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Official Committee Hansard

JOINT COMMITTEE ON THE AUSTRALIAN COMMISSION FOR
LAW ENFORCEMENT INTEGRITY

Reference: Operation of the Law Enforcement Integrity Commissioner Act 2006

FRIDAY, 16 OCTOBER 2009

BRISBANE QLD

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JOINT STATUTORY COMMITTEE
ON THE AUSTRALIAN COMMISSION FOR LAW ENFORCEMENT INTEGRITY

Friday, 16 October 2009

Members: Ms Parke (*Chair*), Senator Johnston (*Deputy Chair*), Senators Carol Brown, Cameron, Fielding and Parry and Mr Chester, Mr Debus, Mr Hayes and Ms Ley

Members in attendance: Senators Cameron and Parry and Mr Debus, Ms Ley and Ms Parke

Terms of reference for the inquiry:

To inquire into and report on:

The operation of the *Law Enforcement Integrity Commissioner Act 2006* (LEIC) and its regulations. In particular:

- a. Provisions for the extension of ACLEI's jurisdiction including but not limited to:
 - i. The merits or limits of extending ACLEI's jurisdiction to other Commonwealth departments and agencies with a law enforcement function and/or coercive powers;
 - ii. an examination of the definition of 'law enforcement function' within the Act (section 5), including identification of the agencies to whom this definition applies;
 - iii. the administrative and operational practicalities of restricting the Integrity Commissioner's jurisdiction to matters pertaining to an agency's law enforcement function;
 - iv. the merits or limits of extending jurisdiction to other agencies by means of regulation or legislation; and
 - v. the expansion of the Integrity Commissioner's anti-corruption education and prevention role to all Commonwealth departments and agencies.
- b. administrative, policy, legislative and case law developments that may affect ACLEI's practices and/or legislation;
- c. the adequacy of ACLEI's reporting requirements with respect to performance and to investigation outcomes as set out in the Act and associated regulations;
- d. the strengths and the limits of the LEIC Act and regulations, and of other arrangements arising from the *Law Enforcement Commissioner (Consequential Amendments) Act 2006*;
- e. the resources required to perform the functions set out in the LEIC Act and, in particular, the resourcing implications of any extension of ACLEI's jurisdiction.

WITNESSES

BENNETT, Mr Peter, National President, Whistleblowers Australia 19
BROWN, Professor Alexander Jonathan, Professor of Public Law, Griffith University 2

Committee met at 11.06 am

CHAIR (Ms Parke)—Good morning. I call the committee to order and declare open this public hearing of the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity inquiry into the operation of the Law Enforcement Integrity Commissioner Act 2006. I remind all witnesses that, in giving evidence to the committee, they are protected by parliamentary privilege. It is unlawful for anyone to threaten or disadvantage a witness on account of evidence given to a committee and such action may be treated by the Senate as a contempt. It is also a contempt to give false or misleading evidence to a committee.

The committee prefers all evidence to be given in public but, under the Senate's resolutions, witnesses have the right to request to be heard in private session. It is important that witnesses give the committee notice if they intend to ask to give evidence in camera. If a witness objects to answering a question, they should state the ground upon which the objection is taken and the committee will determine whether it will insist on an answer having regard to the ground which is claimed. If the committee determines to insist on an answer, a witness may request that the answer be given in camera. Such a request may, of course, also be made at any other time. I would ask that people in the hearing room ensure that their mobile phones are either turned off or switched to silent. I would also ask witnesses to remain behind for a few minutes at the conclusion of their evidence in case the Hansard staff need to clarify any terms or references.

[11.07 am]

BROWN, Professor Alexander Jonathan, Professor of Public Law, Griffith University

CHAIR—Welcome. The committee has accepted your submission as submission no. 15. Are there any changes that you would like to make to it before we proceed?

Prof. Brown—No.

CHAIR—I now invite you to make a short opening statement, at the conclusion of which I will invite members of the committee to ask questions.

Prof. Brown—I thank the committee for the opportunity to be here. My introductory comments will be relatively brief since you have the advantage of the submission and also various other results from research that we have been involved in at Griffith University with other universities nationally on integrity systems and this particular question of both the Australian Commission for Law Enforcement Integrity and its future and also the context in which it fits.

I have two main things to lay out. One is to emphasise what is in the submission about the opportunity that your inquiry represents. In my view, and I know in the view of many others, this is an opportunity not just to sort out technical deficiencies with a piece of legislation and the jurisdiction of one lone Commonwealth agency that was created three years ago and has since been on the diverse institutional map of the Commonwealth; this is an agency that raises integral questions to the roles and jurisdictions of a whole range of agencies and measures that go to the very heart of public integrity in the Commonwealth. I am sure the committee appreciates that fact.

My first real observation would be to emphasise that you are dealing with some of the core parts of what is, by default if nothing else, a whole integrity system at the Commonwealth level, and that the way in which you come up with your recommendations should be informed by some set of principles as to the design of that integrity system, irrespective of what you come up with. What I would encourage you to do is to make sure that in your report you are as explicit as you can be about the vision that you see on behalf of the parliament for what this integrity system is and where it should be going as a framework within which you are making your decisions about the Australian Commission for Law Enforcement Integrity. If nothing else, that is going to assist both the public and the parliament—this government and future governments—in trying to navigate what is a continuing range of decisions into the future about the development of that whole integrity system. I cannot emphasise enough the importance of taking that sort of systemic approach and to make explicit whatever those principles might be.

My submissions lay out a number of institutional design principles that are relevant. They are not necessarily the quintessential set of institutional design principles, but whatever the design principles are, the first principles that you are working from, I would implore you to lay them out and make them explicit for the benefit of everybody trying to navigate this very complex field. I would be confident that if you do that then we will be at a point where whatever decision

you make will be much more likely to be coherent, rational and contribute to the sensible development of the Commonwealth public integrity system, rather than be yet another ad hoc decision about how that system might develop.

The second thing I thought I would do was sketch out, if I was asked, what I would regard as being the current answer—what I would do if I were you. I do so for a few reasons. One is that some of the submission, attachments to the submission and some of my earlier submission to the original Senate legislation committee dealing with the original ACLEI Bill have advanced various proposals at various times and they are not necessarily consistent, because as the situation has changed the institutional options have changed. I think they have changed again just even over the last several months in terms of the outlook for different parts of the integrity system. I guess my contribution today would be based on the fact that this is an example of what I would view as being a rational decision to take today if you were going to take one. I am not suggesting that it is the only decision that you could take.

I would do four things. The first is that I would extend ACLEI's jurisdiction. I would extend it so that within the jurisdiction of ACLEI came every agency that is currently a member of the Heads of Commonwealth Law Enforcement Agencies Committee. I am happy to explain why I would do that. I would put all of those agencies on tier 1 of ACLEI's suggested tier 1 out of its three-tiered model in the ACLEI submission. I would abolish the distinction between law enforcement functions and non-law enforcement functions in any of the operations of ACLEI. I notice that ACLEI itself is now calling for that amendment and I would simply note, for the benefit of history, that this was a suggestion that many of us made when the bill was still a bill and that it should have been done then.

I would keep the power to extend the jurisdiction further by regulation if that is what you want to do. My own submission has been that in fact that is undesirable, but I do not think at the end of the day that it is a crucial issue because it is really only a variation and, in some respects, I would concede a more transparent variation on the power of an executive government to commission an ad hoc inquiry anyway. I do not see it as being a crucial issue provided, of course, that the foundational jurisdiction of

ACLEI is extended to reflect its current core mission as being a law enforcement integrity agency body by including all of the relevant agencies that it should have within its jurisdiction. That is the first thing that I would do and I am happy to explain why I would do that.

The second thing I would do is still create a new general anti-corruption agency alongside ACLEI and alongside the Commonwealth Ombudsman's Office, or I would make it a division of the Commonwealth Ombudsman's Office. I would still give it jurisdiction over all Commonwealth agencies. I would not try to redraw the boundaries so that it was confined to non-law enforcement, because ACLEI was there to deal with law enforcement and that is just creating a gap within which things are going to be invited to fall. I would still give it a general jurisdiction and, therefore, use it as a catch-all backup in some ways in the way in which the Ombudsman currently could provide if it was properly resourced and had a proper mandate, which it does not. I would give that general anti-corruption agency or that general anti-corruption division of the Ombudsman's Office all the prevention/corruption resistance building functions for the Commonwealth right across-the-board and make it responsible for the educational and risk assessment activities that are conducive not just to fighting corruption as a

negative but to building integrity and maintaining integrity as a positive right across the Commonwealth's public sector. That is the second thing I would do.

The third thing I would do is set up a statutory coordination mechanism for ensuring that what has now become an expansion in the number of integrity agencies is properly coordinated. I am recognising that what we are talking about is now a permanent increase on this model and a permanent increase in the number of agencies that are occupying this field, and there is a need to ensure that they coordinate, cooperate and conduct their activities in an efficient manner. That statutory coordination mechanism would be something that would need to ensure the coordination of investigative activity, intelligence, risk assessment activity, corruption resistance building and prevention activity. That is the third thing that I would do.

The fourth thing that I would do is try to articulate a vision for where the Australian Public Service Commission is meant to fit into all of this. I would try to increase its relevance by extending its jurisdiction in a lot of its core areas of responsibility to all Commonwealth agencies and not continuing the type of bifurcation that exists between Australian Public Service agencies and everybody else. I would do that for a range of reasons that we could discuss. That is critical to giving it relevance right across the Commonwealth public sector in a way which has been uncertain for some time, eroding in some areas and potentially growing in others. It is one of the biggest problems in the Commonwealth public sector integrity system.

The roles for the APSC in all of this are potentially many and also potentially few. It is a real issue. One of the most important things is that the APSC would need to be included in the integrity system that is part of that coordination mechanism. In some respects some of those complexities are such that the best thing that you could do is make sure that all of those agencies coordinate and collaborate, and then get them to sort it out between themselves, including the APSC, as to who should do what in an efficient fashion, but that the APSC should not be left out of the equation. Those are the four things that I would do if the decision were mine today. It is probably best to hand back for questions from the committee at this point. Thank you.

CHAIR—Thank you. That was extremely interesting. I would like to clarify something. When you were talking about perhaps a new general anti-corruption agency being a division within the Commonwealth Ombudsman's Office, I take it from that you would not see ACLEI being part of that Ombudsman's Office as well? ACLEI would be a separate law enforcement corruption focus?

Prof. Brown—That is what I would do if I were making the decision today. I say that noting that in the book chapter published last year and which was part of our submission that looks at all of this at some length what I suggested was that there were really only two futures for ACLEI. One was either to expand it into a general anti-corruption commission itself or to effectively roll it back into another agency, which would be the generalist body. That was at a point where it was very clear that ACLEI had almost no resources and that it really was in effect a paper creature. Since the time that was originally written there has been quite significant expansion in the resources given to ACLEI. It has the potential to reach critical mass in its field. If its jurisdiction were extended to many of those other key law enforcement agencies—for want of a better term—especially Customs as the first priority, you could reasonably see that you have an agency that will have critical mass, will have work and could sustain itself as an organisation.

I have a certain amount of sympathy for the sorts of principles put forward by ACLEI in its submission that there are valid reasons why the Commonwealth should be giving priority to the sharp end of corruption risks that are articulated in that submission, especially those that are really central to Commonwealth responsibility, in terms of corruption risks that relate to border protection, international crime—a whole range of really big ticket things where you would never want the strength of focus and attention diluted, because if they are not looked after by a Commonwealth agency in a very sophisticated and increasingly sophisticated way into the future, then who else is going to look after them? I do not think those submissions should be taken lightly at all.

It really means that if you were to expand ACLEI's jurisdiction to anti-corruption generally you would want to take special measures to make sure that the ability to focus on the sharp end was not lost and was not diluted. You are in a situation now where ACLEI could turn into a body that has critical mass and could stand alone, provided it remains coordinated with other agencies. I do not think that you want to set the cause back by upsetting what has already been achieved in the establishment of ACLEI, the resources they have gathered together and the agenda they have managed to set. Obviously there is a lot more that could be done and should be done, but at least there is no evidence that anything that has been done so far is bad in terms of ACLEI's operation. It has only just got its feet under the table. I would be looking for a strategy that meant that you did not go backwards when trying to go forwards.

CHAIR—Do you have any comments about the Attorney-General Department's suggestion that perhaps the Commonwealth Ombudsman could be expanded to include ACLEI?

Prof. Brown—Yes. There is a certain logic to that. It is not very consistent in terms of the departmental position over time, so from that point of view it is a bit hard to fathom how deep its logic goes. I can see a logic in that because I have always advocated the fact that one should not start from a principle of creating a new agency every time a new job needs to be done. In integrity systems nationally there has been a bit of a chronic disease of that. New South Wales is the example. No offence to former Attorneys-General of New South Wales who may or may not happen to be present. There is a lot that the Commonwealth Ombudsman could do in the anti-corruption field, including more investigations. I say that from the point of view of having been a senior investigator in major projects in the Ombudsman's Office in the 1990s where we did serious investigations into corruption related issues.

If you are talking about the scale, sensitivity and complexity of some of the issues that you want ACLEI to handle, then with that go the types of investigation functions and resources that traditionally have not been the Ombudsman's job to hold or to manage, including powers like telephone intercepts. I think it is a desirable arrangement to have the Ombudsman monitoring the use of things like telephone intercept powers and controlled operations on the part of other agencies. As long as you have those you have an extra institutional design problem of how you maintain that independent role, if in fact you are giving all of those powers to the one body. There are probably solutions to that problem, but it may also be a problem best managed by having independent agencies do these different things, which is how it seems to work pretty well at the moment.

There are a number of implications for the idea of rolling ACLEI back into the Ombudsman's Office and I think there are a lot of dangers in that. Unless it is done as part of a very

sophisticated strategy with quite a lot of legislative reform, and again unless it is done with a view to the design of the whole system, it is potentially a recipe for yet again giving the Ombudsman a specialist function and then in a few years time when the budget gets tight it starts to get absorbed and consumed by other complaint handling functions, which are always the great chewer uppperer of resources in any Ombudsman's Office. There are all sorts of complexities. I would respond to that suggestion—having come late and somewhat inconsistently in the piece—from the Attorney-General's Department with a bit of scepticism.

CHAIR—I have a general question. Some contributors to this inquiry, including the Australian Public Service Commission, have suggested that there are no gaps in the Commonwealth integrity system and that corruption matters in Commonwealth agencies can be adequately handled by the Public Service Commission, the AFP and the Ombudsman. Could you give us your response to that?

Prof. Brown—It would be lovely if that was the case. Unfortunately, it is simply not true. In principle, it may well be the case, but in reality it is not the case. You do not need to look very far for examples that confirm why it is not the case. The quintessential confirmation of that fact for me was in the original hearings on this act when it was a bill, when the Commonwealth Attorney-General's Department was making exactly that argument to the Senate legislation committee and the AFP Commissioner, Mick Keelty, disagreed and said, 'No, there are gaps in the system.' You have a system that is constructed—as it still is to this day—on the principle that serious corruption issues across the public sector generally will somehow be handled magically by the AFP and, therefore, by having a body like ACLEI supervising the AFP the whole system is covered. The principles that the Senate legislation committee recognised in 2006 are the same today, and that is simply not true. The AFP's job is to do criminal investigations. That is its core business. The bulk of the volume of the corruption risk assessment, intelligence analysis/prevention business is to do with non-criminal matters, abuses of office and potential risks of various kinds of misconduct that are the thin edge of the wedge, the beginning of the slippery slope or whatever you want to call it, or that are just simply not in the public interest full stop in their right. To regard the AFP as having any kind of serious interest in most of that territory is delusional.

The fact is that those issues are not dealt with by any other Commonwealth agency. Commonwealth agencies are left to deal with those issues by themselves. That is the reality. That is not undesirable in some respects, but it does not make for a comprehensive integrity system with no gaps. There are clearly gaps.

CHAIR—Thank you. Senator Parry.

Senator PARRY—I am trying to reconcile the four items that you listed. I like them all, but they do not marry up. You want to extend the jurisdiction of ACLEI, but then you want to take away ACLEI and put it into the Ombudsman's Office, for example, and then have extended jurisdiction of the Public Service Commission and then set up a separate statutory coordination unit, after making the statement that we should not be creating more agencies. I find it difficult to reconcile all the bits and pieces. Can I start with ACLEI.

Prof. Brown—With all due respect, it may be better to start by clarifying your confusion, because what you described is not what I said. Would you like me to do that?

Senator PARRY—Yes. You do not want to roll ACLEI into the Ombudsman’s Office?

Prof. Brown—No. That is not what I said.

CHAIR—No, it was the A-G’s office.

Senator PARRY—You want to roll it into something else; you do not want to keep it on its own?

Prof. Brown—No, that is not what I said.

Senator PARRY—Please explain.

Prof. Brown—My apologies to the committee if it was not sufficiently clear, but I am happy to run through it again quickly. I would keep ACLEI at least for the foreseeable future.

Senator PARRY—Let me get it clear. You said you wanted to expand it to every Commonwealth law enforcement agency?

Prof. Brown—Yes.

Senator PARRY—What were the words?

Prof. Brown—It was to the agencies that are members of the Heads of Commonwealth Law Enforcement Agencies Committee.

Senator PARRY—That is correct. You want to expand it and then you want to roll it in?

Prof. Brown—No. I want to leave it there.

Senator PARRY—Leave it as it is?

Prof. Brown—As it is.

Senator PARRY—What was the suggestion of rolling it into the A-G’s office? You did make that suggestion, I am sure.

Prof. Brown—No.

CHAIR—Let me just clarify. I asked Professor Brown about the Attorney-General’s Department’s suggestion of rolling ACLEI into the Commonwealth Ombudsman’s Office, but as far as I could remember Professor Brown never suggested that.

Senator PARRY—So, leave it on its own?

CHAIR—Yes.

Senator PARRY—We do not need any further explanation. That is very good. You still want to set up a statutory coordination unit to coordinate all the agencies, I presume from an investigative prospective, so you do not have duplication of investigations? Is that the main reason?

Prof. Brown—That would be one of the coordinating—

Senator PARRY—What are the other reasons for coordination?

Prof. Brown—As to the three areas in which coordination currently occurs to some extent—de facto but not always; and sometimes it does not occur at all—would be, firstly, investigations; secondly, intelligence and risk assessment; and, thirdly, effectively what you might call prevention, education, corruption resistance building activities.

Senator PARRY—Why expand the Australian Public Service Commission? Why not just let that come under the jurisdiction of ACLEI?

Prof. Brown—There may be some confusion here. I am not really sure that the Australian Public Service Commission is under the jurisdiction of ACLEI. It is a bit of a separate question.

Senator PARRY—It is not, but if you expanded it you would not include the APS?

Prof. Brown—No. What I am suggesting is that amongst the various integrity agencies that the Commonwealth is currently dealing with—let us say ACLEI, the Ombudsman's Office and you might include others—whatever the coordination mechanism is, whatever you regard as being the core agencies to that integrity system, the Australian Public Service Commission should be regarded as one of those. I know that the APSC has made submissions to the committee. The APSC currently has its own ethics advisory service, established by the current government, which has to be a positive initiative. It has interests in public integrity and standards setting, which are very important.

The single biggest problem that everybody constantly comes up against when trying to figure out how to keep the APSC relevant and to make it more relevant, to let it do its job properly in terms of employment standards, operating conditions, integrity standards and the professionalism of the Commonwealth public sector, is the fact that it only covers half the Commonwealth public sector. It only has jurisdiction over Australian Public Service agencies, which is the single biggest constraint on its ability to actually provide the service that it should to the Commonwealth public sector and the taxpayer.

Senator PARRY—You do not see a need for that to be rolled into the umbrella jurisdiction of ACLEI?

Prof. Brown—No.

Senator PARRY—Obviously you would be familiar with the Queensland model of the CMC. Do you think that is a good model?

Prof. Brown—I think that is a very good model. It has certainly been the right model for Queensland. If you were to wind back the clock prior to the establishment of ACLEI, my recommendation at that point would be not to set up ACLEI as a standalone law enforcement integrity commission but to set up a body that is not necessarily identical to the CMC but which would be a body of general jurisdiction. That would be the simple thing to do. If the committee wanted to revert to that position and try to find a way to make the decisions now that should have been made then, that would be both understandable and extremely admirable. It is also very complex, because you are not in that position.

Senator PARRY—Could you see ACLEI morphing into a CMC?

Prof. Brown—I could indeed. The reason for suggesting something like the statutory coordination mechanism is that I could see the four-point plan, if you like, that I have suggested there as being a sensible way to keep moving forward without losing the benefit of decisions that have already been made, and that would put the Commonwealth on a track to making that sort of decision if it wants to next time around. One of the best ways to make all of this work would be to create a framework by which these agencies have to work together and can sort it out for themselves. Let theory be led by practice to some extent, and that may well end up being a situation where you could realistically say ACLEI becomes a law enforcement division of another Commonwealth agency.

The committee could recommend quite justifiably—I would be the last person to criticise this—that that is what should happen right now, but you would need to be able to articulate a very clear plan for how that should happen and can be made to happen without taking any steps backwards along the way, which is a bit of a challenge.

Senator PARRY—Thank you. I have lots more questions. Finally, would the statutory coordination unit be like the heads of each agency coming together similar to the crime review panel that is attached to the CMC? Would that be a similar thing?

Prof. Brown—It would be a similar thing. To achieve what I am suggesting and to be more than just a meeting of a committee it would need some dedicated resources of its own sited within one of the agencies to actually make sure that there was some operational coordination.

Senator PARRY—Would you see ACLEI as being the prime agency to coordinate that role?

Prof. Brown—Absolutely.

Senator PARRY—Thank you.

CHAIR—Mr Debus.

Mr DEBUS—I found that discussion immensely useful and observe that it is very frequently the case in the public sector that there are alternative ways of structuring agencies to achieve a particular goal. I accept the analysis you have made for, as it were, making it work, on the one hand, or making it perfect on the other. Given the background that I have coincidentally had, I am still unable to easily understand how there can be such a widespread belief in the Commonwealth Public Service that there is no problem with potential for corruption. On the

basis of your own experience, could you explain for the purposes of the committee's deliberations how you think that feeling can remain so perplexingly strong within the Public Service of Australia?

Prof. Brown—I will have to keep this short, but we could talk about that for a very long time.

Mr DEBUS—You are welcome to.

Prof. Brown—The first thing to notice is that the Commonwealth is not unique in having this somewhat privileged view of itself. In the chapter that is part of my submission I compare the Commonwealth with Victoria in terms of some of its decisions. Victoria has taken a similar view of its own public sector in many respects. I think any government can potentially do that. At a Commonwealth level there are a number of reasons. I think traditionally historically the professional standards in the Commonwealth have been incredibly high. They were high from the outset and have remained generally very high until the last couple of decades, when life has got a lot more complex. It comes from a background of being entitled to justifiably claim that there was a level of professionalism and integrity in the Commonwealth public sector which was genuine, but I also think more recently it has been defended on the basis of a policy logic that the Commonwealth does not have the same sort of corruption risks or interface with the public or with criminals, for example, as do state police forces, or the Commonwealth dishes out money and there is less corruption risk. You do not have to be a rocket scientist to consider that statement for very long before you realise that the level of government dishing out the most money probably has the highest corruption risk. That has been part of the logic, that corruption comes with opportunity for discretion on the street, if you like, which has not been the Commonwealth's role. In fact, that is just not true, but that has been the logic.

I think there has been a number of things contributing to that sense. Having been born and grown up in Canberra, I also think there is some Canberra isolationism involved in some of those perceptions as well.

Mr DEBUS—As a supplementary question, do you agree with ACLEI's own proposition that the department of Customs is the most exposed at present?

Prof. Brown—That would be my assumption, both from the outside and my own experience from the inside when that experience was relevant, which is now quite some time ago, but I doubt that things have changed.

At the same time, I think it is very important for the committee to not just carry on in a piecemeal fashion. Customs could have been included the first time around, but we would now be talking about what would be the next agency—in Commission Keelty's terms—to which the risks have been displaced. Displaced was the term that he used. Even if you are only looking at the core business of ensuring integrity in law enforcement functions, the number of agencies that really have core responsibilities, and more importantly, access to the core information and the type of information that runs central to a lot of those activities, it does not stop at Customs. You can immediately look at all of those agencies that are part of the Heads of Commonwealth Law Enforcement Agencies group, and any of those agencies are agencies that automatically should be able to come within the ambit of an ACLEI jurisdiction without anybody having to even think about it, even though the need for ACLEI to go and investigate AUSTRAC or CrimTrac or the

DPP is probably limited. You would not want to find yourself suddenly halfway through an investigation into a serious matter finding that you could not get any information out of the Commonwealth DPP. It strikes me, if there is a logical boundary to be drawn just simply around law enforcement agencies, then it is that group. That would be my starting point.

CHAIR—As a follow-up to that, I note that group includes the Attorney-General's Department. Do you think that department has also some opportunities and reasons why they should be subject to ACLEI?

Prof. Brown—There is one issue of whether there are actually corruption risks per se in there. I would be surprised if there were not some people within the Attorney-General's Department that do not have functions that mean that they are privy to the sort of information that makes them part of the operational side of law enforcement in crucial national security matters. Members of your committee would have the experience to assess whether that is the case or not. With access to information about sensitive matters goes an involvement in those matters operationally.

The other side of the coin is that you do not want to have arguments about whether or not people need to provide the information to ACLEI. If ACLEI is doing an investigation where there is information that the Attorney-General's Department holds, one would presume that there would never be resistance to providing that information, but the whole purpose of having an independent agency with the sorts of powers that it does is to make sure that there is no doubt about it.

CHAIR—Senator Cameron.

Senator CAMERON—You have put forward what you see would be the preferred position if you were running the show.

Prof. Brown—Today.

Senator CAMERON—Yes, and that is very good, but we have had submissions from ACLEI itself in relation to this building block approach, which I must say I have been a bit concerned about. The commissioner himself says, 'The building block approach is the best I've got.' What is your view if no decision was made and this building block approach to funding and resourcing continued? Would this be an effective body?

Prof. Brown—I think it has the potential to be a very effective body, but there will always be limits on its effectiveness. Even if you give it more agencies and more powers, there will always be limits on its effectiveness if you do not make those decisions in the context of the broader integrity system and who has got responsibility for what. That is for a number of reasons, including the fact that corruption risks are displaced to other places so that law enforcement may be looked after fine, but the Commonwealth has just helped map out a strategy for being seen to be pretending that is the only area where integrity risks arise and that the rest of the Commonwealth public sector simply does not need any kind of integrity oversight. That is a long-term issue. It may blow up within the life of this government or the next government or it may not blow up for quite some time, but those are the sorts of issues that still arise.

I think it has the potential to be a very effective body. Even though I criticised the decision originally for being an ad hoc decision, and subsequently for being a window-dressing decision in effect, the fact is that there is policy logic to focusing on law enforcement integrity, especially if you take a broad view of it as being effectively regulatory integrity. Criminal law enforcement does a lot of other regulatory law enforcement, but those are the prime areas of corruptions risks. You cannot afford to have corruption risks taking hold in any kind of systemic fashion or you know that you have got a collapsing public sector.

Having that focus is still legitimate, but it is a matter of recognising that is still not the only focus as part of the system. I do not know if that answers your question.

Senator CAMERON—I may have a look at the transcript. I must say that my concern has been that the building block approach is an ad hoc approach. It does not provide certainty to the operation of ACLEI. ACELI has itself indicated that if we had to give them wider responsibilities then basically they would have to start all over again. Is that your assessment?

Prof. Brown—It depends on what you mean by ‘wider responsibilities’.

Senator CAMERON—Extending the jurisdiction to the Heads of Commonwealth Law Enforcement Agencies.

Prof. Brown—I do not think that is accurate. I think what ACLEI is trying to do is make a life that is as meaningful, sensible and preferably as comfortable for itself in its future development as it can. I say ‘comfortable’ with all due respect. Public servants should be trying to make sure that their environment is actually sustainable and that they are not snowed with more work than they can handle. If you were going to take a building block approach, then the building block should be all of those agencies. ACLEI and those agencies will automatically recognise that there are big fish in that group and there are collateral fish in that group. The collateral fish will not require a lot of investment, time or attention up front. They are passengers on the ship. There are a few big fish in there. Doing the job properly in relation to the Department of Immigration is a serious operation that is obviously bigger than just taking on Customs.

I think there would be a case for some further serious injections of resources that went with that sort of building block. I would absolutely agree with you that any smaller building block than that is just ad hocery continued. That is the building block that I would regard as being the rational building block—all of those agencies. I fully agree with your logic in that as long as you have got the Attorney-General’s Department suddenly making suggestions out of the blue that you could just roll ACLEI straight back into the Ombudsman’s Office and everything would be fine, that suggests that another government could do something. It would be possible to do that in a way which is logical and beneficial. Equally, it would be possible to do that in a way which was a retrograde step of grand proportions, and governments are occasionally capable of taking such steps.

I would agree with you. If the committee’s commitment is to logical long-term thinking then you should be questioning the building block approach. If I was in your shoes I would err on the side of the long-term strategic vision, if you can find a way forward from the current situation to that long-term strategic position.

Senator CAMERON—Any of these bodies around the country would have difficulty if they cannot act proactively. If you are not resourced to act proactively—and I do not think ACLEI is resourced to act proactively—that is a fundamental flaw in the operation, is it not?

Prof. Brown—Absolutely. I would agree with you. I think ACLEI is only just on the verge of being resourced now to be able to act proactively in any sense and it is probably fairly questionable. It is a bit hard to say without knowing exactly what they are doing operationally. It is all about information, intelligence and having the data on which to make assessments of where different corruption or misconduct risks lie. That is all a sophisticated and quite intensive operation. I am sure that they are trying to get themselves in a position where they think that they are able to do that and doing their best, but it is certainly resource intensive.

Senator CAMERON—Your second recommendation is that you would create a general anti-corruption agency across all agencies. Is that purely in the Commonwealth or would there be some benefits in having this national overview, given that crime operates nationally and internationally?

Prof. Brown—Almost by definition thanks to our federal system, we are talking about a Commonwealth agency. The fact is that operationally the links have previously existed between Commonwealth and state integrity agencies and there are ways to strengthen those. It is fascinating looking back at the history of the Fitzgerald inquiry and the fact that it was Australian Federal Police officers who were providing quite a bit of the crucial information that actually helped kick off revelations as to state-level corruption. The same is true with the New South Wales police royal commission, the Harrison inquiry and the overlaps between different parts of the system.

Until such time as the Commonwealth decides to change its criminal law to use things like the postal power or the communications power as a vehicle for investigating any kind of crime that involves Commonwealth postage or the use of telephones and issues like that. I am really comparing us to the United States where in the United States the FBI and federal agencies have an enormous on-ground anti-corruption role at a state level because of the way in which the federal criminal law in the United States works. We just do not do it that way. Potentially we could, but we just do not. As long as that is the case then I think you are still thinking about a Commonwealth public integrity system that has natural links with the state integrity systems.

Senator CAMERON—The Queensland Crime and Misconduct Commission has what it describes as a low threshold to commence investigations. Even if it is a rumour then they will commence an investigation. Do you have a view about that type of approach and whether the body that you are proposing should go for the low threshold investigation? If you do support that, what are the implications for the protection of an individual and the civil rights of an individual with such a body?

Prof. Brown—I do support that kind of approach. One of the reasons for suggesting that it would be logical to give that back-up or catch-all anti-corruption jurisdiction to a division of the Ombudsman's Office is that at the coalface on the ground corruption risk, low level misconduct, maladministration, minor abuses of office, poor personnel practices—a whole range of different types of badness, if you like—can be indistinguishable. Where systems like the Queensland integrity system works quite well is by operationally having a commitment to acting on whatever

type of misconduct, maladministration or whatever is going wrong. Assessing it, figuring out what it is and checking that it is not something else, and then dealing with it accordingly. In effect, it is the only way to efficiently run an integrity system.

What it means is that you trigger inquiries and investigations that are commensurate with the nature of what is suspected with an eye on the potential for what might lie behind what is suspected. It really means that individual's rights are protected by the fact that these inquiries and investigations are made in private and in confidence until such time as there is a need to elevate them into any kind of higher level.

Senator CAMERON—Would you have an officer of this body making some value judgements about how to proceed? That has implications, even if it is not a proven fact, against an individual. I am very worried about this low threshold approach. It might be great for getting more investigations going, justifying the establishment and turning over a few rocks, which does not happen in other places, but once you start turning the rocks over you have to be able to have some better check and balance, as I think you have outlined, of an individual's civil rights in the process.

Prof. Brown—There are plenty of checks and balances in the system and you would not want to remove any of those. If your concern is particularly triggered by the fact that ACLEI is one of those agencies which has very strong coercive powers, for example, then I would agree with you. I think those coercive powers should only come into play once a certain threshold has been established. It is for the same principle that law enforcement agencies are not meant to be able to conduct telephone intercepts unless there an indictable offence is reasonably suspected.

I share with you the need to be very careful about integrity agencies getting more and more of these sorts of powers and then using them unless those sorts of thresholds are met. I could not agree with you more. I look at the Corruption and Crime Commission investigation in WA into lobbyists and as much as I disagree with the behaviour that was revealed, in terms of the behaviour of lobbyists in WA, I could never figure out in my own mind was the suspected serious offence was that justified the use of telephone intercepts and then the publication of those transcripts on the open internet. There may be a logical answer—it is just that I am not aware of it—as to why those particular circumstances justified that level of privacy intrusion. I could not agree with you more, if that is your particular concern. I do not think that it changes where you need to be able to start, but it may well change the point at which those sorts of powers are made available.

Senator CAMERON—Thank you.

Ms LEY—You mention in your submission to us that the public service committee and its State of the Service report would be a logical starting point to extend into a systematic program for identifying trends and so on, and we have talked about that this morning. I would describe the Public Service Commission as a large well resourced agency, very comfortable with its place in the world. Do you think that it has the right culture, if the need arose, to take on this task?

Prof. Brown—To take on anti-corruption investigations?

Ms LEY—Just to play its role in drilling down into the information it receives to address the gaps that you are convinced are there?

Prof. Brown—Not in and of itself. Not as it currently works, no. It is difficult to figure out exactly what functions the APSC should play in this whole mix, but it certainly has to play some. It is responsible for a whole range of issues to do with standard setting, maintaining an ethical culture and professionalism in the Australian public sector and it should be defined broadly. The good thing is that things like State of the Service reporting need to be made more relevant and not less relevant in the sorts of decisions that we make about how information will be collected to tell us what is the current ethical culture in the public service. It is important, in my book, not to forget about those things and to figure out how they should be built into the system.

The opportunity to try to build a lot of the core integrity functions into the main business of the APSC, if there was an opportunity, was in the 1990s when there were some serious decisions being made about the APSC. Operationally its responsibilities always fall back, in terms of caseload-type responsibilities for integrity risks and integrity matters on grievances and HR-type issues. If anything, its capacity to do those well actually needs to be boosted, because that whole mechanism is also reactive and not necessarily working as well as it should.

I am glad that you think that the APSC feels comfortable with its own position, but that is not how I see it. I see the APSC as being under enormous amounts of pressure and uncertainty, even if it puts a brave face on itself. Those aspects have an enormous role to play and they should be strengthened, but I do not think the APSC has the history or the institutional base or experience from which to build in terms of the sharper end of corruption, integrity, intelligence assessment, corruption risk assessment or investigations. It certainly has a role to play on the education, prevention, standard setting, standard building, corruption resistance building side. It has to be part of that game or you would wonder what sort of Public Service we are trying to promote.

CHAIR—I had a couple of other questions. In terms of funding, if ACLEI's jurisdiction were to be extended to all of those Commonwealth law enforcement-type agencies, as you have suggested, then what sort of increase in funding do you think would be required for ACLEI?

Prof. Brown—I would not try to hazard a guess. I think the committee and the committee secretariat sitting down with the best information from the agencies involved would be able to crunch through numbers and that would be much better than any sort of stab in the dark that I could try to make.

CHAIR—From what you have submitted I gather that you do not think that there should be a distinction made between the law enforcement functions and the non-law enforcement functions within particular agencies? It would be too difficult to make that distinction?

Prof. Brown—Yes. That is a tragedy and embarrassment waiting to happen. It means that you need to deal with the issue of: if this is a law enforcement integrity agency that you are talking about, then how do you make sure that its resources are not sidetracked into all sorts of minor corruption, abuse or whatever that do not really go to core business, if that is what you do not want it to do? In my submission I made some suggestions—and I think that ACLEI has made some similar suggestions—about doing away with that particular distinction but giving ACLEI both the power and in some ways a responsibility or a duty to prioritise so that it does not have

to, if it does not want to, get caught up in those other types of corruption or minor risks/conflicts of interest that does not threaten the integrity of a law enforcement operation or activity. For example, just stealing the pencils out of a filing cabinet or whatever.

Even that pathetic example reinforces the fact that there are issues about who is actually worrying about who is stealing the pencils out of the filing cabinet. If it turns into major fraud, where there are a lot of pencils—semitrailer loads of pencils—then the agency may notice that, refer it to the AFP and somebody might do something about it. But there is still that problem about whether there is a conflict of interest involved in where the pencils are coming from, and there is actually a genuine misconduct issue there which is an integrity issue, and which is actually a corruption issue, and it is at a low level, then we currently have a system where those sorts of issues, in my view, are not adequately necessarily being dealt with in the system.

CHAIR—Could you give us some other examples of how the current Commonwealth integrity system has gaps?

Prof. Brown—Each of the major inquiries that has popped up at a Commonwealth level over recent years point to some of those gaps and then there has been responses to some of those gaps. The Palmer and Comrie inquiries to do with immigration detention highlighted gaps. The extension and the shift in the Ombudsman's jurisdiction to be Immigration Ombudsman to deal with a lot of those issues was sort of a plugging of that gap to some extent. I think the AWB royal commission pointed to a number of gaps, especially in terms of policy responsibility for what information did or did not come through to whom at a government level. The problem with ad hoc inquiries, which are always available, is that there will always be questions about the terms of reference and whether there were attempts made to insulate some parts of the system, especially at a political level, from an explanation of exactly what happened.

A recent example of the sort of gap that exists is something as simple as the Utegate affair and the conduct of Mr Godwin Grech. There is a whole range of systemic questions behind how a public servant got into a position where what is known on the public record to have occurred actually occurred. Sending the AFP in to investigate the fabrication of a Commonwealth record only deals with one component of that. It is not going to resolve the questions of what is going on that enables this sort of situation to occur. It does not need to be an inquiry that becomes party political to do that. They are just questions about what was going on within Treasury. That is one example that has been prominent recently where there is a legitimate reason for a range of people—and indeed the entire broader public—to know how this could have come about. The damage to the reputation of the Commonwealth public sector from that incident is enormous and the feeling that is left and the question marks that run through the minds of most Australian about what the hell is going on in Canberra are just enormous. You cannot afford to keep on having incidents like that. This illusion that the Commonwealth is somehow magically better than the states is one of the reasons why it has been going backwards to the extent that it is there at a rate of knots.

Unless you have mechanisms that are in place where a full account can be given of those sorts of matters, then the overall question of public confidence in the integrity of the public sector, which is really the ultimate acid test—those questions are not going to go away.

CHAIR—I have one final question. When the leak bill was examined by the Senate Legal and Constitutional Affairs Committee in 2006 you made a submission in which you noted that the functions of the Integrity Commissioner, as set out in the bill, failed to provide for a proactive corruption prevention function and failed to adequately reflect the objects of the bill. This is a concern that the committee shares with respect to that act. In your opinion, what would it take to ensure that corruption prevention is a priority function for the Integrity Commissioner? Is it just a matter of legislative amendment, resourcing or other things?

Prof. Brown—It is a matter of a legislative amendment, and some of those original suggestions of mine to the Senate legislation committee in 2006 remain relevant. I think they are set out in the submission or the literature that is available to the committee. Resources that go with that are important. This idea of boosting ACLEI's prevention and education role across other agencies that are not within its investigative jurisdiction is an important one for the committee to think seriously about. I can see why ACLEI should be able to assist agencies who ask for assistance with their internal agency integrity system, but that is not the same as a general responsibility to look after integrity risk assessment, intelligence and capacity building right across the public sector, which should be a responsibility and not just a discretion.

In my four-point plan for today I would consider giving that sort of general mandate to do that sort of work to a body that has general jurisdiction and not one that is limited to certain specific agencies. Even though ACLEI would still be involved I would leave it as an intelligence but also investigation body, provided somebody else had that general preventative educational responsibility. If you were not going to do that then you would want to boost ACLEI's education and prevention responsibilities.

CHAIR—In your four-point plan would ACLEI still have a corruption, prevention and education aspect in relation to those law enforcement agencies in which it had jurisdiction—the law enforcement agencies—or would that be taken over by this generalist body?

Prof. Brown—Some of both. By definition the investigation body carries with it an education and prevention function, even if it is not articulated well in the legislation as it is not currently. It would be some of both. That is one of the reasons why the coordination mechanisms are so important. Even in places like New South Wales and Queensland, where the various integrity agencies are well organised, one of the things that they are not good at is within line agencies actually delivering in a sophisticated integrated way prevention and education strategies that actually deal with maladministration risks, conflict of interest, corruption risk and misconduct all in the one package so that public servants, and especially line managers at junior levels, have an overall sense that these are the danger signs for those five major types of integrity risk that they need to worry about and it is all in one integrated package, rather than being layers of different confusing systems and procedures. That is one area where there needs to be coordination, so that you can embed a corruption resistant culture, which is also a misconduct resistant conduct, which is also just a good administration culture, at an operational level in agencies.

CHAIR—Thank you.

Senator CAMERON—I am interested to know whether you have had any assessment of the budget implications for your proposals, if there are budget implications and costings? Secondly, should this be seen as a cost or an investment?

Prof. Brown—It certainly should be seen as an investment rather than a cost. Some of the research that is reflected in the submission is intended to provide some kind of rational basis for making an assessment of the extent to which the Commonwealth has let its investment—to use that term—drop relative to other jurisdictions in Australia. You can argue about some of the assumptions behind that, but it has certainly led us to an overall conclusion that there is a fair case for saying that the Commonwealth investment, in terms of per taxpayer per dollar Commonwealth expenditure per public servant, is not as high as the Commonwealth might automatically assume, but it has let the system languish to a certain extent.

In terms of budgetary implications, my answer to the chair a moment ago is probably the same answer. It would take a lot of work to come up with some kind of budget estimate that was meaningful that would help the committee beyond what the committee could work out for itself, so I am loath to try to do that. I am happy to be involved in those sorts of discussions if it helps.

CHAIR—Mr Debus.

Mr DEBUS—There was one other matter. The AFP is thinking of introducing integrity testing for its own staff and I just wondered if you had an opinion about it, and whether ACLEI might have a role in that?

Prof. Brown—Absolutely. I was amazed when I read that the AFP was not already doing integrity testing. I thought they were meant to start introducing integrity testing years ago. I think integrity testing is just part of the landscape of high-corruption risk professional life these days. That would be somewhere ACLEI should have a role and should potentially be delivering some of, or certainly helping validate the quality of what integrity testing is going on. I thought that was part of normal business in law enforcement integrity these days.

CHAIR—There being no further questions, thank you, Professor Brown, for giving your time to give evidence today. It has been very helpful.

Prof. Brown—My thanks to the committee.

[12.12 pm]

BENNETT, Mr Peter, National President, Whistleblowers Australia

CHAIR—I apologise that we are starting with you a little late. The committee has accepted your submission as submission No. 18. Are there any changes you would like to make to it before we proceed?

Mr Bennett—No.

CHAIR—Would you like to make a short opening statement?

Mr Bennett—I actually have a page that I would like to address shortly but arising from the proceedings that have gone on before it just seems to me that we are approaching this as the cart before the horse. The question is: is there an issue of maladministration and corruption in the federal public sector and the answer is yes. If there is, then how do we address it and is the system in place at the moment able to do it and could ACLEI do that? The short answer is: as it is structured now, no it does not. Even if we extended it to the Australian Customs Service it would just be one more agency, so we end up having three agencies. But then would it be all the functions within that agency or would some of the administrative functions in Customs not be included?

At this stage of the game what we are looking at is not what the problem is, we are looking at the solution. I think we need to go back to what the problem is. There is Public Service corruption. Professor Brown's inquiry report stated that there is a significant amount of unreported Public Service corruption that is simply witnessed by people, which goes back to Mr Debus's point about the fact that a lot of people say, 'Oh, there is no corruption in the Public Service.' The report from AJ Brown's inquiry shows that is not the case.

At the workforce level it has well and truly been identified, but unfortunately the politicians and the bureaucrats are being told that everything is going really, really well. Nobody is testing the system. The Public Service Commission is supposed to be an oversight organisation. It does not oversight. It makes platitudes in annual reports and says everything is really going well; there is not a problem; do not bother it. They are part of the system. You cannot have an organisation which is part of the system oversighting the system and saying, 'Oh, I am taking a critical viewpoint.' They do not take a critical viewpoint. Read the annual reports. There is nothing negative in there.

In a worst case example, under section 16 dealing with whistleblowers they continually report for 20 years that legislation has been in place and the Public Service Commissioner consistently says something along the lines of, 'Not all agencies have complied with the requirements after 20 years but next year we will be better.' They have been doing that for 20 years. Where is the objectivity? You cannot have the Public Service Commission as an objective place to actually test whether the Public Service is corrupt or is not. Certainly it cannot deal with the matter because it has no capacity, and I think no will, no actual intent to do anything. Because the second they do they are acknowledging that their oversight has failed, that their standards have

not been met. If that is the case, what are they going to do about it? That is a job for them. They are not resourced to do it. They cannot do it. They have not done it so it is just going to fall in another heap, so the best idea is not to acknowledge it, just let it go.

But this cart before the horse issue is not clear. People do not seem to grasp the distinction between an integrity commission, the Ombudsman and the Public Service. The integrity commission is about what is wrong with an organisation. It is to do with the critical aspect of corruption, that is somebody not doing their duty. An ombudsman's office is about equity. What is right? Is it being done correctly? The difference is one is looking at the negative side, the bad issues, and the other one is making sure that it is being done properly, and there is a significant difference. The Public Service Commission's role is to actually set the standards that the other two police. Having the Public Service Commission carrying out part of that policing role as well actually defeats the purpose of the Ombudsman and the integrity commission.

Senator Cameron asked about resources. I do not know how many people in the Public Service Commission are supposed to be involved in law enforcement and oversight but if there are 50 people in there, there is a resource of 50 people you can move out tomorrow and put into a position where they can actually conduct a federal integrity commission function and do the job properly because it is a waste of time currently having them in the public sector. It is just simply a waste of time in the Public Service. It is absolutely a waste of time having them there. That issue is integrity for an integrity commission, ombudsman's offices are about equity and a Public Service Commission is about standards.

If we started off tomorrow saying, 'What is the perfect arrangement?', what we have got now is not the way to go. We are trying to fit the problems into the existing structure rather than saying, 'This is the problem. Now let us see which one of these organisations will solve it.' What we need to say is that there is a corruption problem. Can the only integrity commission in the Commonwealth, that is ACLEI, do the job? No, it cannot. It is too narrow. It focuses on two agencies and it is only looking at law enforcement and criminal offences. What about all the other offences that happen in the public sector that costs millions and millions of dollars through royal commissions, Public Service inquiries, readjustments of agencies that go on time after time after time and never get rectified because we deal with them one at a time. You would have to be out of your tree not to realise that somebody knew about the wheat export scandal before it happened, about the equine flu, about the Midford report, about the gun buyback—about all the issues.

In fact I wrote to Mr Howard two months before the guns issue saying, 'Customs has failed in its job to look after and monitor importation of automatic firearms into Australia. If you do not do something about it shortly we are going to have another Hoddle Street massacre or a Strathfield massacre.' Customs response to that was: Bennett does not know what he is talking about. Two months later we had Port Arthur and a \$500 million buyback. If we had spent the \$500 million in the first place we would not have the dead people at Port Arthur.

The issue is that there is nowhere where anybody can go at this stage to actually talk about maladministration, misconduct, malfeasance and the other issues affecting the public sector. There isn't anywhere because if you go to the Ombudsman's office he cannot deal with it if it involves an employment matter. So he is out of the picture. Even if he is in the picture—even if you manage to get past that first threshold issue—he is really only looking at whether the agency

is doing its proper job, not whether in fact somebody has done something illegal. If they do find something illegal, the first thing the Ombudsman does is tell the agency about it and/or maybe tells the AFP. The AFP in its professional role says, 'We are really only interested in criminal offences. We do not want to know about abuse of office, maladministration, malfeasance or any of those other issues. It is not a policing function, so we are not involved in it.' The Public Service Commission never looks at any. They just refer it back to the agency and say, 'Get your act together', and that is the end of the matter, so there is nowhere.

As the president of Whistleblowers Australia I would have to get a call three times a week from people involved in the public sector saying, 'Things are going wrong and I do not know how to fix it.' Frankly I cannot tell them how to fix it either. All I can tell them is how to protect themselves from the damage that is likely to occur if they tell anybody about it. That is what I am limited to.

Federal governments have not shown an interest in an integrity commission and are not really looking at anything other than those narrow things that are covered by this act, the integrity commissioner Act, in two agencies. There is nothing in the rest of the public sector to look after it. There are no means by which anybody can resolve all these other issues of maladministration that occur in the public sector.

I probably really think I have covered what I have written down to cover. But I am hostile to governments coming at it from the back end. We have got a problem. If the integrity commission cannot solve the problem then we do not need that; we need another commission that will solve the problem. But I see you have already got one set up. Expand it. Expand it to cover the rest of the public sector and increase the description of corruption to cover all forms of corruption where people are not doing their duty and allow them to carry out that function across the entire public sector. That is my answer to your issue. I still think that there are probably at least 30 people involved in the Public Service Commission who have a primary role in monitoring—or are supposed to be monitoring—what is going on and, because they do not do their job, if we shift them out of there that gives us 50 positions to add to the integrity commission's office just like that.

CHAIR—You have advocated for a broad-reaching Commonwealth public sector integrity agency and you have suggested that because ACLEI already exists that could be the body that is expanded. Do you think there is some benefit to having a specialist law enforcement integrity agency?

Mr Bennett—Not particularly. It is two branches of the one body. There are criminal offences; we are talking about theft and bribery and misappropriation where it is obviously a crime as opposed to an administrative offence. You need to have police officers looking at the way that is done, and it is a specialised skill. You need to have other people who can look at these other things like abuse of office, malfeasance and those types of administrative misconduct matters and they have to have a different mindset.

CHAIR—Would you like to see a sort of CMC style body at the federal level?

Mr Bennett—Yes. I like Senator Parry's comments about the CMC, the arrangement in Queensland, and the support given to it by Professor AJ Brown as well. Yes, it is a better idea to

have a CMC looking at any form of public sector corruption. It must not be limited only to people who are employees. Anybody who has any idea about corruption within a Public Service function must be able to put that forward before the relevant integrity commission.

Part of the problem with the whistleblowing legislation that is proposed by the Dreyfus inquiry is that they are only talking about employees. I will give you an example of a Customs agent. A Customs agent is not a Commonwealth employee. He is a private enterprise person. He has got his own business. He goes into a Customs place and he says, 'I want my gear cleared.' The Customs bloke says, 'Well I can get it cleared for you in a rush but it is going to cost you money.' The bloke says, 'Well, I do not want to pay any money.' And he is told, 'If you do not pay any money you go to the back of the queue.' After that who does he go and tell? There isn't anybody. You can go and tell the AFP. The AFP says, 'It is not a major crime. I am not interested in it.' But that Customs officer who may be doing that is doing that to 30 other people. He has not only just picked one person. That Customs agent has got nowhere to go. There is no corruption you can report. You can go and talk to his senior officers but you do not know whether the senior officers are involved in the scheme as well. So there is nowhere to go. A person on the outside who is dealing with the Public Service must have a right to be able to report the matter as well. Under the proposed whistleblowing legislation, he does not get a go. That is not good.

It needs to be that if a person identifies corruption in the Public Service or in an organisation which provides a public service then that information must be allowed to be exposed and that person must get the protection they need. Under the current ACLEI act there is no protection for a whistleblower. For anybody who provides the information there is nothing in the act that says, 'We are going to look after you.' You can lose your job, your family, your health, your life even by reporting the information and the only thing the act is going to do is: if we can prove that you were dumped on we will hurt the person who did it to you. That is no compensation, I can tell you.

From a person who has actually been dumped on for six years in the Australian Commonwealth Public Service I know that no matter what they did to the people who did it to me it is no compensation to me that something happened to them. I need to be put back to where I was before it started. I need a big pat on the back saying, 'Thank you. You helped us.' This is what we need. This helps clean up the public sector. That does not happen. It does not happen under the current act and you need some big changes under the whistleblowing legislation and under an integrity commission before you will actually get the system to work because nobody is going to put their hand up and run forward and say, 'I can see corruption there', if you are not going to protect them for doing it.

CHAIR—What sort of measures would you recommend putting in place in terms of legislation and, in the interim, are there any measures that could be brought into being to protect people before legislation is brought in?

Mr Bennett—The problem is simply that the second a person lodges information their name is recorded and from the second that information is recorded they are under the protection of the relevant act, whether it be under the ACLEI act or the whistleblowing act, and anything adverse that happens to them from that point onwards is considered to be reasonably likely to be because they reported or disclosed the information. In fact there has to be a reverse onus of proof. If a

person discloses something and then is later harmed in their employment you have to prove that the harming of them in their employment had nothing to do with the disclosure that they made, and if you cannot prove that the assumption is that you were not harmed because you disclosed the information.

If you do not have that protection then it is a waste of time as well. Under most of the whistleblowing legislation you can issue injunctions, et cetera, against the agency or people in the agency for harming you. We are talking about somebody who might be at the bottom of the food chain and just to lodge an injunction is \$650 to simply register it to have the matter brought on before the court. Then you have got to have the legal advice to be able to do this to get somebody to stop harming you in the workplace because you have just done a public service.

The Allan Kessing matter is a classic example. He allegedly provided information which has been recognised by an inquiry as benefiting the community and yet the Commonwealth—both the previous government and this government—have allowed him to go before the courts twice and he is a convicted criminal. What incentive do you think that is to other people to come forward and say, ‘I know that something is happening in this organisation that harms the community? But if I tell you about it I am going to be a criminal.’ The fact of the matter is that the information that he allegedly released was about the fact that there were a whole pile of people involved in bogus security clearances at Sydney (Kingsford Smith) Airport involved in drug trafficking.

What happened three weeks ago? Six people at Sydney (Kingsford Smith) Airport with bogus security clearances were involved in drug trafficking. He is a criminal for talking about it. He is a criminal for bringing it to light. It has not been fully addressed even yet. The issue has not even been fixed. But for him serving a community interest issue he has become a criminal. How serious is the government—not only this government but the previous government as well—about protecting whistleblowers? It is not. It just hangs them out to dry. In fact the only places the legislation that is in place under the Crimes Act at the moment protects are the government and the public sector of the Public Service. It does not protect a person coming forward with information that serves the public interest. Anything which protects either a government or an agency and does not serve the public interest is bad law. Section 70 of the Crimes Act is currently being used in a fashion that is simply bad law in respect of whistleblowers. It stops people coming forward and telling both the government, the Public Service and the public generally about things that are wrong in the Public Service. It is bad law.

CHAIR—Thank you. I think we have got that message now.

Mr Bennett—You asked what legislation—

CHAIR—Yes, I did.

Mr Bennett—There is a classic example. If you want to address a piece of legislation, get section 70 and exclude whistleblowers from it.

Ms LEY—You worked for Customs for 36 years. What areas present corruption risks within that organisation now?

Mr Bennett—Everyone. I think human resources perhaps and pay might not be, but on the other hand if in fact somebody wanted to get at some staff and find out who were vulnerable staff, put somebody into the human resources area and find out who are the weak links. Find out who are the people who are discontented about staying at the airport and who have asked to be moved to quiet areas, because that person will eventually be moved into a law enforcement function somewhere in the organisation and then you know you have got a weak link in that area and you can lean on them. So if you are a criminal you can find out who the person is and then you can send in a boyfriend or a girlfriend, depending on who it is, soften them up, put some pressure on them and then that is your opening to be able to import whatever you want to import. It only takes one stamp from one officer and you can import a container tomorrow. It is as easy as that. The problem is—and this is in my submission—if you do not designate people within the organisation as being law enforcement officers and give them law enforcement functions, then you can put vulnerable people into law enforcement positions and make them targets for criminals. That is an abrogation of responsibility by the Public Service to allow people to be put into positions that will make them vulnerable and open to corruption.

Ms LEY—Are you saying that the selection process for the law enforcement positions is not a good one?

Mr Bennett—No, you just get rotated. A block of people in that area will move to that area. They will go back the other way. They will show you some job descriptions but the job descriptions are generic and they do not apply. Because job descriptions no longer apply, it is at the discretion of supervisors. Since the hiring and firing has now gone to agencies, it does not conform to any Public Service Commission standards any longer and the duty statements are just bits of paper. Nobody is obliged to stick to them and relocation and reallocation of staff is simply a discretionary move on the part of supervisors. You do not get asked; you just get moved.

They can take a person who is terrified of confronting people on the waterfront or at the airport and who might currently be serving in any part of the service and they can shove them there. They have had people break down into tears just being told that they were going to go to the airport. ‘Please, I could not go there. I could not confront people. I do not want to do that.’ They have been told, ‘That is where you are going.’ It drives them nuts. There are people just not turning up to work for days after days because they are sick.

One of the highest levels of absenteeism in the Australian Public Service is at Sydney (Kingsford Smith) Airport. It is a high-risk area. It is a high-stress area. But it is not the most dangerous place. The place where you can land a container or whatever you want to land is back at the waterfront. That same person who did not want to go to the airport could be put down on the waterfront and is still scared of confrontation. You could lean on her with a bit of time and effort and you can get a container through. It is a bloody lot easier than trying to get a person walk past with two kilos strapped to their body when you can bring three and a half tonne in through a container.

It is a bad situation because people are not recruited, selected and trained as law enforcement officers in the Commonwealth Public Service. If you want to solve the problem, start off by drawing a division between those people who are actually committed to law enforcement in the Commonwealth Public Service and those who would just like a job as a public servant. And make sure that those people who are law enforcement officers are only the ones who are put on

the line where they are going to be tested for their integrity on issues like corruption and whether or not they can be easily leaned on or otherwise by crooks.

If you were to start off tomorrow and said, ‘What is the way to set up Australia’s law enforcement integrity commission and the Public Service?’, the system we have got in place would be the last model you would pick. It would be at the bottom of the chain. This is a hotchpotch of pieces that have only been stuck together over an extended period of time. Every time there is a problem someone will say, ‘We will do that to fix it’, and they shove another bandaid on. But it is not starting off from saying, ‘What is the ideal situation? Can we manoeuvre the organisations that we have got into that ideal situation?’ What we keep doing is saying, ‘We have got an organisation; can we make them do the ideal?’ And it does not work. It is too hard to move the existing structures into the ideal situation such as trying to move ACLEI to push it into the situation of saying that we want a Commonwealth law enforcement agency overall. It would be better to say that we actually needed a law enforcement organisation; can ACLEI do it? Yes, it can in most areas but it cannot do it in all, so therefore it is not the appropriate organisation. We need a broader organisation. Create the broader organisation and get rid of ACLEI. You have to create a Commonwealth organisation to fit the need, not make the organisation that exists fit the need. I am sorry; you are getting 40 years of passion here, quite frankly.

Senator CAMERON—That is fine. On that last point, that would be consistent then with what the chairman of ACLEI says. If you create a new body you would basically have to start again. That is inconsistent with some of the arguments we have heard that you could actually use the basis of ACLEI to form a more wide-ranging and more effective organisation. Why have you come to the view that you cannot widen the application of ACLEI to become more effective?

Mr Bennett—You can do that, but it needs a cultural change. The integrity commission needs to understand that it is not stuck in that law enforcement culture. Whatever this new organisation is, whether it be built from the existing one and expanded, the first thing that that organisation—and it is in my statement here—must do for itself is make a cultural shift. The trouble with being a copper is when you are a copper you always think like a copper and when you are told that you have to do things like malfeasance, misfeasance and abuse in office it is really, really hard to leave that criminal aspect behind. That is what ACLEI would have to do. It would have to say, ‘I have got to look at these broader issues.’ It has to stretch that mindset to cover all of corruption. Now as long as it can do that, that is good. Go with the organisation you have got at the moment and get them to stretch that understanding of corruption against any wrongdoing that harms the public interest in the public sector. If they can stretch their mindset to cover that then they can go for it, but there has to be that real cultural understanding about what their principal purpose of employment is and that is whatever corruption exists in the public sector they are entitled to look at. If they can do that they are the boys to go for it.

Senator CAMERON—I suppose there is an old saying that you cannot change culture, you can only change people. I have heard that a number of times. But ACLEI is a very small organisation. I have not heard any information in any of the hearings I have been involved in to say that there is a bad culture in ACLEI—

Mr Bennett—No.

Senator CAMERON—The issue I have heard about with ACLEI is a lack of resources. If you modelled ACLEI on say the Queensland model—

Mr Bennett—The Crime and Misconduct Commission?

Senator CAMERON—Yes, where you have specialised areas within the overarching body, would that not resolve the issues you have raised?

Mr Bennett—Yes, but the difference is the Crime and Misconduct Commission started off with that broad understanding of corruption. That is if there were a local council that was involved in corruption they understood that they could deal with that. If that just meant misappropriation, bias or partiality saying, ‘Okay, that developer gets a go but this developer does not because this one treats me nicely and I go out to dinner and he provides girls’, or whatever the case may be, they are starting off from that broad point of view and, because they start off from that broad spectrum, the chances are that they will continue to approach it in that way.

Senator CAMERON—I do not want to interrupt you, but do you accept the point that I am making that ACLEI is a small group and could actually be widened and not have the problems of some well established, cemented in, overarching bad culture? It does not seem to me that that is an argument that stands up.

Mr DEBUS—It is not just a small group, it is a tiny group.

Mr Bennett—I see the issue. I am looking at the problem. How you get to the solution is really your issue. Whether you could fit ACLEI into that to tackle the problem of corruption in the public sector, I am not sure. If you have confidence that they can spread their understanding and their culture of corruption widely enough and they are given resources to do it, including the 50 people from the Australian Public Service Commission, then that fits the bill. If you cannot do that then it is not the appropriate organisation and perhaps you just need to create a new organisation called the Australian public sector integrity commission of which ACLEI can be the law enforcement part where officers are specifically carrying out law enforcement functions; they can continue to do that wherever there is a law enforcement officer throughout the public sector. The new part would be those who are going to investigate those administrative type offences in the public sector.

CHAIR—In your submission you have emphasised areas of corruption risk within Customs and in particular the lack of accountability with respect to the relationships between Customs and other agencies that are governed by MOUs. Could you tell us a bit more about that?

Mr Bennett—The problem is that there are no statutory arrangements in relation to MOUs; they are an arrangement that is convenient between agencies and they give them an out. There is the interconnection and overlapping that exists between agencies. You might have a boat going out off Broome to do a particular function and you will have a quarantine officer, a Customs officer, an immigration officer, a health officer, an AFP officer and probably a Navy officer all on board.

They have all got MOUs in relation to how they interact with one another. I bet the parliament does not know about 90 per cent of the MOUs and how they work. The problem is that if you find a problem with somebody, one of the laughable issues is: who pays for that boat and how the MOUs work about paying for that boat. But if something goes wrong who is responsible for it and how much does the MOU allow you to be able to blame the other people who are with you, or the reverse is true. If somebody gets it right everybody else says, 'Under the MOUs we are all involved so we should all get the credit.' The MOUs are a real weakness. I understand that they have to exist; they really do. But they need to be tested and they need to be checked that they are working properly, and guess who does it at the moment? Nobody! There isn't anybody to check how the MOUs are actually functioning and whether they actually serve the public interest. Under those circumstances the MOUs are a weakness. The MOUs need some form of auditing and management to make sure that they are working and working properly.

CHAIR—Are you suggesting that they could be a corruption risk, though?

Mr Bennett—They are a corruption because they allow people to shift blame. I am using the word 'corruption' in the broadest context. It means that they do not necessarily have to do their duty because they can then say, 'Although I thought it was my duty the MOUs said that they could have done it as well, so why didn't they do it? It is really not my fault.' The MOUs help to fudge the line between the responsibilities of agencies and that fudging allows people to not be held accountable and it blurs the transparency of the process. It is very, very difficult to pin down specific responsibilities in agencies when you have got MOUs that make them just gel together over the edges and share responsibility. It is a weakness. My only criticism of MOUs is that they are unaccountable. There is not an organisation to do that and until you have one it is open to abuse. Monitoring MOUs and their use and application I think should be with the integrity commission.

It could be with the Ombudsman but, frankly, I think it is too technical for the Ombudsman. Last year it is my understanding that the Ombudsman had 19,500 complaints to it of which it dealt with 4,500 and 15,000 people got a letter back saying, 'We have looked at it. Sorry, we cannot deal with it any further. We do not think there is any need to take any further action.' Giving the Ombudsman another function is just a waste of time. It is not going to solve anything. If you were looking at correcting the wrongness of some parts of public administration you do not need the Ombudsman to do it. He has got enough work looking at making sure that agencies do their job and do it properly without looking at whether they are actually corrupt in how they do their job.

Senator CAMERON—I happened to look at the legislation for the Customs department a couple of years ago and to be honest I was absolutely taken aback by the complexity of the regulations and the legislation. You have just raised this point about people not understanding. Would you need specialist investigators for Customs if ACLEI widened its purview to Customs?

Mr Bennett—I really think across the Public Service you need to identify who is a law enforcement officer. You just need to identify them because it is not fair—as I talked about before—to get somebody who had never joined the Public Service to be a law enforcement officer to suddenly be put in the position of being one. I seriously believe that for anybody who volunteers to be a law enforcement officer, their standards of integrity, their conduct and any

action taken against them must be at a higher level because they have volunteered to be part of that integrity level; they have volunteered to be law enforcement officers.

Senator CAMERON—That is not the point I am trying to get some help on. One of the issues that we are looking at is to widen the scope of ACLEI and that can be done in a range of ways. But if we do widen the scope of ACLEI and ACLEI then had responsibility for not just law enforcement but corruption issues in Customs, if ACLEI did that, the question I am asking is would you need specialised expertise of officers in ACLEI to deal with Customs?

Mr Bennett—No. I do not think so. I cannot imagine any specific form of corruption in Customs that would not be recognised as such by any competent law enforcement officer. The elements of the offence become self-evident. As soon as you start to unravel the matter that has been related to you, you can say, ‘That fits in the element of the offence. That fits in with the conduct that relates to it.’ You go through the process. It is a mental, tick, tick, tick. You can see as the information is related to you that it is an offence that falls within my jurisdiction; I know how to go and do that. It does not matter whether it is a banking fraud, or you name it. A properly trained investigator can look at the offence and mentally know that such conduct is going to breach legislation even if you then have to go off and find out the specific act or the section of the act that applies.

There have been dozens of times I have been in sets of circumstances and I know the person in front of me is an offender and I cannot think whether it a 233 or 232 or perhaps just 31 that I have to be using against him. I am not exactly sure what it is but I know he has committed an offence and I have to go off and make sure that I have lined up in my mind the correct piece of legislation to apply the events on notice. It is just a case of everybody has a conscious knowledge of what is right or what is not right and if you have read the act once in any legislation you know what is expected of that legislation. The second somebody turns up in front of you and it is inconsistent with that ideal behind the legislation, you know you are going to find the offence somewhere in the act. It is a real surprise sometimes when you have read it and you think, ‘Oh gee, they just missed.’

Senator CAMERON—I think some of the acts could not get to that level, I must say.

Mr Bennett—When I joined Customs, the Customs Act was 79 pages. Part one is 340 and I think there are three parts of the act now. It is just unbelievable. If you talk about people joining the Public Service to be involved in law enforcement, why is the Customs Act not divided into those parts as to those things which are criminal offences and those things which are administrative processes? What we have got is a potpourri. The whole thing is just intermixed together. There is no way to distil from the act those parts which have to do with offences against the act and those things which have to do with the administrative processes by which the act works. There is no way to do it.

If you had law enforcement officers you would say, ‘You are looking at pages there to there and you joined the Public Service to simply clear the goods off the wharf and to get things done and that is your part of the act.’ And we would be looking at two separate parts of the act. But now we have to have everybody reading the whole dam thing. ‘Tomorrow you are going to be doing this law enforcement—forget that. You have just done that for 15 years, now you are going to be doing this part because we have just shifted your location.’ It is crazy. The cost to the

community has been horrendous. I have just seen so many people who have trained and trained. I am talking about some people who have been marvellous administrative people who know tariff and exactly the way that the system for landing goods in Australia should work and how export should work, trade descriptions and all the rest of it, and all of a sudden they are picked up and shoved out to the airport. They do not know the first thing about an offence.

When I joined the Australian Customs Service every single person who was at Sydney (Kingsford Smith) Airport had to know how to conduct a record of interview, prepare a statement and execute a prosecution. There are three officers at the airport at the moment who can do it because they get changed over that fast the training just does not stick. It is crazy. But it is not just in Customs, it is in every single department. Until you actually—

Senator CAMERON—We have got our work cut out trying to deal with ACLEI, without adding the Customs department.

Mr Bennett—But you have to start off with what the problem is. It is not just in law enforcement. If you are concentrating on law enforcement then the rest of the corruption that is going on within the public sector and the waste of public moneys and abuse of office that is going on will never be addressed. You have to have a mind shift and acknowledge that the problem is bigger than ACLEI. The problem is not law enforcement, it is public administration. It is the way the Public Service functions and we need to have something that is going to address it and address it properly. ACLEI is not going to do it but it could be where you can continue on with part of the solution, but the problem is bigger than ACLEI and you need to be looking at the rest of it. This constant piecemeal approach of just whacking another bandaid over another wound just does not help the matter. The patient is dying.

We have international conventions we are supposed to be complying with under fraud and public sector management. We have not got within a bull's roar of them. Yet I was just reading on the web last night Jamaica has got an integrity commission.

Senator CAMERON—Do not take us there.

Mr Bennett—How did we get to the state where a federal government has not taken the lead and said, 'This is the best practice we can have and all you states should be jumping in behind us.' The federal government is following Tasmania. Tasmania is further in front than we are. It is a sad state of affairs, it really is. With all due respect it should not be a political issue, but if it has to be a political issue to get it onto the agenda then that is the next step. Somebody needs to say, 'We need a federal integrity commission and we need to be able to look at the way the Public Service works and how it is accountable.' Nobody is doing it currently. Nobody did it for the last 10 years and nobody has done it for the last two years. Nobody is saying, 'We have got a problem that needs to be fixed.'

Mr DEBUS—You rather overtook the questions that I was asking but am I right in thinking that you would like to see a reamalgamation of lots of particular agencies involved at the present time in various aspects of, for instance, border protection and that you would in turn like a closer definition of those who are qualified and tasked to do law enforcement and that you think in those circumstances that many preconditions for corruption would be eliminated? Is that what you are saying?

Mr Bennett—In 1979, 1982 and—I cannot remember—1990—something it was mooted on a number of occasions that we need to have a Commonwealth law enforcement authority. It is in the submission. We needed to have it where everybody who came into law enforcement functions in the Commonwealth was recruited, selected and trained and came through the same source, like the Army. You would come through the same source, you do your basic training; then you can go out to quarantine, therapeutic goods, Customs or wherever it is, and you can carry out that function. But the advantage is you have commonality of recruitment, selection and training. You can actually move between those agencies and take it with you and patch protection is immediately gone. It is dissolved. Because at the moment if you are trained in quarantine and somebody wants to shift you to somewhere else they say, ‘Do not trust him, he has just come from quarantine.’ But if in fact you all came through the same door to start with, when you get moved you are brothers in arms and you take with you that brothers in arms understanding from agency to agency. The advantage is that the information that you did collect in quarantine goes to Customs and Customs now takes advantage of it rather than you being held as an outsider coming into Customs and we do not want you. We do not have that. We build these Chinese walls between agencies and there is no communication.

I was an intelligence officer in the Australian Customs Service as part of my function and the number of times you would go to agencies and say, ‘Look, I know these people are importing stuff from overseas. Some of it is quarantine goods. We need to liaise about this because what I think he is really doing is importing heritage articles from overseas and we want to be able to stop him. He is using the quarantine goods to do this.’ The response is, ‘Sorry, I cannot talk to you; you are from Customs.’ Then you say, ‘I will go to the AGS because this is a heritage thing’, and heritage issues are dealt with by the AGS. ‘Sorry, we have got information on these people. We are not going to talk to you about it’, or, ‘We cannot talk to you about it because there is a piece of legislation that stops us.’ The Australian Customs Administration Act is one example. The information is not exchanged. ‘Why, don’t we just go to our computers and have a look at it?’ ‘Sorry, the computers in intelligence systems do not talk to one another.’ Each one has set up their own intelligence unit. Each one has set up their own computers. The computers do not talk to one another so we die in the backside. If we had a Commonwealth law enforcement authority where everybody who was identified as a law enforcement officer all had that same commonality then the information exchange would be much, much easier and you would not have to have legislation that stopped the movement of information one from another because it would be above that level. Anything going across agencies is lateral rather than the way it currently has to go which is between agencies, silo to silo to silo.

One of the things that came out of 9/11 was that they talked about the fact that there were 20 agencies who actually knew about these potential bombers. They did not talk to one another. They just did not talk to one another. They said the problem was silos. Each agency had its own thing. They did not have commonality with each other; they did not have computer systems that talked to one another and they were not allowed to exchange information. Exactly the same thing happens in the Australian Customs Service in relation to every single harm that comes into this country from overseas. Every single one of them! Quarantine, equine flu, pornography, illegal immigrants, drugs and firearms—every single one of them! There is a different agency dealing with it and they cannot talk to one another. It is crazy.

CHAIR—Thank you. I am afraid that is all we have time for today. I thank you very much for taking your time to give evidence today. I would like to thank both witnesses who have given evidence to the committee today.

Committee adjourned at 1.01 pm