Parliamentary Joint Committee

On The Australian Commission For Law Enforcement Integrity – Inquiry Into

The Jurisdiction Of The Australian Commission For Law Enforcement Integrity

Submission of the Accountability Round Table

Introduction

The Accountability Round Table (ART) has been invited to make submissions to your Committee on seven issues, by letter dated 21 March 2014. The purpose of this submission is to call for a single overarching national anticorruption body.

Principles of effective anti-corruption bodies

ART has set out consistent principles for an effective anti-corruption regime in three previous submissions to your committee and departments of the Commonwealth. The main recommendation of each of these submissions is that to satisfy Article 36 and the spirit and intention of UNCAC, the jurisdiction of ACLEI should be extended to provide a single national anti-corruption and malpractice body with a jurisdiction giving it comprehensive coverage of the whole Commonwealth sector.
The current multi-body approach is inadequate. ART has argued that the danger of relying on a multi-body approach and shared responsibility was that each body was likely to assume effective oversight from every other body, and thus abrogate their own ultimate responsibility.

The previous submissions to your committee and departments of the Commonwealth were:

(a) ART submission to PARLIAMENTARY JOINT COMMITTEE on ACLEI, January 2011 (ART 2011a) (Appendix 1);

(b) ART Submission to Review of Australia's Implementation of UNCAC, June 2011 (ART 2011b) (Appendix 2);

(c) ART's submission to the International Review of Australia's Implementation of UNCAC, March 2012 (ART 2012) (Appendix 3).

Each of these three submissions is attached to this submission and the contents of all three are relied on by ART in support of the contentions in this submission.

Evidence of lack of effectiveness

The first submission (ART 2011a) argued that the jurisdiction of the present Commonwealth independent-corruption body ACLEI, is inadequate, and that it should be extended to at least include other law enforcement bodies such as the ATO, ASIC and the Department of Immigration. But in light of then recent events, ART argued that consideration should also be given to enlarging its jurisdiction so as to include not only corporations doing business overseas that received direct or indirect assistance from the Federal Government, but also the Reserve Bank and any corporations in which it has an interest, defence department officials who negotiate contracts, Austrade, Ausaid, and the Therapeutic Goods Administration (TGA). ART also submitted that even with these additions, the jurisdiction of ACLEI would be inadequate, and that the jurisdiction of ACLEI should be extended to provide a single national anti-corruption and malpractice body with a jurisdiction giving it comprehensive coverage of the whole Commonwealth sector.

In the second submission (ART 2011b), ART submitted that the Australian Government had failed to address the agreed concerns and agreed purposes of UNCAC, and that Article 36 of UNCAC described the sort of integrity structure needed to manage the on-going problem of corruption. ART submitted that in the last 20 years the risk of corruption had increased exponentially and continued to do so. Again it submitted that to satisfy UNCAC Article 36 and the spirit and intention of UNCAC, the Australian Government should provide an adequately empowered and resourced anti-corruption commission covering the whole of the public sector and its activities including matters involving decisions and provision of services flowing from an allocation of public funds and the activities of government agencies and of corporations operating overseas.

In the third submission (ART 2012), ART again focussed on the question of compliance by Australia under its obligations under Article 36 of UNCAC and

challenged the major premise of the then Government's approach to preventing corruption, which was that no single body should be responsible, instead that a strong constitutional foundation was enhanced by a range of bodies and government initiatives to promote accountability and transparency. ART argued that the federal system could not be said to be working effectively in light of the fact that on at least two occasions two companies (Securency and Note Printing Australia [NPA]) closely associated with the Reserve Bank bribed foreign officials in the course of doing business overseas. There was a strong contrast between the high figure for allegations of misconduct including fraud, and the very small number of cases where action had been said to have been undertaken. The probability was that the number of cases published fell short of the reality having regard to the secret nature of corruption. The submission examined in some detail both the activities of AWB Limited in Iraq and the allegations of foreign bribery in relation to NPA and Securency. It was noted that the foreign bribery allegations occurred notwithstanding that in each case the Reserve Bank, NPA and Securency had eminent, highly qualified, experienced and seemingly capable people on their Boards and apparently sound systems and practices in place to guard against illegal and other misconduct. Notwithstanding that the companies had been put on notice again of actual foreign bribery by NPA in May 2007, yet in 2009 corrupt activity was still being revealed in the case of Securency. ART argued that the danger in relying on a multi-body approach and shared responsibility was the result that no one had ultimate responsibility and each body involved was likely to assume that all was well because the other body had been making sure that nothing corrupt was going on. ART argued that the Australian Government had hitherto failed to adopt best practice and that to address its commitments the Australian Government should introduce an independent anti-corruption body with jurisdiction over the entire public sector.

In August 2012, there was a Commonwealth conference relating to a proposed National Anti-Corruption Plan to which ART again made submissions.

Notwithstanding that nearly two years have passed since that teleconference on 1 August 2012, there has, so far as ART is aware, not been any National Anti-Corruption Plan completed or announced. In the ART submission in relation to the creation of a National Anti-Corruption Plan (NAP) Final Submission 18/05/2012 forwarded to the Attorney-General's Department on 25 May 2012), at least nine examples of corrupt conduct were instanced, some particularly damaging, arising between 1999 and 2012, involving a range of public agencies including NPA and

Securency, an Assistant Commissioner of Taxation, evidence of corruption of the Defence procurement system, bribing of a Tax Office Inspector, corruption of at least 15 Customs and Border Protection officers and rorting of allowances by employees in the Attorney-General's Department.

Evidence of the complexity of interrelationships and implications for the federal level

Since 2012 the community has been shaken by the disclosures following ICAC's investigations into the activities of the former NSW Minister for Mining, Mr Ian Macdonald and the Obeid family, and the many recent revelations in ICAC hearings concerning political donations on both sides of the political spectrum in NSW. Evidence before ICAC suggests many of these may be illegal and hidden by the use of slush fund organisations. Some who support the current federal anti-corruption system argue that NSW is Australia's most corrupt political jurisdiction and in any case the most serious disclosures relate to land use decisions which are not a federal concern. Prime Minister Abbott has been quoted as declaring that Canberra has a "pretty clean polity" and saying that stopping lobbyists from also serving as party officials is sufficient reform.

ART's response is that the reality is quite different, and that the allegations in NSW are investigated because NSW has Australia's most effective anti-corruption system. This is supported by Mike Seccombe's article in The Saturday Paper (May 10-16 issue), headed "The clean money in a dirty system" and "Donation Shambles." The following paragraphs by Seccombe are quoted in full in support of the argument –

> *"The laws in NSW are the most stringent of all; a low declaration threshold ($1,000), tight caps on donations, and prohibitions on some donors, including property developers. Equally importantly, it has an effective investigating body in ICAC.*
>
> *In contrast, says Anne Twomey, Professor of Constitutional Law at Sydney University, "at the federal level you can get away with almost anything".*
>
> *The federal system is the biggest and weakest of all the nation's electoral funding regimes. There are no prohibitions on any class of donors and no caps on the size of donations or size of*

> *expenditure. Thus it becomes attractive to launder donations through the federal system.*
>
> *There was once a requirement that donations of more than $1,500 be declared, but in May 1996 the Howard Government lifted the threshold to $10,000, and indexed it, thereby ensuring the bulk of donations stayed secret. The threshold now stands at $12,400.*
>
> *Further obscuring of the donations picture are the hundreds of "associated entities" – businesses, companies, unions and foundations, such as the Free Enterprise Foundation, set up to collect money and pass it on to the parties with which they are aligned.*
>
> *The effect of this is to make it all but impossible for an outsider to determine exactly who has given exactly how much to which politician, and to what end. The Australian Electoral Commission (AEC) requires three groups to submit returns; parties donors and associated entities. But often these returns don't match up."*

Seccombe concludes that the laws are "a shambles". He blames both major parties for this situation, but then says "the conservative parties, by virtue of the fact that their constituency has the deepest pockets and most vested interests, are more resistant to transparency and regulation."

Australia v East Timor

The rather special case at the intersection of the national interest (i.e. enlightened national self-interest), the conduct of national security and the rule of law arises from events in 2004 involving a number of Commonwealth agencies and public officers. At that time, the Commonwealth of Australia was negotiating with the Democratic

Republic of Timor-Leste ("East Timor") to share revenues from the oil and gas deposits under the Timor Sea called the Greater Sunrise Field. Since December 2013 the East Timorese have alleged that during these negotiations, ASIS used the cover of Australia's aid program to install listening devices inside the East Timorese Cabinet room and elsewhere so that Australia could spy on sensitive information. Woodside Petroleum, hoping to exploit the gas fields, was working with the Australian Government to secure the best possible deal. The allegation of the solicitor acting for the Timorese, Mr Bernard Collaery, is that the Director-General of the Australian Secret Intelligence Service (ASIS) and his deputy instructed a team of ASIS technicians to travel to East Timor in an elaborate plan, under cover of Australian aid programs relating to the renovation and construction of the Cabinet offices in Dili, East Timor, to insert listening devices into the wall which were to be constructed under an Australian aid program. Mr Collaery said the ASIS operator decided to blow the whistle after learning that Alexander Downer had become an advisor to Woodside Petroleum after his retirement from politics.

East Timor then launched a case before an International Arbitral Tribunal in The Hague to have the oil and gas treaty declared void as obtained by fraud.

East Timor intended to prove its case by calling as a witness before the Arbitral Tribunal the ASIS operator who was the former director of all technical operations in ASIS. However, officers of ASIO raided the offices of Mr Collaery in Australia and cancelled the passport of the retired ASIS operator who was to give evidence in The Hague. The ASIS operator was apparently also detained.

The Attorney-General, George Brandis QC, has confirmed that he approved the warrants to conduct the raid, saying that ASIO requested the search warrants on the ground that the documents and electronic data in question contained intelligence relating to security matters. The present head of ASIO is Mr David Irvine, who in 2004 was the Director-General of ASIS. Both Mr Brandis and the Prime Minister have defended the raid on Mr Collaery's offices and the use of the search warrants as being done in the national interest, and to protect Australia's national security interest.

While the Government says it will not comment on security matters, it would seem that the only secrets likely to be disclosed by the ASIS officer would relate to the identity of ASIS officers in any bugging operation and the operational methods used by ASIS. If this is correct, it is noteworthy that Australia's response to East Timor's

major claim appears not to deny but rather implicitly to accept that the bugging operation took place. Mr Collaery claimed that he had the evidence of the bugging operation in any event with him in The Hague.

If the allegations of East Timor are made good in the Arbitral Tribunal, Australia would be stigmatised in the international community as having been guilty of an indefensible fraud on East Timor, and having attempted to prevent the fraud being proved in evidence by actions which in ordinary court proceedings would be regarded as a most serious contempt of court.

Implicated in the fraud would be ASIS officers, and senior members of the Australian Government involved in the negotiations. Even if the raid on Mr Collaery's office is not to be categorised as a contempt of court, ASIO's officers and the Attorney-General's office would at least be regarded as having taken part in an attempt to prevent the fraud being proved in the Tribunal. At the very least the evidence so far raises serious concerns that would thoroughly justify investigation by an anti-corruption commission with effective powers.

ART contends that if similar facts occurred in NSW, the ICAC would clearly have jurisdiction to investigate, having regard to the definition of "corrupt conduct" in s.8 of the ICAC Act and the wording of s.13. ACLEI should be similarly broad.

ART understands that Parliament may regard ASIS, ASIO and national security as being a special case and that specific, special arrangements might need to be created to accommodate national security issues. One method of treating national security concerns would be to require ACLEI to treat national security issues in-camera and in absolute confidentiality.

Disclosure of complaints

The public disclosure of a complaint by a complainant, for whatever motive, potentially places an investigation at risk. If a complainant really believes that another may be doing something wrong, the alleged wrongdoer should not be alerted, thereby giving the latter an opportunity to destroy evidence, coerce potential witnesses, or concoct or share stories among potential witnesses. Such disclosure reduces the chance of the alleged wrongdoer being caught and/or convicted.

Any exemptions to this proscription should be carefully considered. They should not rule out making complaints to other bodies (for example, some corrupt behaviour

might also breach other laws such as insider trading). Nor should they rule out complaining to oversight bodies if they are concerned that the complaint is not being properly investigated.

Sanctions would be appropriate for disclosing that a complaint had been made.

The resolution

In relation to the Committee's Terms of Reference, ART therefore submits that:

(1) ACLEI's current jurisdiction is inadequate and should be extended to provide a single national anti-corruption and malpractice body with a jurisdiction giving it comprehensive coverage of the whole Commonwealth sector;

(2) ACLEI's jurisdiction should be extended to include the entire Department of Agriculture;

(3) ACLEI's jurisdiction should be extended to include each of the Australian Securities Investment Commission, the Attorney-General's Department and the Australian Taxation Office;

(4) ACLEI's jurisdiction should be extended to include the Department of Immigration and Border Protection;

(5) ACLEI's jurisdiction should be neither activity-based nor jurisdiction-based. Its jurisdiction should be extended, as submitted above, to provide a single national anti-corruption and malpractice body;

(6) The most appropriate method of implementing any such change to ACLEI'S jurisdiction would be by reviewing all related matters, including relevant definitions, such as definitions of corruption and malpractice, and the adequacy of -

(i) the educative, research and policy functions;

(ii) preventative measures and measures which act to facilitate the co-operation of parliamentarians and the whole commonwealth sector, and to prevent political resistance to building an anticorruption culture;

(iii) measures which require complainants to maintain absolute secrecy as to the making of a complaint to the Commission until the Commission itself makes public that such a complaint has been received;

(iv) the system for coordinating the work of all Commonwealth agencies involved in monitoring and investigating misconduct;

(v) existing powers, including investigatory powers and whether additional powers are required; and

(vi) the resourcing needed to ensure that the comprehensive jurisdiction can be adequately serviced.

16 May 2014

Appendix 1

Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity – Review of Jurisdiction of ACLEI

Submission of the Accountability Round Table:

Executive Summary

The jurisdiction of the present Commonwealth independent anti-corruption body, ACLEI, is inadequate. It should at least include other law enforcement bodies such as the ATO, ASIC and the Department of Immigration. In light of recent events, consideration should also be given to including not only corporations doing business overseas that receive direct or indirect assistance from the federal government, but also the Reserve Bank and any corporations in which it has an interest, defence department officials who negotiate contracts, Austrade, Ausaid and the TGA.
But to do so would be to continue the past reactive and inadequate piecemeal approach and to ignore the realities and the extent of the risks posed by government corruption, risks that will always exist and have significantly increased in the last 20 years.

ART submits that the jurisdiction of ACLEI should be extended to provide a single national anti-corruption and malpractice body with a jurisdiction giving it comprehensive coverage of the whole Commonwealth sector, including:

- Ministers, Parliamentary Secretaries, Members of Parliament and their staff,
- The Commonwealth Public Service,
- Courts and tribunals,
- Compliance, regulatory and law enforcement agencies,
- Statutory corporations, companies in which government has an interest or on which government relies to provide services to the community or to meet statutory, or international treaty obligations, or which receive direct or indirect assistance from the government or its agencies.

Other consequential action will need to be taken. It will be necessary to rename ACLEI to reflect the broadened jurisdiction. It will also be necessary to review all related matters including:

- relevant definitions (including the definitions of corruption and malpractice),
- the adequacy of existing powers, including investigatory powers, and whether additional powers are required, and
- the adequacy of the educative, research and policy functions.
- the adequacy of the system for co-ordinating the work of all Commonwealth agencies involved in monitoring and investigating misconduct,
- the resourcing needed to serve the comprehensive jurisdiction.

The new Parliament has a unique opportunity to establish a comprehensive and effective national integrity system that would enable Australia to join New Zealand at the top of Transparency International’s integrity list.

Appendix 1. ART (2011a) Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity – Review of Jurisdiction of ACLEI

Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity – Review of Jurisdiction of ACLEI

Submission of the Accountability Round Table

The present Commonwealth government integrity system[1] includes Parliament (especially its committees), Courts, administrative review tribunals, Director of Public Prosecutions, oversight bodies such as the Ombudsman and the Auditor General, FOI and an independent anti-corruption body, the Australian Commission for Law Enforcement Integrity (ACLEI). During the 1970s, Australia introduced important reforms in administrative law and the last Parliament saw some important developments. However, the Australian government integrity system is no longer up to international best practice (or that of some Australian states). In particular, the jurisdiction of ACLEI is seriously limited. It has been confined to preventing, detecting, and investigating serious and systemic corruption issues in two Commonwealth law enforcement agencies: the Australian Federal Police and Australian Crime Commission. Australian Customs has been added to its jurisdiction this year.

The NISA Report of 2005[2] which comprehensively reviewed government integrity systems in Australia, commented,

> "Even if 'law enforcement' were the only area of Commonwealth activity in which more anti-corruption capacity is needed, there would be little logic in excluding many *other* Commonwealth agencies with major compliance and law enforcement powers — including the Australian Customs Office, Australian Taxation Office, Australian Security & Investments Commission, and Department of Immigration. In fact, there is a larger argument that to represent a serious injection of capacity and meet national best practice, a more comprehensive approach and general jurisdiction are needed to ensure that capacity for independent anti-corruption investigation is boosted across the whole Commonwealth sector rather than in select fragments.[3]"

If that call had been heeded there would have been an appropriate independent body in existence able to investigate recent serious allegations made about the actions of Securency, Austrade and the Reserve Bank, and Defence Department contracts[4]. It is

[1] Various definitions are used for integrity systems but one of the simplest is drawn from the overview paper for the 2008 International Anti-Corruption Conference commissioned by Transparency International which defined national integrity systems as "the interconnecting institutions, laws, procedures, practices and attitudes that promote integrity and reduce the likelihood of corruption in public life" (Sampford, C.J.G. From National Integrity Systems to Global Integrity Systems http://www.13iacc.org/en/IACC/Conference_Papers#Discussion Paper p.11). [See also Sampford, "From Deep North to Global Governance Exemplar: Fitzgerald's Impact on the International Anti-corruption Movement" Griffith Law Review 2009]

[2] Key Centre for Ethics, Law, Justice and Governance (Griffith University) and Transparency International, *National Integrity Systems Assessment* (NISA) Final Report, 2005, p 65.

[3] Brown A.J., *'Federal anti-corruption policy takes a new turn … but which way? Issues and options for a Commonwealth integrity agency'*, Public Law Review Vol 16, No 2 (June 2005).

[4] See recent media discussion of Securency particularly by Nick McKenzie, and Richard Baker in The Age of 20 November 2010 and 4 October 2010 and concerning the alleged involvement of Austrade. Note also concerns raised in The Age by Dan Oakes (17 November 2010 – including allegations of a cover up), Richard Baker (30 September 2010) and Linton Besser in the Sydney Morning Herald (eg 9 March 2010) about defence contracts.

also unlikely that the Therapeutic Goods Administration would have failed to maintain a record of gifts and other benefits received by staff.[5] Such an independent body would also have been available to any citizens who wished to raise their concerns about possible misconduct and, if there was, it could have been nipped in the bud. Instead conduct that has raised concern continued for a considerable time.

In reviewing the Commonwealth integrity system[6] the NISA Report identified a number of gaps and weaknesses. They were recently summarised as follows[7]

> "Ministerial standards and the roles of ministerial advisers; the inability to enforce ministerial and other parliamentary standards; and increased political pressure on senior civil servants. While accountability systems appeared to function with the Senate at their peak, the role of the Senate had been repeatedly attacked, over a long period, by executive governments of all persuasions. Inadequacies were found in the whistleblower protection and management scheme, as well as an under-reporting and potential concealment of the incidence of corruption; because, for the purposes of classification, 'bribery, corruption and abuse of office' are subsumed within 'fraud'.[8] The absence of an anti-corruption body, and fragmented leadership of integrity systems, resulted in a lack of clear leadership and co-ordination. The report comments: 'There is now a clear case for a general purpose Commonwealth anti-corruption agency, which includes educative, research and policy functions.'"[9]

During the last parliamentary term steps were taken to address some of those concerns and further action is being taken. But many concerns remain and the risks of corruption have been increased in recent years by: the increase in government control of information;[10] the ever-increasing need for funding of political campaigns; the methods employed to obtain it and the failure to enact legislation to provide adequate controls and transparency;[11] the commercialisation of government services and projects;[12] the development of lobbying, the inadequacies of the attempt to control that activity and make it transparent in a timely manner; and the failure to either stop or control the flow of Ministers and their staff to the lobbying industry on retirement from their positions.[13] The merging of national interest in urban and regional policy and large infrastructure funding decisions (Infrastructure Australia) has also added to the risk of corruption. Combined with those factors, there will also be an increased risk of corruption resulting from the impact on major vested commercial interests of the significant changes that will be needed to address the problems posed by climate change and the exhaustion of natural resources, including energy, water and phosphate.[14]

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[5] Linton Besser, The Age, 3 January 2011; Editorial, The Age 4 January 2011;

[6] *NISA Report*, above, pp 31-36.

[7] T.H.Smith, "*Corruption; The abuse of entrusted power in Australia*," Australian Collaboration, 2010 (Corruption), p 33. That essay considers the nature and extent of the risks of government corruption in Australia, their causes and the action to be taken. It includes examples of corruption at the Commonwealth level.

[8] NISA Report, above, p 35

[9] Ibid.

[10] *Corruption*, above, pp 47-49

[11] op.cit. pp 45-47

[12] op.cit. pp 50-51; that has extended to the delivery of foreign aid – see issues raised in articles "Who profits from foreign Aid? ...", including by the Australian Centre for Independent Journalism, published on www.crikey.com.au on and between 12 July 2010 and 28 July 2010.

[13] op.cit. pp 51-54.

[14] op.cit. p 55

Any system must also provide a place for people to take their concerns about the activities of not only government but also its agencies, including statutory corporations, companies in which government agencies hold an interest and other companies which may be breaching laws put in place to give effect, for example, to international treaty obligations or engaged in other misconduct. Examples include the activities of the AWB and Securency. Both corporations have seriously damaged the international reputation and credibility of Australia and its government. In both cases, people in government received information of the allegations but there was no independent overarching crime and misconduct body to which such allegations could be referred. In such situations there will be people who have the integrity to be concerned and the courage to act. There must be an independent standing anti-corruption and misconduct body to which such people can take their concerns knowing that they will be investigated.

If we were to continue the past ad hoc and piecemeal approach, we would be considering now whether to widen the jurisdiction of ACLEII to include:

- corporations doing business overseas receiving direct or indirect assistance from the federal government and its agencies,
- the Reserve Bank and any corporations in which it has an interest and which do business overseas,
- the Defence Department,
- Austrade and Ausaid,[15] and
- the Therapeutic Goods Administration.

To acknowledge that fact, however, only highlights the unreality of the past approach – the approach also taken in Victoria but now abandoned. The past approach also ignores the reality that each year, the Federal Government purchases tens of billions of dollars of goods and services[16].

The risk of corruption is not confined to law enforcement agencies. As was said in the essay "Corruption"

> "…there will always be a government corruption problem (in all countries) unless a miracle occurs to remove greed and the desire for power and hubris from the psyche of *homo sapiens*. There is also the fact that some of the species do not believe that the rules apply to them, and others believe that the end will always justify the means."[17]

The past approach reflected a denial of this reality and of the extent of the damage that can be done to the whole community by corruption. The past approach will also lead inevitably to unproductive definitional debate and uncertainty about where to take concerns.

It is time that a comprehensive independent integrity system was created for the Commonwealth. It should incorporate a general purpose Commonwealth anti-corruption agency with educative, research and policy functions and all necessary powers which is subject to parliamentary oversight. It should also address the need to

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[15] See fn 11.

[16] In and between 2006 and 2009, the Defence Department spent more than $48 billion (Linton Besser, The Age, 30 December 2010). (Note, according to an advertising feature on how to go about making successful tenders to Federal and State governments (including techniques on securing internal contacts), there were $45.5 billion worth of tenders sought in 2009 (John MacPherson, The Age, 8 January 2011).

[17] *Corruption*, above, p 22.

co-ordinate the work of agencies involved in monitoring and investigating misconduct. The recommendations for the Commonwealth in the NISA Report should be regarded as best practice and setting the standard by which any proposals should be judged.

Recommendations of the Accountability Round Table

ART submits that the jurisdiction of ACLEI should be extended to provide a single national anti-corruption and malpractice body with a jurisdiction giving it comprehensive coverage of the whole Commonwealth sector, rather than select fragments of it, including:

- Ministers, Parliamentary Secretaries, Members of Parliament and their staff,
- The Commonwealth Public Service,
- Courts and tribunals,
- Compliance, regulatory and law enforcement agencies,
- Statutory corporations, companies in which government has an interest or on which government relies to provide services to the community or to meet statutory, or international treaty obligations, or which receive direct or indirect assistance from the government or its agencies.

Other action will need to be taken. It will be necessary to rename ACLEI to reflect the broadened jurisdiction. It will also be necessary to review all related matters including:

- relevant definitions (including the definitions of corruption and malpractice).
- the adequacy of
    - the educative, research and policy functions.
    - the system for co-ordinating the work of all Commonwealth agencies involved in monitoring and investigating misconduct
    - existing powers, including investigatory powers and whether additional powers are required, and
    - the resourcing needed to ensure that the comprehensive jurisdiction can be adequately served.

Appendix 2

Claire Cocker
Treaties, International Arrangements and Corruption Section
International Crime Policy and Engagement Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

Claire.Cocker@ag.gov.au

15 June 2011.

Dear Claire,

Thank you for the opportunity to comment on the the review of Australia's implementation of the **United Nations Convention against Corruption.**

Attached is our submission.

Yours sincerely

Ken Coghill

Acting Chaan.

Correspondence: Ms Anne Mancini,
Secretary, Accountability Round Table,

Appendix 2. ART (2011b) Submission to the review of Australia's implementation of the United Nations Convention against Corruption (UNCAC)

Submission to the review of Australia's implementation of the United Nations Convention against Corruption (UNCAC)

The UNCAC context

In assessing Australia's compliance with Chapters 3 and 4 of the *United Nations Convention against Corruption,* those chapters should not be considered in isolation but should be considered in light of the whole UNCAC, including the Preamble and the Statement of Purpose in Article 1. We draw attention first the following contained in the Preamble:

> "*The States Parties to the Convention,*
> Concerned about the seriousness of problems and threat posed by corruption to the stability and security of societies, undermining the institutions and values of democracy, ethical values and justice and jeopardising sustainable development and the rule of law...
> *Concerned further* about cases of corruption that involve vast quantities of assets which may constitute a substantial proportion of the resources of States, and that threaten the political stability and sustainable development of those States,
> *Concerned* that corruption is no longer a local matter but a transnational phenomenon that affects all societies and economies, making international cooperation to prevent and control it essential,
> *Convinced also* that a comprehensive and multidisciplinary approach is required to prevent and combat corruption effectively...
> *Bearing in mind* that the prevention and eradication of corruption is a responsibility of STATES and that they must cooperate with one another, with the support and involvement of individuals and groups outside the public sector, such as civil society, non-governmental organisations and community-based organisations, if their efforts in this area are to be effective.
>
> *Bearing also in mind* that the principles of proper management of public affairs and public property, fairness, responsibility and equality before the law and the need to safeguard integrity and to foster a culture of rejection of corruption...

Correspondence: Ms Anne Mancini,
Secretary, Accountability Round Table,

Have agreed as follows: ....
Thus the State Parties agreed that serious action was necessary to prevent and combat corruption, that they were dealing with not simply a domestic problem but an international problem and that an effective response required a comprehensive and multidisciplinary response."

In addition, **Chapter 1** *Article 1. Statement of Purpose* of the UNCAC provides -

"The purposes of this Convention are:
(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
(b) To promote, facilitate and support international co-operation and technical assistance in the prevention of and fight against corruption, including asset recovery;
(c) To promote integrity, accountability and proper management of public affairs and public property.

The question of compliance: Article 36

We submit that, regrettably, the successive Australian governments in office in the period since the UNCAC came into operation have failed to address the agreed concerns and has failed to address the agreed purposes. In relation to Chapter 3 we submit that, regrettably, it has failed to comply with Article 36, which provides:

"*Article 36. Specialised authorities*
Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively[18] and without any undue influence. Such persons or staff of such body or body shall have the appropriate training and resources to carry out their tasks."

The State Parties committed to an effective approach to deal with the problem of corruption, both domestic and international. To be effective, the specialist body or bodies must cover the whole of the domestic public sector and cover the activities of all government agencies and activities agencies and corporations operating overseas, such as the former Australian Wheat Board, and Securency International Pty Ltd.

No such a comprehensive system has been established. Instead the Australian government created the Australian Commission for Law Enforcement Integrity (ACLEI), but narrowly confined its anti-corruption jurisdiction to the law-enforcement activities of three bodies at the national (Commonwealth) level: initially, the Federal Police and the Australian Crime Commission and, recently, Australian Customs. It does not have jurisdiction over the generality of the Australian Public Service, or any state-level public official, members of Parliament, their staff, the judiciary or any other persons making decisions or providing services involving the expending of public funds. The result is that, at the national level, it cannot be claimed Australia maintains, in the broad sense envisaged by the Preamble to the UNCAC, a "body, bodies or persons specialised in combating corruption through law enforcement".[19]

[18] Emphasis added

[19] One may speculate whether the reference to "law enforcement" in the Convention was a factor in the government choosing to limit the jurisdiction of ACLEI to law enforcement agencies. But the reference in the convention to "law enforcement" does not purport to define the jurisdiction of the required body or bodies. It requires that law enforcement be linked to the work of the body or bodies or people, or to be

Justification?

We submit that the very limited approach of the Australian Government cannot be justified.

An attempted justification proffered by Australian Governments from time to time for not creating a broad-based Commonwealth body to address corruption is that there is no evidence of corruption in the federal government system. It is our submission that this is not the case (see Annexures A and B). Such an argument would only have weight if Australia had

- a broad-based anti-corruption commission with the power and the resources to investigate the existence and extent of corruption,

or

- maintained or supported some other form of comprehensive independent research and monitoring program(s) -

which had investigated thoroughly and reported that there was no evidence.

In any event the attempted justification proceeds on the basis of an erroneous assumption that if there is no overt evidence of corruption occurring, then it is not occurring. But there has been and always will be corruption in government and it is always conducted with the utmost secrecy. What is at stake is the management of a very serious domestic and international issue which is often misrepresented, and misunderstood.

Article 36 attempts to describe the sort of system-level integrity structure needed to manage the on-going problem of systemic corruption. We submit that in the last 20 years the risk of corruption has increased exponentially and it continues to do so. These concerns were discussed in the Accountability Round Table (ART) submission to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, a copy of which is attached (See Annexure A).

Other justifications have been advanced for the current limited approach at the national level. In 2009, the Department of the Attorney –General lodged a detailed and closely argued submission with the ACLEI Parliamentary Joint Committee.[20] An analysis of that submission is also attached (Annexure B). For reasons advanced, the justifications proffered do not, on examination, support Australia's limited approach. Rather, on fair and proper analysis they support the wide approach.

Finally, if cost is a concern, assuming an annual cost of say $40,000,000, it would amount to $2.00 per Australian – a very low premium for a program and policy to address both a domestic and international problem.

To satisfy Article 36, and the spirit and intent of the UNCAC, the Australian Government should provide an adequately empowered and resourced anti-corruption commission which covers the whole of the public sector and its activities at the national level, including matters involving decisions and the provision of services flowing from an allocation of public funds and the activities of government agencies

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available to them, not that it be a limit on jurisdiction. The link is effectively a minimum requirement of any Integrity system set up to comply with UNCAC.

[20] See the Committee website; current inquiries, Submissions

and of government –owned or controlled corporations operating overseas.[21] Regrettably, despite official claims to the contrary, it must be accepted that the Australian Government has not as yet complied with this fundamental aspect of the UNCAC.

The question of compliance: Article 33

Article 33 requires states to consider providing measures to protect persons who report offenses established in the UNCAC to competent authorities.

It is this Submission's position that effective statutory whistleblower protection measures, including effective sanctions against attempts to discourage the principled disclosure of official wrongdoing, corrupt and corruptive conduct, to a competent authority, is necessarily a key feature of any genuine attempt by governments to combat corruption.

Such measures are generally understood as including laws to encourage designated 'whistleblowers' and others to expose corrupt conduct and other forms of administrative wrongdoing by offering various forms of protection and support, as well as exemption from otherwise applicable confidentiality obligations, and immunity from prosecution for (for example) alleged breaches of duty as a public official, or alleged defamation. Effective measures of this kind will also impose significant sanctions on any person who takes retaliatory action against a presumed whistleblower, or otherwise causes 'detriment' to any person, because of the making of a protected 'public interest disclosure'.

While the great majority of Australian States and Territories enacted 'whistleblower' protection laws which address the above objectives, over a decade ago, successive Australian governments at the national level have failed to enact comparable comprehensive legislative measures. (While the Australian Public Service is subject to minimal provisions under its 1999 employment legislation, this coverage is limited to public servants who constitute only about one third of public sector employment at the federal level, and then only in relation to breaches of the Public Service *Code of Conduct*: the Code does not treat 'corruption' matters in specific terms.)

The Australian Government response "Whistleblower Protection: A comprehensive scheme for the Commonwealth public sector—Ministerial statement by the Special Minister of State" was tabled on 17 March 2010. The statement set out in general terms the Government's response to each of the Report's recommendations, the great majority of which were accepted as recommended by the Committee, or in principle.

On the other hand, the Government's response to the Committee's report provides no information as to the form and scope of protections which it proposes to provide to whistleblowers and other persons under the scheme, nor does it outline the Government's proposals in relation to the all-important issue of sanctions to be available in respect of persons who take or threaten retaliatory action.

[21] Former government-owned entities, AWB and Securency P/L are not now in the government sector, although they were at the times of involvement in alleged corrupt activities.
AWB Limited was a government body known as the **Australian Wheat Board** until 1 July 1999, when the AWB was transformed into a private company, owned by wheat growers. In 2010, AWB was acquired by the Canadian firm Agrium.
Securency was reported to have been sold off by the Reserve Bank of Australia in 2010.

The Government's foreshadowed bill for a Public Interest Disclosure Act is currently listed as proposed for introduction in the 2011 winter sittings. Provided that the above reservations are met, the forthcoming legislation may largely satisfy Australia's obligations under Article 33 of the UNCAC.

Conclusion

The major action required for effective compliance with the United Nations Convention against Corruption (UNCAC) is establishment of an Australian anti-corruption commission as stipulated in Article 36.

There has been no action to legislate for a national anti-corruption commission, notwithstanding comparable action by most Australian States; nor is such a body known to be contemplated by the Australian Government.

Article 33, requiring establishment of effective whistleblower protection, is also of great importance, in that it facilitates the effective operation of an anti-corruption commission pursuant to Article 36, and supports other measures to improve transparency and accountability in government and the public sector. National legislation appears to be imminent, but the Government's proposals in relation to the precise content and timeframe of such legislation remain unknown.

Overall, it is our respectful submission that since the UNCAC was ratified by Australia on 7 December 2005, successive Australian Governments have failed to make satisfactory progress to meet the obligations to which Australia committed itself under the all-important Articles 33 and 36 of the Convention.

Appendix 2. ART (2011b) Submission to the review of Australia's implementation of the United Nations Convention against Corruption (UNCAC)

Annexure A –

Submission of the Accountability Round Table to the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity – Review of Jurisdiction of Australian Commission for Law Enforcement Integrity (ACLEI)

Executive Summary

The jurisdiction of the present Commonwealth independent anti-corruption body, ACLEI, is inadequate. It should at least include other law enforcement bodies such as the ATO, ASIC and the Department of Immigration. In light of recent events, consideration should also be given to including not only corporations doing business overseas that receive direct or indirect assistance from the federal government, but also the Reserve Bank and any corporations in which it has an interest, defence department officials who negotiate contracts, Austrade, Ausaid and the TGA.
But to do so would be to continue the past reactive and inadequate piecemeal approach and to ignore the realities and the extent of the risks posed by government corruption, risks that will always exist and have significantly increased in the last 20 years.

ART submits that the jurisdiction of ACLEI should be extended to provide a single national anti-corruption and malpractice body with a jurisdiction giving it comprehensive coverage of the whole Commonwealth sector, including:

- Ministers, Parliamentary Secretaries, Members of Parliament and their staff,
- The Commonwealth Public Service,
- Courts and tribunals,
- Compliance, regulatory and law enforcement agencies,
- Statutory corporations, companies in which government
  - has an interest or
  - on which government relies to
    - provide services to the community or
    - meet statutory or international treaty obligations, or
  - which receive direct or indirect assistance from the government or its agencies.

Other consequential action will need to be taken. It will be necessary to rename ACLEI to reflect the broadened jurisdiction. It will also be necessary to review all related matters including:

- relevant definitions (including the definitions of corruption and malpractice),
- the adequacy of existing powers, including investigatory powers, and whether additional powers are required, and
- the adequacy of the educative, research and policy functions.
- the adequacy of the system for co-ordinating the work of all Commonwealth agencies involved in monitoring and investigating misconduct
- the resourcing needed to serve the comprehensive jurisdiction.

Appendix 2. ART (2011b) Submission to the review of Australia's implementation of the United Nations Convention against Corruption (UNCAC)

The new Parliament has a unique opportunity to establish a comprehensive and effective national integrity system that would enable Australia to join New Zealand at the top of Transparency International's integrity list.

Appendix 2. ART (2011b) Submission to the review of Australia's implementation of the United Nations Convention against Corruption (UNCAC)

Submission

The present Commonwealth government integrity system[22] includes Parliament (especially its committees), Courts, administrative review tribunals, Director of Public Prosecutions, oversight bodies such as the Ombudsman and the Auditor General, FOI and an independent anti-corruption body, the Australian Commission for Law Enforcement Integrity (ACLEI). During the 1970s, Australia introduced important reforms in administrative law and the last Parliament saw some important developments.

However, the Australian government integrity system is no longer up to international best practice (or that of some Australian states). In particular, the jurisdiction of ACLEI is seriously limited. It has been confined to preventing, detecting, and investigating serious and systemic corruption issues in two Commonwealth law enforcement agencies: the Australian Federal Police and Australian Crime Commission. Australian Customs has been added to its jurisdiction this year.

The NISA Report of 2005[23] which comprehensively reviewed government integrity systems in Australia, commented,

> "Even if 'law enforcement' were the only area of Commonwealth activity in which more anti-corruption capacity is needed, there would be little logic in excluding many *other* Commonwealth agencies with major compliance and law enforcement powers — including the Australian Customs Office, Australian Taxation Office, Australian Security & Investments Commission, and Department of Immigration. In fact, there is a larger argument that to represent a serious injection of capacity and meet national best practice, a more comprehensive approach and general jurisdiction are needed to ensure that capacity for independent anti-corruption investigation is boosted across the whole Commonwealth sector rather than in select fragments.[24]"

If that call had been heeded there would have been an appropriate independent body in existence able to investigate recent serious allegations made about the actions of Securency, Austrade and the Reserve Bank, and Defence Department contracts[25]. It is also unlikely that the Therapeutic Goods Administration would have failed to maintain a record of gifts and other benefits received by staff.[26] Such an independent body would also have been available to any citizens who wished to

[22] Various definitions are used for integrity systems but one of the simplest is drawn from the overview paper for the 2008 International Anti-Corruption Conference commissioned by Transparency International which defined national integrity systems as "the interconnecting institutions, laws, procedures, practices and attitudes that promote integrity and reduce the likelihood of corruption in public life" (Sampford, C.J.G. From National Integrity Systems to Global Integrity Systems http://www.13iacc.org/en/IACC/Conference_Papers#Discussion Paper p.11). [See also Sampford, "From Deep North to Global Governance Exemplar: Fitzgerald's Impact on the International Anti-corruption Movement" Griffith Law Review 2009]

[23] Key Centre for Ethics, Law, Justice and Governance (Griffith University) and Transparency International, *National Integrity Systems Assessment* (NISA) Final Report, 2005, p 65.

[24] Brown A.J., *'Federal anti-corruption policy takes a new turn … but which way? Issues and options for a Commonwealth integrity agency'*, Public Law Review Vol 16, No 2 (June 2005).

[25] See recent media discussion of Securency particularly by Nick McKenzie, and Richard Baker in The Age of 20 November 2010 and 4 October 2010 and concerning the alleged involvement of Austrade. Note also concerns raised in The Age by Dan Oakes (17 November 2010 – including allegations of a cover up), Richard Baker (30 September 2010) and Linton Besser in the Sydney Morning Herald (e.g. 9 March 2010) about defence contracts.

[26] Linton Besser, The Age, 3 January 2011; Editorial, The Age 4 January 2011;

raise their concerns about possible misconduct and, if there was, it could have been nipped in the bud. Instead conduct that has raised concern continued for a considerable time.

In reviewing the Commonwealth integrity system[27] the NISA Report identified a number of gaps and weaknesses. They were recently summarised as follows[28]

> "Ministerial standards and the roles of ministerial advisers; the inability to enforce ministerial and other parliamentary standards; and increased political pressure on senior civil servants. While accountability systems appeared to function with the Senate at their peak, the role of the Senate had been repeatedly attacked, over a long period, by executive governments of all persuasions. Inadequacies were found in the whistleblower protection and management scheme, as well as an under-reporting and potential concealment of the incidence of corruption; because, for the purposes of classification, 'bribery, corruption and abuse of office' are subsumed within 'fraud'.[29] The absence of an anti-corruption body, and fragmented leadership of integrity systems, resulted in a lack of clear leadership and co-ordination. The report comments: 'There is now a clear case for a general purpose Commonwealth anti-corruption agency, which includes educative, research and policy functions.'"[30]

During the last parliamentary term steps were taken to address some of those concerns and further action is being taken. But many concerns remain and the risks of corruption have been increased in recent years by: the increase in government control of information;[31] the ever-increasing need for funding of political campaigns; the methods employed to obtain it and the failure to enact legislation to provide adequate controls and transparency;[32] the commercialisation of government services and projects;[33] the development of lobbying, the inadequacies of the attempt to control that activity and make it transparent in a timely manner; and the failure to either stop or control the flow of Ministers and their staff to the lobbying industry on retirement from their positions.[34] The merging of national interest in urban and regional policy and large infrastructure funding decisions (Infrastructure Australia) has also added to the risk of corruption. Combined with those factors, there will also be an increased risk of corruption resulting from the impact on major vested commercial interests of the significant changes that will be needed to address the problems posed by climate change and the exhaustion of natural resources, including energy, water and phosphate.[35]

Any system must also provide a place for people to take their concerns about the activities of not only government but also its agencies, including statutory corporations, companies in which government agencies hold an interest and other companies which may be breaching laws put in place to give effect, for example, to international treaty obligations or engaged in other misconduct. Examples include

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[27] *NISA Report*, above, pp. 31-36.

[28] T.H. Smith, "*Corruption; The abuse of entrusted power in Australia*," Australian Collaboration, 2010 (Corruption), p 33. That essay considers the nature and extent of the risks of government corruption in Australia, their causes and the action to be taken. It includes examples of corruption at the Commonwealth level.

[29] NISA Report, above, p 35

[30] Ibid.

[31] *Corruption,* above, pp. 47-49

[32] op. cit. pp. 45-47

[33] op. cit. pp. 50-51; that has extended to the delivery of foreign aid – see issues raised in articles "Who profits from foreign Aid? ...", including by the Australian Centre for Independent Journalism, published on www.crikey.com.au on and between 12 July 2010 and 28 July 2010.

[34] . pp. 51-54.

[35] . p 55

the activities of the AWB and Securency. Both corporations have seriously damaged the international reputation and credibility of Australia and its government. In both cases, people in government received information of the allegations but there was no independent overarching crime and misconduct body to which such allegations could be referred. In such situations there will be people who have the integrity to be concerned and the courage to act. There must be an independent standing anti-corruption and misconduct body to which such people can take their concerns knowing that they will be investigated.

If we were to continue the past ad hoc and piecemeal approach, we would be considering now whether to widen the jurisdiction of ACLEII to include:

- corporations doing business overseas receiving direct or indirect assistance from the federal government and its agencies,
- the Reserve Bank and any corporations in which it has an interest and which do business overseas,
- the Defence Department,
- Austrade and Ausaid,[36] and
- the Therapeutic Goods Administration.

To acknowledge that fact, however, only highlights the unreality of the past approach – the approach also taken in Victoria but now abandoned. The past approach also ignores the reality that each year, the Federal Government purchases tens of billions of dollars of goods and services[37].

The risk of corruption is not confined to law enforcement agencies. As was said in the essay "Corruption"

> "…there will always be a government corruption problem (in all countries) unless a miracle occurs to remove greed and the desire for power and hubris from the psyche of *homo sapiens*. There is also the fact that some of the species do not believe that the rules apply to them, and others believe that the end will always justify the means."[38]

The past approach reflected a denial of this reality and of the extent of the damage that can be done to the whole community by corruption. The past approach will also lead inevitably to unproductive definitional debate and uncertainty about where to take concerns.

It is time that a comprehensive independent integrity system was created for the Commonwealth. It should incorporate a general purpose Commonwealth anti-corruption agency with educative, research and policy functions and all necessary powers which is subject to parliamentary oversight. It should also address the need to co-ordinate the work of agencies involved in monitoring and investigating misconduct. The recommendations for the Commonwealth in the NISA Report should be regarded as best practice and setting the standard by which any proposals should be judged.

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[36] See fn. 11.

[37] In and between 2006 and 2009, the Defence Department spent more than $48 billion (Linton Besser, The Age, 30 December 2010). (Note, according to an advertising feature on how to go about making successful tenders to Federal and State governments (including techniques on securing internal contacts), there were $45.5 billion worth of tenders sought in 2009 (John MacPherson, The Age, 8 January 2011).

[38] *Corruption*, above, p. 22.

Appendix 2. ART (2011b) Submission to the review of Australia's implementation of the United Nations Convention against Corruption (UNCAC)

Recommendations of the Accountability Round Table

ART submits that the jurisdiction of ACLEI should be extended to provide a single national anti-corruption and malpractice body with a jurisdiction giving it comprehensive coverage of the whole Commonwealth sector, rather than select fragments of it, including:

- Ministers, Parliamentary Secretaries, Members of Parliament and their staff,
- The Commonwealth Public Service,
- Courts and tribunals,
- Compliance, regulatory and law enforcement agencies,
- Statutory corporations, companies in which government
  - has an interest or
  - on which government relies to
    - provide services to the community or
    - meet statutory or international treaty obligations, or
  - which receive direct or indirect assistance from the government or its agencies.

Other consequential action will need to be taken. It will be necessary to rename ACLEI to reflect the broadened jurisdiction. It will also be necessary to review all related matters including:

- relevant definitions (including the definitions of corruption and malpractice),
- the adequacy of existing powers, including investigatory powers, and whether additional powers are required, and
  - the adequacy of the educative, research and policy functions.
  - the adequacy of the system for co-ordinating the work of all Commonwealth agencies involved in monitoring and investigating misconduct
  - the resourcing needed to serve the comprehensive jurisdiction.

Appendix 2. ART (2011b) Submission to the review of Australia's implementation of the United Nations Convention against Corruption (UNCAC)

Annexure B
Analysis of the Submission of the Department of the Attorney-General – July 2009.

A detailed and closely argued justification for the present limited jurisdiction of ACLEI is to be found in the submission to the Joint ACLEI Committee from the Commonwealth Attorney-General's Department, July 2009 the following appear to be the essential arguments advanced

1. ***"the Australian Government's approach to preventing corruption is based on the premise that no single body should be responsible. Instead, a strong constitutional foundation (the separation of powers and the rule of law) is enhanced by a range of bodies and government initiatives to promote accountability and transparency"***

   If we understand these propositions correctly, it is being put that, rather than follow the broad-based overarching single body model (the model that experience has shown is necessary and best practice), the best course is to have a range of bodies and government initiatives which promote accountability and transparency.[39] The crux of the argument would appear to be that the better approach is to improve accountability of government and the transparency of government.
   The submission does not indicate what the requisite measures should be. The only topic referred to is Whistleblower Protection. This 2009 submission states that that the Department of the Prime Minister and Cabinet was developing its response to the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs' *Inquiry into Whistleblowing Protections within the Australian Government public sector.* We note that well into the year 2011, no Bill has been published and enquiries made on behalf of the ART have failed to elicit any information about the government's intention. Of course, the Department was not to know that that would happen when it made its submission.
   We submit that what is significant that the submission fails to identify and recognise the exponential growth in serious corruption risks which require genuine and rigorous regulation to provide accountability and transparency, matters discussed in the ART submission to the ACLEI Committee (Annexure A). Further in recent years, attempts have been made to improve accountability and transparency in several critical areas (e.g. FOI, lobbying, post-retirement employment and political funding), but, while there some improvements have been made, they have fallen well short of what is required.[40] Even if they were adequately addressed there would still be a strong case for a broad-based anti-corruption body because of the increased risk of corruption flowing from the commercialisation of government (See Annexure A). In such a situation, it should need fewer resources to carry out its work.
2. ***"This distribution of responsibility is a great strength in Australia's approach to corruption because it creates a strong system of checks and balances"***

[39] It is said that this will build on "a strong constitutional foundation" which is said to be the separation of powers and the rule of law. This sounds impressive but on closer consideration, the alleged link is not readily apparent. It is not explained.
[40] See Attachment A and the material cited.

"Checks and balances" is an expression usually used to describe mechanisms designed to limit the exercise of power by the institutions concerned. How such limits could strengthen the anti-corruption system is not readily apparent. The quoted proposition is referring back to a list of 11 Commonwealth bodies, including ACLEI, the Federal Police, ACC, ACCC and A-G's department. It is not explained which is checking and balancing which and no evidence is offered as to how any of them other than ACLEI would see "checking" of any sort on each other as part of their role.
Limiting the exercise of power and distributing responsibility must make the task of monitoring government corruption and combating it more difficult. It is the antithesis of the desirable "one-stop shop" and co-ordinated approach and can only place unnecessary obstacles in the path of any citizen considering whether to draw corrupt activity to the attention of law enforcement authorities.

3. ***In determining what jurisdiction should be given to ACLEI (and presumably any proposed anticorruption body), "[T]he following are suggested as relevant criteria:***

   - ***Agency risk profiles (including existing internal mechanisms).***
   - ***Consequences of corruption within the agency under consideration, and***
   - ***any demonstrated incidence of corruption or misconduct***

   These criteria are not weighted and all criteria are related. The emphasis placed on individual criteria will differ according to the circumstances."
   The other criterion stated, but not explained or justified, is that the jurisdiction of ACLEI should be to prevent corruption in only those government bodies that have law enforcement functions – even though, it is said, that there was no perception that the two original agencies over which it was given jurisdiction "had difficulties with corruption" .
   Applying these criteria, the jurisdiction of ACLEI remains inadequate if it is to prevent corruption in law enforcement bodies and inadequate to satisfy Article 36 of UNCAC.
   For as the Department's submission acknowledges, there are at least 40 Commonwealth Agencies that could be considered to have law enforcement functions and could come within ACLEI's proposed limited jurisdiction. They include (see Attachment A to the Department Submission) the Departments of Defence, Finance, Foreign Affairs and Trade, Treasury and the Therapeutic Goods Administration Agency. In recent years evidence has come to light of bribery by bodies and people that should have been under the watchful eye of at least two departments listed – Foreign Affairs and Trade (AWB) and Treasury (Reserve Bank subsidiary, Securency International Pty Ltd). In addition, it has emerged that there has been for some time a practice of accepting gifts within the Defence Department and the Therapeutic Goods Authority from people seeking very large contracts and approvals. Each body would satisfy the stated criteria.
   The reality is that applying the Department's criteria, the jurisdiction of ACLEI falls short of what Article 36 requires.

Appendix 3

Claire Cocker

Treaties, International Arrangements and Corruption Section
International Crime Policy and Engagement Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT
2600

6 March 2012

Dear Claire,

Thank you for the opportunity to participate in the International assessment of Australia's implementation of the United Nations Convention against Corruption.

Attached is our

submission. Yours

sincerely

Tim Smith

Chair ART

Submission of the Accountability Round Table to the International Review of Australia's Implementation of the United Nations Convention against Corruption (UNCAC)

Introduction

The Accountability Round Table (ART) made a submission to the Domestic Review of Australia's implementation of the Convention on 2 June 2011 ("the original submission"). We understand that that submission has been supplied to the International Teams. We wish to

rely on that submission in this International Review and

add to it, having regard, among other things, to what has occurred since that original submission.

Our focus, therefore, remains, as it was in that earlier submission, on the question of compliance by Australia with its obligations under Article 36 of the Convention having regard to the domestic and international concerns and purposes stated in the Convention.

> *Article 36*
> *Specialized authorities*
>
> Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

Article 36 plainly anticipates an active and focused approach not a passive one. That approach must be comprehensive and co-ordinated because otherwise the envisaged system will not work. Article 36 does not state that "the body" should be confined to law enforcement. Rather, it refers to "functions" which, in most anti-corruption bodies include educative and preventative
functions – one of the major objectives of the Convention[1]. Law enforcement itself will play a part in the preventative function because it will act as a deterrent.

The Australian Federal Anti-corruption Bodies

Our federal anti-corruption system remains the same as that noted in the original ART submission. The only specialized authority created to combat corruption is ACLEI. Its jurisdiction is confined to the Federal Police, the Australian Crime Commission and Australian Customs. It has no jurisdiction over public servants, members of Parliament, their staff, the judiciary or persons making decisions or providing services involving expenditure of public funds. As a result, Australia is yet to meet the Convention objective of having a

> "body, bodies or persons specialized in combating corruption through law enforcement""

covering the activities of the whole public sector. Can that situation be justified?

Issues – a justification of the Australian federal anti-corruption approach?

Recent developments – the ACLEI Review and Recommendation

The issue of establishing a specialist federal anti-corruption body covering the whole public sector was considered by the ACLEI Parliamentary Committee Review. In its Report of
2.7.2011 the Committee considered submissions made about the need for such a body at the federal level. Its response (Recommendation 10 was

> The committee recommends that the Australian Government conduct a review of the Commonwealth integrity system with particular examination of the merits of establishing a Commonwealth integrity commission with anticorruption
> oversight of all Commonwealth public sector agencies, taking into account the need to retain the expertise of ACLEI in the area of law enforcement.

So the Parliament through its specialist committee, recommended that the government consider the option. It appears that at least at or about that time, the government, was still opposed to even considering the option and responded, through Minister Gray, publicly as follows:

"**Noted**

[1] UNCAC Articles 5 and 6

> "The Government's approach to preventing corruption is based on the premise that no single body should be responsible. Instead, a strong constitutional foundation (the separation of powers and the rule of law) is enhanced by a range of bodies and government initiatives to promote accountability and transparency. This distribution of responsibility creates a strong system of checks and balances."

This attempted justification of the approach taken by the Australian Government is identical with that put by the Department of the Attorney General (July 2009) to the ACLEI Committee.

We refer to and rely upon our analysis and comment on this justification in Appendix B to our submission to the ACLEI Committee.[2]

We note that the premise on which the Government's approach is based was not supported in the response by either evidence or argument. Rather, the attempt was made to support the assertion in the premise by further unsupported assertions – that a range of bodies and government initiatives in some undefined unexplained way enhances the constitutional foundation of the separation of powers and the rule of law and that by distributing responsibility a strong system of checks and balances is created. We submit that, on proper examination, no justification has been advanced for rejecting the Committee's recommendation. Rather than attempt to do so, the response goes on to list "significant work to improve the Commonwealth integrity system". The first item on the inclusive list is to develop Australia's first National Anti-corruption Plan. Of particular relevance to this Inquiry is the elaboration that this exercise is intended

> "to clarify the roles and responsibilities of the range of bodies that promote accountability and transparency, including the overall lead responsibility for Commonwealth anti-corruption policy development and agency coordination". [3]

Fine tuning is valuable and should be an on-going exercise. But if one of the primary objects is to clarify "the overall lead responsibility for Commonwealth anti-corruption policy development and agency coordination" there is a problem – there is no "overall lead responsibility" that can be clarified .

In any event the fundamental questions in the present review are

> whether the federal anti-corruption system structure enables Australia to meet its Convention commitments and, if not,
>
> what is required to enable it to do so.

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[2] Part of the ART original submission to the Domestic Review of Australia's implementation of UNCAC

[3] The response identifies three other initiatives "to improve the Commonwealth Integrity system" ;

> implementation of revised Commonwealth Fraud Control Guidelines (24 March 2011),
>
> "working towards" establishment of a Parliamentary Integrity Commissioner who will provide advice to parliamentarians and uphold a Parliamentary Code of Conduct which is in preparation,
>
> "significant reforms" to managing federal judicial complaints (announced March 2011

Important as these are, they do not remove the need for an overarching Federal anticorruption body.

To embark on the Minister's proposed exercise before addressing those questions will regrettably only delay facing up to the inevitable conclusion that Australia does not meet those commitments and will be of little or no assistances in identifying what is required.

The reality is that government bodies that need to be overseen have already been identified and there is nothing particularly unusual about them[4]. The question of the best way to approach the task of combating corruption in similar government systems through law enforcement has been discussed and debated for many years around the world and in Australia. We also have the benefit of extensive experience around the world and in Australia of relevantly similar government systems. From that experience, it is clear that, relying on a range of bodies and government initiatives that "promote accountability and transparency", can never be enough. All Australian State governments have had such bodies, and in spite of them, systemic corruption has arisen in at least three of them. Any integrity system needs to go further and provide an overarching body which specialises "in combating corruption through law enforcement" over the whole public sector.

In Victoria, this debate has persisted for several years. The previous Bracks & Brumby Labor Governments for some years took the sort of ad hoc approach currently advocated by the federal government of relying upon internal systems and responding to the disclosure of significant corruption by ad hoc solutions; for example, by empowering the Ombudsman to investigate police misconduct and then creating a special Office of Police Integrity with special powers to address police corruption. When corruption was revealed within local government and the existing internal government systems for dealing with such corruption was shown to have failed, a new body was created - the Local Government Inspectorate. Later, the government, under considerable pressure, established the Proust and Allen Enquiry. It recommended the establishment of an overarching anti-corruption body and finally a consensus was reached, at least in principle, for the establishment of such a body. The present government is in the process of creating it.

More recently, the Victorian experience revealed another potential problem with multi-body systems– the risk that you will have more than one body with the jurisdiction to investigate the same alleged misconduct and that they will do so. We refer to the recent investigation by the Office of Police Integrity into the conduct of a Parliamentary Secretary, a very senior police officer and a police officer seconded to be ministerial adviser to the Minister for Police, and the investigation by the Ombudsman of some of the same aspects, and some different aspects, of the same incident. The two bodies had different jurisdictions and investigative powers. The end result was that, they having reported, the matter has remained unresolved. Issues of corruption as such, were not raised but the problems that resulted from what came to light in that situation highlights the importance of any anti-corruption system having a single overarching body with adequate powers to investigate covering the whole public sector subject, of course, to there also being a satisfactory independent system providing the necessary scrutiny of the conduct of that body.

Recent Developments- another attempted justification of the status quo

On 31 October 2011, following a series of articles in the Sydney Morning Herald attacking the federal government, an article by the Special Minister of State, Mr. Gray, was published in the

[4] See for example the 40 bodies with law enforcement responsiblitites identified in Attachment A of the A- G's Department submission to the ACLEI Inquiry referred to in Attachment B of the ART Submission to that Inquiry .

Canberra Times in which he sought to defend the systems in place that deal with "fraud" (which includes corruption) and misconduct in the Federal public sector. In it he developed further the "checks and balances" argument referred to above. The information relied on by the Sydney Morning Herald and the Article are contained in appendix A to this submission.

The Canberra Times itself took up the issue and, while challenging the Sydney Morning Herald conclusions, had argued that although there was no need for an independent corruption commission like those in New South Wales and WA, there was a need for stronger investigative powers for the purpose of independent oversight of Commonwealth agencies. The Minister, in response in his Article argued that there was no need for fundamental change and that the information relied upon by the Sydney Morning Herald was provided by the internal audit and risk management arrangements that then existed and demonstrated their effectiveness. He went on

> "the APS already has in place powerful checks and balances that are demonstrably identifying and improving integrity issues. These checks do not represent a single body, as has been argued for, but they represent the culmination of years of effective work that ensures proper internal and external oversight of the ABS"

He then gave information about the detail of that system. He concluded by asserting that

> "Together, this combination of mechanisms ensures that all APS employees are held to account"

and later

> "there is a series of mechanisms to ensure that all employees are expected to act professionally and comply with the law." and "all the evidence at this stage suggests that current systems are working effectively".

The following points should be made:

1. There seem to be two major blind spots in the argument.

   (a) How can the present Federal systems be said to be working effectively when relatively recently between at least 1999 and 2005[5], two companies closely associated with one of Australia's most important institutions, the Reserve Bank, did business overseas by bribing foreign officials?

[5] On 27 July 2011, the Age reported that Securency and NPA were expected to plead guilty to bribery charges concerning paying kickbacks to senior central bank officials in Malaysia, Vietnam and Indonesia between 1999 and 2005. On 28 July 2011, the Age reported the decision by the companies, Securency and NPA, to accept a plea brief announced by a Commonwealth prosecutor to charges of conspiracy to bribe officials in Indonesia and Malaysia to obtain a business advantage. Discussion was continuing about adding other countries to the plea

(b) The argument does not address government corruption but looks at the broad area of misconduct by those engaged in government in Australia affecting Australian and Australians domestically. Further, it does not consider the issues in the context of corrupt conduct by officers of various government agencies, its affect in other countries, on Australia's international obligations under UNCAC or Australia's reputation internationally.

2. In relation to the figures published by the Sydney Morning Herald:

(a) they cannot tell us whether the system is working effectively or not without more information, particularly when there is no body with the independent authority and responsibility to monitor the whole system for its effectiveness. To the contrary, the contrast between the high figure for allegations of misconduct including fraud (which category includes corruption), and the very small number of cases where action is said to have been taken, raises a serious question as to whether the system is functioning effectively.

(b) The probabilities are that the figures published fall short of what is the reality. Corruption is usually a secret activity and with no witnesses who are not participants in it. Further, we have been waiting for nearly 3 years since the Dreyfus Committee report for the government and Parliament to provide us with a satisfactory system of Whistleblower protection. Finally

> "…there will always be a government corruption problem (in all countries) unless a miracle occurs to remove greed and the desire for power and hubris from the psyche of *homo sapiens*. There is also the fact that some of the species do not believe that the rules apply to them, and others believe that the end will always justify the means."[6]

3. Experience has shown that to rely solely on internal integrity systems is never enough in the long term. Most, if not all, of the people and bodies mentioned in the Cabinet Minister's Article (other than ACLEI), have more immediate, often competing, priorities to deal with than the risk of corruption and will usually only consider acting proactively when someone makes an allegation

4. The argument is not directed at the relevant problem. The anti-corruption system needed is one directed to the risk of corruption, a risk that carries with it the potential for extremely serious damage, both to Australia's economy, policy formulation and body politic and to its international objectives in this and other areas and its reputation.

Even if it could be assumed that, at a Federal level, the very limited steps that have been taken so far have been effective, the question still remains as to whether they adequately address those risks. The evidence that has emerged since the Foreign Bribery Act was enacted in 1999, and is still emerging, particularly about the foreign bribery matter and

[6] Tim Smith, *Corruption*, The Australian Collaboration, 2010, p. 22.

the handling of it has caused Australia's international reputation considerable damage and has set back the international efforts, including Australia's efforts, to address the systemic corruption that causes such problems in so many countries.

Issues- relying on internal systems alone to address the risk of corruption

The AWB/Iraq and Foreign Bribery matters - a result of internal system failure?.

It will be recalled that during the Iraq War, trade sanctions were imposed, to which Australia was a party, which limited the sale or supply to Iraq of goods or products to those intended for medical purposes and , "in humanitarian circumstances",[7] foodstuffs. There was also an obligation on members of the UN not to allow their nationals to provide funds to any persons or bodies in Iraq.[8] The Australian Wheat Board had a monopoly under statute to export Australian Wheat. It exported wheat to Iraq but to facilitate the transactions with Iraq made payments contrary to the trade sanctions. For a considerable time allegations were made that this was occurring including from the AWB's competitors but no action was taken to investigate.

As now, there was no single body or dedicated system with the responsibility to monitor or investigate the performance of the AWB in selling wheat to Iraq. Rather Australia relied on existing internal systems. When, after troops entered Bahgad, documents came to light revealing what had happened a Royal Commission was set up to establish the facts. The internal
systems had failed and there had been no body with the responsibility to investigate from time to time to ensure that the positive obligations of the trade sanctions were adhered to by the AWB

Turning to the foreign bribery allegations, [9] in 2007, the Reserve Bank of Australia owned Note Printing Australia (NPA) and was half owner of Securency, ("the RBA companies") two companies which produced and sold banknotes to the Australian Government and to overseas governments. NPA, Securency and the RBA appear to have relied principally upon their internal systems to protect them from the risk of corrupt conduct and to investigate allegations of corruption when they arose. We do not know the precise details of those systems but it is reasonable to assume that they included most of the features of the kind referred by Minister
Gray in his Canberra Times article, including; employing a system of responsibilities like that of
APS employees under the Public Service Act 1999, Codes of conduct and values, the
(inadequate) whistleblower protection in the Public Service Act; the placing of responsibility on

[7] SC Res 661, para 3 and UN Doc S/Res/661 (1990)

[8] Ibid para 4

[9] Appendix B contains information about the course of events that followed the making of the first foreign bribery allegations in May 2007

agency heads to investigate suspected breaches of the code of conduct and a discretion to refer matters to appropriate enforcement agencies if there are serious suspicions of fraud (including corruption);

While such systems may be adequate to deal with individual and simple cases of misconduct, they are unlikely to protect an organization from systemic corrupt conduct or enable it to effectively investigate such corrupt conduct because it will usually have involved the corruption of the protective and investigative systems and prevent them functioning. To try to rely on the internal systems in that sort of situation is to try to rely on systems that have already been seriously subverted. That may explain how large payments came to be made to tax havens by the RBA companies. In addition, in such a situation, finding out what has been happening will require a significant investigation by professionals with the time, skills, experience, resources, focus, rigour and, perhaps most importantly, the powers required to establish what has been
occurring. Internal systems will not normally have those qualities. In the overseas bribery matter, the ultimate investigation was international.

A further difficulty is that, those with the responsibility and authority in an organization to investigate allegations of misconduct may be placed in a conflict situation because one of the issues that may need to be considered is whether they had failed in some respects in discharging their duties under the internal systems. Even if they conduct themselves with complete integrity, their findings are likely to have a question mark over them. If subsequent events demonstrate that their conclusions were not correct, as happened in the foreign bribery matter in relation to the
2007 investigation, those question marks will become larger.

The RBA and the RBA companies were faced with a situation in 2007 where plainly it was necessary to have the foreign bribery allegations investigated. If it was a systemic problem, any investigation was beyond their internal system. They embarked upon investigation using their internal systems supplemented by the engagement of Freehills. In the course of that investigation, a judgement had to be made about whether the activities of Securency needed to be investigated. They decided not to do so because its systems were thought to be first class. They appear to have proceeded on the assumption that they would have been applied satisfactorily.
The events of 2009 demonstrated that the internal systems had not operated to prevent foreign bribery.

The explanation for the failure to identify the extent of the problem in 2007 may lie in each one of the factors identified above. But what should be particularly troubling to those who maintain that internal systems are sufficient to address the risk of corruption is that the RBA, NPA and Securency, had eminent, capable, highly qualified and experienced people on their Boards and apparently sound systems and practices in place to guard against illegal and other misconduct – at least after May 2007. In addition, the Chair of both NPA and Securency was Mr Graham Thompson who had also been Chief Executive Officer of the corporate watchdog, the Australian Prudential Regulation Authority.

In addition, it was not as if they were not alive to the potential for foreign bribery. They had been put on notice by the Cole Report on the AWB and had taken action to revise their systems and practices. They were put on notice again in May 2007 of actual foreign bribery by NPA, sought investigative help and advice, that, in their informed opinion, they state they regarded as appropriate and sufficient and acted upon it. Yet, in 2009 corrupt activity was revealed, this time that of Securency. If a leadership group of such quality in relying upon and applying internal systems in such a situation fails to prevent, or cut short, corrupt conduct, one can have little confidence in such systems to do so on their own.

It should also be noted that the RBA itself identified systems failure as the problem . It expressed its regret that the governance arrangements in place at the companies had been unable to detect or prevent alleged wrongdoing. The RBA took the position that the governance arrangements failed.

It also defended its actions and those of the Board of NPA in 10 August 2011 (in response to criticism in the Sydney Morning Herald) stating that the facts were

> "that an audit done at the request of the NPA board in 2007 showed serious deficiencies in the company's practices and controls relating to the use of sales agents. It made no findings regarding illegality but recommended a separate investigation into whether there had been a breach of Australian law. When it received the audit report, the NPA board decided to terminate the use of sales agents immediately and engaged Freehills to investigate whether there was a breach of Australian law. The Freehill's
> investigation concluded that there was not. The question of a referral to the AFP therefore did not arise.
>
> On any reasonable reading, the NPA board at that time sought the appropriate information, sought appropriate advice, responded appropriately to the information it received and reasonably relied on the advice it received."

One or more of their judgements may ultimately be shown to have been incorrect at the time [10] but what occurred at the time may fairly be described, at least in part, as they do, as a failure of their internal integrity systems, their systems of checks and balances.

There is also a reminder in some of the information about the foreign bribery matter that has been revealed more recently that there are dangers in relying on a multi-body approach and shared responsibility; for that can result in

> no one having the ultimate responsibility and

[10] It appears, for example, that no request was made of Freehills or any other investigator to investigate whether despite its superior policies and systems Securency's agents were paying bribes to local officials or to otherwise be sure that the policies and systems were working.

each body involved may assume, that all was well because the other body would have been making sure that nothing corrupt was going on.

The information we refer to is that which reveals that Austrade was another Federal government agency involved in dealings of interest with knowledge that commissions were being paid to
local agents.[11] Austrade was part of the internal government systems. Did it let matters proceed
without question? Its people may well have been proceeding on the basis that surely one need not worry about corruption in transactions in which RBA companies were involved?

In response these criticisms, it might be argued that the system has changed. The Minister mentioned in his Article that new Fraud Control Guidelines came into effect in March 2011. They apply to all agencies subject to the Financial Management and Accountability Act 1997.[12]
Such agencies are required to comply, in particular by referring all allegations of serious or complex fraud involving the Commonwealth interests to the Australian Federal police. But the focus is on fraud against the Commonwealth, referral powers are closely defined and the Heads of Department and Senior executives are given a discretion to exercise as to whether to refer a matter to the AFP – which was in reality the situation of those in charge at the RBA, NPA and Securency in 2007.[13]

What if there had been an independent overarching anti-corruption body from 2000?

[11] Age 1 December 2011 reported that 5 Austrade employees had been questioned by AFP over the foreign bribery matter.

[12] See in particular, clauses 3.6,4.8,10.1-10.13, and (at p 19) the definitions of "Serious and Complex Matters)

[13] None of whom are in the published list of agencies subject to the FMA Act 1997; Austrade is. We note also that the core of the Federal Government's approach of distributing accountability obligations among the Federal public service, non-statutory agencies, statutory agencies, statutory corporations and government business enterprises is contained in a network of inter-related statutes: the Public Services Act, Financial Management and Accountability Act and the Commonwealth Authorities and Companies Act. This collection of legislation has a range of deficiencies. It does not clearly distinguish between appropriate ex ante and ex poste accountability mechanisms or provide for clear processes. In addition, the accountability framework appears to have been developed in isolation of any clarification of how these statutory accountability obligations intersect with the extension of ministerial responsibility obligations to non-departmental governmental bodies outside the constitutional core of government. The consequence is an ill-defined and fragmented accountability framework that lacks a clearly identifiable and enforceable body of principles to guide the behaviour of public officials. For more information see: Sheehy, B. and Feaver, D. (2012) "The Separation of Accountability and Control and the Regulatory State" (submitted International Organization) abstract available at SSRN: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1954250.

Might the history of events in the foreign bribery matter have been different if there had been an independent anticorruption body covering the whole of the Federal public sector, and in particular, the RBA and its companies from say the year 2000 (one year after the Foreign Bribery Act came into force) ?

We submit that the probabilities are that it would have been. First, the presence of such a body would have significantly changed the environment in which public sector corruption issues were dealt with and its dynamics. Knowing that people can go to such a body with their concerns gives governments and their agents an added incentive to be vigilant. Looking at the foreign bribery matter, the RBA, NBA and Securency Boards would, in 2007, have had immediately available to them a specialist body to consult and to involve in its investigations of the allegations then made. They would have found it difficult to do otherwise, because to do otherwise would have been difficult to justify with such an anti-corruption body in place. Further, if the person or persons who raised the allegations were dissatisfied with the result, they could have gone to the anti-corruption body themselves and it could have intervened.

We submit that the reality would have been that the RBA, NBA and Securency Boards would have had no option but to in fact go straight to such a body on receipt of the allegations.

The damage that has been caused by Australia's inadequate response

Damage of different kinds have flowed from our inadequate response to UNCAC.

As to practical impacts of the foreign bribery matters, apparently negotiations for contracts for the supply of banknotes fell through with the breaking of the news in 2009 of the foreign bribery allegations.

Another impact has been to increase the damage done to the reputations of those caught up in the foreign bribery investigation and the RBA and its companies. Investigation and enforcement of the law by an independent anti-corruption Federal body in 2007 may well have damaged the reputations of some of those in positions of authority in the RBA, NPA, and Securency. But that would have been significantly less, and is likely to have affected fewer people, than that which appears now to have resulted from the subsequent events and discoveries in 2009, which
includes media allegations of cover-ups. The probabilities are also that the matter would have been over and behind us well before 2012 rather than still attracting the headlines.

The failure to adequately address our commitments under Article 36 is, we submit, also a major reason for the fact that in the first 10 years of UNCAC (1999 – 2009) there have been no prosecutions launched for foreign bribery. This has resulted in Australia being criticized by the OECD [14], in October 2009, and subsequently [15], for its failure to pursue foreign bribery.

[14] Age editorial 31 October 2009

[15] Age 3 July 2011

Our failure to adequately address article 36 has plainly damaged our international reputation and our capacity to play a constructive role in addressing the foreign bribery problem.

Conclusion

We submit that that the Report of the International Assessment on Australia's performance of its obligations under UNCAC should,

1. Identify Australia's failure to address its commitments under Article 36.
2. Strongly criticize that failure.
3. Recommend that to address its commitments, the Australian Government should introduce an independent anti-corruption body with jurisdiction over the entire public sector including all government activities outsourced to private enterprise bodies.
4. In doing so, it should adopt best practice in all aspects including the body's investigative and law enforcement powers and its preventative capacities including educative; protection of whistleblowers; and the scrutiny of its activities by the Parliament.

Appendix A. The allegations raised in the Sydney Morning Herald about high levels of misconduct including fraud in the Federal government and the Government Response

There has been discussion of this question in the media based primarily on numbers of allegations of fraud by people employed in the Federal government and the investigations. It should be noted that the statistics do not separate corrupt behaviour from other forms of fraud. They do tell us that there have been a large number of allegations of fraudulent conduct in government which have been investigated, generally internally.

In the Sydney Morning Herald 24 September 2011, Linton Besser reported that

(a) over the previous approximate three years, unpublished audits obtained by the Herald recorded more than 3800 internal investigations of APS staff in nine departments and
1300 in the Department of Defence

(b) over the previous two years, 83 internal investigations in the Australian Taxation and 500 internal fraud cases raised in the Department of Immigration, six of which were referred to the AFP Office

(c) in the previous year in 10 agencies, 21 allegations of corruption, 65 of conflicts of interest and 47 cases of fraud; Centre Link investigated 377employees for misconduct
involving conflict of interest, frauds and abuses of office.

On the question of whether reliance can be placed on the Australian Federal Police to perform the necessary investigative role in law enforcement, its capacity to do so has been questioned. Mr
Besser made the following observations;

"The Australian Federal Police, which concentrates on drug traffic and counter-terrorism, is reluctant to deal with fraud matters."

Besser went on to say that they will only deal with official misconduct matters that touch on criminality at the top end of the spectrum because it has other priorities. Mr. Besser quotes Prof AJ Brown, one of our leading public law experts, as saying that "there is currently no expectation [among COmmonwealth agencies) that the AFP would ever help deal with other types of alleged misconduct, such as conflict of interest even complex or serious cases"

Among other things, he also notes that in 2006 the former commissioner of the Australian Federal Police, Mr Bill Keelty, said that he thought that ACLEI could have its jurisdiction expanded saying that "if we are serious about this, and it is not just a quick fix, and the AFP could benefit in its investigations if ACLEI actually had a wider remit than what is proposed."

There have also been reports of a high number of allegations of corruption occurring at overseas posts. In Sydney Morning Herald 24 September 2011, a former diplomat Bruce Hague stated "I don't think we begin to understand the level of corruption in overseas posts". It appears that the vast majority, if not all, cases were internally investigated.

On 19 September 2011, in the Sydney Morning Herald, Mr Besser recorded details of internal investigations into corruption at a senior level in the Federal Department of Agriculture, Fisheries and Forestry

The Federal government responded in the following Article by Minister Gray on 31 October 2011.

2011 Publications and Ministerial Statements

Address by The Hon Gary Gray, AO MP
Special Minister of State,
and Special Minister of State for Public Service and Integrity

Opinion article for The Canberra Times

The Australian Public Service (APS)—and at times the whole notion of public service – does not always get the recognition it deserves.

It presents a soft target that will not fight back, making it easy for politicians and journalists to attack it unfairly without rebuke.

This week The Canberra Times referred to a number of allegations about fraud, corruption and misconduct in the public service, which were previously reported in the Sydney Morning Herald.

The Canberra Times rightly pointed out that there is no evidence of endemic corruption, or a culture of complacency, in the APS. Correctly, The Canberra Times argued that sufficient anti-corruption systems exist and acknowledged that there is no need for an independent corruption commission like those that exist in New South Wales and Western Australia.

It did, however, use those allegations to suggest the need for stronger investigative powers to provide independent oversight of integrity in Commonwealth agencies. I do not accept that the allegations substantiate an argument for fundamental change to the existing approach. Indeed, most of the claims of the Sydney Morning Herald were identified by the agencies' own internal audit and risk assessment arrangements, demonstrating the effective approach of the APS.

The APS already has in place powerful checks and balances that are demonstrably identifying and improving integrity issues. These checks do not represent a single body, as has been argued for, but they represent the culmination of years of effective work that ensures proper internal and external oversight of the APS.

Internally, individual APS employees have significant personal responsibilities under the *Public Service Act 1999*.

The Code of Conduct and APS Values set high and enforceable standards for employee behaviour. All employees, for example, are expected to act professionally and comply with the law.

Section 16 of the Public Service Act also provides protection for employees who make whistleblower reports of suspected misconduct.

Under the Public Service Act, agency heads are responsible for the investigation of suspected breaches of the Code of Conduct, and may refer matters to the appropriate enforcement agencies if there are serious suspicions of fraud. The decision to involve enforcement agencies such as the Australian Federal Police (AFP) is a serious one and is not made lightly.

New Commonwealth Fraud Control Guidelines were issued in March this year and all agencies subject to the *Financial Management and Accountability Act 1997* (FMA), including those reported recently, are required to comply with the guidelines. They also form the basis for continuous improvement within agencies.

These guidelines make clear that agencies must refer all allegations of serious or complex fraud involving
Commonwealth interests to the AFP.

The more vulnerable, high risk agencies have internal fraud investigation units often staffed with employees with previous experience in police forces.

Where an employee's behaviour may be both a breach of the Code of Conduct and a serious criminal offence the matter is discussed with the relevant police service which may prepare a brief of evidence for the Director of Public Prosecutions. Investigations into criminal matters are independent of an employee's employment and cannot be discontinued by resignation.

External to agencies, the Auditor-General provides independent assurance about the use of public sector resources to Parliament, the Executive, Chief Executive Officers and the public. As noted, the AFP will investigate complex and serious cases and criminal matters. The Australian Commission for Law Enforcement Integrity investigates law-enforcement-related corruption issues for agencies within its jurisdiction, giving priority to systemic and serious corruption.

Further, the Commonwealth Ombudsman has powers to investigate complaints from people about the administrative action of an Australian Government agency, including alleged unlawful action. The Public Service Commissioner can also initiate an investigation into any matter relating to the APS, including at the request of the Public Service Minister.

Together, this combination of mechanisms ensures that all APS employees are held to account. And despite the simplistic and misleading claims from the Sydney Morning Herald, the APS continues to identify and effectively deal with claims of misconduct and fraud. I have written separately to the Sydney Morning Herald about these matters.

The most common type of misconduct in the APS is improper use of the internet or email (313 employees investigated in finalised cases in 2009-10), not fraud or theft.

The most recent published Australian Public Service Commissioner's State of the Service Report (SOSR) data shows that out of around 151,000 ongoing APS employees, only 33 were determined to have committed fraud and eight to have committed theft. As a percentage of employees, this amounts to 0.02 per cent and 0.005 per cent respectively. The matters reported have been examined through appropriate internal mechanisms within each agency.

Data is openly and transparently provided through the Australian Institute of Criminology's report on Fraud Against the Commonwealth, the report to Parliament on Compliance with the FMA requirements and the SOSR.

There is a series of mechanisms to ensure that all employees are expected to act professionally and comply with the law.

The Australian Government takes all fraud and corruption allegations very seriously, and is determined that all appropriate measures are taken to ensure that public funds are spent properly and accountably.

All the evidence at this stage suggests that current systems are working effectively.

Appendix B- Events in the Investigation of the Foreign Bribery allegations.

The information that follows was obtained from the Federal Parliament Economics Committee hearing of 26 August 2011 and reports in the Age by Baker and McKenzie [16] of the events as they have unfolded.

The Initial disclosures and investigation

In 2007, the Reserve Bank owned Note Printing Australia (NPA) and was half owner of Securency, two companies which produced and sold banknotes to the Australian Government and to overseas governments. NPA had 5 directors and Securency had 3. They had 3 directors in
common Messers Thompson, Austin and Ogilvy. None of their directors were on the RBA Board

After the Cole Inquiry into the payments to Iraqi officials by the Australian Wheat Board, the RBA had asked the NPA Board to review and strengthen its policies about the engagement of agents. This was completed by July 2006 and accepted by the RBA Board. Implementation commenced. In 2007, The NPA Board was concerned about management's slowness on implementation. The Deputy Governor of the RBA received a written briefing from an NPA employee containing admissions that Malaysian and Nepalese agents of NPA had paid bribes for NPA[17]. The NPA Board discussed the issues in May 2007. The RBA leadership decided that the matter should be handled internally and asked its chief auditor, Paul Apps, to investigate. The

[16] Including The Age of 2, 31 October 2009; 7, 8 October 2010; 3,4, 27, 28 July 2011, 11, 22 August 2011, 5 October 2011, 1 December 2011

[17] Report of Economics Committee meeting 24 February 2012 in the Age 25 February 201202)check

Age reported[18] that the RBA had confirmed that "Mr. Apps had found serious problems and recommended a separate investigation to determine whether Australian laws had been broken". These findings were referred to the RBA Board's audit committee which also audited NPA, and was chaired by Deputy Gov Battelino. The Governor, Glenn Stevens was briefed on the audit. Freehills was then engaged to investigate NPA's exposure to bribery through the actions of its agents. It found no breach of Australian law. The Age has stated "but RBA sources have confirmed to the Age that evidence provided to RBA officials in 2007 was serious enough to warrant an immediate referral to police."[19]

In a statement issued 10 August 2011, the RBA disputed the Age's implications and defended its actions stating that the facts were

> "that an audit done at the request of the NPA board in 2007 showed serious deficiencies in the company's practices and controls relating to the use of sales agents. It made no findings regarding illegality but recommended a separate investigation into whether there had been a breach of Australian law. When it received the audit report, the NPA board decided to terminate the use of sales agents immediately and engaged Freehills to investigate whether there was a breach of Australian law. The Freehill's
> investigation concluded that there was not. The question of a referral to the AFP therefore did not arise.
>
> On any reasonable reading, the NPA board at that time sought the appropriate information, sought appropriate advice, responded appropriately to the information it received and reasonably relied on the advice it received.[20]

The RBA Board had been briefed (orally) about the audit and the planned investigation at its July 2007 meeting and was briefed about the advice at its August meeting after it was received by NPA It appears that they were also told of the sacking of agents of NPA (including an agent that was also an agent for Securency). In his evidence to the Committee, Mr. Battelloni said that he did not think that the RBA board knew that there were some agents in common – they did not receive the audit reports[21] The RBA board would also have been informed about an audit of Securency's use of agents. The audit report was that it had very sound business practices and policies. (a similar conclusion was reached by KPMG in 2009). For that reason, no action was
taken to change the practices of Securency. But Mr Battelloni said that the agents that had caused concern at NPA were also sacked at Securency. Mr Stevens said at the Committee hearing that major differences between NPA and Securency were that in their policies and practices

[18] Age 11 August 2011

[19]

[20] We note that the response refers to an investigation of NPA's conduct but not Securency

[21] Hearing of the Economics Committee on the 6 August 2011

Securency got a tick in the 2007 audit. He also referred to the fact that KPMG in their 2009 investigation reported that the Securency audit of 2007 had information withheld from it.

The disclosures of 2009 and investigation

In May 2009, the RBA became aware of bribery allegations against Securency from reports in the Age. The chairman of Securency on behalf of the Securency board, requested that the AFP investigate the allegations. Although the allegations did not involve NPA, the chairman of Securency brought the 2007 review of NPA agents' arrangements that had been conducted in
2007 to the attention of the AFP at the start of their investigation. The AFP was subsequently provided with copies of the 2007 audit report and the Freehill's report when they requested access to them during the course of their investigation**.** KPMG was also engaged.

An AFP taskforce began investigating Securency in May 2009.[22]. In October 2009 the Age reported alleged further corruption in banknote production and sale activities of Securency, in particular referring to the alleged bribing of Nigerian officials.

In late 2009, Securency made changes to management and agents. The RBA and Securency co- operated with the AFP investigation giving documents when asked.

The investigation involved action overseas. The Age,[23] reported that the AFP police and overseas police agencies had raided premises in Spain and Britain and Melbourne and other countries (homes and offices) of people alleged to have links with the payments by Securency of millions of dollars to foreign officials. Two federal agents had travelled to Britain to assist and the Serious Fraud Office and the AFP were engaged in a joint investigation

On 8 October 2010, the Age reported that the Reserve Bank had demoted its chief polymer banknote salesman and the Age stated that it "believed" that the RBA had banned the practice of paying overseas middlemen to win contracts having previously suspended the practice for Securency.

By early July 2011, 9 people had been arrested re alleged bribery by Securency in Malaysia, Nigeria and Vietnam and both NPA and Securency had been charged with bribery. In addition, it was revealed that the involvement of Austrade in the Securency transactions was under investigation at that time.[24] 2 Austrade officials were identified as having facilitated contacts with overseas government officials alleged to be corrupt.

[22] Age 2 October 2009

[23] 7 October 2010

[24] Baker and McKenzie Age 3 and 4 July 2011 and Neil Fergus Age 4 July 2011

In late July 2011, the Age [25]reported that Securency and NPA were expected to plead guilty to bribery charges concerning paying kickbacks to senior central bank officials in Malaysia, Vietnam and Indonesia between 1999 and 2005. The boards of both companies were taking legal advice at the time. The RBA was reported to have expressed deep regret that the governance arrangements in place at the companies had been unable to detect or prevent alleged wrongdoing.

The Age reported that the full list of tax haven accounts used between 1999 and 2009 was greater than previously reported and raised serious questions about the level of scrutiny applied by the RBA appointed board directors. More than $30 million was wired by the two companies to accounts in Lichtenstein, Switzerland, Belgium, the Seychelles, the Isle of Man, Guernsey, Jersey, the Bahamas, United Arab Emirates and Hong Kong. The Age reported that the Securency Board authorized the payment of more than $18 million to tax havens between May 2006 and September 2009.

The Age, 28 July 2011, reported the decision by the companies, Securency and NPA, to accept a plea brief announced by a Commonwealth prosecutor to charges of conspiracy to bribe officials in Indonesia and Malaysia to obtain a business advantage. Discussion was continuing about adding other countries to the plea. The assistance of both firms was acknowledged.

[25] Baker and McKenzie Age 27 July 2011