

# “Democracy at the Crossroads?”<sup>1</sup>

## 1. Introduction

### 1.1 What is Democracy?

In Western Democracies, is it not “government of the people, by the people for the people?”<sup>2</sup>. It is a system of government whose role is to serve the people.

### 1.2 Assessing the state of our Democracies?

How do we assess the state of its major institutions and the actions of the individuals involved in them?

*“It is by reference to the values, purposes and duties for which that power is entrusted to, or held by, the institutions and individual office-holders concerned. When individuals and institutions act in a manner that is true to these values, purposes and duties, we say they have integrity. Truth and honesty are not synonyms for integrity, but provide fundamental elements”;*<sup>3</sup>

### 1.3 Realities - Challenges to the integrity of our Parliamentarians and Democracies

Looking at the role of our parliamentarians in our Democracies, their integrity is inevitably, and often, challenged. The Hon Fred Chaney<sup>4</sup> in the inaugural Accountability Round Table (ART)<sup>5</sup> Government Integrity Lecture, demonstrated that every person elected to Parliament brings to that office conflicting interests and obligations -

- Loyalty to oneself and one’s supporters and your Party’s faith in you;
- Duty to electorate, parliamentary party, and, if a member, Cabinet or Shadow Cabinet.

To that should be added personal and party political ambitions – in particular the pursuit of power and the retention of power.

As they attempt to perform their duties, they will inevitably and frequently be placed in specific conflict of interest situations that challenge their integrity, for example, issues of open and accountable government. They should be handled consistently by our parliamentarians whether they are in government or not - but they are not. In 2009, the then shadow Attorney – General, Senator Brandis, when strongly supporting in Parliament government measures to strengthen the FOI system, commented

*“The true measure of the openness and transparency of a government is found in its attitudes and actions when it comes to freedom of information. Legislative amendments, when there is need for them, are fine, but governments with their control over the information in their possession can always find ways to work the legislation to slow or control disclosure”*<sup>6</sup>

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<sup>1</sup> Paper delivered by Hon Tim Smith QC at the Cairn’s Tropical Writers Festival, 11 August 2016

<sup>2</sup> John Wycliffe and Abraham Lincoln

<sup>3</sup> National Integrity Systems Assessment (NISA) Final Report December 2005.

<http://www.transparency.org.nz/docs/2005/NIS%20Australia%202005.pdf> ;

<sup>4</sup> Liberal Party Senator 1974-1990, member of the House of representatives 1990-93, Minister 1978-83

<sup>5</sup> Chaney, Integrity in Parliament - Where does Duty Lie? - <https://www.accountabilityrt.org/tag/art-lecture-2011/>

<sup>6</sup> Senator Brandis

[http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId\\_Phrase%3A%22s702%22%20Dataset%3Ahansardr.hansards%20Title%3A%22second%20reading%22;rec=1](http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=BillId_Phrase%3A%22s702%22%20Dataset%3Ahansardr.hansards%20Title%3A%22second%20reading%22;rec=1)

These inevitable realities make even more important the identification and articulation of the “values, purposes and duties” that should be served by our elected representatives whether in government or opposition.

Fred Chaney’s advice was that the key guiding principle for parliamentarians is to assess what will best serve the public interest. But there is more that can, and should be, said.

## **2. What are the principles that should be served by those elected to public office in the Parliament?**

Accepting that the purpose of Democracy is to serve the people, what guiding principles flow from that?

### **2.1 The “Fitzgerald Principles”**

In the 2015 Queensland election campaign, the Australian Institute,<sup>7</sup> sought commitments from those seeking election to the following key values, purposes and duties put forward by the Hon. Tony Fitzgerald QC, AC<sup>8</sup>;

- Govern for the peace, welfare and good government of the State;
- Make all decisions and take all actions, including public appointments, in the public interest without regard to personal, party political or other immaterial considerations;
- Treat all people equally without permitting any person or corporation special access or influence; and
- Promptly and accurately inform the public of its reasons for all significant or potentially controversial decisions and actions.

This is a very important and valuable statement. It played a significant role in that election.<sup>9</sup> The parties committed to it.<sup>10</sup>

But on what are these principles based?

### **2.2 The Public Office Public Trust principle**

There is another principle that underpins, and is taken up, in the Fitzgerald principles – an ancient and fundamental ethical, and common law, principle.

The ethical principle can be traced back to Plato. It is based on the proposition that where you entrust another with power over you and your affairs, that person is obliged to exercise those powers for your benefit in priority to their own.

Our elected and non-elected public officers are entrusted with power, and substantial sums of our money, to make decisions of enormous significance for us and following generations, for the present and the future. The principle requires that, when making decisions, they must put

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<sup>7</sup> <http://www.tai.org.au/content/accountability-push-ahead-queensland-poll>

<sup>8</sup> in conjunction with the St James Ethics Centre and the Australian Institute <http://foi-privacy.blogspot.com.au/2015/01/tony-fitzgeralds-prescription-for-good.html#.Vm68MO9uIKY> .

<sup>9</sup> See Project Snapshot, p.19 The Australian Institute Annual Report 2014-15, [http://www.tai.org.au/sites/default/files/Aust\\_Inst\\_AR\\_2014-15\\_ART\\_low\\_res.pdf](http://www.tai.org.au/sites/default/files/Aust_Inst_AR_2014-15_ART_low_res.pdf)

<sup>10</sup> [http://www.tai.org.au/sites/default/files/TAIQOL\\_AdCourierMail\\_FINAL.pdf](http://www.tai.org.au/sites/default/files/TAIQOL_AdCourierMail_FINAL.pdf)

the public interest first in priority to their personal interests and other private interests. It is also part of Australia's law - the Common Law.

The legal principle was described by Sir Gerard Brennan, the former Chief Justice of the High Court, in his speech at the presentation of the ART Commonwealth Parliamentary Integrity Awards for the 43<sup>rd</sup> Parliament. He said<sup>11</sup>

*"It has long been an established legal principle that a member of Parliament holds "a fiduciary relation towards the public"<sup>12</sup> and "undertakes and has imposed upon him a public duty and a public trust".<sup>13</sup> The duties of a public trustee are not identical with the duties of a private trustee but there is an analogous limitation imposed on the conduct of the trustee in both categories. The limitation demands that all decisions and exercises of power be taken in the interests of the beneficiaries and that duty cannot be subordinated to, or qualified by the interests of the trustee.<sup>14</sup>*

Turning to the question of enforcement, he said:

*"True it is that the fiduciary duties of political officers are often impossible to enforce judicially; the courts will not invalidate a law of the Parliament for failure to secure the public interest<sup>15</sup> – the motivations for political action are often complex – but that does not negate the fiduciary nature of political duty. Power, whether legislative or executive, is reposed in members of the Parliament by the public for exercise in the interests of the public and not primarily for the interests of members or the parties to which they belong. The cry "whatever it takes" is not consistent with the performance of fiduciary duty."*

This is not the occasion to explore the scope of the legal principle and its application in our legal system. Examples include the development of administrative law, the common law criminal offence of misconduct in public office for which Mr Obeid was convicted<sup>16</sup>, sentencing law, and contract law. Where unfettered statutory discretions are given to ministers such as planning ministers, the common law requires that the ministers comply with the principle.<sup>17</sup> The Queensland Crime and Corruption Act definition of "corrupt conduct"

<sup>11</sup> P.3, <http://www.accountabilityrt.org/integrity-awards/sir-gerard-brennan-presentation-of-accountability-round-table-integrity-awards-dec-2013/>

<sup>12</sup> (quoting Higgins, J. in *R v Boston* (1923)33 CLR386, 412)

<sup>13</sup> *ibid*408

<sup>14</sup> citing Rich,J in *Horne v Barber*(1920)27CLR494,501

<sup>15</sup> citing *United Steamship Co of Australia Pty Ltd v King* (1988) 82 CLR 43 at 48; In para 16 of the judgement it is stated:

<sup>16</sup>16. These decisions and statements of high authority demonstrate that, within the limits of the grant, a power to make laws for the peace, order and good government of a territory is as ample and plenary as the power possessed by the Imperial Parliament itself. That is, the words "for the peace, order and good government" are not words of limitation. They did not confer on the courts of a colony, just as they do not confer on the courts of a State, jurisdiction to strike down legislation on the ground that, in the opinion of a court, the legislation does not promote or secure the peace, order and good government of the colony. Just as the courts of the United Kingdom cannot invalidate laws made by the Parliament of the United Kingdom on the ground that they do not secure the welfare and the public interest, so the exercise of its legislative power by the Parliament of New South Wales is not susceptible to judicial review on that score. Whether the exercise of that legislative power is subject to some restraints by reference to rights deeply rooted in our democratic system of government and the common law (see *Drivers v. Road Carriers* (1982) 1 NZLR 374, at p 390; *Fraser v. State Services Commission* (1984) 1 NZLR 116, at p 121; *Taylor v. New Zealand Poultry Board* (1984) 1 NZLR 394, at p 398), a view which Lord Reid firmly rejected in *Pickin v. British Railways Board* (1974) AC 765, at p 782, is another question which we need not explore."

<sup>16</sup> Lusty, D. "Revival of the Common Law Offence of Misconduct in Public Office" (2014) 38 *Criminal Law Journal* 337.

[http://www.accountabilityrt.org/?s=Lusty; Roger McNay Q.C. "Trust in Public office"](http://www.accountabilityrt.org/?s=Lusty; Roger McNay Q.C. )

<https://www.ccc.wa.gov.au/sites/default/files/Trust%20in%20Public%20Office.pdf> and see the research and writing in recent years; particularly Hon Paul Finn, Chief Justice French and former Chief Justice Gleeson and Dr Solomon (referred to in Smith T., *Integrity in politics? Public office as a public trust? Is there hope?* -[http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-T-2014-Lyceum-U3A-Speech-final-3\\_.pdf](http://www.accountabilityrt.org/wp-content/uploads/2009/11/Smith-T-2014-Lyceum-U3A-Speech-final-3_.pdf) ( note p11 and discussion of *Magill v Porter* ; also Smith T., *Government Secrecy and Urban Planning – The Forgotten Trust and Reform*, <http://www.accountabilityrt.org/government-secrecy-and-urban-planning-the-forgotten-trust-and-reform/> ; See also the recent consideration of the principle in the context of political funding by Dr Colleen Lewis. <http://www.johncaifoundation.com.au/come-clean-stopping-the-arms-race-in-political-donations-by-dr-colleen-lewis/> .

<sup>17</sup> [https://www.accountabilityrt.org/wp-content/uploads/2014/10/Smith-Tim-Smith-Tim-Paper-021014-Urban-Dev-Conf-Final\\_4\\_.pdf](https://www.accountabilityrt.org/wp-content/uploads/2014/10/Smith-Tim-Smith-Tim-Paper-021014-Urban-Dev-Conf-Final_4_.pdf)

includes “knowingly or recklessly breaching public trust”.<sup>18</sup> The principle has guided Reviews of Corruption, been included in codes of conduct, and legislation but still does not appear to be in the consciousness of those we entrust with the power to govern.<sup>19</sup>

An important feature distinguishing the Public Trust from the private trust, is that where the Public Trustees fail the beneficiaries, for example, in developing policy or in preventing breaches of the Public Trust, we, the beneficiaries, cannot generally turn to the courts for assistance because of the separation of powers between the three branches of government. As a result, in many situations the buck ultimately stops with us. That is our ultimate responsibility in this mega Public Trust.

I turn to the question posed for this paper.

### 3. Is Democracy at the Crossroads in Australia?

I propose to explore the question by focussing on two Australian Democracies – the Queensland and Commonwealth Democracies. The circumstances and health of these Democracies are very different.

#### 3.1 What is the state of the Queensland Democracy?

##### 3.1.1 2015 election<sup>20</sup>

Professor AJ Brown expressed the view that Queensland had reached “its present low point” because of the “winner takes all” approach to government, what he describes as “Queensland’s “old-style politics”.<sup>21</sup> He said that it became “entrenched” under “successive Labor and LNP governments”.

Looking back, he commented that in the 1990s it was the conservatives who had played a pivotal role in the reform of those “Old-style politics” but, from the Beattie administration onwards, it had got worse. He described it as “a bipartisan problem, urgently needing a bipartisan solution.”

He identified as examples of the “old style politics” in the recent past:

- Premier Anna Bligh’s attempt to refer the Newman family to the CMC.
- the ALP “playing the man” in relation to the acting chair of the CMC– Dr Levy.
- the significant weakening changes to Queensland’s Government Integrity System made by the Campbell Newman government<sup>22</sup>.

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<sup>18</sup> E.g. s 15 (1)(b) Crime and Corruption Act (Queensland);

<sup>19</sup> Also the public office – public trust principle was referred to and relied upon by the authors of the reports recommending the establishment of anti-corruption bodies – for example, in Tasmania ( “Public Office is a Public Trust” 2009” and Western Australia ( Royal Commission into Commercial Activity of Government 1992); and relied on as the guiding principle in Codes of Conduct (Commonwealth; Ministerial Standards - [https://www.dpmc.gov.au/sites/default/files/files/Statement\\_of\\_Ministerial\\_Standards.pdf](https://www.dpmc.gov.au/sites/default/files/files/Statement_of_Ministerial_Standards.pdf) : Queensland ( Code of Conduct for the Queensland Public Service ( p4 - <http://www.psc.qld.gov.au/publications/subject-specific-publications/assets/qps-code-conduct.pdf>), Queensland Parliament Standing Orders Preamble para 2, “ It is vital that elected representatives be continually reminded that they exercise a public trust which should not be subject to any private interest, <https://www.parliament.qld.gov.au/documents/assembly/procedures/StandingRules&Orders.pdf> ; and Public Sector Act 2008, s 26- <https://www.legislation.qld.gov.au/legisln/current/p/publicserva08.pdf> ) , s 26) and Parliamentary Code of Conduct . It has recently been considered in the context of political funding reform - Dr Colleen Lewis – Come Clean; <http://www.johncainfoundation.com.au/wp-content/uploads/2015/11/jcf-come-clean-political-donations.pdf> . Stopping the Arms Race in Political Donations

<sup>20</sup> A.J Brown - <http://theconversation.com/labors-first-test-putting-integrity-before-politics-in-queensland-37373>

<sup>21</sup> - a close relative of Richo’s “whatever it takes”?

<sup>22</sup> In particular the reforms that removed the corruption preventing function of Queensland’s CCC the requirement of statutory declarations for allegations of corruption and the narrowing of the statutory definition of “corrupt conduct”

- the ALP election promise of a donations enquiry primarily focussed on the LNP;

On the positive side, he acknowledged ALP election promises to restore integrity and accountability in government, including commitments to

- apply the Fitzgerald Principles for good governance.
- lower the political donations disclosure threshold to \$1000
- restore the CCC's corruption prevention functions and review the requirement of statutory declarations for corruption allegations.

Dr Brown expressed concern, however, about the lack of “a comprehensive strategy” and the need for “systematic review and rebuilding”.

### 3.1.2 *Other issues to be considered in assessing the Queensland Democracy*

The above are valid and serious concerns. But, it needs to be remembered that, as Dr Brown also pointed out, Queensland has led the nation in the scope and content of its government integrity system.<sup>23</sup> Democracies like those of the Commonwealth and Victoria lag well behind in that area.

Since the 2015 election, the Queensland Government has committed to further positive action:

- The Official Government Review into the definition of “corrupt conduct”,<sup>24</sup> and
- Introducing a system for real time on-line disclosure of political funding.<sup>25</sup>

Dr Brown also referred to the Premier's letter to the Independent Peter Wellington, promising not only to “restore integrity and accountability” but to do so with “consultation and consensus, rather than the division of the past three years”. He described this as a “tall order” bearing in mind the “winner takes all” mentality of successive governments. But it has considerable potential and serves the Public Office Public Trust principle and the Fitzgerald Principles.

One aspect of the present structure, however, remains a serious concern - the absence of an Upper House of Review in the Parliament. It has been found elsewhere to be a critical element if the Parliament and its elected members are to be able to perform their major democratic role of holding the Executive to account.

For example, its importance was shown over the last few years in the Commonwealth Parliament where the Senate prevented the passing of the Bill to abolish the Office of the Australian Information Commissioner (OAIC) (see further below), a statutory body created by the Parliament in 2010 and modelled on the Queensland Right to Information legislation.<sup>26</sup>

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<sup>23</sup> Probably the strongest Democratic Government Integrity system. It sets the standard in major areas such as addressing the risk of corruption, recognising the “right to know” of citizens and providing a pro-active approach to access to information held by government, providing ethical guidance to members of Parliament through the independent Parliamentary Integrity Commissioner (<http://www.integrity.qld.gov.au/>) who also has responsibility for monitoring compliance with the lobbying system. As noted above (fn.19) it specifically cites the Public Office Public Trust principle in 2 public sector Codes and the Public Sector Act. Might these be significant factors in Queensland's superior performance on integrity issues?

<sup>24</sup> [http://www.justice.qld.gov.au/\\_\\_data/assets/pdf\\_file/0007/458881/corrupt-conduct-issues-paper.pdf](http://www.justice.qld.gov.au/__data/assets/pdf_file/0007/458881/corrupt-conduct-issues-paper.pdf)

<sup>25</sup> <http://statements.qld.gov.au/Statement/2016/7/19/realtime-disclosure-of-political-donations-to-be-introduced-in-qld>

<sup>26</sup> This is discussed further below in the assessment of the Commonwealth government integrity system para 7.1(p.22)

It may be said that Queensland's Democracy is at the "Crossroads" in the sense that there are serious issues still to be addressed. But a sufficient number of the Queensland people, election candidates, and the media, faced the need to take serious action at the 2015 election to restore the government integrity system and to make government integrity a major concern at the last election. Queensland's Democracy appears to be, as a result, much better placed than other Australian Democracies such as the Commonwealth and Victoria.

While there is no immediate need for a major change of direction as such, the people of Queensland, who ultimately have the responsibility to ensure the integrity of their Democracy, must remain vigilant and ready to act to ensure that the guiding values and principles of its Democracy are honoured by those they elect and that the present best practice integrity measures are sustained and strengthened where necessary.

I will return to these issues in discussing a potentially major new opportunity that has become available and could be used to reinforce and assist the Premier's promise to consult and seek consensus.<sup>27</sup>

### 3.2 What is the state of the Commonwealth Democracy?

Significant light has been shed on the current state of the Commonwealth Democracy, much of it relevant to the States, in lectures by The Hon Barry Jones AC,<sup>28</sup> the Hon Lindsay Tanner and Michelle Grattan.<sup>29</sup>

Between them, they have identified a large number of damaging changes in the conduct of members of Parliament<sup>30</sup>:

**(a) *An absence of meaningful debate of public policy resulting from:***

- a shift in the political debate from the rationalism of the 80s and 90s to the populism of the late 1990s onwards;
- seeking advice only from people who will support the Party narrative - the full evidence is not considered;
- reliance on surveys and focus groups;
- the growing switch from public campaign meetings to intimate fundraising dinners as the pursuit of funding has grown;
- "the bear pit of question time";
- a decline in the ability to debate major issues and defend positions;
- failing to attempt to justify broken promises.

**(b) *Deception:***

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<sup>27</sup> See below para.7ff

<sup>28</sup> In lectures he has given including one for ICAN and ([ican2014@bigpond.com.au](mailto:ican2014@bigpond.com.au)), now the Australian Citizens Against Corruption (ACAC) – [acac.forum@gmail.com](mailto:acac.forum@gmail.com)), an independent network established by a member of ART, Carmel Benjamin. Its aims are to

- "Engage, members of the public in active, non-partisan support for the principle of public office as a public trust".
- "Advocate for a corruption free government of integrity and accountability".

For Barry Jones's speech for ICAN; - <http://www.accountabilityrt.org/barry-jones-whats-wrong-with-democracy/> Barry Jones.

<sup>29</sup> Delivering Integrity in Government Lectures for the ART and the Melbourne University Law School Centre for comparative Constitutional Studies; <http://www.accountabilityrt.org/integrity-lectures/>

<sup>30</sup> Discussed subsequently in T Smith "Australia's democratic governments; a proud history, their present state and future"; <http://www.accountabilityrt.org/australias-democratic-governments-a-proud-history-their-present-state-and-future/>

- lying to Parliament, no longer a resignation offence and, lying to the people, no longer seen as a serious matter;
- the continuous election campaign involving “half-truths” and “exaggerations”;
- the development of the “spin industry”;
- the lack of transparency of political fund-raising and the devices used to avoid the inadequate regulation that is in place;
- reliance on invented narratives.

At the 2012 Woodford Festival, Malcolm Turnbull summed up the state of our Parliamentary Democracy by saying that it has never been easier for parliamentarians to lie because of what he called the 60 second media cycle. He also said that parliamentarians treat us, the people, with contempt. He expressly included himself among such parliamentarians.<sup>31</sup>

There should be added to those concerns, the ever increasing secrecy of our governments. As Attorney-General, Senator Brandis has since May 2014 effectively abolished the Office of the Australian Information Commissioner (OAIC), the major 2010 FOI reform which had been restoring and strengthening that FOI system.<sup>32</sup> In May 2016 he maintained that the reason is financial,<sup>33</sup> having originally relied upon an alleged annual saving of \$2.5m. When it became clear that the Senate would not pass the abolition Bill, it achieved its aim by not restoring the funding needed to enable the OAIC to perform its open government role. It continued that approach in the 2015 – 16 and 2016-7 Budgets.

These actions have added to the secrecy of government and have been pursued notwithstanding serious public concern that their actions have also breached the common law principles recognized in the Constitution of the Separation of Powers and the Rule of Law, critical safeguards of our Democracies.<sup>34</sup> As the Chair of the International Commission of Jurists (ICJ), the Hon John Dowd AO, QC, a former Attorney-General in a New South Wales Coalition Government, wrote to the Attorney-General:

*“When a government is seen to be doing executively what it was unable to do by legislation, concerns about insults to the rule of law and the doctrine of separation of powers are understandably aroused. When this executive function has the effective result of emasculating a statutory body, which can only be abolished by statute, there can be no doubt that the wall of protection separating the executive from the legislature has been breached”.*<sup>35</sup>

The Attorney-General’s responsibilities for the rule of law are expressly recognized on the Commonwealth Attorney-General’s Departmental website<sup>36</sup>:

*Our department has primary responsibility for supporting the Australian Government in protecting and promoting the rule of law. The rule of law underpins the way Australian*

<sup>31</sup> <http://www.youtube.com/watch?v=VTOtpzMelyI> ,

<sup>32</sup> See further discussion below p.22 (para 7.1)

<sup>33</sup> Senate Estimates in May 2016. The Attorney-General said that the decision in 2014 to abolish the office was a “good economy measure- and we haven’t changed our mind.”

<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22committees%2Festimate%2Fdf59a2-9694-43a8-bb17-3c452655dca6%2F0003%22>

<sup>34</sup> <https://www.accountabilityrt.org/time-for-turnbull-to-step-up-on-open-government/> ; <https://www.accountabilityrt.org/senates-last-chance-to-save-foi-watchdog-and-protect-the-rule-of-law/>

<sup>35</sup> This and other relevant material Included on ART website at; [www.accountabilityrt.org/georgebrandis-urged-to-respect-rule-of-law-by-former-attorney-general](http://www.accountabilityrt.org/georgebrandis-urged-to-respect-rule-of-law-by-former-attorney-general). <https://www.accountabilityrt.org/tag/john-dowd/>

<sup>36</sup> <https://www.ag.gov.au/About/Pages/Ruleoflaw.aspx>

*society is governed. Everyone—including citizens and the government—is bound by and entitled to the benefit of laws.*

These actions have further weakened our Commonwealth Government Integrity System.

### 3.3. The state of the Commonwealth Government Integrity System

The Commonwealth Government Integrity System has for some time been among the weakest in Australia. While it has an effective Parliamentary House of Review, the Senate, and the Auditor-General, the other parts of the Government Integrity System fall well behind the Queensland system. Examples include,

- ***Anti- corruption system*** – there is ACLEI, but it covers only a small part of the public sector and relies on a multi- agency approach in which no one has the ultimate responsibility.
- ***Political funding disclosure*** – it allows inordinate time for disclosures, the disclosure threshold is too high and disclosure is easily avoided.
- ***FOI*** – substantially reformed in 2010 in light of the Queensland model but effectively returned to the old failed system.
- ***Codes*** – while there is a good Code of Conduct for Ministers, there is none for others parliamentarians and no Integrity Commissioner (another best practice to be found in Queensland) to advise MPs.
- ***Lobbying regulation*** – this is confined to third party lobbying and, as a result, easily avoided by retiring Ministers and MPs accepting employment in companies that in turn lobby directly in their own corporate interests or engage third party lobbyists. Also, unlike the Queensland system, the Lobbying Register and the monitoring of the system is not the responsibility of an independent Integrity Commissioner but that of the Prime Minister through his Department’s Secretary and the Minister assisting the Prime Minister.<sup>37</sup>

Successive governments have also failed to meet their obligations to strengthen the integrity of our governments through the United Nations Convention against Corruption (in particular the long overdue direct action plan) and most recently, the Open Government Partnership (OGP).<sup>38</sup>

## 4. What have been the major causes of the deterioration of our Democracies?

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### 4.1 Trends in politics

Barry Jones<sup>40</sup> identifies 2 major trends since the 1970/80’s

(a) ***Professionalization of the political trade?***

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<sup>37</sup> [http://lobbyists.pmc.gov.au/conduct\\_code.cfm](http://lobbyists.pmc.gov.au/conduct_code.cfm)

<sup>38</sup> Discussed below; para 8 ff.

<sup>39</sup> See discussion by Barry Jones - above; and 2 other papers – “Political recruitment in Australia - Why do we not trust our leaders and politicians?” ( 9/5/2013) and “Gough Whitlam’s vision of social democracy with a focus on parliament and party” ( 4/11/2015) available at <http://www.accountabilityrt.org/barry-jones-on-democracy-in-australia-two-papers/> .

<sup>40</sup> <https://theconversation.com/profiles/barry-jones-2557> .

In the 80s, the majority of members of Parliament came from careers other than politics. Since the mid to late-90s that has reversed. The only experience that the majority have had is in the political culture

**(b) *The development of major party factions?***

The result of this development has been a focus of those in politics on what will sell and “what will my faction want”, not “what is in the public interest”.<sup>41</sup>

**4.2 Community loss of knowledge of the key guiding principle.**

When the people involved in an organization abandon will, or forget, any of its underlying key values and principles, changes adversely affecting the performance of that organization are likely to happen. This has been, and is, happening in Australia’s Democracies.

Those we elect to Parliament, those who are public servants, and the media, have forgotten over time the fundamental value and principle that should guide us in our Democracies - the principle that public office is a public trust and the obligations that flow from that principle. So too have we, the people.

In support of this proposition, I note that the conduct and changes which commentators have criticized involve breaches of, or failures to honour, the Public Office Public Trust principle. But they do not refer to it even though that connection, when made, adds considerable weight to the validity and significance of their concerns.

I was not aware of it until it was brought to my attention seven years ago by Associate Professor Coghill. The vast majority of people I have spoken to about it have not been aware of it. Those most likely to be aware of it appear to have studied philosophy not law or government. ART has been raising the issue when it can, including in submissions to government and parliaments on government integrity issues.

If we go back 100 years, it appears that it was common to refer to the principle in assessing and passing judgement on the actions of those entrusted with power to govern. For example, Maitland complained

*“Open an English newspaper, and you will be unlucky if you do not see the word “trustee” applied to the “Crown” or to some high and mighty body. I have just made the experiment, and my lesson for today is, that as the Transvaal has not yet received a representative constitution, the Imperial Parliament is “a trustee for the colony”.*<sup>42</sup>

It seems that it was not expressly talked about in the 1970s and 1980s, but that the public officers we elected, and the public service, by and large, appear to have still seen their jobs as ones where they had to focus on, and give priority to, the public interest – for example, as Barry Jones has commented, the bi-partisan approaches taken to refugees in those years and the major economic reforms of the 1980s by the major parties.

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<sup>41</sup> Other matters? Issues have been raised elsewhere about whether there has been a diminishing of the important public integrity role of the A-G ( Gerard Carney; Comment- The Role of the Attorney- General, 1997, Vol 9 Bond Law Review - <http://epublications.bond.edu.au/cgi/viewcontent.cgi?article=1120&context=blr> - in particular, the independent public interest role of the A-G. Was this a factor in the role taken by our present A-G, who is also the Minister in Charge of the FOI system, enabling him to feel free to lead and administer the on-going action to abolish the OAIC?). How is that action in the public interest? Any diminishing of this role may also have been increased by the next matter - the loss of awareness of the Public Office Public Trust principle.

<sup>42</sup> F.W.Maitland, “Trust and Corporation” in Collected Papers (CUP, Cambridge, 1911) Vol 3, P403 -

As noted above, the Hon Fred Chaney,<sup>43</sup> when speaking in 2012 identified the principle that will enable parliamentarian's find their way through their conflicts of interest - the placing of the public interest first. He was giving effect to the Public Office Public Trust principle, but did not cite it – similarly Tony Fitzgerald, Dr. Brown and Malcolm Turnbull in their above public statements.

The result appears to have been, now and for some time, that when members of our Parliament have been faced with a choice between the public interest and personal or political interests, there has been missing from their thinking either

- the critical element - that the public interest is a relevant issue
- or, if aware that it is,
- the awareness that their duty, ethically and in law, is to put the public interest first, ahead of their personal and other private interests.

As a result, the parliamentarians making the choice are likely either

- not to consider the public interest question,
- or, if they do,
- to consider it as no more than a competing interest, not the priority interest.

Until recently (when Fairfax Media took up<sup>44</sup> the issue), the Public Office Public Trust principle had, for many years, been absent not only from political and social debate but from our community's consciousness.

### **4.3 The importance of the Public Office Public Trust principle for our Democracies**

It is submitted that there is a significant connection between

- the adverse changes in Australian Democracies, and its worsening, since the 80's, and
- the ever increasing loss of our community's awareness of the Public Office Public Trust principle, the last vestiges disappearing through the 1990s as the "winner take all" and "whatever it takes" cultures became dominant.

Much is said of the decline in recent years of the people's trust in our elected representatives. A major cause must be, as Malcolm Turnbull said, their lying to us and treating us with contempt – both, the antithesis of his and his colleagues' obligations as our Public Trustees.

It is also submitted that the lack of awareness of the Public Office Public Trust principle helps to explain our disengagement from our Democracy that Lindsay Tanner referred to in his lecture.<sup>45</sup> Would so many of us allowed ourselves to disengage from our Democracies to the extent we have if we were all aware of the Public Office Public Trust principle and the political and legal reality that the ultimate responsibility to address the problem rests with us?

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<sup>43</sup> <http://www.accountabilityrt.org/inaugural-art-lecture-fred-chaney-integrity-parliament-where-does-duty-lie/> ; Member of the Commonwealth Parliament 1974-1993.

<sup>44</sup> Michael Short, <http://www.smh.com.au/national/protecting-the-public-is-key-to-resolving-conflict-of-interest-among-politicians-20141114-11mn6d.html>; <http://www.theage.com.au/comment/the-age-editorial/the-political-price-of-betraving-public-trust-20150206-138e6b.html>; and see, Ms Gai Brodtmann, Member for Canberra, Shadow Parliamentary Secretary for Defence, <http://www.canberratimes.com.au/national/public-service/a-matter-of-public-trust-measuring-how-government-performs-20151003-gk0omx.html#ixzz3wMuDO1Bw> .

<sup>45</sup> see link in footnote 12 above.

It also explains the fruitless conversations we have about the conduct of those we elect and our failure to do anything despite our great concern; for we assume that we do not have any principled case to put and no responsibility to put it– “the problem is politics”.

The principle is still being ignored, however, and unless something significant is done it will remain so and the deterioration of the integrity of our Democracies will continue.

## **5. What can and should be done?**

We must not just stand by and allow the current trends to continue with government decisions and actions, driven by politics in priority to the public interest, breaching the Public Office Public Trust principle, resulting in poor government, increased the loss of the people’s trust in our elected representatives, and our increased disenchantment with our Democracies.

It would also be unwise to assume that we will see things change for the better as more voters direct their votes away from the major parties and more people seek election as independents particularly when our community is largely unaware of Democracy’s fundamental guiding principle that public office is a public trust.

In addition, long term positive action is needed in all our Democracies to change their political and public culture back to one that respects and applies the Public Office Public Trust principle. We need those who can to join, and be active in, political parties to help restore this principle. But it is also critical that the integrity of our Democracies be and be seen to be a major political issue. At the moment, in the Commonwealth Democracy, it is at best a minor issue that attracts little commitment from the participants or interest, except as a basis for attack on political opponents. How can this be changed?

There are lessons to be learned from the recent Queensland experience.

### **5.1 The Queensland experience**

A critical factor in the 2015 election appears to have been the participation, in conjunction with the Australian Institute, of Tony Fitzgerald, calling for the restoration of the Queensland government integrity system and articulating, for the first time in our history, I suggest, a detailed statement of the principles that should guide the conduct of those we entrust with the power to govern for us all, the Public Office Public Trust principle.

This helped to make the government integrity issues major election issues. The media took it up and ultimately all the parties committed to the Fitzgerald Principles. Enough of the voters responded and supported the re-election of a critical Independent – Peter Wellington.

The Queensland experience was built on a clear, well organised and principled campaign led by someone highly respected in the community and received media support. What can be done to secure that result and build on it there and elsewhere?

### **5.2 Long term measures?**

To address the ignorance, we need to have restored as quickly, and as widely as possible, to our shared consciousness and the political debate both

- the guiding principle – that public office is a public trust –
- and the Fitzgerald Principles,

They need to be taken up and promoted widely together.

How can we all best do that? For a start, we can now, when and wherever we or the media are discussing the conduct and performance of our parliamentarians or public servants openly apply the Public Office Public Trust principle and the Fitzgerald Principles.

But in the immediate and long term, we also need to ensure that there are subjects on the curriculum of schools and universities in which the topic is addressed.

I return to the question posed for this paper.

## **6. Are our Democracies at the crossroads?**

In a sense, our Democracies, whatever their condition, seem always to be at the “crossroads” because their integrity is always under challenge from the inevitable conflicts of interest and the political pressures of Democracies and they usually have some integrity aspect needing urgent attention. But are the Queensland and Commonwealth Democracies at “the crossroads”?

### **6.1 Queensland’s Democracy**

Queenslanders have demonstrated for some time their ability and willingness to continue to engage in the ongoing battle for their Democracy as governments have changed. They would be assisted if the Fitzgerald Principles and the Public Office Public Trust principle were brought together in the ongoing private and public political debate. This would significantly improve the navigation needed and the prospects of less disruptive change – for example, attempts at reviewing the issue of the lack of an effective Upper House.

It may not be at the “crossroads” but there are significant issues to be addressed.

### **6.2 The Commonwealth Democracy.**

The Senate is an effective Upper House of Review which has shown its value, for example, since mid- 2014 by its refusal to pass the legislation to abolish the OAIC placed before it by the Attorney-General and the Abbott government.

But, as also discussed above,<sup>46</sup> its Government Integrity System not only lacks key bodies and systems but, those it has are seriously flawed. Further, unlike Queensland, the Government integrity issue is not as yet being recognised as a matter of major significance on which all parties should be advancing and debating policies. In the 2016 federal election campaign, the Coalition advanced no reforms. The Greens and the Labor Party did but there was little or no promotion of their reforms by them or the media. The ART sought commitments from the major parties but received no response from the Coalition or the Labor Party. The Greens responded.<sup>47</sup>

In addition, the Commonwealth Democracy has a major fundamental and continuing challenge to address. I refer again to the action of the Commonwealth Government in 2014 to attempt to significantly reduce the effectiveness of the Commonwealth Freedom of Information System and so the openness and accountability of government by abolishing the independent statutory body the OAIC. That was bad enough so far as the integrity of the Commonwealth Democracy was concerned. But as noted above, there is also the question of the impact on the Australian Democracy of the alleged breaches of the key common law principles of the separation of powers and rule of law. Serious direct and urgent action is required if this serious damage to our Commonwealth Democracy is to be addressed.

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<sup>46</sup> Above para.3.3.

<sup>47</sup> <https://www.accountabilityrt.org/election-survey-results-coming-in/>

I submit that all the above matters have placed the Commonwealth Democracy at the crossroads in the sense that a major change of direction is needed to start restoring its integrity. Such a major change is available to us.

## 7. Our Commonwealth Democracy – a new direction?

There has been available to us since 2011 a new way to operate our Democracies and address government policy and government integrity issues, one that requires the participants to act in a manner that will honour and serve the Public Office Public Trust principle.

I refer to the international Open Government Partnership (OGP).<sup>48</sup> Australia was invited to join in 2011, and joined in 2013, so providing a new direction for our Commonwealth Democracy.<sup>49</sup> It can also be accessed at State, Territory and Local Government levels.<sup>50</sup>

### 7.1 The Open Government Partnership.

The OGP is of potentially great significance. Until recently, however, its history in Australia has been some 4 years of government delay and prevarication. That does not encourage optimism for a significant reform process.

But the situation changed on 17 November 2015, when the Prime Minister wrote to the OGP advising “that the Australian Government will finalise Australia’s membership with the OGP” and that:

*“The goals of the partnership are directly aligned with Australia’s long and proud tradition of open and transparent government.”*<sup>51</sup>

We have had such a tradition and the OAIC had been part of that tradition. Its establishment anticipated the OGP principles and objectives by strengthening Australia’s commitment to

- “promote transparency” of government,<sup>52</sup>
- “empower citizens”,<sup>53</sup>
- help to guarantee “the public’s right to information and access to government data” – a matter that is “essential to the spirit and practice of open government”,<sup>54</sup>
- provide more “effective remedies when information or the corresponding records are improperly withheld, including through effective oversight of the recourse process”.<sup>55</sup>

It was the sort of “ambitious”<sup>56</sup> reform now required of OGP participant nations when they attempt to address their obligations under the OGP.

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<sup>48</sup> <http://www.opengovpartnership.org/>

<sup>49</sup> <https://ogpau.govspace.gov.au/>

<sup>50</sup> . Australia’s membership of the OGP brings with it the opportunity for the States, Territories and Municipalities to participate ( as “ sub-nationals”.) The OGP has a pilot programme underway <http://www.opengovpartnership.org/how-it-works/subnational-government-pilot-program> .

<sup>51</sup> <https://opengovernment.org.au/wp-content/uploads/2016/02/Australia-Letter-of-Intent.png>

<sup>52</sup> c.f. OGP Articles of Governance p 20.

[http://www.opengovpartnership.org/sites/default/files/attachments/OGP%2520ArticlesGov%2520Apr%252021%25202015\\_0%5B1%5D.pdf](http://www.opengovpartnership.org/sites/default/files/attachments/OGP%2520ArticlesGov%2520Apr%252021%25202015_0%5B1%5D.pdf) ;

<sup>53</sup> ibid

<sup>54</sup> Op cit. p15

<sup>55</sup> Op cit. p20

<sup>56</sup> A requirement of commitments proposed by member nations; op cit.p3

The Government's announcement went largely unnoticed in the community. The Government did not attempt to publicise its decision. It appears to have been largely ignored in the political world and had very little media coverage.<sup>57</sup>

## 8. The new direction –Australia's Open Government Partnership Democracy?

### 8.1 The Open Government Partnership (OGP) - Objectives

The OGP is

*“a voluntary, multi-stakeholder international initiative that aims to secure concrete commitments from governments to their citizenry to promote transparency, empower citizens, fight corruption and harness new technologies to strengthen governance”.*<sup>58</sup>

Australia, like all participating governments, commits “to meeting five common expectations”.<sup>59</sup> They are:

” *Endorse the high-level Open Government Declaration;*<sup>60</sup>

1. *Make concrete commitments, as part of a country action plan, that are ambitious and go beyond a country's current practice;*
2. *Develop country action plans through a multi-stakeholder process, with the active engagement of citizens and civil society;*
3. *Commit to a self-assessment and independent reporting on the country's progress; and*
4. *Contribute to the advancement of open government in other countries through sharing of best practices, expertise, technical assistance, technologies and resources, as appropriate.”*

Further,

*“OGP participating governments are expected to uphold the values and principles articulated in the Open Government Declaration<sup>61</sup> and to consistently and continually advance open governance for the well-being of their citizens.”*<sup>62</sup>

The Open Government Declaration referred to above is a detailed document containing important acknowledgements including, for example, that governments

*“... collect and hold information on behalf of people, and citizens have a right to seek information about governmental activities”.*<sup>63</sup>

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<sup>57</sup> Note, however, <http://www.theage.com.au/victoria/malcolm-turnbull-signs-up-to-international-open-government-partnership-20151204-glg732.html>.

<sup>58</sup> Articles of Governance, p2

<sup>59</sup> Articles of Governance; p.3

<sup>60</sup> Set out in Articles of Governance, p 20-22;

<sup>61</sup> Op cit. p 3

<sup>62</sup> Ibid.

<sup>63</sup> Op Cit. p20

It also spells out detailed commitments under the following Headings

- “Increase the availability of information about governmental activities.”<sup>64</sup>
- “Support civic participation”.
- “Implement the highest standards of professional integrity throughout our administrations...”<sup>65</sup>
- “Increase access to new technologies for openness and accountability”.

## 8.2 National Action Plan requirements

Participating Nations are required to produce and implement a two-year National Action Plan (NAP) and do so every two years. For each NAP, they are required to select at least 1 of the following 5 “Grand Challenges”;

1. Improving Public Services<sup>66</sup>...
2. Increasing Public Integrity<sup>67</sup>...
3. More Effectively Managing Public Resources<sup>68</sup>...
4. Creating Safer Communities<sup>69</sup>...
5. Increasing Corporate Accountability.<sup>70</sup>

The Articles of Governance go on to provide that

*“all OGP commitments should reflect four core open government principles”.*<sup>71</sup>

These address:

*“Transparency:<sup>72</sup> .....Citizen Participation:<sup>73</sup> .....Public Accountability:<sup>74</sup>..  
and Technology and Innovation for Transparency and Accountability:”<sup>75</sup>*

## 8.3 Key OGP support and review of performance systems

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<sup>64</sup> Includes - “ commit to providing access to effective remedies when information or the corresponding records are improperly withheld, including through effective oversight of the recourse process.”

<sup>65</sup> Includes - “ having robust anticorruption policies, mechanisms and practises,” and “ ensuring transparency in the management of public finances and government purchases and strengthening the rule of law””p.21

<sup>66</sup> Articles of Governance, (above), p17; “measures that address the full spectrum of citizen services including health, education, criminal justice, water, electricity, telecommunications, and any other relevant service areas by fostering public service improvement or private sector innovation

<sup>67</sup> *ibid* “ measures that address corruption and public ethics, access to information, campaign finance reform, and media and civil society freedom”

<sup>68</sup> *ibid* – “ measures that address budgets, procurement, natural resources and foreign assistance”

<sup>69</sup> *ibid* – “measures that address public safety, the security sector, disaster and crisis response and environmental threats.”

<sup>70</sup> *ibid* “measures that address corporate responsibility on issues such as the environment, anticorruption, consumer protection, and community engagement”

<sup>71</sup> *Op cit* , 18

<sup>72</sup> *Ibid*; “Government-held information (including on activities and decisions) is open, comprehensive, timely, freely available to the public, and meets basic open data standards (e.g. raw data, machine readability) where formats allow.”

<sup>73</sup> *Ibid*; “Governments seek to mobilize citizens to engage in public debate, provide input, and make contributions that lead to more responsive, innovative and effective governance.”

<sup>74</sup> *Ibid*; “ Rules, regulations, and mechanisms in place call upon government actors to justify their actions, act upon criticisms or requirements made of them, and accept responsibility for failure to perform with respect to laws or commitments.”

<sup>75</sup> *Ibid*; “Governments embrace the importance of providing citizens with open access to technology, the role of new technologies in driving innovation, and increasing the capacity of citizens to use technology.”

The OGP also provides

- **Civil society support** - a substantial Worldwide Support Unit<sup>76</sup> to assist civil society groups and individuals who wish to participate in the OGP and in their national partnerships in addressing their nation's obligations under the OGP.
- **Internal and independent performance assessments** - these are to occur mid-term and end of term (i.e., at the end of the first and second year of each biennial plan cycle) comprising self-assessment reports by the participating governments and an Independent Reporting Mechanism (IRM) in addition to the participating government's self-assessment report.<sup>77</sup>

## 9. The Potential of Australia's OGP

The Commonwealth Government and the people of Australia, are participants in a substantial international organisation and program, and are committed to engage as partners in addressing our Democracy's problems and their causes.

Detailed and extensive relevant material about the Australian OGP and what has been, and is, happening can be found on the website created by the Government to facilitate Australia's OGP partnership<sup>78</sup>, the website created by the Australian civil society network, the Australian Open Government Network (AOGPN)<sup>79</sup> and Peter Timmins' blog, "Open and Shut".<sup>80</sup>

What has been provided is a system which, if operated with integrity by all participants, has enormous potential benefits for Australia's Democracies.

### 9.1 Realising the potential

To realise that potential, all the participants in this partnership will be greatly assisted by approaching their tasks on the basis that each biennial National Action Plan must serve the public interest and do so in priority to any personal interests or other private interests. If they do so,

- they will also honour and address the OGP's values, objectives, requirements and guiding principles – in particular the people will be informed and will have genuine involvement in the Australian OGP's consultation and decision making processes with the government, the Public Trustees and
- The Public Trustees will be assisted in taking into account all they should in considering what will best serve the public interest. This will be particularly important where our Public Trustees find themselves, as they unavoidably do, in conflict of interest positions, including government integrity issues.

### 9.2 The challenges.

We are very fortunate to have this new and special opportunity. But it presents major challenges. It requires very significant changes to the ways our Democracies have operated particularly for our elected representatives and our public servants. These challenges have

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<sup>76</sup> Articles, p11-12

[http://www.opengovpartnership.org/sites/default/files/attachments/OGP%2520ArticlesGov%2520Apr%252021%25202015\\_0%5B1%5D.pdf](http://www.opengovpartnership.org/sites/default/files/attachments/OGP%2520ArticlesGov%2520Apr%252021%25202015_0%5B1%5D.pdf),

<sup>77</sup> <http://www.opengovpartnership.org/independent-reporting-mechanism>

<sup>78</sup> <https://ogpau.govspace.gov.au/>

<sup>79</sup> <https://opengovernment.org.au/>

<sup>80</sup> <http://foi-privacy.blogspot.com.au/search/label/Australia.%20Open%20Government%20Partnership.#.VouxB-9umbw>

been apparent in the processes that have occurred between 17 November 2015 and the 2016 Election.

### 9.2.1 November 2015 – April 2016; material published

By April 2016, the Government had placed on the website very important material inviting responses on a range of significant matters and issues and civil society had responded and also raised significant matters and issues. These included the following:

(a) *Vision statement* <sup>81</sup>

The Government statement discussed some guiding principles and values, but did not include the principles and values stated in the OGP articles of governance or the Public Office Public Trust principle.

(b) *Background material statement* <sup>82</sup>

The Government statement did not provide a full background picture. It focussed on background material about developments in providing easier access through data systems to information held by government, referred to the positive history of the creation of the OAIC but did not address the reality of the government's actions that had effectively abolished the OAIC, and so significantly weakened the FOI system contrary to Australia's commitments under the OGP or the serious failings of the Government Integrity System referred to above.

ART responded with submissions on the above two matters,<sup>83</sup> including the critical need to address the OAIC issues, but they are yet<sup>84</sup> to be discussed by our government and civil society.

(c) *National Action Plan*

On 5 April 2016, shortly before the first Australian Open Government Partnership (AOGP) Workshop, the Prime Minister's Department (PM and C) placed on the website<sup>85</sup> a draft National Action Plan for civil society to consider, stating that it was not proposing to seek responses from civil society before or at the Workshop about the draft itself. It had been distributed to assist the identification of commitments sought by Civil Society to be included in the National Action Plan, I prepared and forwarded a response before the Workshop which was placed on the AOGP website.<sup>86</sup> Prior to the election, there was no consultation between the Government and Civil Society about that NAP.

The civil society network, (the Australian Open Government Network (AOGPN)) had made a submission<sup>87</sup> on 2 February 2016 raising concerns about the lack of a partnership approach and the need for a joint working committee of representatives of the Government and Civil Society to reflect, and enable, the officers of PM and C and members of the Civil Society Network Steering Committee to discuss the preparation of the NAP.

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<sup>81</sup> <https://ogpau.wikispaces.com/Vision+for+open+government+in+Australia> - for Government statement and ART responses.

<sup>82</sup> <https://ogpau.wikispaces.com/Background+of+open+government+in+Australia>- for government statement and ART responses.

<sup>83</sup> Fns 86,87

<sup>84</sup> as at 11 August 2016

<sup>85</sup> <https://ogpau.wikispaces.com/Draft+text+of+the+National+Action+Plan+-+5+April+2016>

<sup>86</sup> <https://ogpau.wikispaces.com/Draft+text+of+the+National+Action+Plan+-+5+April+2016>; note combined on the page with other other submissions

<sup>87</sup> <https://ogpau.govspace.gov.au/submission-aogpn/> ; It is chaired by Dr David Solomon and Peter Timmins is the convenor

On 3 August 2016, PM and C placed on the Government website, a revised timetable for the production of the Action Plan by the end of October 2016 involving “the public, civil society, organisations and other interest groups”. It went on to say,

*“... we are eager to continue working together to settle a set of commitments that not only meet government and civil society’s objectives, but also meet the core OGP requirement that the NAP be developed publicly and transparently in a spirit of genuine partnership.*

*We hope to use this process to jointly review the key proposals put forward through the initial workshops and to identify new proposals where appropriate. It will also allow us to take account of the outcomes from the United Kingdom Anti-Corruption Summit held in May 2016 and other countries NAPs as appropriate, to raise the overall aspiration of the Plan.*

*Further details will be provided shortly on the form of these consultations and engagement. We would welcome suggestions from interested parties”.*<sup>88</sup>

Addressing the request of the Civil Society Network (AOGPN) is an important advance. So too is the first public acknowledgement of the partnership nature of the Australian OGP (AOGP) between Government and Civil Society.

## **Conclusion.**

Past and recent history has shown that the integrity of our Democracies is inherently vulnerable and will continue to be so whatever battles may be won in defending or strengthening them. History also tells us that if such a battle is won, there are no guarantees that it is permanently won.

But we now have in place a system in which we and our Public Trustees can work together to address our Democracies’ functioning and integrity.

To be serious about addressing the state of our Democracies, we, - the Public Trustees and the beneficiaries of the Public Trust, the partners in our Democracies - must do all that we can to support and advance the work of our OGP. It will be critical to continue to work to re-install the Public Office Public Trust principle to our consciousness and secure government and community acceptance of the Fitzgerald Principles. We must not give up.

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<sup>88</sup> <https://ogpau.govspace.gov.au/ogpau-update-3-august/>

## Postscript

Since this paper was presented, there have been further significant and encouraging developments in the operation of the AOGP in its work towards the Australia's first NAP.

On 18 August 2016, PM and C responded to the concerns that civil society had raised about the lack of a partnership framework by

- (a) placing on its website, and distributing to those in Civil Society who had engaged with it about the Open Government Partnership, a proposal<sup>89</sup> for an “Interim Working Group” (IWG) to” co-draft and finalise the draft National Action Plan”,
- (b) providing
  - draft terms of reference for the proposed Working Group, and
  - a list of 137 possible commitments for consideration raised by “stakeholders”,<sup>90</sup> and
- (c) publishing a media release about what had been proposed.<sup>91</sup>

The 18 August proposal also called for expressions of interest in serving on the Interim Working Group. Its proposed structure involved two co-chairs, one each from government and civil society, and five representatives each from government and civil society.

Again, the Government had the responsibility to initiate action on this issue. It moved quickly to act and create a Working Group to bring Government and Civil Society together to co-create a draft National Action Plan.

On 30 August, the PMC representatives announced the proposed membership of the IWG<sup>92</sup> noting that 40 people had expressed interest in taking part. The reactions to the selections by PM and C of the civil society representatives have been positive.

The agenda for the first IWG meeting on 5 September was published on the Ogpau website on 6 September<sup>93</sup> and it was proposed that Minutes of the Meeting of 5 September would be published in the same week and submissions could be made in response.

On 9 September 2016, PMC published minutes of the 1<sup>st</sup> meeting.<sup>94</sup> The programme detailed in the Minutes provides for public feedback on the potential commitments between 9 and 19 September and

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<sup>89</sup> Blog post: <https://ogpau.govspace.gov.au/interim-working-group-for-australias-national-action-plan-expressions-of-interest/>; see also for further information - [https://twitter.com/pmc\\_gov\\_au/status/766088542095278080](https://twitter.com/pmc_gov_au/status/766088542095278080)

<sup>90</sup> <https://ogpau.govspace.gov.au/files/2016/08/Australias-National-Action-Plan-Stocktake-of-commitments.pdf> ( including “Government Integrity Issues (Commitments 53-73) Freedom of Information (Commitments 132-7 which included maintaining and funding the OAIC)

<sup>91</sup> <http://www.dpmc.gov.au/news-centre/public-data/interim-working-group-australia%E2%80%99s-national-action-plan-eoi>

<sup>92</sup> <https://ogpau.govspace.gov.au/announcing-the-members-of-the-interim-working-group-for-australias-ogp-national-action-plan/v=ced>.

<sup>93</sup> See details - <https://ogpau.govspace.gov.au/>; Also published on that page was a submission to the IWG by the ART addressing 3 areas – a national Integrity System, Political Funding and the OAIC.

<sup>94</sup> <https://ogpau.govspace.gov.au/outcomes-from-the-first-meeting-of-the-interim-working-group/>

on a draft NAP in late September and early October with a final IWG Workshop event on 7 October. It should be noted that that will include the recording of “areas of dissent/contention”.

The organisers from PM and C should be thanked for their progress in developing the required partnership approach and in attempting to address the challenge of producing an “ambitious” NAP in such a short time frame in very new circumstances.

The timetable, however, now looks even tighter (a minimum of 2 IWG meetings six days apart and a final Workshop 18 days later on 7 October with the proposed NAP being submitted to Australian government for the finalisation by the Government in time to submit the NAP to the OGP by 1 November 2016. There does not appear to be any suggestion, as yet, of a co-creative consultation at ministerial level for that final stage.

At least another month is needed for adequate consideration of the evidence, issues and options and decisions by the members of the IGW and for civil society to participate in the final phase with the Government itself, this time at ministerial level. In light of the above progress, it should not be assumed that that will not occur.

There has not, as yet, been any indication that the IWG has considered the matters that have been raised concerning the Vision Statement, Background Material Statement, or resolution of the OAIC issues – all of which need to be considered and co-resolved with civil society so that

- the selection criteria and priorities can be best identified and agreed upon before the attempt is made to finalise the choices of areas of commitment to be addressed in the first National Action Plan - those that will best serve the public interest, and
- the ongoing failure to meet Australia’s obligations as a participating nation in the OGP by failing to restore the OAIC’s resources can be addressed.

**15.09.2016**

**T.H.S**