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13 April 2017

Submission by Transparency International Australia
Re: Establishment of a National Integrity Commission

Committee Secretary
Senate Select Committee on a National Integrity Commission
Parliament House
Canberra ACT 2600

Dear Committee

As Australia's leading anti-corruption non-government organisation, Transparency International Australia welcomes the re-establishment of the Senate Select Committee on a National Integrity Commission, and is pleased to again support such a Commission.

We trust our submission of 20 April 2016 to the 2016 Senate Select Committee will continue to assist the new Committee. However we are pleased to provide the following supplementary submissions, especially in light of more recent developments and discussions. Our submissions cover six issues:

1. Growing public support for a well-designed federal anti-corruption agency
2. Continuing under-investment in Commonwealth investigative capacity
3. Institutional developments and the structure and jurisdiction of a new Commission
4. Movement towards a clearer national definition of corrupt conduct
5. Investigative powers and public hearings
6. Relationship with criminal prosecutions

1. Growing public support for stronger federal anti-corruption institutions

Transparency International Australia's position remains that a broad-based federal anti-corruption agency is needed, as part of an enhanced multi-agency strategy – especially to ensure a comprehensive approach to corruption risks beyond the criminal investigation system, and support stronger parliamentary integrity.

Transparency International Australia was the first public interest group to advocate a more broadly-based federal anti-corruption body, following the assessment of the first National Integrity System Assessment (2005) that the narrow, piecemeal approach suggested by the limited jurisdiction of the proposed Australian Commission for Law Enforcement Integrity was unlikely to represent a sustainable, effective response to corruption issues. We consider our position to have been vindicated by successive calls by federal parliamentary committees,

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ever since ACLEI's inception, for examination of whether there should 'a Commonwealth integrity commission of general jurisdiction',[1] capable of oversighting all agencies;[2] and by successive expansion of ACLEI's jurisdiction.

Effective institutions to prevent, detect, expose and remedy official corruption are vital at all levels of government. Under Articles 6 and 36 of the UN Convention Against Corruption (2004), governments including Australia's have committed to ensuring they have 'a body or bodies or persons specialised' in combatting corruption, through prevention and enforcement.

While a specific-purpose anti-corruption commission is not the only form that such 'a body or bodies' may take, the benefits of such a Commission are now well proven in Australia by its long history of specialist anti-corruption agencies (ACAs) at State level, including the NSW Independent Commission Against Corruption (NSW ICAC) (1988), Queensland Crime & Corruption Commission (1991), WA Corruption & Crime Commission (1992), Tasmanian Integrity Commission (2010), Victorian Independent Broad-based Anti-corruption Commission (IBAC, 2012) and SA Independent Commissioner Against Corruption (SA ICAC, 2012).

Transparency International Australia has supported a 'multi-agency approach'[3] to integrity such as currently attempted by the Australian Government – consistently with TI's development of the 'national integrity system' approach to anti-corruption in preference to over-reliance on a single institutions or law. However, over many years we have reached the assessment that the Commonwealth's multi-agency approach is one with significant gaps, of a kind that is best addressed through the addition or expansion of a general-purpose integrity commission with both investigation and prevention powers. Our 2016 submission appended our 2012 submissions on these issues, which remain current:

- *A Ten-Point Integrity Plan for the Australian Government* (May 2012)
- *Best Practice National Integrity System Structures, Systems and Procedures* (August 2012)

A national integrity commission is needed which addresses the following specific gaps and weaknesses:

- Currently, most federal agencies' anti-corruption efforts continue to go unsupervised by any coordinating agency (other than criminal conduct reported to the AFP), including around half of the total federal public sector not in the jurisdiction of the Australian Public Service Commission, and not subject to the APS Code of Conduct regime;
- Only limited independent mechanisms currently support federal parliamentary integrity (AFP investigations into criminal conduct; and the new Independent Parliamentary Expenses Authority);
- Prevention, risk assessment and monitoring activities are uncoordinated;
- Criminal law enforcement by the AFP is prioritised on foreign bribery, anti-money laundering and other crimes, with limited capacity or relevance for dealing with 'softer' or 'grey area' corruption across the federal sector.

[1] Australian Senate (2006), *Provisions of Law Enforcement Integrity Commissioner Bill 2006* [and related measures], Report of the Senate Legal and Constitutional Legislation Committee, Parliament House, Canberra, May 2006, p.28. See also A J Brown (2008), 'Towards a Federal Integrity Commission: The Challenge of Institutional Capacity-Building in Australia' in Head, B., Brown, A.J. & Connors, C. (eds), *Promoting Integrity: Evaluating and Improving Public Institutions,* Ashgate, UK

[2] Parliament of Australia, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report,* Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, July 2011, Rec. 10.

[3] Attorney-General's Department, *Discussion Paper: Australia's Approach to Anti-Corruption*, March 2012, p.12; Australian Government Response to the 2011 Report of the PJC on Australian Commission for Law Enforcement Integrity (February 2012).

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In April 2016, we called for funding for Australia's next national integrity system assessment, to help assess solutions to these gaps. We are pleased to report that this assessment is now underway, through an Australian Research Council Linkage Project, 'Strengthening Australia's National Integrity System: Priorities for Reform', funded in May 2016 and led by Griffith University with support from Transparency International Australia, NSW Ombudsman, the Queensland Integrity Commissioner and Crime & Corruption Commission, Queensland.

In March 2017, Griffith University issued a first discussion paper from this project, 'A Federal Anti-Corruption Agency for Australia?' in order to stimulate debate on the questions being considered by the Senate Select Committee. In a valuable contribution to that paper, Dr Grant Hoole and Associate Professor Gabrielle Appleby of the University of NSW wrote (see 'Integrity of Purpose: Designing a Federal Anti-Corruption Commission'):

> … there is a seeming lack of coherence in the federal integrity landscape as a whole. A pitfall in diffusing integrity and anti-corruption functions across multiple institutions is that it may deny individuals, including citizens and public service employees, a prominent and accessible point of contact for reporting concerns. It may also fail to broker public confidence in and awareness of integrity activities that do not benefit from the profile and publicity of a single, well-known institution. The interrelationship of the institutions under review, including the legal and functional scope of their jurisdiction, is confusing, requiring attention to multiple cross-referenced statutes and interpretive provisions. It is not obvious that a citizen or public servant wishing to report a serious corruption concern would know where best to start.

All feedback to date, received by TI Australia, supports this assessment.

TI Australia also notes, and agrees wholeheartedly with, Professor George Williams' submissions (with Harry Hobbs) highlighting the comparative failure of the present multi-agency system and the significant gaps in the present system. These arguments echo our own views, and demonstrate the increasingly compelling case for a truly independent body covering the entire public sector at a federal level.

The absence of an overarching agency of this type at a federal level is now also more clearly a stark deficiency in the eyes of the community. In the wake of several parliamentary entitlements scandals, robo-polling by The Australia Institute in January 2017 recorded 82 per cent of Australians as supporting a new independent corruption watchdog to investigate corruption among federal politicians and officials.

More rigorously, Transparency International's Global Corruption Barometer surveys released in 2012 and 2017, together with ANUPoll, confirm that Australians do not consider federal politicians or officials to be immune from the types of corruption risks facing other politicians or officials. The latest Global Corruption Barometer, released on 1 March 2017, showed that 76 per cent of citizens think at least *some* federal parliamentarians are involved in corruption, including 12 per cent who believe that *most* or *all* are involved.

In TI Australia's view, there can at this time be no serious case put forward against the establishment of a broad-based federal anti-corruption agency, if well designed. The community demands it and the circumstances of our time urgently require it. The principal outstanding questions are what forms it should take, what behaviour should be targeted, what power it should have, what procedures it should follow, and what limits should be placed on it.

2. Continuing under-investment in Commonwealth investigative capacity

In our view, the case for a national integrity commission has been strengthened since April 2016 by continuing fragmentation and under-investment in the Commonwealth law enforcement response to public sector corruption risks.

Our 2016 submission referred to our proposal for a two pronged approach:

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1. Establishment of a new Australian Serious Fraud & Corruption Office (ASFACO) to investigate and prosecute serious criminal corruption and wrongdoing. This agency would have subsumed the AFP Fraud & Anti-Corruption Centre and coordinated closely with other agencies such as AFP, ATO, ASIC, AUSTRAC, ACC and state agencies and commissions.

   The context was the proposed re-establishment of the Australian Building and Construction Commission, which we advocated could be included in ASFACO so that one body, not a host of piecemeal bodies, was tasked to tackle criminal corruption wherever it occurs. This would have extended to the business and private sectors as well as unions, examining serious criminal behaviour of all Australians whether here or abroad.

2. Separate reforms to better coordinate integrity and anti-corruption measures within the Federal Government, especially through a National Integrity Commission and a Parliamentary Integrity Commissioner.

   With establishment of an agency such as ASFACO, these latter reforms would have been principally concerned with non-criminal corruption and serious misconduct falling short of criminality, embracing conflict of interest questions, the issues of entitlement and the vexed issue of donations to political parties.

The Parliament eventually elected to proceed with a more narrowly based Building and Construction Commission as proposed.

In TI Australia's view, the failure to take the opportunity to upgrade the Commonwealth's criminal investigative capacity in anti-corruption, across the board, now increases the case for a stronger national integrity commission. Since 2006, the rationale for *not* having a broader-based federal anti-corruption body has rested on arguments that the Australian Federal Police (AFP) is appropriately placed and resourced to deal with serious public sector corruption risks.

While we strongly support the AFP Fraud & Anti-Corruption Centre, it is now very clear that it is neither appropriately placed nor resourced to provide comprehensive leadership with respect to investigation and prevention of serious public sector corruption risks. Its resources are plainly consumed, almost entirely, with private sector corruption threats, especially those relating to foreign bribery and, to a lesser extent, money-laundering and terrorist financing.

It also remains unrealistic to expect criminal law enforcement agencies to place priority on dealing with high corruption risk, non-criminal misconduct such as undisclosed conflicts of interest and other abuses of trust. In our view, therefore, the case for an alternative new agency with strong investigative powers, capable of dealing with both criminal and non-criminal corruption, has only grown since our 2016 submission.

3. Institutional developments and the structure and jurisdiction of a new Commission

For the above reasons, it remains the case that the new body should cover the entire public sector at federal level, including all Commonwealth agencies and entities, whether part of the Australian Public Service or more generally.

In our view, the jurisdiction should extend to all public officials, including Ministers and Parliamentarians and their staff, along with anyone whose actions may have a corrupting effect upon public officials or public administration. However, three developments indicate how a sensible relationship might be established to prevent a national integrity agency being unnecessarily drawn into electoral and parliamentary integrity disputes, at the expense of higher-risk, more complex corruption challenges confronting the Commonwealth.

First, there is a strong movement to improve and regulate the transparency of electoral donations and finances at a federal level. In recent times in both Queensland and NSW there has been a much improved movement towards overcoming the shortcomings in this area.

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On the assumption that federal laws move in the same direction, should a federal anti-corruption body be authorised to investigate fraudulent or even inappropriate behaviour in relation to such matters? In NSW, this difficult question has been resolved in the affirmative following upon the Gleeson/McClintock Review, but with greater clarity that it is the function of an anti-corruption agency (ICAC) to support other integrity agencies in their enforcement of electoral laws, rather than to subsume their jurisdiction by treating every breach of law as a corrupt act.

Accordingly, the NSW position is now that ICAC may investigate breaches of electoral law (that do not otherwise constitute suspected corruption) upon referral from the Electoral Commission, i.e. where that assistance is actually needed; and that it is not open to the ICAC to make administrative findings of corrupt conduct in relation to such matters, but rather simply to make findings of fact, and recommendations such as referral of matters for criminal prosecution or other sanctions for breach of electoral laws.

TIA supports a similar approach in relation to a federal anti-corruption agency.

Second, the Commonwealth has moved in 2017 to address the abuse or breach of entitlements by federal parliamentarians by establishing an Independent Parliamentary Expenses Authority (IPEA). The submission of Professor Williams and Harry Hobbs details the sad history of matters of this kind in recent times, which we respectfully endorse and adopt.

There is no doubt that the public are very disappointed with the behaviour of politicians in this regard. As Professor Williams has noted, in other areas of society such misbehaviour would not be tolerated.

The establishment of this new Authority is, in our view, a potential major step towards a far stronger Commonwealth integrity system. It is obviously a positive step in the right direction. For many years, establishment of a Parliamentary Integrity Commissioner has been proposed by some parties, and even by promised by some Governments. The establishment of a fully-empowered Independent Parliamentary *Standards* Authority (as the Turnbull Government initially proposed), to assist the Parliament to investigate and resolve a wide range of integrity matters, would command great public confidence, and further relieve an anti-corruption agency of the burden of being too easily sucked into political matters, at the expense of more serious, hidden and systemic corruption risks.

An Independent Parliamentary Standards Authority or Commissioner would also be able to invite the involvement of, or refer more serious matters to, a national integrity commission as cases genuinely require – as discussed above.

Currently, the new IPEA does not possess sufficient jurisdiction, capacity or independence to play this role. Consequently, calls will remain for a national integrity commission to have primary jurisdiction over many allegations of inappropriate conduct by parliamentarians, that would in fact be better dealt with by a stronger parliamentary integrity regime, with an anti-corruption agency simply available as a back-up for those serious matters justifying its involvement. While TIA agrees that as a default, a federal anti-corruption agency should have this jurisdiction, the Committee would be well-placed to recommend an even wiser alternative.

Third, the Commonwealth's experience can now be informed by over a decade of experience amassed by the Australian Commission for Law Enforcement Integrity. In fact, it is not correct that the Australian Government has no anti-corruption agency. It actually already has an anti-corruption agency with strong experience and high strategic capability, in the form of ACLEI – simply one with a limited jurisdiction, and insufficient resources, powers and profile.

It is now clear that ACLEI should form the core of a more comprehensive agency, with ACLEI's important work preserved within the umbrella of the new agency by ensuring specialist capacity and effort continue in protecting integrity in the area of law enforcement agencies.

Following this logic, the work of the new agency will require the appointment of a Chief Commissioner and perhaps three Assistant Commissioners to manage effectively the tasks set by the legislation: one for Law Enforcement Integrity, one for equivalent functions relating to

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general Commonwealth administration, and one for strategic corruption risk assessment and prevention functions.

In this respect, a federal anti-corruption agency must also have the power and capacity to act in an educational and advisory role. Its task as a preventative agency is as important as its investigative function.

Whatever the structure, it must be appropriate to manage the additional workload. A fundamental feature of the new agency must be the presence of ample resources to enable it to carry out the difficult tasks it will be required to perform.

4. Movement towards a clearer national definition of corrupt conduct

Arguments against a national integrity commission often draw on the fact that, despite their important achievements, state anti-corruption agencies have been at the centre of a some controversial problems including:

- Variable and inconsistent legal definitions of official corruption;
- Questions over whether ACAs' efforts are properly prioritised, proactive and coordinated with other agencies;
- Concerns over the action taken to deal properly with individuals who engage in or benefit from corrupt conduct, once exposed;
- Debates over whether ACAs have the right powers, sufficient resources and necessary independence from government; and
- The adequacy of accountability, oversight and performance assurance.[4]

These debates are also international.[5]

It is true that creating a federal anti-corruption agency may not provide solutions unless it is well designed to achieve its intended purposes, taking into account these valid challenges. TI Australia also believes that currently, there is no clear understanding of 'best practice' in the design and implementation of these institutions, and has argued that all Australian governments need to agree on, and implement, best practice principles for the powers and accountabilities of their ACAs (for example, through the Council of Australian Governments (COAG) Law, Crime and Community Safety Council).

TIA nevertheless believes that progress is being made in approaches to the definition of corruption that makes establishment of a national commission more feasible.

The NSW ICAC model defines corrupt conduct in a comprehensive manner. Although it has been criticised for its complexity, including by the High Court in the *Cunneen* case, it has recently been scrutinised, affirmed and extended as a result of the Gleeson/McClintock Review. The Queensland approach is largely based on the NSW legislation, but was narrowed in 2014, and is now the subject of a sensible proposed broadening under a 2017 Bill. In the same way, the Victorian approach has been amended to overcome some of the limitations of too narrow a wording, and limitations considered by the High Court in the *Cunneen* case.

By contrast, ACLEI already operates with the benefit of a much simpler approach to the definition of 'engaging in corrupt conduct'. This refer to abuse of office, perverting the course of

[4] See e.g. Hon Wayne Martin CJ, 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government', 2013 Whitmore Lecture, (2014) 88 *Australian Law Journal* 106; cf C Wheeler, 'Response to the 2013 Whitmore Lecture', (2014) 88 *Australian Law Journal* 740; A J Brown, 'The integrity branch: a 'system', an 'industry', or a sensible emerging fourth arm of government?' in M. Groves (ed.), *Modern Administrative Law in Australia: Concepts and Context*, Cambridge University Press, 2014, pp.301-325.

[5] See e.g. *Jakarta Statement on Principles for Anti-Corruption Agencies* (2012), Jakarta, 26–27 November 2012 http://www.unodc.org/eastasiaandpacific/en/2012/12/corruption-kpkl/story.html.

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justice or 'corruption of any other kind'.[6] In the recent discussion paper referenced above, Hoole and Appleby describe this as 'an instructive counter-example to Australia's State-level commissions', and note that the breadth of this definition is married with further qualifiers of 'serious corruption' (conduct that could result in a charge punishable, on conviction, by a term of imprisonment for 12 months or more) and 'systemic corruption' (instances of corrupt conduct, whether or not serious, that reveal a pattern of corrupt conduct).

The benefit of the ACLEI approach is in showing it is possible to differentiate between broad ideas of 'corruption' that may seem mismatched with a commission's strong investigative powers, and others that align more closely with the commission's motivating purpose.

The common thread between these different approaches, is that following the stringent legal analysis conferred upon it by the Gleeson/McClintock Review, the more prescriptive NSW-style definition also has its underlying test, the question of whether the partial, dishonest or criminal conduct has the effect of impairing public confidence in public administration – much like the abuse of office or trust at the core of the comparatively simple ACLEI definition.

The final selection of a preferred approach is a matter for discussion and debate. However, building on the ACLEI experience, there is clear benefit in a jurisdiction which is based on this broad principle. As outlined by Hoole and Appleby, there is also benefit in ensuring the special role and powers of the Commission are targeted first and foremost upon corruption which is either 'serious' (which should be statutorily defined, for example as likely to threaten public confidence in the integrity of government) or 'systemic' (defined as per the ACLEI statute as a pattern of corrupt conduct, which presumptively would endanger public confidence, even if the individual acts taken alone would not be considered 'serious').

5. Investigative powers and public hearings

A federal anti-corruption agency needs to possess the wide range of coercive and investigative powers commonly found in state agencies. These powers are similar to those found in a Standing Royal Commission. To some, powers of this width are distasteful and suggest oppression and unfairness. However, it needs to be borne in mind that an anti-corruption agency is an investigative body. It is not a court of law and does not adjudicate in disputes between citizens nor in disputes between the state and its citizens.

Anti-corruption bodies are susceptible to judicial review where there has been a gross error of law or a genuine denial of natural justice. There are adequate safeguards in the process.

One of the most vexed questions is whether or when a federal anti-corruption agency should have the power to investigate through the use of public hearings. TIA holds a firm belief that public hearings for the purpose of an investigation are, in proper situations, essential to the effective operation of an anti-corruption agency.

However, public hearings must not occur as a matter of course, and it is appropriate to ensure that unfair reputational damage is not occasioned wherever possible. Public examinations must be available in carefully defined situations and not otherwise. This is not the same, however, as saying that public hearings should only be used in 'exceptional circumstances' (a position incorrectly ascribed to TI Australia by Chris Merritt of *The Australian* on 7 April 2017). That is the test imposed in Victoria (s.117, 2011 Act), but in our view, is an uncertain and unnecessarily restrictive approach, which ought not to be followed.

Public hearings are essential in proper cases. The real question is what statutory barrier should be in place to ensure that public hearings do not occur as a matter of course. The decision of the NSW ICAC to take this approach, at times, has been the primary trigger for it to come under political and media attacks, notwithstanding that its power to do so has never been successfully challenged in any court process.

[6] See s 6 of the Act.

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As a result, there are now those who advocate against public hearings in any circumstances. However, in NSW, the Gleeson/McClintock Review noted that public hearings are essential in a proper case to the uncovering of serious corruption and to facilitate the prevention of corruption. Public hearings may also be necessary to allow witnesses to come forward and provide useful information to the continuation of the investigation. The danger of driving investigations underground and conducting the investigations entirely in secrecy is obvious. The South Australian legislation does this, and has been quite roundly criticised even by the South Australian Commission itself.

In the National Integrity System discussion paper of March 2017, 'A Federal Anti-Corruption Agency for Australia?', Dr Hoole and Associate Professor Appleby similarly agreed that the use of private hearings and investigative methods should be 'the ordinary course' – but proposed that a test for when a federal commission could convene public hearings should be 'cases where public concern surrounding an allegation of corruption is so high that… the subject has provoked a crisis of public confidence in government'.

The feedback collected by TI Australia on this particular suggestion is that it would be unlikely to prove workable (in terms of definition of what would constitute a 'crisis'). Further, to so limit public hearings would prevent their use in some of the legitimate circumstances described above, and could defeat the ability of the commission to undertake public investigations in a way that might help *prevent* a crisis of public confidence, as opposed to simply respond to one. However the debate has certainly helped clarify what an appropriate test is likely to be.

Currently, the Queensland approach proceeds on the most logical basis, clearly stipulating that hearings will be conducted in private unless, in the opinion of the Commission as a whole, the public interest requires otherwise. TIA supports this model as appropriate.

6. Relationship with criminal prosecutions

Many concerns regarding the value of anti-corruption commissions stem from their sometimes unclear relationship with normal legal processes for dealing with corrupt conduct which is criminal by nature.

First, it can be unclear why an anti-corruption agency should have the power to make findings that corrupt conduct has occurred, based on factual or administrative criteria, without this necessarily being provable to a criminal standard or having been tested by a court. Second, even when criminal charges are recommended, these are not necessarily laid or can take a long time to be brought – undermining public confidence that even though corrupt conduct has been officially identified, no-one is actually facing any penalties because of it.

In TIA's view, it should be clear that if or when an investigation gathers sufficient evidence to make a sustainable criminal charge either possible or likely, an anti-corruption agency should complete the investigation with the aim of that charge being laid and the matter decided by a court, rather than making its own finding of corrupt conduct. An anti-corruption agency has many powers to make findings of fact and recommendations for action, which do not require it to make its own non-judicial findings that corrupt conduct has occurred.

If necessary, these principles should be placed in the legislation.

A major reason for anti-corruption agencies to have the power to make such public findings and recommendations, is to ensure that Governments act to remedy corruption, in circumstances where powerful interests may have previously prevented this from occurring, or the Government itself is implicated.

In the agencies throughout Australia, the ultimate step taken is for matters to be referred to the Director of Public Prosecutions for the institution of criminal proceedings. In NSW, the ICAC can institute proceedings itself, but only at the request of and with the permission of the Director of Public Prosecutions (DPP). The actual conduct of the prosecution is of course

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undertaken by the Director. There are variations throughout Australia.

Fortunately, the statutory independence of Directors of Public Prosecutions, and the comparatively high integrity of the courts help ensure that, once recommended, prosecutions will usually occur or at least be fully considered. However, there has been criticism of agencies throughout Australia in that prosecutions seem to follow quite slowly when a recommendation is made. There are obviously practical reasons why this is so. One of the reasons relates to the burden placed upon the DPP to assemble a body of admissible evidence and to prosecute ICAC-type matters along with the burden of work he or she already carries. In the normal course of business, a DPP may not see a corruption matter (e.g. a petty bribe accepted by a public servant) as as high a priority as many other pressing matters (e.g. a murder or sexual assault), even when the former has the risk of undermining the integrity of government and the latter does not.

Mechanisms and resources need to be in place to ensure that when corruption problems are identified, appropriate sanctions or remedies are actually implemented, and in a timely and visible way. For criminal matters, consideration should be given to the formation of a special prosecutor to deal with federal anti-corruption matters; or the Commonwealth DPP given additional resources to prevent such delays arising.

We trust these submissions assist the Committee.

The Hon. Anthony Whealy QC
Chair, TI Australia

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