Corruption and anti-corruption as domestic political issues in Australia[1]

Paper and materials

What aspects to discuss? And where and what should be the starting point?

Notwithstanding a life spent in the law and as a watcher of politics, until 2009 I was no more than an interested but casual observer of corruption and anticorruption measures. At that point, I reached statutory judicial senility, retired, was approached to write an essay on corruption in government and agreed[2]. Since then I have been a reasonably close observer of those matters and been involved in their discussion particularly at the Commonwealth level and in Victoria.

So if I am to speak with any authority on the proposed subject matter I must focus on the Commonwealth and Victorian experience from 2009 onwards

Scope of Paper

What to discuss? In that essay I attempted to ask the obvious questions such as what is government corruption, why does it matter, what are its causes, do we have a corruption problem, have we worsened the problem by the way we conduct government (outsourcing services by and to government, PPPs) and party politics, how is it best addressed, what are the elements of a best practice anticorruption system - generally described by those who have the expertise and experience in the field of government integrity systems and how good are integrity systems that are in place. I also looked at the question of cost.

I don't propose to discuss those issues in this paper. Suffice it to say, looking at the issues and the available evidence, I came to the conclusion that corruption should be handled as a risk management problem, that in the last 30 years we have significantly increased the opportunities to corrupt, and the temptations to do so, by the ways we have changed the way we conduct politics and government, that there is a high risk of serious government corruption throughout Australia, that the integrity systems of the Commonwealth and Victoria are inadequate and that the case for adopting best practice in addressing that risk is very strong.

Since publishing the essay, evidence that has emerged appears to me to have confirmed that view. For example, I suggest that an examination of the way that the foreign bribery issue was handled by the Reserve Bank and its companies clearly demonstrates that the present system, which essentially relies upon what is described as a "multi-agency approach" and internal investigations not independent external investigations, is fundamentally flawed[3]. Further evidence has been emerging

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[1] Hon T.H.Smith,Q.C. Adjunct Professor, Monash University, Department of Management, Faculty of Business and Economics, and Chair of the Accountability Round Table

[2] Tim Smith, *"Corruption -- The abuse of entrusted power in Australia"* , The Australian Collaboration, 2010 (hereinafter "Corruption essay"

[3] For a summary of suggested weaknesses see Appendix A, Extract from ART Submission on the National Anti-Corruption Plan.

suggesting a growing risk throughout Australia and government from organised international crime.[4] I suggest also that reports of corruption in government at the Commonwealth and Victorian State level appear to have increased in recent years. [5] Since writing the essay, I have also had cause to look at the Australian Public Service code and its provisions on gifts. Bearing in mind that the classic approach to corrupting public officials is through small gifts and favours I expected to see that gifts were banned or that there would be least a requirement for registering them and handing them over to the State. Not so.

For this paper, however, I want to focus on the attempts to address the risk of corruption in government in the Commonwealth and in Victoria since 2009 and, in particular on the different ways those attempts have played out since 2009 and why they have played out as they have.

Before doing so, it is necessary to describe the state of the government integrity systems in place and available to address the risk of corruption in Australia at that time.

Government Integrity systems - 2009

Anti-corruption bodies. The Commonwealth and the States and Territories had Ombudsmen, Auditors-General, and a judicial branch of government, an important part of any government integrity system often overlooked in discussion in Australia. Generally, they have enjoyed a reputation for independence of government and high integrity. Queensland, New South Wales, and Western Australia had also introduced into their integrity systems, about 20 years before an overarching body, independent of government, which was given the responsibility to monitor, prevent and investigate misconduct and corrupt conduct in government. This action had followed revelations of major corruption at the highest levels of government including the Premiers and senior government personnel which created a political consensus within the community which the politicians and public servants had to recognise and address and could only be met by the introduction of such a body. In each case, the body was given the power to compel people to answer questions and produce information. To protect the community, and those investigated, the body was made subject to the scrutiny of special parliamentary committee.

In November 2009, Tasmania introduced an Integrity Commission following revelations of serious corrupt conduct in government. The issue has been raised from time to time in South Australia but no action taken.

In 2009, Victoria and the Commonwealth did not have such a body. They each had an independent preventative and investigative body with jurisdiction over the police- the Office of Police Integrity in Victoria, with jurisdiction over Victoria Police, and the Australian Commission of Law Enforcement Integrity, with jurisdiction over the Australian Federal police and the Australian Crime Commission. In the Commonwealth there was a Joint select Parliamentary Committee with responsibility for monitoring ACLEI's performance.

[4] See Appendix B.
[5] See Appendixes B and C

It should also be noted that in 2009 there was available a comprehensive independent expert analysis of government integrity systems in the 2005 of the National Integrity Systems (NISA) Final report: "Chaos Coherence? Strength, opportunities and challenges for Australia's Integrity Systems".[6] That Report reviewed the Commonwealth integrity system and identified a number of weaknesses in it[7] including inadequate whistleblower protection and the absence of an anticorruption body, a fragmented leadership of the Integrity Systems resulting in a lack of clear leadership and co-ordination. The Report commented

> "there is now a clear case for a general purpose Commonwealth anti-corruption agency, which includes education, research and policy functions"[8] .

While it did not review the Victorian situation, the Report analysis of principle and practice was extensive and included a detailed template for a best practice government integrity system.

Other integrity systems deficiencies. The absence of an independent overarching anti-corruption body in both jurisdictions was significant. But Victoria and the Commonwealth had also lagged behind States such as Queensland and New South Wales in other features of their integrity systems such as providing adequate protection for whistleblowers, freedom of information[9], and transparency of political donations. They still do.

The Victorian Experience – 2009 to the present

The action taken by ALP government. In 2009, the Victorian government continued with its ad hoc approach and created a further body, the Local Government Inspectorate in response to a report by the Ombudsman disclosing corrupt conduct in the municipality of Brimbank.

At the same time, however, the need for an independent overarching anti-corruption body had become a major political issue. In November 2009, the Victorian government established an enquiry, headed by Elizabeth Proust as a Special Commissioner and the Public Sector Standards Commissioner, Peter Allan, into Victoria's integrity and anticorruption system. The Opposition was calling on the government to create an independent overarching anticorruption body. It should be noted, however, that while the Opposition raised concerns about possible corruption in various areas of government and was highly critical of what it saw as the secrecy of the then government, and while a number of concerns have arisen particularly in relation to the police and local government, no evidence had been identified of systemic corruption at the highest level -- as had been the case generally in those jurisdictions that had introduced an over-arching anticorruption body.

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[6] Published in 2005 by the Key Centre for Ethics Law Justice and Governance, Griffith University and Transparency International; see discussion in Essay page 28 and following. The Report did not review the Victorian situation.

[7] see summary, Essay , 33

[8] The NISA report, p35

[9] Notwithstanding significant Commonwealth reforms.

In early 2010, the Victorian Enquiry reported recommending the creation of a new system including such a body. The debate then changed to the features of the proposed new system. The principal criticism of the Enquiry proposal was that it was too complicated. The then Opposition argued that the Victoria should take the New South Wales system as the model. In particular it argued that what was needed was a body similar to its Independent Commission against Corruption (ICAC). The Opposition went to the State election in 2010 committing, itself in the strongest terms, to the introduction of such a body if elected[10]. It won the election.

The Coalition government – 2010-2012. The new government had promised to have such a body established by July 2011 and it set about the task. The proposed target was unrealistic. An end of year target would have been more realistic. But, as events have unfolded, we are apparently still awaiting the final legislation.

Initially, the new government moved quickly and engaged Douglas Meagher QC in late 2010 to advise. In about April of 2011, the Government created a committee to consult with lawyers, judges, academics, police, the journalists' union and public service representatives on some 41 specific issues such as whether the proposed Commission should cover government contractors, rules governing the seizure of documents and the entry of premises, the issue of private or public hearings, coercive questioning, and the legal rights of those appearing before the commission. The committee was chaired by Stephen Charles QC. It was to report those responses but not to express any conclusions about the matters discussed. The Charles committee completed its task and reported to the government. The government has declined to release the Report citing Cabinet confidentiality. The government continued to proceed with the task of preparing the legislation. It did so in an unusual way by drafting and putting through Parliament a number of pieces of legislation.[11] In particular the central legislation was published and dealt with by three separate

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[10] For the election in 2010, it published a "Plan for Integrity of Government" in which it stated that

> "The Liberal Nationals Coalition believes that Victorians will be better assured that government decision-making will be in the public interest for all Victorians under the Liberal National Coalition plan for a broad-based anti--corruption commission, modelled on the world's best practice in other Australian jurisdictions" (p 2).

It criticised the Labor Government for failing to adopt "world's best practice" in the model it was proposing and stated that its anticorruption commission

> "to be known as IBAC will be modelled most closely on New South Wales' Independent Commission against corruption (ICAC)..."

and that IBAC would have jurisdiction over all the branches of government and

> "will have access to the full range of anti-corruption investigative powers available to other anti-corruption commissions around Australia".

It also stated that it would

> "give IBAC full powers to scrutinise ministers and members of Parliament and their staff, consistent with all other public servants".

It later stated that

> "The function of IBAC is to investigate any allegation or complaint of corrupt conduct, including any matter referred to it by either cathouse of Parliament. IBAC will also have owned motion powers to undertake investigations on its own initiative".

After stating its promise to "restore honest and transparent government in Victoria" it stated that

> "an anti-corruption commission, by its very nature, is a force for prevention of as well as for the identification of existing misconduct and corruption in the public sector. Corruption hides behind institutional secrecy and there is no government in Australia so secretive as the current Victorian Labour Government".

[11]. INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION ACT 2011 (NO. 66 OF 2011); INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION AMENDMENT (INVESTIGATIVE FUNCTIONS) ACT 2012 (NO. 13 OF 2012); INDEPENDENT BROAD-BASED ANTI-CORRUPTION COMMISSION AMENDMENT (EXAMINATIONS) ACT 2012 (NO. 28 OF 2012). The first Act came into operation on 1 July 2012. The remaining 2 Acts are yet to come into effect and a further Bill has been foreshadowed

Bills, each impacting on the ones that had gone before. The first Bill established "IBAC" The second and third deal with the investigatory and examination capacity and powers are yet to come into effect. The government did not expose the draft legislation to public consultation. As a result, the input to, and the decisions, on policy and implementation issues to be addressed in the legislation appears to have been confined to the public service and the government members of Parliament and ministers.

The failure of the attempt. Probably what is most remarkable about the legislation produced to date and passed by the Victorian Parliament is that the proposed anti-corruption body, IBAC, will not be similar to New South Wales ICAC in its critical investigatory role of the public sector. It will have the jurisdiction to do so in relation to police misconduct, similar to that of the OPI which it will replace, but its power to investigate corruption and misconduct in the public sector generally has been so confined that it will have the greatest difficulty conducting any such investigations at all and, if it does, will be open to collateral challenges in the courts at each step of any investigation[12]. As a result, Victoria does not, and will not, have an independent broad-based anticorruption commission.

The government in response to the concerns publicly raised in the media, supported by a number of people including Douglas Meagher, has not attempted to advance any arguments as to why the narrow construction is incorrect . Rather, the government has stated that it wants IBAC to investigate only serious corrupt conduct and that it believes that the legislation will achieve that purpose. To date it has not appointed a permanent head for I BAC but has appointed an acting head, Ron Bonighton AM, who has worked in the defence and intelligence fields for nearly 40 years. He also heads the OPI which is still operating while establishment of IBAC Is completed.

What happened? The contrast between the election commitments made on this issue compared with the action taken is stark. So too is the contrast between the lack of action and the strength of the election promises to provide open and accountable government, strengthen the Freedom of information system and to give consideration to Victoria adopting the Queensland approach on the issue, it being regarded at the time as best practice[13] and significantly better and more effective than the Victorian system.

The Premier and the relevant ministers came to office with a reputation for integrity. Why have they retreated so far from their government integrity election promises? I will return to that question after discussing the Commonwealth experience.

The Commonwealth experience – 2009 to the present

ACLEI Committee Inquiry. At the Commonwealth level, there was little public discussion of the issue of the Integrity System in 2009 and 2010. But the Parliamentary Committee supervising

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[12] See Appendix D

[13] See now the ACT legislation, Public Interest Disclosure Bill passed 23 August 2012. The Victorian government has fallen significantly short on those other commitments.

ACLEI was active and on 14 May 2009 commenced an inquiry into the operation of ACLEI and the effectiveness of the Commonwealth Integrity systems.

That enquiry has been significant for a number of reasons including the insight it has given about the position taken to date by the Commonwealth public sector of resisting the suggestion that the Commonwealth needs an independent over arching anticorruption body and the reasons advanced.

- *The Rationale for ACLEI.* ACLEI appears to have been established by the Parliamentary and Executive arms of government on the basis that there was a need to have such an overarching body for agencies engaged in law enforcement but not elsewhere. But the two agencies initially within the jurisdiction of A CLEI, the AFP and the ACC "were not chosen because there was a perception that these agencies had difficulties with corruption".[14] In its submission, to the Inquiry, the Attorney- General's Department, however, identified over 40 organisations which had law enforcement responsibilities including Customs, Defence Treasury and Finance. No satisfactory explanation was proffered, however, as to what it was that distinguished them from the AFP and the ACC and why it was not proposed that they be included.

- *The lack of evidenced argument.* The Attorney-General's department in arguing against an extension of the jurisdiction of ACLEI stressed the need for an evidence based approach. The Public Service Commissioner argued that the evidence that was available suggested that the existing framework was adequate for managing Australian Public Service employees and argued that there was no evidence of corruption in the Commonwealth government[15].

  These would be strong arguments if there was a whistleblower protection system that gave adequate protection and there was an adequately resourced body monitoring the situation and attempting to establish where the risks of corruption lay; for corrupt conduct is carried on in secret and there is usually no individual victim within the public service in a position to supply that information. In those circumstances there is no factual basis to support the no-evidence assumption. The Accountability Roundtable made this point in the course of the public hearings.

- *The principal arguments?* The Attorney-General's Department, in arguing against change advanced the following.

  > "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 that promote accountability and transparency. The Commonwealth bodies involved in preventing corruption include:
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  > • Australian Consumer and Competition Commissioner

[14] Attorney-Gen's submission page 3;

[15] Submission of the Attorney -General July 2009; Australian Public Service Commissioner 23 June 2009; both available on the Committee's website.

• Australian Crime Commission
• Australian Commission for Law Enforcement Integrity
• Australian Federal Police
• Attorney-General's Department
• Australian Public Service Commission
• Australian Securities and Investments Commission
• Australian Taxation Office
• Australian Transactions Reports and Analysis Centre
• Commonwealth Director of Public Prosecutions, and
• Commonwealth Ombudsman.

This distribution of responsibility is a great strength in Australia's approach to corruption because it creates a strong system of checks and balances.

Difficulties with this approach include that there is no person or body that has the ultimate responsibility for managing the risk of corruption or coordinating that task. As to the reasons advanced, it is not readily apparent

- how the present arrangements can enhance the separation of powers and the rule of law and no explanation was or has been proferred and
- what are the checks and balances referred to and who is checking whom and who is balancing what.

The submission also identified three relevant criteria to be applied in determining whether an agency should be brought within the jurisdiction of ACLEI namely

1. agency risk profiles (including existing internal mechanisms)
2. consequences of corruption within the agency under consideration,
3. any demonstrated instances of corruption or misconduct.

The submission included in an Appendix a list of 40 agencies which had some law enforcement functions. These agencies included the Department of Defence, the Department of Finance and deregulation, the Department of the Treasury, the Department of Foreign Affairs and Trade and the Therapeutic Goods Administration. The ART in its evidence to the Committee drew attention to these matters and pointed out that allegations had recently been made of concern about employees in those Departments or their agencies' organisations. The submission had not addressed the question as to why those Departments and agencies should not be added to the jurisdiction of ACLEI.

***The ACLEI Committee Reports*.** The Committee issued 2 reports – an Interim and a Final Report.

- *The Interim Report*. [16] It recommended that ACLEI's jurisdiction be expanded to include Customs immediately (Recommendations 2 and 3) in light of the evidence placed before it of corruption risks in that agency. The Government's Response announced in September

[16] 22 February 2010

2010 was that it would take the steps necessary to bring Customs within the jurisdiction of ACLEI with the expectation that that would commence to operate in 2011.

- *The Final Report.* The Committee continued its review and received further submissions and evidence. In its Final Report in July 2011,[17] it recommended that

    - ACLEI be given a "second tier jurisdiction" [18] that would initially comprise the Australian Taxation Office, the Australian Transaction Reports and Analysis Centre, CrimTrac, the Australian Quarantine and Inspection Service and the Department of Immigration and Citizenship and that

    - there be a review of the operation of the new system two years after initial establishment, and every 2 years thereafter to include consideration of whether any of such agencies would be more appropriately placed in the first tier

  It also recommended [19]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 anti-corruption oversight of all Commonwealth public sector agencies, taking into account the need to retain the expertise of ACLEI in the area of law enforcement."

  In February 2012, the Government responded. After repeating the passage quoted above (about the separation of powers and checks and balances) it said that the Government would consider whether it is appropriate to expand ACLEI's jurisdiction but before doing so would allow 12 to l8 months for ACLEI to consolidate its existing jurisdiction, including Customs and enable that experience to be used to properly to inform any further expansion of ACLEl's functions.

  In relation to the recommendation that the government consider establishing an overarching anti-corruption body, the Government noted the recommendation, repeated the arguments about the strength of the multi body approach, including the enhancement of the separation of powers and the rule of law and the checks and balances provided and referred to the work being undertaken to improve the Commonwealth integrity system – including

    - Development of a Public Interest Disclosure Bill to establish further whistleblower protections in the Commonwealth public sector to give effect to the report of the House of Representatives Standing Committee on Legal and Constitutional Affairs.
    - Working towards the establishment of a Parliamentary Integrity Commissioner (PIC), and its reference of the matter of a Parliamentary Code of Conduct, to

[17] 7 July 2011

[18] Recommendation 1 was that there be a "second tier would be subject to limited ACLEI oversight, under which the head of an agency, or the minister responsible for the agency, may refer a corruption issue, on a voluntary basis, for consideration by the Integrity Commissioner. The Integrity Commissioner should also have the power to commence an investigation or inquiry into a corruption issue in a second tier agency on his or her own initiative".

[19] Recommendation 10.

relevant House and Senate Committees.[20]

- Developing Australia's first National Anti-Corruption Plan, (announced in September 2011).[21]
- The implementation of revised Commonwealth Fraud Control Guidelines, issued by the Minister for Home Affairs and Justice on 24 March 2011.
- Significant reforms to managing federal "judicial complaints, which were announced by the Attorney-General in March 2011
- The then current review of Australia's implementation of the *United Nations Convention Against Corruption* (UNCAC).
- Recent changes to the *Financial Management and Accountability Regulations* 1997 to enhance the role of Audit Committees.

The government stated that it was inappropriate to implement these measures before considering whether any further review should be conducted. It concluded by noting that "on the available evidence there is no convincing case for the establishment of a single overarching integrity commission."

The first two initiatives listed were the subject of the 2010 agreement between the government and the Independents and Greens. 7 months since the government response, they and most of the other initiatives are yet to be implemented.

Other developments. On 22 February 2012, the Minister for Home Affairs and Minister for Justice, Jason Clare, announced that the first year of the Australian Commission for Law Enforcement Integrity's (ACLEI) oversight of the Australian Customs and Border Protection Service would be reviewed by former senior public servant Mr. Peter Hamburger PSM to commence in March and report to the Government by the end of April. The Minister stated that he had

> "commissioned this review to ensure ACLEI is implementing this new responsibility effectively and is properly equipped to discharge this crucial function".

The Minster made a further announcement in March that he would introduce legislation to conduct targeted integrity testing of Commonwealth law enforcement officers and that this would include the AFP, ACC and the Australian Customs and Border Protection Service.

On 17 May 2012, the Greens provided their proposal from the previous Parliament for the creation of a National ICAC. The Special Minister of State, Mr. Gray said that the government would consider the proposal but was reported as warning that setting up such a body "could have major implications and complications" and that we "have to have in mind (that) our system works"[22].

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[20] It referred to the fact the House Committee released a Discussion Paper at the end of the 2011 Spring sittings including a draft Code and that the Senate Committee was expected to report back in the 2012 Winter sittings. That has now been deferred to November.

[21] It stated that in developing the Plan, the Government would examine evolving corruption threats to Australia's national interests and ways to reduce corruption risks. The Plan would also 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 co-ordination

[22] Vasek, The Australian, 17 May 2012

Ad Hoc Changes and significant reviews – 2011-12 . On 28 April 2012 Minister Clare announced the addition to ACLEI' jurisdiction of the Department of Agriculture, Forestry and Fisheries – Biosecurity Staff (formerly the Australian Quarantine and Inspection Service), the Australian Transaction Reports and Analysis Centre (AUSTRAC); and CrimTrac and increased resources for ACLEI to oversee the Customs and Border Protection Service (Customs).

He also announced the extension to Customs of the same integrity powers given to the AFP and the ACC including the power to authorise drug and alcohol testing and the power for the CEO to make a declaration terminating the employment of an officer for serious misconduct; and the introduction of mandatory reporting of any misconduct or corruption activity.

Commencing in the latter half 2011, there had been potentially significant anti-corruption work within the Attorney-General's Department. It concerned the National Anti-Corruption Plan (NAP) and the review of Australia's performance under the United Nations Convention Against Corruption (UNCAC. That Review involved a domestic review and a review by an international committee and took into account the development of the NAP. One of the requirements of the Convention in relation to such reviews is that there be public consultation in the community concerned. The Department invited submissions for both the NAP and the UNCAC domestic and international reviews. Among those who participated have been Transparency International and The Accountability Round Table . The UNCAC reviews concluded in July and August of this year.

The Domestic Review Report shed no new light on the position of the Government. It described the system currently in place as a multi- agency system and emphasised the constitutional safeguards providing for the separation of powers, an independent judiciary and the operation of the rule of law as forming "a strong base for preventing and addressing corruption in Australia". In response to a question asked in the UNCAC domestic review about action taken to assess the "effectiveness of anti-corruption measures taken", details were given by the Government of the NAP project

The International Review Executive Summary was made available in early August this year. It noted two areas requiring attention

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> - The adoption and implementation of legislation currently under review for the establishment of a comprehensive scheme for public sector whistleblower protection and to expedite access to existing protections for private sector whistleblowers
> - Continue the consultative process for the development of a national anti-corruption plan, which will include an examination of how to make anti-corruption systems more effective."

While this had been happening there has been an OECD review underway of Australia's practices in 2012, in accordance with our implementation of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.

The Commnonwealth; 2012 – changes in position?

Returning to the NAP, in early 2012, the A-G's Department for the purpose of public consultation, published a Discussion Paper. While, in describing the present anti-corruption system it referred to

it as a "comprehensive ... system of checks and balances for both public and private sectors" [23] (the key features which remained unidentified) it did not seek to argue that there was no evidence of corrupt conduct and, therefore, no need to change the status quo. Instead it argued that on the basis of the figures in the Public Service Commission, State of the Service Report 2010 – 11, the "level of misconduct in the Australian Public Service continues to be low". That Report stated, however, that there had been some 2188 Investigations of breaches of the APS Code of Conduct in that year and breaches were found in up to 92% of cases. They ranged from dishonesty, the misuse of resources, information, authority and power, and conflict of interest to non-compliance with lawful directions, applicable laws and lack of due diligence. They included 72 conflict of interest cases (86% proved) and 64 "Fraud other than theft" cases (83% of which were proved). [24] It also noted that the ATO, Department of Defence and Department of Human Services accounted for 62% of all terminations and 79% of resignations of employees under investigation[25]. Bearing in mind the secrecy of corrupt conduct, the lack of whistleblower protection, the other weaknesses in the system, and the absence of any evidence supporting the effectiveness of existing systems, the probabilities are that the cases identified represent a large and serious tip of an iceberg of significantly larger dimensions.

Importantly, the Discussion Paper acknowledged the following

- "the Australian public rightly expect high standards of behaviour and a high level of performance from the government, public institutions and the business sector" [26]
- "respect for the rule of law, accountability and having a highest ethical standards are the foundation of any democracy and provide the grounding through a society that is resilient to corruption". [27]

It went on to state that the decision to develop a National Anti-Corruption plan was recognition of

> "the need to ensure better co-ordination of Australia's anti-corruption efforts and to effectively address emerging corruption risks"[28]

Those risks included those identified by the

"Commonwealth Organised crime Strategic Framework and other relevant government reports such as those produced by the Australian Crime Commission and the Auditor-General". [29]

It also noted the need to ensure that

> "all elements of the system are appropriate and functioning effectively"

and that included

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[23] P.10
[24] APS State of the Service Report 2010 -- 2011, Tables 3.2, 3.3, APSC, Canberra
[25] Ch. 3.
[26] P 10
[27] ibid
[28] P5.
[29] P6

"ensuring the correct institutions and frameworks are in place".

Further it indicated that what was at issue was the best way to address the risks of corruption and the larger domestic and international objectives of addressing government corruption risks. The latter may prove significant because a leadership role internationally is asserted in the Discussion Paper as a fact and an aspiration and the best way to lead, of course, is by example.

Importantly, the Discussion Paper stated that it was planned to conduct a risk analysis of current and emerging corruption risks, and to develop a framework to effectively address these risks into the future.[30]

Subsequently, a Workshop took place on 11 July 2012 as part of the public consultation process for the National Anticorruption Plan. During that workshop a Table, entitled "Risk Profiling", was produced and distributed to participants by the Department which attempted to identify the corruption risks. It contained the following items and information.

Commonwealth Regulation	**Commonwealth Revenue and Expenditure**	**Commonwealth Law Enforcement**	**International**
Climate change Licensing and regulation Access to Personal and Commercial Government information Visas and Passports Political Donations	Outlays and benefits Revenue Procurement Development assistance	Organized Crime Law enforcement	Money Laundering Foreign bribery Australian officials overseas Transnational Crime

This appears to a significant change of approach from the long-standing Commonwealth narrow focus on the area of law enforcement as the area of concern. The above acknowledges that all sectors of national government activity are exposed to the risk of corruption. It also identifies some of the areas of activity outside government which pose a threat and create opportunities.

Looking at the examples (in Appendix B to this paper) that have come to light it is difficult to argue otherwise.

The Accountability Round Table also took part with Transparency International in a teleconference with representatives of the Department on 1 August 2012. The ART made a subsequent submission on the assessment of the risk of corruption providing a more detailed risk analysis (see Appendix E). The ART and TI also canvassed the pros and cons of the different options for change to the Commonwealth Integrity system in their further submissions.

[30] P5

Lessons to be drawn from the recent experience?

To describe the experience of Victoria and the Commonwealth in the period since 2009 as complex and difficult is an understatement. Tortuous might be more accurate. Certainly, the "KISS" principle appears to have been forgotten.

While the events in the two jurisdictions have been very different, the major forces at work have not been different. Rather they have worked themselves out in different ways because of the circumstances operating at different times.

Resistance – Why?. A major operating factor in both jurisdictions appears to have been resistance to the adoption of best practice by those in a position in the Executive and Parliamentary branches of the government to bring in best practice - in particular, the introduction of a new independent over arching anticorruption body with the jurisdiction over the whole public sector.

Why the resistance? It is not as if the design and introduction of such a body has never been attempted. On the contrary, there is a wealth of experience in Australia of the operation of such bodies. The operation of the major Integrity Systems received an independent expert review in the 2004 NISA Report. There does not appear to have been any argument publicly advanced against that approach based on adverse experiences of such bodies. True they need to be established with care and safeguards because they are given considerable powers. But it has not been publicly argued that the safeguards that have been put in place elsewhere for such bodies are inadequate. There is widespread acceptance elsewhere in the community that such a body should be part of any government Integrity system.

Cost? Is the concern cost? Again that does not appear to have been advanced as a reason for not introducing such bodies to integrity systems in the period to which I have referred. And there is good reason why it would not be. Consider such a body in the Commonwealth.

What will be the cost if we don't adopt best practice? That has to be estimated. The ACC has estimated, for example, that, under our present system, "serious and organised crime", major corrupters of the Public Sector "costs Australia between $10-15 billion every year[31].

What would be the cost of a best practice National Integrity System? Around $40 M per annum? There is already the agency, ACLEI, with lead agency duties and powers but its jurisdiction is limited to law enforcement integrity. ACLEI could be incorporated into a lead agency for the Commonwealth Public Sector, with appropriate powers, by legislation. The cost of best practice would be the additional cost[32] (approx. $30M) of the expanded operation not the full cost of setting up and running a new lead agency.

As to the costs generally, as previously submitted, the cost should be considered as an insurance premium against corruption risk. Looked at per head of population the cost is very small - less than two dollars per head. Looked at as expenditure to improve the operation and performance of the

[31] ACC Report "Organised Crime in Australia" 2011, p 4

[32] The published Budget Estimate for expenditure for ACLEI for 2012-13 was $8.561M

whole Public Sector and to protect and enhance its reputation, the annual cost compared to the total Budget estimated receipts and payments is also very small[33]. When one also factors in the potential benefits for both the community, and the Public Sector (and its personnel as members of the community) that would follow the reduction of the financial and the reputation damage that would otherwise have been caused by corruption, cost should not be regarded as an issue.

In any event, the money needed, say an additional $30M, could normally be found relatively easily in a Budget of the size of Australia's National Budget. But, in addition, the NAP Discussion Paper noted that the Australian Government has allocated $1 billion per annum for international anti-corruption work. Adopting best practice domestically would greatly assist Australia in its international leadership role. To allocate $30M from that amount to provide the funding needed for such a federal Integrity system, would still be supporting our international action by enabling Australia to lead by example and to improve our performance in preventing corrupt activities by Australians officials and agencies overseas.

In Victoria, the government is allowing a budget of approximately $40 million per annum for IBAC

- say $10 per head. This is still a very inexpensive insurance premium.

A question of priorities? If the decision about whether to fund a best practice system comes down to a decision about priorities, why should not the funding of a best practice National Integrity System be seen as the top priority? It will be money spent to ensure the integrity of the operation of the entire Public Sector. Integrity is critical to the successful operation of the Public Sector and community confidence in our system of government. But if top priority is thought to put the matter too high, should it be seen as at least as important as, for example, the performance of Australia's elite athletes for which we apparently provided $75M per annum of federal public funds over the last 4 years?[34] And in Victoria, recent governments have been prepared to find $50 million so that we can have the Grand Prix.

In Victoria, arguments have not been advanced in defence of the approach taken. When one looks at the arguments that have been publicly made in defence of the present Commonwealth system they do not bear close examination. So why the resistance?

Possible explanations. One can hypothesise as to the possible reasons and they would vary among the individuals concerned who are responsible for the position taken. But they would presumably range from inertia to determined resistance to any change. Within the Public Service the reasons for the latter might range from

- a concern at the highest levels to changes to the power structure and a possible loss of power, fear of being subject to the scrutiny of an independent watchdog, fear of being held responsible in some way for the misconduct of those under your supervision, to

[33] According to the published Budget estimates for 2012-13, total payments $364.2B and total receipts $368.8B; outlay of $40m - .001% of payments and receipts ; very reasonable insurance premium without allowing for the potential benefits obtained from the expenditure in 2012-13 and future years.

[34] S. Carney, The Age, 8 August 2012. Also R Hinds, The Age, 9 August 2012 - $170M per annum spent on elite athletes and the AOC.

- fear of potential embarrassment, or having a view that there are more important things to do and this will only cause trouble and be a major distraction.

Of course another way to look at those latter concerns is that under a best practice system problems can be referred to others with the resources and expertise to deal with them and those with integrity responsibilities within departments and agencies should be able to avoid criticism provided they consult appropriately with the over-arching anticorruption body in designing internal integrity systems and enforcing them? Certainly a common human reaction to suggestions of change, particularly in what are perceived to be difficult areas, is to move into denial mode and the events in Victoria and the Commonwealth, and the public justifications for limited or no action by the Commonwealth public sector provide a basis for that hypothesis.

For parliamentarians, particularly those in government, adding an overarching anticorruption body to the Integrity system to cover the whole public sector means another mechanism that could prove damaging to their political fortunes personally or through their party. People who claim to have their finger on the pulse in Victoria will tell you that one of the factors at work was a fear of having the same experience of the former New South Wales Premier, Nick Greiner. It will be recalled that he established such a body in New South Wales, ICAC, and was the subject of an investigation as a result of which he felt obliged to resign although the findings of ICAC were subsequently set aside by the Court of Appeal of New South Wales. But, it should be borne in mind that, if Victoria had adopted the New South Wales model and its legislation, the Court of Appeal decision and the amendments made to the legislation after the decision should prevent such an investigation occurring again. Of course it does not stop politicians trying to use such a body to attack the integrity of their opponents but the recent experience of the Premier of Queensland referring matters relating to the then leader of the Opposition and his family could be seen as a salutary reminder that such action should not be taken lightly and in fact should only be taken in clear cases because it can prove to be detrimental to the person making the attack.

The experience in those jurisdictions also demonstrates that there can be specific external forces that have an impact -- both negative and positive. How, for example is the about-face by the Coalition on introducing a best practice anticorruption body after it came into government to be explained? Explanations that have been suggested include the fact that the Coalition has only a one seat majority in the Legislative assembly and serious allegations have emerged or may do so. As to the latter concern possible examples include

- a person in the office of the Minister for the Police and the Parliamentary Secretary seeking to undermine the Commissioner of Police and the possibility that the Minister himself was involved - an allegation he denies,

- a member represening a pivotal seat, Frankston, having abused his entitlements in relation to motor vehicles

Could another example be the remarkable matter mentioned in Appendix C concerning the employee in the Department of Justice, a mega-department, allegedly seeking a bribe from a tenderer who were seeking the contract to provide security services to IBAC and discussing it with

a public servant in the Primary Industry Department? But, at the same time, there has been a retreat by the Coalition since coming into government from its other Integrity commitments, namely, open government, the introduction of an Information Commissioner to deal with rejected applications but the exclusion from that Commissioner of decisions to reject made by Ministers and Heads of Department, and the failure to proceed with a review of the FOI legislation in comparison with the major Queensland reforms. At the same time, the ALP Opposition has highlighted the failure to honour commitments but is yet to say what it will do if elected to government in addressing the risk of corruption.

The underlying problem – conflict of interest?

Lacking from the Victorian experience has been the presence of a joint Parliamentary committee of integrity which has challenged the status quo position and provided a place where views outside government can be heard and expressed. Also lacking are the external realities of the UNCAC and G 20 international obligations and the discipline of international reviews that those arrangements require. A result of those factors appears to have been that some genuine public consultation with experts and civil society groups has taken place on the key structural issues, something which did not occur in Victoria. Whether this results in a National Anti--corruption Plan recommending the adoption of best practice which has as its keystone an overarching independent peak anticorruption body remains to be seen. But, as the ART has submitted to the government, while having a sound National Anti-corruption Plan will be a valuable thing, it cannot implement itself and it will need to have a body independent of the rest of the Public Sector to carry it out.

Hindsight is a wonderful thing. But one cannot help wonder whether the outcome in Victoria might have been different if, before the Bills were placed before the Parliament and voted upon, the community including experts in the field and relevant civil society groups, had been given the opportunity to comment on them and their comments received and considered before the legislation was passed.

But these matters can only be a part of the explanation and the solutions. It is reasonably clear that at times decisions by holders of public office about reform to government integrity systems have given priority to personal concerns. Are they in a conflict of interest situation when considering making such decisions?

Have we lost sight of the nature of public office and the duties that attach as a result of changes in the way the Public Sector operates? Consider the politicisation of the public service, the reduction of job security in the public service, the commercialisation of services to government and by government, the use of incentive payments in some public sector agencies and the movement in employment between the public sector and private enterprise. These issues are rarely discussed and that has been the case from many years.

What then are the duties and obligations of people holding public office?

I suggest that this topic has been rarely discussed. I cannot recall it being taught or discussed in those university subjects that I studied many years ago in which it would be relevant. It was in

2009 that I first became aware of an old principle that public office is an office of public trust in which the officeholder owes a fiduciary duty to those he or she serves. [35] It is part of the law of the United States of America and has been used to protect the environment. In Canada it has been used to resolve native title questions. While it is not part of the law in Australia, the principle has been part of the foundation for the development of administrative law and underpins the rule of law.

It was recently discussed by the Chief Justice of the High Court, Robert French A.C. in an important lecture entitled "Public Office and Public Trust"[36]. His Honour commented that

> ".. there is no single ethical theory which all can agree will provide a complete guide to ethical behaviour by public officials or by anybody in a position to exercise power over others"[37]

After discussing the demand for public sector ethics training and the approaches taken to trying to spell out ethical principles and the standards of practice expected, His Honour commented

> "It is probably not controversial that ethical behaviour derives from a view that the actor holds of himself or herself in relation to others. In the case of a person occupying public office, the relationship will always be defined by the constitutional proposition that the office is held for the benefit of others. Public offices are created for public purposes and for the benefit of the public. It is not necessary to travel beyond the boundaries of utilitarian ethics to conclude that ethical behaviour by a person exercising public power requires that person to exercise that power honestly, conscientiously and only for a purpose for which the power was conferred. This is in one sense nothing more than a manifestation of the application of the rule of law to public decision-making."[38]

Referring to members of Parliament, he said

> "Each member ... is a public officer with powers exercised collectively with other members of Parliament and subject to rules and constraints, including constitutional limits on the exercise of those powers. Many of the laws which they make confer powers on Ministers of the Crown and appointed officials of the executive government. ..... The powers which are conferred on any public official must necessarily be exercised only for the purposes of, and in accordance with the law by which those powers are conferred"

He then commented

> "Here, there is an intersection between ethics and the law. For what would be expected of the ethical exercise of public power in utilitarian terms is reflected substantially, although not entirely, in the rules to finding the boundaries of lawfulness. There is a metaphor which straddles the divide between law and ethics. That is the idea of a public office as a public trust." [39]

His Honour referred to two High Court decisions in which the fiduciary nature of the office was relied upon as part of the judicial reasoning. The first concerned the attempted enforcement of a commission agreement by the agent against his principal, the vendor of land he was seeking to sell to the Victorian government. The agent had employed a member of Parliament as his

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[35] A workshop was organised which examined the principle in the context of the issue of climate change. A book of papers was later published - . Coghill, Sampford and Smith, "Fiduciary Duty and Atmospheric Trust, Ash gate, 2012

[36] Seventh Annual St Thomas More Forum Lecture, www.hcourt.gov.au/assets/speeches/current justices/frenchcj/frenchcj22jun11.pdf .

[37] P.4

[38] P7

[39] P 8

representative as a lobbyist on the basis that he would receive a share of the commission paid to the agent. Subsequently there was a dispute between the agent and the vendor about the agent's entitlement to the commission. The Supreme Court of Victoria held that the commission agreement between the vendor and the agent was illegal because of the involvement of the parliamentarian and was void. That decision was upheld in the High Court. Sir Isaac Isaacs after referring to the "high public duties" of a member of Parliament and commenting, that "he cannot retain the honour and divest himself of the duties" and that they included holding the Executive to account said,

> ".. the law will not sanction or support the creation of any position of a member of Parliament where his own personal interests may lead him to act prejudicially to the public interest by weakening (to say the least of it) his sense of obligation due watchfulness, criticism, and censure of the Administration."[40]

Justice Rich commented

> "Members of Parliament are donees of certain powers and discretions entrusted to them on behalf of the community, and they must be free to exercise these powers and discretions in the interests of the public unfettered by considerations of personal gain or profit. So much is required by the policy of the law. Any transaction which has a tendency to injure this trust, a tendency to interfere with this duty, is invalid... Courts of equity, in dealing with transactions between private persons, have always avoided as contrary to the policy of the law purchases by trustees for themselves..... This applies with greater force to public affairs and the responsibility of the trust towards the public implied by the position of representatives of the people."[41]

In the other case,[42] a member of Parliament was charged with conspiracy with two other persons. The allegation was that he had agreed to use his position to help secure the acquisition of land by the Government of New South Wales in return for payments. The charge was challenged on the grounds that it was too wide because it would cover the payment to a member of Parliament to use his position outside Parliament and would cover involvement in transactions which might never come before the Parliament and which the member might believe genuinely were beneficial to the State.

Isaacs and Rich JJ referred to Members of Parliament as being "public officers" and relied on the Oxford Dictionary definition of "Office" as including "a position of trust, authority, or service under constituted authority." [43] Justice Higgins confirmed the fiduciary nature of public office, referred to cases concerning bribery of Members of Parliament and their criminal liability saying

> "All the relevant cases rest on the violation of a public trust. 'The nature of the office is immaterial as long as it is for the public good'... An agreement between a trustee and an estate agent to share commission on the sale is void and the trustee has to account to the beneficiaries for his share. But it is not an indictable matter, as it is not a public trust -- a trust 'concerning the public'..."[44]

He also stated,

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[40] Horne v Barber (1920) 27 CLR 494, 500
[41] at 501 -2
[42] R v Boston (1923) 33 CLR 386
[43] (1923) 33 CLR 386 at 402
[44] ibid, 410-11

> "He is a member of Parliament, holding a fiduciary relation towards the public, and that is enough"[45]

French CJ discussed the reality that the introduction of statutory regulation of the public service and specific mechanisms for oversight and accountability have, among other matters, diminished "the importance of the public trust metaphor"[46.] He noted also the comments by Justice Finn that a loss of faith in such mechanisms has been the

> "principal stimuli to renewed interest in the 'public trust' and in its implications both for officials and for our system of government itself". [47]

It may also be said that at the same time the changes mentioned earlier[48] and other trends only make these fundamental underlying principles, and their recognition, acceptance and application, more important and more necessary. Their recognition, acceptance and application by all in public office would go a long way to restoring community confidence in, and respect for, our democratic system of government and those engaged in it.

Ethical guidelines for government integrity reform?

Let us consider the situation of people holding public office making recommendations or making decisions concerning the nature and extent of government integrity reform. They hold positions of public trust and are likely to be in a position of conflict of interest. Can an ethical framework for decision making be formulated for appropriately managing the conflict of interest?

Would the following provide sound guidance?

> Consistently with their fiduciary duties (which include maintaining and strengthening the integrity of government), persons holding public office are obliged to support and implement integrity reforms affecting their government's[49] integrity where
>
> - the government is at risk of corruption, and
> - the proposed reforms are likely to help to meet or reduce those risks
>
> unless to do so would cause damage to the public interest that would outweigh the benefit to the public interest that would flow from the reforms.

I suggest that for a holder of a public office to do otherwise would be to act in breach of the public trust obligations of public office. Compliance with the guidelines should enable holders of public

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[45] ibid, 412
[46] op. cit., p12
[47] P D Finn, *The Forgotten "Trust": The People and the State*, in M Cope (PD), Equity: Issues and Trends (Federation Press), 1995, 131, 134.
[48] politicisation of the public service, the reduction of job security in public service, the commercialisation of services to government and by government, the use of incentive payments for persons employed in the public sector agencies, the encouragement of movement in employment between the public sector and private enterprise,
[49] in the sense of the three branches of government -- Parliament, the Executive and the Judiciary

office to make recommendations and decisions about changes to government integrity systems which will advance the public interest and so enable them to serve their office and the duties of their office.

Appendix A – The Multi- agency model – weaknesses. (Extract from ART Submission to the National Anti-corruption Plan)[50]

The "multi-agency model" relies heavily on the individual public sector agencies to handle the misconduct issue, including corruption, internally and on their own. We drew attention to weaknesses in this approach in

[50] Available on the ART website (www.accountabilityrt.org.) and the NAP website (www.ag.gov.au/anticorruptionplan)

our submission to the International Assessment of Australia's Implementation of the United Nations Convention against Corruption (see pp3-6 and 7 and 8-12; Appendix B) In summary the following concerns were discussed.

(a) *Corruption of internal systems?* Reliance on internal agency systems may be adequate to deal with individual and simple cases of misconduct. They will be at risk in performing their role in protecting the organisation from systemic corrupt conduct. On occasions, the corrupt conduct will have subverted the protective and investigative systems and prevented them from functioning (p9).

(b) *More than one agency with jurisdiction.* On occasions, there will be the potential for more than one body to have jurisdiction to investigate some alleged misconduct and to do so using powers of investigation that will differ with the result that when they report the issues will remain unresolved (p5). This happened recently in Victoria under its ad hoc arrangements.

(c) *more than one agency involved in the particular transactions.* There is the potential in that situation (e.g.) for each to assume that the other is ensuring compliance with the relevant codes and laws and addressing the danger of corruption. (p.11)

(d). *Competing priorities*. Save for ACLEI, the bodies and officers identified as making up the multi agency model will usually have more immediate and less awkward and sensitive competing priorities to deal with than investigating possible corruption. There will often be a reluctance to investigate and otherwise act unless someone makes an allegation. (p.7-8)

(e) *Lack of skills and other resources.* The agencies are unlikely to have the resources, or the personnel with the time, skill, experience, focus, rigour and powers required to monitor compliance, educate and train and, when concern arises, establish the full scope of what has occurred and why it occurred .(p 8.9)

(f) *Conflict of interest*. Those in the organisation with the responsibility for standards of conduct and investigations of misconduct are likely to find themselves in a conflict situation when called upon to intervene because their performance may also be in question in the course of any investigation (p.9)

As noted above, and discussed in the above submission, it is important to note that the RBA has sought to explain the failure to detect or prevent foreign bribery on the failure of internal systems.

- **Appendix B Commonwealth corruption risks**

Extract from ART Submission on the NAP

"Corruption in the federal system of government?

Risks identified in the Discussion Paper – organised crime

As noted above, the Discussion Paper[51] lists as one of the objectives for the NAP

> "Addressing corruption risks identified in the Commonwealth Organised Crime Strategic framework, and other relevant government reports such as those produced by the Australian Crime Commission and the Auditor-general."

The material referred does not look at corruption risks generally. It focuses on the link between organised crime and public sector corruption. It has identified as "the main benefits to organised crime from public sector corruption"

> "...access to public funds and assets, rights and permissions, information, protection and platforms that facilitate other crimes.[52]

As to the way organised crime operates it has been said that it seeks out "individuals within law enforcement and other public sector agencies and industry for the purpose of infiltration, corruption or facilitation to further their criminal activities"[53]. Examples include the infiltration of "critical infrastructure, such as ports and aviation and telecommunications facilities"[54] . But it has been said to go further than that-

> "there is an ongoing threat of corruption of employees who work in areas that can facilitate illegal activities of organised crime groups, such as trusted insiders at Australian ports. This also includes people with access to information on the activities of other organised crime groups and law enforcement, and areas which can provide identification documents such as driver licences and other permits. Improper or inappropriate relationships with informants, as well as poor management of experienced criminals, remain corruption risks for law enforcement officers."[55]

The point has also been made that the potential for both political and public sector corruption increases, however, as organised crime identities extend their influence in the private sector, where they may influence decisions that will advance their corporate (criminal) interests.[56]
These analyses point to serious corruption risks across the whole public sector from organised crime. Are there corruption risks and concerns from other sources? That issue must also be explored.

The material that follows is drawn from media accounts. We submit that the probabilities are that media reports disclose at best only a sample of present corrupt activity and concerns.

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[51] P6
[52] Australian Crime Commission Organised Crime in Australia 2011,,36
[53] Commonwealth Organised Crime Strategic Framework, Overview,9
[54] Commonwealth Organised Crime Strategic Framework, Overview, 14
[55] Australian Crime Commission Organised Crime in Australia 2011,, 36

[56] Australian Crime Commission Organised Crime in Australia 2011,36

Other Examples and Concerns

There have been serious examples and concerns publicised in recent years**.**

- In 2002, Andrew Theophanous, who had been a member of the House of Representatives for 21 years, and a Parliamentary Secretary, was convicted of having sought money for assistance in migration matters.[57]
- The AWB matter noted in the Discussion Paper.
- Between at least 1999 and 2005, two companies closely associated with one of Australia's most important institutions, the Reserve Bank, engaged in bribing foreign officials in several countries. The companies have pleaded guilty. A number of people have been charged.

In 2008, former Assistant Commissioner in the Australian Taxation Office, Nick Petroulias, was convicted of corrupt conduct.[58]Concerns have been raised about the following;

- ***Defence Department***: From time to time serious issues have been raised in the media about Defence Contracts. [59]

  In 2010, The Age recorded that the Inspector-General of Defence was investigating why two officers from an Australian Defence Force unit overseeing a 2005 tender process for flying Australian troops to the Middle East at a cost of more than $100 million, gave inside information to the winning company and were soon employed by that company afterwards. It also reported an investigation by an accounting firm into the tender process in 2010 for contracts to fly troops and equipment to the Middle East involving one of the two persons under investigation in respect of the 2005 tender matter, who at that stage was working as a consultant to the successful tenderer and was also working in Defence's Joint Movements Group.[60]

  Recently[61] the AFP commenced investigations into alleged bribery in the early to mid 2000's by Tenix to secure contracts for the manufacture and supply of search and rescue ships, and other contracts, in different parts of Asia. One contract, with the Philippines' Government was underwritten by a $109m guarantee provided by Export Finance Insurance Corporation, an arm of the Department of Foreign Affairs and Trade. Reference was made in the reports to the "strong links" between Tenix, Australian Government officials and Defence Force members. Issues were also raised in that matter about the employment in senior positions by Tenix of two retired former senior Royal Australian Navy Officers. According to the Age report[62], doubts about the transaction arose in Manila in 2005 and the Philippines' government stopped repaying its loan leaving the Australian Government liable on the guarantee for almost $100m. It also stated that the matter was referred to the AFP in 2009. The Department of Foreign Affairs did not know about the probe until 2010 and the EFIC until 2011

[57] Corruption Essay, 25 ,
[58] Moran, The Australian, "Third Time Unlucky..." 21 June 2008,
[59] Linton Besser in the Sydney Morning Herald (e.g. 9 March 2010) about defence contracts
[60] Baker, Of age, 13 September 2010 and August 2010
[61] McKenzie and Baker, The Age 7 March 2012
[62] MacKenzie and Baker, The Age 7 March 2012 and 21 March 2012

"Lower level" corruption –examples and concerns

- Between June 2001 and mid-2004 a former federal police officer who was then a Tax Office investigator took bribes from illegal tobacco producers.[63]

- On 28 March 2012, it was reported [64]that 24 Customs and Border protection officials were being investigated for corruption or misconduct in connection with suspected offences including drug trafficking and leaking sensitive information. It was also reported that Customs had suspended or sacked 15 offices since 2010 over misconduct or corruption allegations. Concerns were also raised about the sufficiency of ACLEI's resources in any event to exercise its new jurisdiction over Customs and Border protection. It was also reported that police suspected that there were corrupt officials in Australian Quarantine and Inspection Service (AQIS). The same report quoted Customs saying that it had suspended 15 staff for offences including possession of narcotics, lack of integrity, and misuse of Commonwealth resources and associations that raised security concerns.
- In September 2011, concerns were raised about the practice of allowing staff at the Therapeutic Goods Administration to receive gifts and other benefits and there not being a system for recording them[65].
- On 26 September 2011, [66]it was reported that 11 employees in the Attorney-General's Department had been the investigated since 2008 for rorting overtime and obtaining financial benefit by deception. Between July 2009 and January 2010, the department had investigated one case of theft, involving $28,000 of smart phones and computer monitors, and 29 cases of obtaining financial advantage or other benefits by deception. It was reported that findings have been made against 10 of the 11. One investigation was stopped after the employee resigned. Another official working in an area of sensitive and confidential material who had a high security clearance had claimed payment for overtime he had not worked and misused a Commonwealth police vehicle. One recommendation was that his employment be ended if trust in him was an issue and that he be moved to a position not requiring a security clearance. In another case involving $9700 in overpayments the recommendation was that the official be subject to sanctions that could include a reduction in classification or being fired. The report did not indicate referral of any of the matters to the AFP or DPP.
- On 1 February 2012,[67] a parliamentary enquiry was announced into the potential for the corruption of Australian law enforcement officials overseas. Some 395 Federal police were stationed outside Australia in 2011. It was reported that the Ombudsman had jurisdiction to investigate such police officers but lacked the resources to do so. Concerns were raised about the nature and extent of the corruption risk."

<u>Appendix C: Corruption Risks in Victoria –</u>

[63] ***March 19 2012 - http://www.theage.com.au/national/extax-man-jailed-over-tobacco-bribes-20120319-1verg.html***
[64] McKenzie and Baker, The Age 28 March 2012
[65] Linton Besser, The Age, 3 January 2011; Editorial, The Age 4 January 2011;
[66] Linton Besser, The Age 26 September 2011
[67] Dan Oakes, The Age, 1 February 2012

Extract from ERRN Paper -"The Victorian Independent Broad-based Anti-Corruption Commission (IBAC): A Toothless Tiger?[68]"

"...In the last 12 -18 months, the media has reported an increased number of allegations of corrupt conduct in the conduct of government and publicly funded services in Victoria:

- Officers of a statutory corporation, Cenitex, being involved in the letting of IT contracts to their own companies;
- Officers of the Victorian Building Commission seeking and receiving kickbacks from hired sub-contractors and for stopping investigations and awarding licences and a history of audits revealing serious failures to meet standards;
- An officer of DOJ soliciting a bribe of $20,000 from a tenderer for a contract to supply security services to IBAC itself and speaking of it to an officer in another department;
- Rorting of funding provided by the government for privatised TAFE education;
- Misuse for private profit of a publicly provided vehicle by business employees of an MP."

Appendix D Extract from Paper delivered by Chair of ART at ERRN Seminar on 23 June 2012

....There is a real question whether IBAC will be able to conduct any investigations under the legislation as presently drafted. But there have been serious concerns raised about limitations on IBAC's investigative powers in the non-police public sector– in particular concerns about the very high threshold (must be "serious corrupt conduct" 41(2)) that has to be satisfied before an investigation can be conducted by IBAC, the exclusions of situations that would constitute the common law offence of misconduct in public office[69], and the consequential opportunities for legal challenges to investigations.

In the Accountability Round Table's view, however, the situation is in fact significantly worse than has been suggested. To explain this conclusion, we must go to the 3 key provisions. Having done that, I will then attempt to apply them to some examples.

S 41 sets out the conditions on which IBAC can "conduct investigations". It provides (quoting the critical parts)

[68] Hon. T.H.Smith Q.C, Adjunct Professor Monash University, Department of Management, Faculty of Business and Economics, and Chair of the Accountability Round Table.

[69] The elements of the offence are; a public officer acting as such, without reasonable excuse or justification, so wilfully neglects to perform his/her duty and/or wilfully misconducts himself / herself as to commit an abuse of the public's trust in the office holder.

S 41 (1). "... IBAC may conduct an investigation in accordance with its **corrupt conduct** investigative function" on a complaint, notification or own motion but

"(2) The IBAC must not conduct an investigation under subsection (1) unless it is reasonably satisfied that the conduct is serious corrupt conduct"

Thus, to be able to conduct an investigation, IBAC must be "reasonably satisfied" that there is "conduct", that the conduct is "corrupt conduct" and that the "corrupt conduct" is "serious". "Conduct" and "serious"[70] are not defined so they will presumably be given their ordinary meaning. But "corrupt conduct" is defined and the factual elements on which IBAC must be reasonably satisfied are set out in the following two provisions:

S3A. "3A Corrupt conduct[71]

(1) For the purposes of this Act, corrupt conduct means conduct—

(a) of any person that adversely affects the honest performance by a public officer or public body of his or her or its functions as a public officer or public body; or

(b) of a public officer or public body that constitutes or involves the dishonest performance of his or her or its functions as a public officer or public body; or

(c) of a public officer or public body that constitutes or involves knowingly or recklessly breaching public trust; or

(d) of a public officer or a public body that involves the misuse of information or material acquired in the course of the performance of his or her or its functions as a public officer or public body, whether or not for the benefit of the public officer or public body or any other person; or

(e) that could constitute a conspiracy or an attempt to engage in any conduct referred to in paragraph (a), (b), (c) or (d)

being conduct that would, if the facts were found proved beyond reasonable doubt at a trial, constitute a ***relevant offence***.

For present purposes, it is sufficient[72] to focus on the concluding proviso in s3A, "being conduct.... ***relevant offence***"

The word "facts" is a critical term. It does not appear to be defined or qualified in any way in the legislation. I suggest that the ordinary meaning would be that "facts" would refer to the factual information in IBAC's possession at the particular relevant times - e.g. when it is deciding whether to commence an investigation and, for such a purpose, must decide if the conduct to be investigated is corrupt conduct. That interpretation, however, appears to create major difficulties. They are discussed below.

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[70] Will relevant matters include; the reasons or motives for the conduct, mental state, the consequences, whether it is systemic or an isolated event, whether the persons concerned had already been alerted or warned about such conduct, the level of government concerned, the level of the position of the person concerned, the experience and training of the person or persons concerned and the nature and extent of the responsibilities of the person for personnel, and/or resources, and/or the exercise of legal authority?

[71] This definition can be compared with ICAC's significantly wider definition in the attached table.

[72] But note, for example, the absence from (1)(a) of "could affect" – included in the ICAC legislation- see attached

What is a ***relevant offence***? It is defined.

> **"relevant offence"** means
>
> (a) an indictable offence against an Act
>
> (b) any of the following common law offences committed in Victoria-
>
> (i) attempt to pervert the course of justice;
>
> (ii) bribery of a public official;
>
> (iii) perverting the course of justice;"

In combination, these provisions define the power of IBAC to conduct investigations. How will these provisions operate?

In combination they require that, to be able to conduct an investigation, IBAC must be reasonably satisfied that "the facts" of the conduct to be investigated, assuming that they were found proved beyond reasonable doubt , at a trial, would constitute corrupt conduct as defined in s3A and it is a serious form of corrupt conduct.

Thus IBAC, before commencing any investigation, must, from the "facts" in its possession, identify the conduct it wishes to investigate, including both the physical acts and their mental elements (the "relevant offence" requirement). It must then be reasonably satisfied that that conduct comes within the definition of "corrupt conduct" and was "serious corrupt conduct".

It should be noted that IBAC must decide whether it is reasonably satisfied as to all those matters in circumstances where it has not commenced its investigation and, therefore cannot be satisfied that it has all the relevant information.

Appendix E. Extract from the ART Further Submission – NAP 13 August 2012

"We submit .... that information in the Risk Profiling Table needs to be further analysed. For the Table identifies, but does not distinguish between, areas of

A. public sector[73] activity exposed to the risk of corruption and
B. activity of persons outside government, and mechanisms, that offer the opportunity and temptation to corrupt government.

When that is done, a number of additional activities from both areas can be identified and detailed.

The following Tables attempt to address those issues.

A. **Public sector[74] activity exposed to the risk of corruption[75]**

Major Policy changes	**Commonwealth Regulation**	**Commonwealth Revenue and Expenditure**	**Commonwealth Law Enforcement**	**International**
The development of major policy changes, including regulatory changes, particularly those that may advantage or adversely	Climate change Licensing and regulation Access to Personal and Commercial Government information Visas and Passports	Outlays and benefits Revenue Procurement of goods and services ***by government and by outsourced government services*** ***Outsourcing government services***	Law enforcement; ***Including by AFP,ACC,ASIC,ACCC,*** ***AUSTRAC, CRIMTRAC,CUSTOMS AND EXCISE, TAXATION OFFICE***	Australian officials overseas ***managing Commonwealth Regulation, Revenue and Expenditure and Law Enforcement*** ***Trade Assistance***

[73] "Public Sector" is used to refer to the three branches of the Commonwealth government (legislature, Executive and Judiciary and to all bodies and persons who supply goods and perform services for or on behalf of government using public funds

[74] ~~"Public Sector" is used to refer to the three branches of the Commonwealth government and to all bodies and persons who supply goods and perform services for or on behalf of government using public funds~~ See fn 6

[75] Additions in bold italics

affect existing interests.		Development assistance		

B. Activities of persons outside government and mechanisms, practices and circumstances that offer the opportunity and temptation to corrupt government.

Activities of persons outside government	**Mechanisms and Practices**	**Circumstances**
Organised Crime Transnational Crime Money Laundering .	Political Donations and t***he Practice of Party fund raising events in which access to MPs, particularly Ministers, can be purchased.*** ***Lobbying*** ***Post-retirement employment of Ministers, MPs, and their staff and other public sector personnel with lobbyists and businesses dependent on or affected by government decisions and personnel from such organizations moving into public sector positions in areas in which they had previously been employed.***	***The "arms race" for political funding*** ***Allowance of gifts to public sector personnel.*** ***Lack of job and/or financial security*** ***Values- Loss of acceptance of the primacy of the obligations of the public trust attaching to public office*** ***Lack of awareness of the concept of conflict of interest and the need to***

		avoid conflicts of interest and/ or declare them. ***Politicisation of the Public Service*** ***Public Sector Secrecy*** ***Concentration of Power in a few hands***