but that is just my view and for those reasons. I cannot see any harm in amending the Police Service Act to make that clear.

Mr MULDER - The simple insertion of the word 'policy' before 'direction' would fix that.

Mr McKIM - I don't think it will be that simple because policy and operations are not always easy to define and delineate.

Mr COATES - I think they're pretty independent. From my experience and knowledge they act independently.

Mr McKIM - I cast no aspersions on Tasmania Police or the current minister. Thank you for giving us your opinion on the independence of Tasmania Police, but isn't there an issue with the section here for us to consider, which is that if the Integrity Commission were to lose its investigative powers and authorities, all complaints against the police would have to be investigated by Tasmania Police? I understand there are bureaucratic structures within Tasmania Police that build in some separations between people investigating and those being investigated, but ultimately in perception terms it is the police investigating itself, isn't it?

CHAIR - I think it needs to be made clear that when you say the police would investigate all complaints against police that is not quite right. It needs to be clear that outside organisations can be called in and police from the mainland can be called in - and they

have previously been considered - to carry out an investigation into an issue. It depends on what area of the police these complaints are made against.

Mr McKIM - I will finish my question if that is okay, Chair. Daryl, isn't it the case in perception terms that people see that as the police investigating themselves? In the case of allegations of criminal behaviour against, for example, a premier or a minister for police - and this is a very hypothetical matter; I'm not alleging anything here - but wouldn't the perception be that a police force that is under the direct authority of the Government would be investigating that government and wouldn't that potentially give rise to conflict-of-interest issues?

Mr COATES - Even with the commission as we have it at the moment, the police do investigate themselves. The Police Integrity Unit conducts many investigations. In fact I don't believe there are any they haven't conducted, although I may be wrong about that.

Mr McKIM - Mr Ellis oversaw an investigation that was conducted by Tasmania Police.

Mr COATES - That's in relation to the minister. I don't see that they are directed by government, so I don't accept that purpose. If you do, it would seem to me that rather than have a general body you could set something up in the circumstances of that case that might occur once every 20 years or whatever. It seems to me at the moment you have a very expensive commission with extraordinary powers. The specialists in criminal law are the police and they should be conducting investigations. On the rare occasions a minister needs to be investigated, perhaps there is. You are able to have somebody like the police who are involved in the investigation report to the Ombudsman or something like that.

CHAIR - Or the DPP?

Mr COATES - We don't like to get involved in investigations but yes, or the DPP, whoever Parliament thinks. The point is the police have the skill set to do investigations. That is not an aspersion on the Integrity Commission or anybody. I don't have the skill set but the police have the skill set to do these investigations and therefore they need to do them in my view. They have done them in the past. I accept your point about appearances, and maybe there needs to be some mechanism where they can report to somebody or, as I said, change the act.

Ms GIDDINGS - That is very much on the corruption and criminal end of the spectrum and much of the work undertaken by the Integrity Commission is more around misconduct and the feeling there that perhaps when it was just left to heads of agencies, for whatever reason, that issue of misconduct may well never have been reported because people didn't want to be seen as dobbing on their immediate work colleagues, or if it was reported that there wasn't necessarily a transparent process for an outcome. Not that the Integrity Commission is necessarily all that transparent - it is a confidential process - but an independent body overlooking those issues. If you come down to the issues around misconduct, do you believe if you removed the Integrity Commission that the system is strong enough to be able to adequately investigate those issues, or is it just too close with people working within an agency, particularly smaller agencies, where everybody knows everybody and those issues may well not be properly investigated internally?

Mr COATES - I am a member of a small agency and am of the view that it would be reported. The problem I see at the moment is that there is one investigation, a report is done and sent to the secretary of the department, who then has to conduct a second investigation. For people who are the subject of these investigations who may have done nothing wrong or done something that is very minor, it is a very lengthy and stressful process. I have known cases where there has been over 12 months investigation by the Integrity Commission and it has gone to the secretary of the department who has then had another investigation and decided that no action should be taken. At present it is very convoluted. If there is a problem that they don't think these complaints would get investigated, one way to do it is to have a person - it could be the Integrity Commission - they make the complaint to, they forward it to the secretary of the department and then ask the secretary of the department what action they are taking, and so on. At the moment effectively you have two investigations.

CHAIR - Daryl, have you had any matters referred to you from the Integrity Commission over their past three years of operation?

Mr COATES - I haven't dealt with any but I know the Integrity Commission saw Mr Ellis in respect of one matter and I know two matters have been referred to Tasmania Police but no charges were laid.

Mr DEAN - You may not be aware of this but when the file was forwarded to your department - or that of Mr Ellis at that time - did it create any problems with the investigative side of the commission and the evidence they provided to your department? Are you aware of that?

Mr COATES - I don't want to say this in public.

Mr DEAN - Okay. If we need to we can probably address that at the end so we will continue. Thank you for that.

Mr MULDER - I thought you said you have received no files for prosecution, either directly from the Integrity Commission or via the Police department?

Mr COATES - No.

Mr MULDER - So you're not in a position to comment on the quality of any investigation?

Mr COATES - All I know is that Mr Ellis was seen in respect to one matter and asked for his advice on it.

Mr McKIM - Just to correct something I said earlier to make sure the record is correct, it is not section 12, it is section 7 of the Police Offences Act. I have Tim's submission before me and I'm sorry if I have you at a disadvantage, that is not my intent, but one of the points he made relating to the independence of police was to refer back to the Carter Royal Commission which was ultimately part of the process that led to a conviction for, in my opinion, corrupt behaviour.

Mr COATES - Actually, I don't think that's the case. I think the conviction came before the Carter Royal Commission.

Mr McKIM - Okay, I will stand corrected on that.

Mr COATES - Yes. If I remember correctly, that was in relation to the bribing of a member of parliament. As I understand, that was investigated by Tasmania Police. Mr Rouse was convicted and then there was the royal commission.

Mr McKIM - Okay, thank you, I stand corrected on that. The point I wanted to make was that Mr Ellis said in his submission to the previous Integrity Commission that there were issues with the minister's office being in receipt of information from a high-ranking police officer during the police investigation and Mr Ellis provided an excerpt from Commissioner Carter's report where he found that the integrity of the investigation was put at risk by the sharing of information from a high-ranking police officer to the minister's office.

Mr COATES - What minister?

Mr McKIM - It is not clear in the excerpt, it says 'the minister', so I don't know that at the moment, but the point Mr Carter was making was that that provision was something that put the integrity of the investigation at risk.

The reason I raise this is because, notwithstanding differing legal opinions about the independence or otherwise of Tasmania Police from government, relationships can be established between senior police officers and police ministers or senior advisers or advisers in the minister's office that can lead to the integrity of investigations being placed at risk. How would you respond to an assertion that the Integrity Commission is not in as much danger of that happening because it is very clearly an independent statutory authority that reports to the Parliament.

Mr COATES - I take your point. First of all, I'm not sure in what context that was. I know during the investigation of that case that Mr Bennett, the then attorney-general, had to be approached because there needed to be regulations passed at the time because there was a problem with the search warrant legislation and regulations. I don't know if he was referring to that or not.

In regard to the primary part of your question, the best we could do in those circumstances is to have somebody who can oversee the matter, but it is still going to have to be conducted by Tasmania Police. Unless you are going to spend a lot of money employing very experienced investigators, and it would seem hard to keep up their skill sets if they're only investigating these matters every now and again, you're going to need to rely on Tasmania Police. As I said, even if Tasmania Police weren't brought in at the start and you went through the procedure currently under the Integrity Commission Act and there is a complaint made, they assess it and run their investigation, eventually it will go to Tasmania Police. I can't see any way around it.

Mr BARNETT - In terms of your comments about it being a hybrid with the powers being disproportionate at one end, essentially you are saying it should be resisted in terms of extending the powers, but rather cut back. That's your thesis, isn't it?

Mr COATES - Yes. I'm not saying the Integrity Commission would use this, but at the moment they have power to get a search warrant to enter a person's home for misconduct.

Misconduct is defined to include a breach of the code of conduct and if you look the code of conduct there are probably many public servants who at some stage would have breached it. The code of conduct includes things such as, 'Must use Tasmania's government resources in a proper manner. Must avoid any conflict of interest. Anyone who receives gifts must declare it under the regulations. Must behave in a way that upholds the State Service's principles.' They're very broad and can be very minor at times. For a breach of that a person can go before the Integrity Commission, be required to attend and answer questions. They can have their emails searched. They can be subject to a search warrant. All of this a head of agency cannot do under an investigation for a code of conduct breach. A state servant does not have to speak in respect to the investigation, they are given the option, so they have significant powers already.

Mr BARNETT - Your view is that any serious corruption should be referred to the Tasmania Police and dealt with by them, and the powers of the police and the DPP would flow from that.

Mr COATES - Yes, that's about it.

Mr BARNETT - Your other key point on page 3 talks about the duplication and reinvestigation matter. To confirm your advice there, are you saying that in nearly all cases or all cases they have to be reinvestigated if they come to police or the DPP?

Mr COATES - I'm saying if it comes to the police it's invariably going to have to be reinvestigated because the Integrity Commission is not bound by the rules of evidence, nor should they be. The rules of evidence are very technical so they're going to have to be reinvestigated by police and it would seem probable - I won't say with any certainty; I don't know far *Lee v the Queen* will go - that not only much of the material gathered by the Integrity Commission would be inadmissible in a criminal proceedings, it may even be improper to provide it to the prosecution.

Mr BARNETT - Why is that? Can you explain?

Mr COATES - Because *Lee v the Queen* found that a fundamental common law right -

Mr BARNETT - That is the High Court case this year?

Mr COATES - Yes - is the right of silence and the right of the accused not to assist the prosecution. In that case the prosecutor was provided with a transcript of what the accused had said at ICAC, or one of those bodies, and it was found that it was given to the prosecutor unlawfully. We don't have a single provision in this act, but the High Court went on further to say it is a common law right that the prosecution is not assisted by compulsion by the accused and that breaches the fundamental right to a fair trial.

Mr BARNETT - It is a good point. I might have missed this at the beginning but in terms of the forum shopping, I am wondering if you had some examples of that? You referred to it early on in your submission.

CHAIR - No, it has not been covered.

Mr BARNETT - The forum shopping issue - have you some examples of that? It is again the duplication of effort issue and you talked about lack of clarity and then forum shopping. I can understand where you're coming from, I'm just wondering if you have any sort of evidence to back that up.

Mr COATES - Well, I do know of matters that have gone to the Integrity Commission and then have to be reinvestigated by the head of agency.

Mr McKIM - Code of conduct?

Mr COATES - Yes, code of conduct matters. I do know of a couple of matters at least that have been investigated by the Integrity Commission and then have gone to the police but nothing further has occurred with them. You have all these people like the police, the Ombudsman, the Auditor-General, all with powers in this area and I just question the need to have another body investigating it. I can see that they might need somebody they can take their complaints to and that body refers them and ensures that the complaints are investigated, but to conduct another separate investigation when it is likely it has to go back to these bodies, in any event, seems unnecessary. As far as forum shopping is concerned, you're always going to get that. You get people who will complain to the police, they'll then go to the Ombudsman and then go to the DPP.

Mr McKIM - Then they'll come to a member of parliament.

Mr COATES - Yes.

Laughter.

Mr MULDER - On this issue, I think we have to recognise that although misconduct can be minor it can also be very serious, and I refer to what was found to be misconduct although your office tried to prosecute the case in the case of the State of Tasmania v Johnston, where the then Deputy Commissioner of Police was found operating under the Sir Max Bingham independence review and the view of the premier of the day that he had a requirement to answer any questions that the premier put to him. As a result of that it was found not to be a crime to release secrets but it was found to be a breach of the code of conduct.

Mr COATES - I don't think there was an actual finding. I think there was an independent person set up by the premier of the day to investigate that and then Mr Johnston subsequently resigned as police commissioner.

Mr MULDER - I don't have the file in front of me but I do recall the actual wording saying that the matter of the breach of the code of conduct had to be conciliated between the various parties and it was the unwillingness of one party's conciliator that resulted in the position becoming untenable.

Mr COATES - I didn't have anything to do with that, so -

Mr MULDER - I'm just trying to make the point that here you have a case where I think the release of operational information by the police commissioner was actually to do with the

code of conduct and considered to be inappropriate given the fact that there was a duty to remain in complete confidentiality.

Mr COATES - That is a very technical case. In the end it had nothing to do with the position between the commissioner and the Premier, there was no problem in respect of that. It was all over whether he had a duty under the Criminal Code not to disclose in official circuits and the judge found that there was no duty to do so under the Criminal Code.

Mr MULDER - I am aware of that but the end result was that it was referred back for conciliation of the code of conduct matter which was the inappropriate release of confidential information. In other words, it was taken from its criminal status back to the code of conduct matter. I am saying there are serious issues here and it was in that context that Sir Max Bingham and the rest claimed that Tasmania Police was a paramilitary organisation not a police bobby organisation. The problem was if you take the perception that it is possible for the Commissioner of Police to do it, which is why it is important to create that independent position that you occupy and perhaps we need some amendments to lock that in.

Mr McKIM - Daryl, you said the Integrity Commission is not bound by the rules of evidence and it should be. For the benefit of the committee could you go through what advantages, if any, you see in having a body that can investigate without being bound by the rules of evidence, and whether if we took all of the investigative powers from the commission and relied on Tasmania Police that wouldn't compromise whatever advantage that might have had.

Mr COATES - For misconduct under the State Service Act, the secretary of the department isn't bound by the rules of evidence either because you're not dealing with a criminal matter where it affects the liberty of the subject. I was chairman of the Legal Profession Tribunal and that is not bound by the rules of evidence either because the important objective for that body is not the rights of the individual, it's the protection of the public, but where you have a body with powers to investigate what can be criminal matters it becomes very problematic.

Mr McKIM - Just so I understand, your views when they are lower code of conduct-type allegations is that it's not an issue that the authority is not bound by the laws of evidence and where the allegation relates to a [inaudible]. Then it becomes an issue. Is that a fair assessment?

Mr COATES - Yes, that's fair.

CHAIR - If the Integrity Commission continues, what changes do you believe would improve the current position with regard to what it does in this state?

Mr COATES - As I said in my submission, I think the best decision would be for the Integrity Commission not to conduct investigations but to forward complaints and then monitor how those complaints have been investigated. If they don't believe they've been investigated properly they can make reports in respect to that.

Mr McKIM - Would the commission not need some powers to adequately monitor investigations?

Mr COATES - Look, I haven't thought about more powers but I would have thought they'd be very limited.

Mr McKIM - If you were able to establish a body like the Integrity Commission that had the capacity to supervise a police investigations into criminal allegations, wouldn't you have to provide that body with the power to obtain information from Tasmania Police, for example?

Mr COATES - You're putting words in my mouth. I didn't say supervise.

Mr McKIM - I'm sorry, I apologise.

Mr COATES - If they get a complaint of criminal conduct they can refer it to Tasmania Police and then they can ask Tasmania Police what they did about that complaint and why they did it in that way. If they are unhappy with that -

Mr McKIM - They can report it to the Parliament.

Mr COATES - Yes.

CHAIR - There has been evidence provided to this committee of a number of personnel within the Integrity Commission who sit there and wait for something to do. If the model was developed as you are saying there that would obviously impact on that and satisfy those concerns so it would not require the number of people currently working in that organisation. You would see that as a benefit in that regard, and cost, very clearly.

Mr COATES - Yes, but that's not really a concern of mine.

CHAIR - No, but you did raise in your first part the expense.

Mr COATES - I think it is an expensive model, yes.

Ms GIDDINGS - I am interested that you raised the Legal Profession Board as being a mechanism used by the legal profession when issues of misconduct have occurred, and that is a proper independent authority. I presume if the lawyer has committed a criminal act, they also go straight to the police and it is not just through the legal profession process.

Mr COATES - I don't have the act in front of me but I think there is a requirement to either report it to the police or the DPP. If the Legal Profession Board believes criminal conduct has occurred they will report it to the police for investigation, and I know where that has occurred.

Ms GIDDINGS - If you were to rethink the model - and that is part of what we can do through these sorts of discussions - rather than go from no Integrity Commission with investigative power back to the old system of heads of agency only really having that power - and I think there will be a community backlash to that; whether it is perception or reality is arguable - do you see a separate body like a Legal Profession Board model as perhaps being an appropriate way of saying that this is the mechanism for public servants to be

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held accountable for misconduct? It is too minor to go to the police or the DPP but arguably should not be allowed to just have a blind eye turned to it.

CHAIR - Or remain in the department.

Ms GIDDINGS - Or remain within the department. I am talking about an independent body that is able to look at it but not quite as powerful as an ICAC or our own Integrity Commission.

Mr COATES - The problem with that is it becomes a body of its own that could be dealing with quite minor allegations. For example there is the Legal Profession Board and the Legal Profession Tribunal. The board only deals with things which I suppose would be similar to the secretary of the department, they investigate them and impose a penalty. It is only if there is something really serious that it goes to the tribunal. One possibility would be to have the secretary of the department deal with most issues but if it is at a certain level it could go to a tribunal.

Ms GIDDINGS - Or indeed the Industrial Relations Commission; it would be the Tribunal Court I suppose.

Mr MULDER - Some of us are old enough to remember the days when we did not have things like codes of conduct, we actually had regulations which, like any other law, would require an investigation, evidence to be built of an infraction, and if the person wanted to dispute the findings or the evidence it would then go before a magistrate who would hold a hearing. There were even special rules of evidence, given the fact that these were minor matters and they didn't want a Supreme Court-style trial over very minor matters. Those regulations would have catch-alls like 'conduct unbecoming', and it was entirely subjective as to what was unbecoming or reflect discredit on the service. I am trying to separate the investigative from the determinative side of things. What we have turned up in this inquiry is this concept of judge, jury, and executioner all in-house. That is one of the things that -

Mr McKIM - They don't have any capacity to sentence anyone.

Mr MULDER - No, but if you make a finding of guilt and you out them in public, you've basically jeopardised any prospect of a fair trial, so you are executing them.

Mr COATES - The police don't have a bad system. The commissioner imposes the punishment and if the police officers are unhappy about that, they go to the -

Mr MULDER - Police Review Board, and guess who sits who sits on that? Three people appointed by the commissioner.

Mr COATES - Well, that may be the case, and I'm not saying they should be appointed by the police commissioner but most of the time people are going to accept that they did the wrong thing, get a rap over the knuckles and that's it. You only need a mechanism in place for the rare cases where someone's employment is terminated or whatever where they're not going to be happy with the secretary's decision.

Evidence taken in camera.