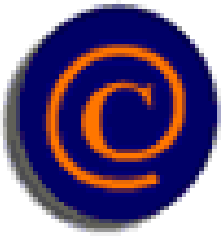

Committee Secretary
Joint Standing Committee on Treaties
e-mail: jsct@aph.gov.au

11 March 2005

Dear Secretary

Submission to the Inquiry into the United Nations Convention Against Corruption (New York, 31 October 2003)

I understand from reports in *The Age* (Thursday 10 March 2005) that members of the Committee recently expressed concern that the Treaty might enable the Commonwealth to enact anti-corruption legislation that applied to state parliamentarians, state executives and state courts. I realise that submissions in relation to this Treaty were due some time ago but I hope that this submission, though belated, is of assistance to the Committee in relation to the concerns expressed this week. I am Director of the Centre for Comparative Constitutional Studies in the Faculty of Law at the University of Melbourne and a specialist academic constitutional lawyer.

In short, in my opinion, it is extremely unlikely that the Treaty would have the effect of enabling the Commonwealth to enact anti-corruption legislation that applied to official conduct by members of state parliaments, state executives and state courts.

On ratification of the Treaty, the Commonwealth Parliament would acquire power under s 51(xxix) of the Constitution to enact legislation that the Parliament considered reasonably appropriate and adapted to implementing the provisions of the Treaty.

However the legislative power under s 51(xxix) is expressed to be '[s]ubject to [the] Constitution'.

As such, power to implement the provisions of the Treaty is subject to the express provisions of the Constitution and the implications to be drawn from the text and structure of the Constitution. One of those implications – the *Melbourne Corporation* doctrine – would preclude the Commonwealth parliament from validly enacting anti-corruption legislation that applied to official conduct by members of state parliament, state executives and state courts.

The *Melbourne Corporation* doctrine was established by the High Court's decision in *Melbourne Corporation v The Commonwealth* (1947) (1947) 74 CLR 31. In that case, the Court held that s 48 of the Banking Act, which prevented private banks from conducting business with states and their agencies, was invalid as inconsistent with the fundamentally federal nature of the Constitution.

The *Melbourne Corporation* doctrine is based on "the constitutional conception of the Commonwealth and the States as constituent entities of the federal compact having a continuing existence reflected in a central government and separately organised State

governments" (*Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 218).

The doctrine applies to all Commonwealth legislative powers, including s 51(xxix) (eg *Richardson v Forestry Commission* (1988) 164 CLR 261 where it was considered but not ultimately applied), at least to the extent that those powers do not expressly contemplate legislation that singles out state governments (eg s 51(xxxi) which enables the Commonwealth to acquire state property on just terms).

In its most recent formulation by the High Court in *Austin v The Commonwealth* (2003) 215 CLR 185, the doctrine establishes an immunity for state governments from Commonwealth legislation that impairs the capacity of the States to function as governments (Gleeson CJ [24]) or that "denies one of the fundamental premises of the Constitution, namely, that there will continue to be State governments separately organised" (Gaudron, Gummow and Hayne JJ [115]). The latter judges also endorsed (at [146]) this passage from an earlier decision:

> "The relevant question is whether the Commonwealth law affects what Dixon J called the 'existence and nature' of the State body politic. As the *Melbourne Corporation Case* illustrates, this conception relates to the machinery of government and to the capacity of its respective organs to exercise such powers as are conferred upon them by the general law which includes the Constitution and the laws of the Commonwealth." (*Native Title Act* (1995) 183 CLR 373, 480)

In concrete terms, this means for example that

- the Commonwealth cannot determine "the number and identity of the persons whom [a state] wishes to employ, the term of appointment of such persons and, as well, the number and identity of the persons whom it wishes to dismiss with or without notice from its employment on redundancy grounds" (*Australian Education Union Case* (1994) 184 CLR 188 at 232)

- the Commonwealth may be able to determine "the minimum wages and working conditions [of these persons] … , at least if it takes appropriate account of any special functions or responsibilities which attach to the employees in question" (ibid)

- the Commonwealth cannot determine the terms and conditions on which a state engages employees and officers at the higher levels of government, in particular "Ministers, ministerial assistants and advisers, heads of departments and high level statutory office holders, parliamentary officers and judges" (ibid at 233)

In my opinion, the course of decisions on the *Melbourne Corporation* doctrine suggests that the High Court would be likely to strike down Commonwealth legislation that purported to define and provide for the regulation, investigation and prohibition of corrupt conduct by members of state parliament, state executives and state courts *in the discharge of their functions as state officials*. The central constitutional functions of government include defining the duties of its members and officials, establishing accountability mechanisms to investigate the discharge of those duties, proscribing conduct as inconsistent with those duties, and providing for the consequences of such inconsistent conduct. These are all part of the process of defining "the machinery of government". It is inconsistent with the continuance of State governments "separately organised" in a federal system for the Commonwealth to attempt to discharge the function of the states to define that machinery.

Such legislation would be not at all comparable with that considered in *Richardson v Forestry Commission* (1988) 164 CLR 261, where the High Court upheld Commonwealth legislation that implemented an environmental treaty but only in relation to Tasmanian forests: that case focused on the selective and arguably discriminatory implementation of the treaty and found that the discrimination was adequately explained. The case does not establish that s 51(xxix) lies outside the scope of the *Melbourne Corporation* doctrine.

Whether the Commonwealth could validly enact anti-corruption legislation that applied to

- *non-official* conduct by members of state parliament, state executives and state courts and

- conduct by members of state parliament, state executives and state courts in their dealings with the Commonwealth government or exercise of Commonwealth functions

are different and more difficult questions. They would depend on the precise form of the legislation enacted to give effect to the Treaty.

Ratification of the Treaty would be unlikely to enable the Commonwealth to regulate such official conduct because the power to implement the Treaty under s 51(xxix) would be limited by the *Melbourne Corporation* constitutional implication that preserves the continued existence of the states and their separately organised governments. However, it should be noted that the High Court has repeatedly observed that the *Melbourne Corporation* doctrine is incapable of precise formulation and much depends on the precise form of the legislation and the facts presented to the Court. It should also be noted that the application of the *Melbourne Corporation* doctrine has frequently divided the members of the High Court. It is therefore possible that implementing legislation could be drafted in a sufficiently general way that some members of the High Court were persuaded was compatible with the federal nature of the Constitution. That likelihood would be increased if the legislation did not extend to the upper echelons of state governments and excluded official conduct.

Thank you for the opportunity to make a submission to this enquiry.

Yours sincerely

Dr Simon Evans
Director, Centre for Comparative
Constitutional Studies
Faculty of Law
University of Melbourne
Victoria 3010

Ph: (03) 8344 4751
Fax: (03) 8344 1013
e-mail: s.evans@unimelb.edu.au