

SUBMISSION

To:

The Select Committee on the Possible Establishment of a National Integrity Commission,
Parliament House,
CANBERRA, ACT

Defective Design of the Federal Court of Australia – No Separate Court of Appeal

The Terms of Reference

The Terms of Reference of this Select Committee Inquiry references:

- a. *the adequacy of the Australian government's legislative, institutional and policy framework in addressing **all facets** of institutional, **organisational**, political and electoral, and individual **corruption and misconduct**, with reference to:*
- i. *the **effectiveness** of the current federal and state/territory **agencies** and commissions in **preventing, investigating and prosecuting corruption and misconduct***

Glaring Design Fault of the Federal Court of Australia

The original organisational framework of the Federal Court of Australia has the potential to allow misconduct and/or corruption to go unchecked, without a major obvious change to the institution, and / or the oversight of the Court by an institution such as a National Integrity Commission.

It should be immediately apparent to this Senate Committee of Inquiry, upon elucidation of this issue, that the Federal Court of Australia by its very setup, has always operated and continues to operate with a gaping inadequacy in its design:

In the Federal Court of Australia, matters are heard at first instance by single Judges. The Federal Court claims to include an appeal division, referred to as the Full Court, which then comprises three judges. However, an obvious flaw in the design of the Federal Court system is that when litigation is, for whatever reason, to be escalated, there is no properly constituted 'Court of Appeal' separated from the workings of the court of first instance - the Federal

Court itself - to which litigants can appeal. Instead, each and any time an appeal is made, the Federal Court of Australia, made up of the same collegiate members as the court of first instance, effectively sits in judgment of itself.

In most jurisdictions, in Australia and throughout the world, the workings of a 'Court of Appeal' necessitates by design, the intentional basic notion that the forum for the appeal is a different forum to the court of first instance. For example, in the NSW system, if an appeal is to be made against a decision of a justice from the "Supreme Court of New South Wales", the natural forums for such appeals are the New South Wales Court of Appeal and New South Wales Court of Criminal Appeal. In the case of the Court of Appeal, the judges are entirely separated from the court of first instance, and are commissioned as judges of appeal, who can pass judgment with no fear of judicial retribution at a later date from the judge of first instance, for any appeal decisions and criticisms they may make of the initial court decisions. But to reiterate, that is not the case with the Federal Court of Australia. When an appeal is made against an initial Federal Court of Australia ruling, the very same college of judges sits back down to hear the appeal.

Clearly, with no separate "Federal Appeals Court of Australia", and with no "National Integrity Commission", by design there are less rigorous checks and balances on the operation of the entire Federal Court system, and therefore there exists a greater and ongoing potential for corruption and/or misconduct to occur, and a greater likelihood such corruption and/or misconduct will never be identified, prevented, investigated or prosecuted.

Submission by Michael John Bates

14th March 2017