



21 January 2011

Mr Tim Watling
Committee Secretary
Parliamentary Joint Committee on the
Australian Commission for
Law Enforcement Integrity
P O Box 6100
Parliament House
CANBERRA ACT 2600

Dear Mr Watling

I refer to the Committee's Interim Report on its review of the operation of the LEIC Act and its statement that it would turn its attention to the question of the Jurisdiction of ACLEI (eg paras 1.7 and 2.8). The attached submission is directed to that question.

We submit that the jurisdiction of the present independent anti-corruption body, ACLEI, is inadequate and will remain so notwithstanding the addition of Australian Customs. For reasons advanced in our submission, it should at least include other law enforcement bodies such as the ATO, ASIC and the Department of Immigration. But, in light of recent events referred to in the submission, consideration would also need to be given to including not only corporations doing business overseas that receive direct or indirect assistance from the federal government, but also the Reserve Bank and any corporations in which it has an interest and which do business overseas, defence department officials who negotiate contracts, Austrade, Ausaid and the Therapeutic Goods Administration.

But to take such steps would be to continue the past reactive and inadequate piecemeal approach. That approach ignores the realities and the extent of the risks posed by corruption – something that will always exist. It also ignores the fact that the risks of government corruption have significantly increased in the last 20 years (see the enclosed submission and essay).

We have reached the point in Australia where we need an adequately resourced comprehensive independent integrity system for the Commonwealth incorporating a general purpose Commonwealth anti-corruption agency. Australia might then join New Zealand in Transparency International's list in the group of the top three nations.

Yours faithfully

Hon T H Smith QC
Chair, Accountability Round Table
enc

Accountability Round Table

15 Loch Street Camberwell VIC 3124

0398826605 : jsmithth@iimetro.com.au : www.accountabilityrt.org

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

Submission of the Accountability Round Table:

Executive Summary

The jurisdiction of the present Commonwealth independent anti-corruption body, ACLEI, is inadequate. It should at least include other law enforcement bodies such as the ATO, ASIC and the Department of Immigration. In light of recent events, consideration should also be given to including not only corporations doing business overseas that receive direct or indirect assistance from the federal government, but also the Reserve Bank and any corporations in which it has an interest, defence department officials who negotiate contracts, Austrade, Ausaid and the TGA.

But to do so would be to continue the past reactive and inadequate piecemeal approach and to ignore the realities and the extent of the risks posed by government corruption, risks that will always exist and have significantly increased in the last 20 years.

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

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

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

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

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

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

Submission of the Accountability Round Table

The present Commonwealth government integrity system¹ includes Parliament (especially its committees), Courts, administrative review tribunals, Director of Public Prosecutions, oversight bodies such as the Ombudsman and the Auditor General, FOI and an independent anti-corruption body, the Australian Commission for Law Enforcement Integrity (ACLEI). During the 1970s, Australia introduced important reforms in administrative law and the last Parliament saw some important developments. However, the Australian government integrity system is no longer up to international best practice (or that of some Australian states). In particular, the jurisdiction of ACLEI is seriously limited. It has been confined to preventing, detecting, and investigating serious and systemic corruption issues in two Commonwealth law enforcement agencies: the Australian Federal Police and Australian Crime Commission. Australian Customs has been added to its jurisdiction this year.

The NISA Report of 2005² which comprehensively reviewed government integrity systems in Australia, commented,

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

If that call had been heeded there would have been an appropriate independent body in existence able to investigate recent serious allegations made about the actions of Securrency, Austrade and the Reserve Bank, and Defence Department contracts⁴. It is also unlikely that the Therapeutic Goods Administration would have failed to maintain a record of gifts and other benefits received

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

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

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

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

by staff.⁵ Such an independent body would also have been available to any citizens who wished to raise their concerns about possible misconduct and, if there was, it could have been nipped in the bud. Instead conduct that has raised concern continued for a considerable time.

In reviewing the Commonwealth integrity system⁶ the NISA Report identified a number of gaps and weaknesses. They were recently summarised as follows⁷

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

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

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

⁶ *NISA Report*, above, pp 31-36.

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

⁸ *NISA Report*, above, p 35

⁹ *Ibid.*

¹⁰ *Corruption*, above, pp 47-49

¹¹ *op.cit.* pp 45-47

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

¹³ *op.cit.* pp 51-54.

¹⁴ *op.cit.* p 55

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

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

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

To acknowledge that fact, however, only highlights the unreality of the past approach – the approach also taken in Victoria but now abandoned. The past approach also ignores the reality that each year, the Federal Government purchases tens of billions of dollars of goods and services¹⁶.

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

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

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

¹⁵ See fn 11.

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

¹⁷ *Corruption*, above, p 22.

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

Recommendations of the Accountability Round Table

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

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

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

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

“Corruption will always be with us. The question is how corruption, and the risk of corruption, are best addressed.”

In *Corruption: The Abuse of Entrusted Power in Australia*, former Supreme Court judge Tim Smith explores corruption in Australia; why it matters, how it thrives, and what is needed to contain it. He analyses some of our worst corruption scandals. He compares the systems presently in place to control corruption with the comprehensive model advanced in the National Integrity Systems Assessment Report of 2005, and asks why governments in Australia have not done all that can reasonably be done to contain corruption.

Smith argues that developments in the last twenty years, such as the extensive commercialisation of government services, our political parties’ ever-increasing need for funding, the movement of personal ministerial staff to and from private enterprise (including lobbying), and governments’ increasing skill in controlling information, have significantly increased corruption opportunities and temptations.

In discussing what measures should be taken to contain corruption, Smith demonstrates that we should proceed on the basis that corruption in government is a serious risk that must be addressed—both now and for the future. We must identify and deal with areas of weakness in our existing systems for the control and prevention of corruption; this requires adoption of world’s best practice. At the same time, we must also reduce the corruption opportunities and temptations that we have created.

Tim Smith is a recently retired Supreme Court judge. He was appointed a Queen’s Counsel in 1985. Prior to his appointment to the Supreme Court in 1990, he was a Commissioner of the Australian Law Reform Commission from 1980 to 1987 and a County Court judge from 1988 to 1990. He has written on issues relating to court governance and the structure of the judicial branch of government. He presently holds the position of Adjunct Professor in the Department of Management, Faculty of Business and Economics, at Monash University. He chairs the Accountability Round Table, a non-partisan group of citizens from diverse backgrounds, who are concerned to promote open and accountable government in Australia.

Corruption

The abuse of entrusted power in Australia

Tim Smith

THE AUSTRALIAN COLLABORATION

A Consortium of National Community Organisations

Corruption

The abuse of entrusted power in Australia

Tim Smith

THE AUSTRALIAN COLLABORATION

A Consortium of National Community Organisations

© Copyright Tim Smith, 2010

ALL RIGHTS RESERVED

ISBN: 978-0-9803962-3-2

Published by:
The Australian Collaboration
5 St Vincent Place
Albert Park Victoria 3206
www.australiancollaboration.com.au

Book design by Thomas Deverall

Contents

Preface 5

INTRODUCTION 7

CHAPTER 1: *Why corruption matters; its consequences and causes* 11

CHAPTER 2: *Is there a government corruption problem in Australia?* 22

CHAPTER 3: *How best to address corruption* 28

CHAPTER 4: *Australian integrity systems compared with the NISA Model* 31

CHAPTER 5: *Why hasn't best practice been adopted in Australia?* 40

CHAPTER 6: *The nature and extent of future corruption risk; further action;
and conclusion* 45

APPENDIX: *Applying the NISA Model in Victoria* 63

Acknowledgements 71

Endnotes 71

Preface

Corruption: The Abuse of Entrusted Power in Australia forms part of a series of essays published by the Australian Collaboration. The essays are devoted to political, societal and environmental issues facing Australia.

The Australian Collaboration is an association of seven leading national community organisations:

Australian Council of Social Service
Australian Conservation Foundation
Australian Council for International Development
Choice (Australian Consumers' Association)
Federation of Ethnic Communities' Councils of Australia
National Council of Churches in Australia
Trust for Young Australians.

The aim of the Australian Collaboration is to help to achieve a sustainable ecological, social, cultural and economic environment within and outside Australia. The Collaboration carries out research and publishes books, essays and reports. A range of free educational and information resources can also be found on its website including *Fact and Issue Sheets* on societal and environmental issues, *Democracy in Australia*, devoted to the enhancement of public accountability, transparency and democratic practice; and *Reference Sources*, a listing of key national and international web sources of statistical and other information.

Recent essays published by the collaboration include:

In or Out? Building an Inclusive Nation by Paul Smyth, Professorial Fellow at The University of Melbourne and Research and Policy Director, Brotherhood of St Laurence.

Wrongs, Rights and Remedies: An Australian Charter? by Spencer Zifcak, Alan Myers Chair in Law ACU, and Alison King, lecturer in law ACU.

The views expressed in this essay are those of the author and do not necessarily reflect the views of the Australian Collaboration or its member organisations.

David Yencken, Chairman, The Australian Collaboration

INTRODUCTION

In 1903, in a lecture to the Episcopal bishops and clergy at Washington, Theodore Roosevelt said:

There are plenty of questions about which honest men can differ. But there are certain greater principles concerning which no man has a right to have but one opinion. Such a question is honesty, the honesty that is aggressive, the honesty that not merely deplores corruption—it is easy enough to deplore corruption—but that wars against it and tramples it underfoot.¹

This and other similar powerful statements were quoted in a letter to the *New York Times* of 7 November 1904, signed 'Jared,' accusing Theodore Roosevelt of double standards in accepting political donations from corporations seeking public favours. The letter concluded:

I merely ask whether Mr. Roosevelt has squared the word with the deed by his attitude toward Republican campaign funds? Has he warred against corruption and trampled it under foot? Has he employed his best effort to put down corruption? Has he set his face like flint against the spirit which seeks personal advantage by overriding the laws? If not he has written his own condemnation.²

The potential for political donations to corrupt government is still with us and always will be, but who are the political leaders who are prepared to 'war against corruption'? Premier Anna Bligh of Queensland recently declared her intention to take action, and launched a major review.³ The proposals in the subsequent report, discussed later in this essay, would make significant improvements to the Queensland integrity system, if carried out. But more could have been done. Other political leaders in this country have been conspicuous in their silence.

In a speech made on the twentieth anniversary of his 1989 report on corruption in Queensland, Tony Fitzgerald QC expressed his concern:

Despite their protestations of high standards of probity, which personally might well be correct, and irrespective of what they intend, political leaders who gloss over corruption risk being perceived by their colleagues and the electorate as regarding it of little importance. Even if incorrect, that is a disastrous perception. Greed, power, and opportunity in combination provide an almost irresistible temptation for many which can only be countered by the near certainty of exposure and severe punishment.⁴

The pattern in Australia has been that those in government have only taken serious, direct action against corruption when there has been a major corruption scandal. Thus, for many years, only Queensland, New South Wales and Western Australia have had permanent anti-corruption bodies. If corruption in government matters, why have the federal government and other State and Territory governments not followed suit? In light of recent incidents of corruption in Queensland and elsewhere does more need to be done?

Time to reconsider the issues

In the last 12 months, federal and state governments have attempted to address different aspects of the problem. The federal government has attempted, unsuccessfully, to address the problem of political donations. The Queensland and New South Wales Governments have recently made significant improvements to their Freedom of Information (FOI) legislation. The Tasmanian government has passed the *Right to Information Act 2009* to make significant improvements to its FOI system. The federal and Victorian Governments have attempted to do so, but so far been unsuccessful. A number of governments have taken steps to regulate lobbyists, but they are inadequate.

As to permanent, independent anti-corruption bodies, the Tasmanian Government has decided to introduce such a body⁵ and Queensland has taken steps to strengthen its system. In South Australia, on 14 October 2009, the Legislative Council passed a Bill to establish an independent commission against corruption. There have been calls for such a body from South Australia's Director of Public Prosecutions Stephen Pallaras QC, the former Auditor-General Ken MacPherson, and more than 80 of the state's criminal lawyers. The Premier Mike Rann has so far rejected the proposal,

saying, amongst other things, that it would cost more than \$30 million a year, and would turn into a 'lawyer's picnic'. He acknowledged that there was merit in the idea of a national body, but considered that the cost of setting up a state body would be too high.⁶

In Victoria, Transparency International reported in October 2009 that it had written to the Premier of Victoria expressing concern about recent incidents of corruption at local government level. It welcomed the subsequent decision to establish a Local Government Investigation and Compliance Unit but expressed its concern at the government's continued failure to follow the precedent of New South Wales, Queensland, and Western Australia, by setting up an Independent Commission against Corruption. It pressed the government, as a matter of urgency, to set up such a body, to address all aspects of public sector corruption in Victoria.

On 23 November 2009, the Victorian Government announced that it had appointed Elisabeth Proust as a Special Commissioner to work with Peter Allen, the Public Sector Standards Commissioner, to review Victoria's integrity and anti-corruption system 'to determine what reforms are needed to enhance the efficiency and effectiveness' of that system, including:

The powers, functions, co-ordination and capacity of Victoria's integrity and anti-corruption system, including the Ombudsman, Auditor-General, Office of Police Integrity (OPI), Victoria Police and the Local Government Investigations and Compliance Inspectorate.⁷

The review is to be completed by 31 May 2010.

In light of these developments, it is timely to revisit some key questions. Why does corruption in government matter? Does a corruption problem exist in Australia, and if so, to what extent? What changes have occurred that provide greater opportunities to curb or encourage corruption? What is best practice in combating corruption? What measures do we have in place in Australia to deal with corruption? What more needs to be done?

The purpose of this essay is to explore these and related questions, to identify the issues that need to be considered in deciding what needs to be done, and to suggest approaches to making those decisions. But first, here follow some definitions.

Defining corruption

The primary focus of this essay is on corruption in government. Corruption in government takes many forms and occurs at all levels. This essay will touch upon: all branches of government (the parliament, the executive and the judiciary); all levels of government (local, state and territory, and federal); all actors involved in government (politicians, their advisers, public officials, those involved in the provision of government services through public-private partnerships (PPPs) and outsourcing, and statutory corporations). For the purposes of this essay, corruption in business, as such, will not be examined.⁸ But it should be noted that the most effective anti-corruption government agencies do deal and should deal with many other forms of misconduct and corruption, as will be made clear later in this essay.

As to the definition of government corruption, the following is adopted: ‘the abuse of entrusted power for personal or party political gain, or both.’⁹ Much of such corruption is inextricably connected with the pursuit and retention of power, including the effect of factions within parties, and politically-motivated promises and deals. It may be said that an examination of government corruption reveals both corruption in, and of, our political system. The issues will be examined, however, within the context of the abuse of entrusted government power within Australia; for private and party gain (political, financial or both), be it securing funding for political purposes, or the abuse of financial entitlements (such as advertising, travel and electoral allowances) by those entrusted with power.

CHAPTER 1: Why corruption matters; its consequences and causes

.....

Does corruption in government in Australia matter? Doesn't it merely 'lubricate the wheels of government to bring the costs of services in line with market prices?' Isn't 'bribery an efficient mechanism for rationing goods and services in short supply?' These questions were raised by Ramash Thakur—and answered:

Not so. Even from the perspective of economic logic, public corruption is bad because it distorts markets and encourages inefficiency. Managers have built-in incentives to distort and disrupt markets because this increases their market power.¹⁰

Around the world we can see many examples of systemic corruption's extremely destructive effect on the political, economic, social and environmental aspects of societies.¹¹ In Australia, we are fortunate that corruption of great magnitude does not appear to exist. It must be remembered, however, that not long ago, in some jurisdictions, it had reached that systemic level.

Its consequences

Corruption in government cannot be justified. Where it occurs, personal benefit becomes dominant and decisions are made to serve private interests rather than our public interest. Most areas of government decision-making are potentially vulnerable, including:

- the granting of government permission for planning or development, take-overs and mergers, media licensing, gaming licensing, and other controls
- making policy decisions, be they government subsidies and tax breaks, or tax rates and levels
- setting up regulatory systems, be they bank regulation, corporate regulation, or foreign investment
- infrastructure decisions concerning locations for projects, entering a

Private Public Partnership (PPP) arrangement, choosing the tenderer or the private partner in a PPP

- the sale of public assets
- contract negotiations; the terms on which private enterprise will provide government services, or provide services to government
- law enforcement by police, corporate monitors, health or work safety inspectors, and building surveyors.

Another form of corruption is the misuse of public funds by MPs, ministers and public officials, for allowances such as travel, living and printing. Misuse of public funds is also found in political party advertising by governments.

Where corruption occurs, public funds are wasted.¹² As a result, resources are unavailable for necessary projects and critical services such as education, health and law enforcement, services for which we never have enough resources. Corruption can enable organised crime to thrive and result in heavy costs for the community in law enforcement.

But the damage is not confined to poor decisions or the misallocation of public funds; it goes much further. Where corruption occurs among those entrusted by us with the power to govern, they demonstrate contempt for us, and cause us to lose trust and belief in the worth of our institutions. Similar consequences flow from corruption of law enforcement agencies and the judicial arm of government. Corruption damages the reputation of all in government, including those who are not corrupt. It also damages the democratic system by fuelling cynicism and causes members of the community to disengage from the political process.

Where corruption occurs among community leaders, it fosters a culture in the community where dishonesty, breach of obligations and contempt for the rights of others is regarded not just as acceptable, but as the norm for all conduct and dealings. It needs to be remembered that:

Our Government is the omnipresent teacher. For good or for ill, it teaches the whole people by its example. Crime is contagious. If the Government becomes a lawbreaker, it breeds contempt for law; it invites every man to become a law unto him; it invites anarchy.¹³

The temptation to corrupt those in public office is always present and there will always be officials who will succumb to that temptation. In the absence of adequate systems and action, corruption in government can grow and spread as the period in power extends. Tony Fitzgerald QC made the point that:

[A]s matters progress and the Government stays in power, support will probably be attracted from ambitious people in the public service and the community. Positions of authority and influence and other benefits can be allocated to the wrong people for the wrong reasons. If those who succeed unfairly are encouraged by their success to extend their misbehaviour, their example will set the pattern, which is imitated by their subordinates and competitors.¹⁴

Plainly, the worse the seriousness and spread of corruption, the greater the damage done and the more difficult and costly it becomes to rein it in.

But people become complacent and focus on other issues; for the impact of corruption is neither direct nor immediate for the vast majority of people. Nonetheless, the continuing threat of corruption of government at all levels should be a matter of the most acute concern to all in the community, and particularly those entrusted by us with the powers of government. They should 'know that complacency is not warranted, nor is it safe.'¹⁵ They should know that, 'Once rooted in a system, corruption is immensely difficult to remove.'¹⁶ We should be able to rely upon those we have elected to govern to 'war' against it.¹⁷

Circumstances in which corruption will flourish

Corruption is often described as a cancer. Certain circumstances will enable it to flourish and spread throughout any community in which it has gained a foothold. What are those circumstances? They were examined by royal commissions into two major instances of government corruption, and associated misconduct, in Queensland and Western Australia, in the 1980s; namely, the Fitzgerald Inquiry and the WA Inc Inquiry. These investigations revealed variations on the theme of government corruption and important similarities in the circumstances that enabled corruption to flourish.

In Queensland, a close relationship developed between the government leadership and the Chief Commissioner of Police, which allowed corruption to flourish within the police force and reversed its role as an integrity institution.¹⁸ There also developed a close relationship between the government leadership and members of the business community. The inquiry found that this resulted in correlations between the making of donations and the making of policy decisions and the granting of permission for developments and government contracts.¹⁹

In Western Australia the premier and some senior ministers had formed well-established relationships with businessmen such as Laurie Connell and Yossie Goldberg.²⁰ The Royal Commission also noted an 'extraordinary' increase in the size of donations to the government party, and many instances of 'an obvious temporal connection between donations and events in which the businessmen who made the donations were involved with government'.²¹ This state of affairs also facilitated the public perception that influence could be bought. A particular feature was the misuse of hundreds of millions of dollars of public money, including funds held by insurance company SGIC and superannuation fund GESB and the Rural and Industries Bank of Western Australia (R and I Bank) to try to save the businesses of Connell, notably Rothwells.²² The commission found that this misuse of funds was the product of a 'well-established relationship' between the premier and Connell, and the premier's desire 'to preserve the standing of the ALP in the eyes of those sections of the business community from which it had secured much financial support'.²³

Both reports identified secrecy as a critical factor in the growth of corruption. *The Fitzgerald Report* commented that secrecy:

Allows corruption to breed, and official misconduct to escape detection. ... Where there is no opportunity for external appraisal and criticism, either because of a lack of suitable mechanisms or absence of information, the possession of authority can result in a self-fulfilling cynicism. This cynicism both causes, and in turn, is magnified by misconduct. Institutions become corrupt or inefficient, because of the attitudes of those who work within them, and the corruption and inefficiency are factors which cause such attitudes to persist.²⁴

Both inquiries found that the state premiers maintained and controlled, directly or indirectly, secret accounts, into which secret donations were deposited. In Western Australia, the premier also kept a safe in his office, into which cash was deposited; for example, \$100,000 from a donation of \$300,000 from Goldberg, used to purchase gold, as well as stamps for the premier's collection. No account of this sort of expenditure was ever made to the state secretary of the Labor Party.²⁵

The WA Inc Inquiry noted that the 'processes of decision-making were often shrouded in secrecy',²⁶ with reasons going un-documented.²⁷ It also noted a number of instances in which the premier gave Cabinet inadequate time and information to consider proposals, and that inadequate records of Cabinet decisions were kept. Examples include: the state acquiring Northern Mining Corporation; a decision affecting Perth's Burswood Casino; the purchase of the Fremantle Gas & Coke Co by SECWA; the acquisition of shares in the Bell group by SGIC, and government involvement in the Kwinana petrochemical project.²⁸

The reports also identified a number of techniques used to withhold, or stifle the flow, of information. The Fitzgerald Inquiry found that the principle of Cabinet secrecy was inappropriately used for decisions concerning the letting of contracts, the issuing of mining tenements, rezoning, and other planning approvals—matters for which the report noted reasons would ordinarily be disclosed.²⁹ A related matter identified in Western Australia was the unwarranted use of commercial confidentiality as a justification for concealing information from the public, notwithstanding the existence of a vital public interest in the information.³⁰ An example put forward was the government involvement in the Kwinana project.³¹

In Queensland, taxpayer-funded defamation writs were issued against critics and the sub judice principle³² invoked to silence discussion. The premier was the plaintiff in 13 out of 16 such publicly-funded defamation actions. The Fitzgerald Inquiry found that in these matters the Justice Department paid legal costs in excess of \$200,000.³³

Neither Queensland nor Western Australia had FOI legislation in place during the relevant period, and accordingly there was no entitlement to

seek government information. Reflecting on the vital role of FOI legislation, the Fitzgerald Commission commented that its importance:

Lies in the principle it espouses, and in its ability to provide information to the public and to Parliament... Its potential to make administrators accountable and keep the voters and Parliament informed are well understood by supporters and enemies.³⁴

The *WA Inc Report* similarly noted the importance of FOI, a Bill for which was then before the Parliament. The report described it as an important step, but only one step, on the path to open government.³⁵

In both Queensland and Western Australia there was no whistleblower protection and no accessible independent body to which confidential disclosures could be made. The absence of these corruption detection mechanisms contributed to the culture of malfeasance. The Fitzgerald Report noted that:

[H]onest public officials are the major potential source of the information needed to reduce public maladministration and misconduct. They will continue to be unwilling to come forward until they are confident that they will not be prejudiced ... It is extremely difficult for such officers to report their knowledge to those in authority ... Even if they do report their knowledge to a senior officer, that officer might be in a difficult position. There may be no one that can be trusted with the information ... If either senior officers and/or the politicians, are involved in misconduct or corruption, the task of exposure becomes impossible for all but the exceptionally courageous or reckless, particularly after indications that such disclosures are not only unwelcome but attract retribution ... It is also necessary to establish a recognised, convenient means by which public officers can disclose matters of concern. What is required is an accessible, independent body to which disclosures can be made confidentially (at least in the first instance) and in any event, free from fear of reprisals.³⁶

The report also argued that such a body must be able to investigate any complaint, and protect those who assist it.³⁷

Both inquiries identified the increased role and presence of media units and press secretaries as obstacles to disclosure because of their control over information. The Fitzgerald Report observed that:

[T]he only justification for press secretaries and media units is that they lead to a community better informed about Government and departmental activities. If they fail to do this, then their existence is a misuse of public funds, and likely to help misconduct to flourish.³⁸

The WA Inc Inquiry noted that there had been significant disinformation from government in its description of key events, often involving the government's media advisers. It also quoted the observation of a long-term colleague of the premier that 'generally, governments are run by press release.'³⁹

It may be said that the basics have not changed. It can be argued, however, that some circumstances have worsened, and the range of situations likely to tempt the corrupt has increased significantly (an issue taken up later in this essay).

Inadequacy of traditional and other control mechanisms

In both the jurisdictions of Queensland and Western Australia, political and government power was highly concentrated in the hands of a few people, so that traditional control mechanisms did not operate. For example, *The Fitzgerald Report* detailed a close relationship between the premier and Sir Edward Lyons, and the influence (or attempted influence) of Sir Edward Lyons over the premier in matters ranging from the appointment of a new chief justice to the investment of TAB funds in Rothwells. Reference was also made to the power of ministers Russell Hinze and Donald Lane.⁴⁰ There was the further problem described above, that the relationship between the premier and the commissioner of police was close, and the commissioner lacked the necessary independence.

In Western Australia, the commission found that the secret dealings, referred to above, involved a concentration of political and executive power in the hands of a similarly small group of people, notably the premier and ministers such as his brother Terry Burke, and a senior minister David Parker.⁴¹ The commission also found that a close friend of the premier, Tony

Lloyd, was also heavily involved.⁴² He was introduced into the public service as the Director of the Policy Secretariat in the Department of Premier and Cabinet. Another person identified was a long-term colleague of the premier and friend of Lloyd, Kevin Edwards, who replaced Lloyd as Director of the Policy Secretariat when Lloyd was appointed Assistant Under Treasurer. The *WA Inc Report* found that these people exercised extraordinary influence in a range of areas of government, including statutory bodies such as SGIC, and GESB.⁴³ They were members of the highly influential Government Functional Review Committee and sat on selection panels. The report noted that Edwards 'was viewed as the de-facto Premier'.⁴⁴

The Fitzgerald Report stated that the parliament was meant to serve 'as an inquest in which all or any aspect of public administration' could be raised⁴⁵ but was no longer capable of fulfilling that function. The report pointed to the absence of an impartial speaker, inadequate resourcing of the parliamentary committees and opposition members, and the provision of insufficient information to enable non-government parties to review and criticise the activities of the government.⁴⁶

The WA Inc Inquiry found that the events into which it had inquired were generally kept out of the parliamentary arena. Major decisions, such as the \$150 million indemnity to National Australia Bank to provide support for the rescue of Rothwells, did not receive parliamentary scrutiny before they were made. The inquiry raised a number of concerns about the inadequacies of the parliament as a gatherer of information, a role that it saw as critical as the 'primary accountability agent of the public'.⁴⁷ It noted that the procedures for question time, and the operation of the committee system, did not bring the executive fully under the scrutiny of parliament.⁴⁸ It recommended a systematic review of the means that should be used by parliament to inform itself about government actions and activities.

The concentration of power in individuals that occurred in both Queensland and Western Australia meant that scrutiny of Cabinet was avoided. The *WA Inc Report* found that Cabinet was ignored⁴⁹ or not adequately informed in relation to the transactions mentioned. The Report noted that 'the proper role and function of Cabinet itself was either poorly understood or deliberately abused by the Premier and senior ministers.'⁵⁰

The Fitzgerald Report also identified a further issue, namely, the combined role of the office of attorney-general with the minister for justice. The effect was that the office holder could not perform the traditional dual role of the attorney-general as chief law officer of the Crown and as a member of the executive, a role to be performed with independence, impartiality and freedom from party political influence.⁵¹ *The Fitzgerald Report* was also critical of the failure of the Justice Department to alert the Cabinet to the problems in Queensland's political and criminal justice systems.⁵² It should be noted that, generally, in Australia, the traditional role of the attorney-general as independent chief law officer has fallen into abeyance.

The Fitzgerald Report noted an informal understanding at Cabinet level that conflicts of interest could be a concern, but there was no clear or firm policy to exclude those who had a conflict of interest from decision-making.⁵³ There was also a failure to enforce such policy as did exist. A reading of the *WA Inc Report* reveals that conflict of interest situations appeared to have attracted little concern among the members of the government at the time, with clear conflicts of interest passing unnoticed. At an individual level, examples included David Parker securing a promise of a donation to a theatre group in his electorate of \$250,000 from Yossie Goldberg, while at the same time engaging in negotiations with Goldberg concerning the Fremantle Gas & Coke Company.⁵⁴ At a government level, the report gives the example of the entrepreneurial approach taken by the premier in acquiring Northern Mining Corporation, thereby creating 'a serious conflict of interest' between the government's simultaneous roles as party to a joint venture and as a taxing authority.⁵⁵

Both inquiries considered the deleterious impact of the politicisation of the public service, including the denial of an effective advisory role for the public service.⁵⁶ The extent of the politicisation was illustrated in the *WA Inc Report* by examples of statutory officers supplying the government with confidential information, damaging to its political opponents.⁵⁷ The Report also noted that the capacity of statutory bodies to appropriately discharge their statutory obligations was 'severely constrained' by the presence on the boards of public servants who represented government.⁵⁸

A common feature of the events catalogued by each inquiry was the connection between political donations and much of the misconduct that occurred. Neither state had a disclosure regime in place for scrutinising political donations.⁵⁹ For those people involved, the confidentiality of such donations was seen as extremely important. There was also no legal obligation on the part of public officials to report official misconduct or any reasonable suspicion of such misconduct to any authority.⁶⁰

The *WA Inc Report* also noted that the existing accountability agents, such as the ombudsman, auditor-general, public service commissioner and law enforcement agencies (the commissioner of police and the director of public prosecutions) could not investigate all matters of government corruption or misconduct. No body or agency had the single and comprehensive function of investigating and reporting on such matters. An official anti-corruption commission was established in 1988 to receive specific allegations of official corruption, though its powers were very limited.⁶¹

In Western Australia, there had been reports in the 1980s by the Law Reform Commission recommending changes to the law to facilitate review by the courts of administrative decisions on issues of law, and review of such decisions on their merits, through an administrative appeals tribunal system. The *WA Inc Report* recommended their implementation.⁶² *The Fitzgerald Report* was critical of the absence of such a system and also recommended the creation of a separate administrative appeals tribunal system.⁶³

Both inquiries identified an absence of ethical education and codes of conduct for public officials as a factor.⁶⁴ The WA Inc Inquiry found that education was needed for all public officials, including members of parliament and ministers.⁶⁵ The Fitzgerald Inquiry noted that legislative changes, and changes to the mechanics of public administration, were insufficient to constitute a complete answer to misconduct. It called for the extension of codes of conduct for public officials dealing with important matters, including the correct relationship between public servants and their ministers.⁶⁶

The consequences of the above inadequacies were succinctly summarised by the WA Inc Inquiry:

Individually, the matters upon which we have reported reveal serious weaknesses and deficiencies in our system of government. Together, they disclose fundamental weaknesses in the present capacity of our institutions of government, including the Parliament, to exact that degree of openness, accountability and integrity necessary to ensure that the Executive fulfils its basic responsibility to serve the public interest.⁶⁷

CHAPTER 2: Is there a government corruption problem in Australia?

.....

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

Plainly, corruption has existed, and at a high level, as noted by Sawyer, Abjorensen and Larkin:

Australians who have been imprisoned over the past two decades for offences relating to corrupt conduct include two former Premiers of Western Australia and former Ministers of the Crown in Queensland and New South Wales. In addition a number of members of federal Parliament have been the subject of investigations and successful prosecutions for corrupt practices in the 1990s, mostly related to abuse of travel entitlements.⁶⁸

It is not possible, however, at any given time, to assess with any accuracy the existence and extent of such corruption because of its covert nature. A consequence is that there are not, and cannot be, empirical studies that provide a comparison and measure of the nature and extent of government corruption in Australia and elsewhere at any given time. The absence of such evidence, however, does not mean there is no corruption problem. There is a problem, and what it presents to each jurisdiction is a risk management challenge, one that requires an assessment of the nature and extent of the risk of such corruption occurring, and an assessment of the potential gravity of its consequences.

Perception of corruption

Surveys and polls reveal that people believe that their representatives engage in corrupt conduct. According to the 2001 Australian Election Study 46%

believed bribery was widespread among politicians, and 54% believed it was widespread among public servants.⁶⁹ Results of the 2006 Morgan Poll show that 90% saw corruption as having an effect on 'political life', and more people thought state government was 'ineffective' rather than 'effective' in addressing corruption.⁷⁰ Arguably these perceptions contribute to the very poor ratings for integrity given to politicians in polls. Morgan Polls rating ethics and honesty of professions have consistently given politicians very poor assessments.⁷¹

Transparency International's Annual Corruption Perceptions Index shows that Australia has consistently been placed just inside or just outside the top 10 in rankings of nations on perceived public-sector corruption (a higher ranking reflecting a lower level of perceived corruption). By way of comparison, New Zealand has been one of the better performers, being consistently placed in the top 3.⁷² Transparency International emphasises, however, that this report is based on perceptions only.

Recently, a minority report in the Law Reform Committee of the Victorian Parliament Review of the *Members of Parliament (Register of Interests) Act* asserted that in Victoria there had been 'misuse of office for partisan benefit.'⁷³ Abuses alleged included:

- politically-motivated government advertising
- partisan appointments to public offices including appointment of former ministerial advisers to senior positions in the public service and statutory authorities
- use of public service staff to run politically motivated media campaigns and collusion between ministerial officers and public officials to control information
- favouritism and blackballing in the awarding of contracts and tenders and government grants
- lack of transparency in land rezoning and other planning decisions and a 'deals for donations' culture
- the systematic cessation of publication of data adverse to government; breaches of FOI law and refusals to provide documents to parliamentary committees.

These are allegations. Examples of various corrupt practices in federal, state and local government, however, have continued to come to light.

Federal and state government examples

State and federal governments and MPs have, on occasion, used public funds for party political purposes. In New South Wales in 2003, Malcolm Jones, MLC, resigned after the Independent Commission Against Corruption (ICAC) found that he had misused his parliamentary entitlements to pay for membership drives for 11 'micro parties', unconnected with his party (the Outdoor Recreation Party), or his parliamentary duties.⁷⁴ At the federal level, in the 1990s, a number of federal parliamentarians were successfully prosecuted for abuse of travel allowances.⁷⁵ Examples of state and federal parliamentarians misusing allowances continue to arise.

A continuing abuse has been the use of public funding for party political advertising by governments. This funding is allocated to governments for the purpose of informing the public. Recently, guidelines have been introduced by some governments; for example, in 2009 by the Victorian and NSW governments and the federal government did so in 2008. Only the latter required that the auditor-general review the advertising (where the cost exceeded \$250,000).⁷⁶ Sawyer, Abjorensen and Larkin argue that:

The whole picture is more disturbing than simply one of public office being used for private office; it is the persistence of systemic, institutional benefits to incumbency—a form of *corruption as partisan abuse*.⁷⁷

This is a particularly dangerous misuse of public funds because it can be used to distort the flow of information.

Government advertising is significant for the media. Between July 1995 and November 2007, the federal government spent more than \$1.8 billion on advertising. In the election year 2007, the federal government spent a total of \$368 million on advertising and overtook corporations such as Coles and Telstra to become the nation's top advertiser.⁷⁸ When combined with the advertising of state and territory governments, the 2007 cost figure more than doubled and, on a per capita basis, exceeded that of the United Kingdom government by a factor of three.⁷⁹ There is evidence that this state of

affairs creates a situation in which governments are in a position to punish the media for adverse reporting, and to seek to influence them, by threatening to withdraw advertising.⁸⁰

There has also been the use of public office to obtain financial advantage for either individuals or political parties, or both. At the federal level, in 2002, Andrew Theophanous, who had been a member of the House of Representatives for 21 years, and a Parliamentary Secretary, was found guilty of having sought money for assistance in migration matters.⁸¹

On 17 July 2009, former Queensland Minister, Gordon Nuttall, was sentenced to 7 years imprisonment after being found guilty of 36 charges of corruptly receiving \$360,000 in secret payments from two Queensland businessmen, between 2002 and 2005, while he was a Cabinet minister. The charges were laid as a result of an investigation by the Crime and Misconduct Commission (CMC), the matter having been referred to it by the premier, after articles in the *Sunshine Coast Daily* alleged improper dealings in relation to land for a hospital.⁸²

In recent years, ICAC has reported on various corrupt behaviours among public officials in NSW, including: corrupt practices amongst employees of Rail Corp; corrupt conduct in issuing driving, building, and security licences, air-conditioning contracts for public buildings, and the sale of surplus properties by the Department of Housing staff. In 2008, ICAC made corrupt conduct findings against two former NSW Fire Brigade project managers, who between 2005 and 2007 received payments totalling \$2.4 million. They had submitted false tenders and quotations for building and maintenance work to manipulate the awarding of contracts to companies controlled by one of the project managers.⁸³

In Queensland findings were made that, commencing in about August or September 2005, the Director-General of the Department of Employment and Training in Queensland, Scott Flavell, gave considerable assistance over a period of 12 months to a private investor, who was wishing to establish a private Registered Training Organisation (RTO).⁸⁴ The early approach to the Director-General included a proposal that he join the private venture, a proposal he accepted. Among other things, the Director-General provided a document outlining a strategy to damage the viability of the State's TAFEs—

contrary to government policy. In the course of giving assistance, the Director-General also obtained the assistance of departmental staff and passed on confidential details of proposed government funding for the following financial year, before approval of the funding.⁸⁵

In New South Wales, in 2008, ICAC made findings of corrupt behaviour against a senior planning officer in relation to her dealings with developers⁸⁶, and corrupt behaviour or misconduct on the part of four former Wollongong city councillors, two former senior managers, and two developers, assisted by the senior planning officer.⁸⁷

The investigation by ICAC⁸⁸ found that the senior planning officer appeared to have little fear of detection, and that this was in part the result of the officer's skill at 'managing up' and 'grooming' council officials by compromising their integrity in minor ways.

The Victorian Ombudsman, in a 2009 Report, identified concerns about the possible inappropriate use of Brimbank Council property and funds and information. The Ombudsman identified the following concerns:

- The identification of, and reimbursement of Brimbank for, the private use of mobile telephones provided to councillors by the council. That process had not been audited by the council, which spent \$63,757 net of reimbursements from councillors in the period 2005-2008.⁸⁹
- Compliance with a requirement of the council to enter all gifts or hospitality, regardless of value, into a register maintained by the council.⁹⁰
- Gifts which were purchased with council funds for out-going mayors each year.⁹¹

It should be noted that a Brimbank resident had lodged a complaint by email with the office of the Minister for Local Government about the telephone use. The complaint was referred to the Executive Director, Local Government, Victoria and Community Information. He purported to deal with the matter on behalf of the minister by referring the allegations back to the council.⁹² There was no anti-corruption or misconduct body to which the concerned citizen could turn.

On 12 August 2009 the State Government of Victoria announced the

creation of the Local Government Investigations and Compliance Inspectorate. On 14 December 2009 the *Age* reported that the Inspectorate had informed a number of the councillors that no action would be taken.⁹³ The *Age* report is unclear as to what issues were involved, save for reference to some council property matters.

As to police corruption, instances have continued to occur in most jurisdictions.

We should not be surprised by the examples above. Corruption will always be with us. The question is how corruption, and the risk of corruption, is best addressed.

CHAPTER 3: How best to address corruption

.....

A review of the steps taken by the Commonwealth, state and territory governments reveals two different approaches. In Queensland, New South Wales, Western Australia, and Tasmania, independent standing anti-corruption systems have been put in place, covering most areas of government. Elsewhere, systems have been put in place that will operate in particular areas of government. The former approach recognises the reality that corrupt activity can occur within a wide range of areas, and that it is desirable, in the short and long term, to have an experienced and expert body to uncover it, and deal with it, as quickly as possible. The latter approach proceeds on the basis that it is sufficient, in the short and long-term, to set up anti-corruption bodies to deal with particular acts of corruption as and when corruption is revealed. This approach may also be driven by other factors, including a reluctance to create more institutions, and the cost. Also, there may be a combination of pride and fear affecting our political leaders; for introducing a standing anti-corruption system might be said by political opponents to be an admission of a widespread government corruption problem and, if introduced, might cause embarrassment to the incumbent government.

How to start

In choosing the approach to be taken to a problem such as corruption in government, a sensible starting point is to consider the most recent integrity model developed by experts, independently of government. Such a model is found in the *National Integrity Systems Assessment (NISA) Final Report*, published by the Key Centre for Ethics Law Justice and Governance, Griffith University, and Transparency International.⁹⁴

There were five phases in the project. Three involved the assessment of the Queensland, New South Wales and Commonwealth public sector integrity systems. The other two phases involved the assessment of business integrity systems, and national comparative and inter-sectoral research.

The assessments of the integrity systems focused on the consequences, capacity and coherence of the systems, and involved a combination of empirical research, documentary analysis, consideration of existing literature, and workshops with experts.

The NISA Report describes its model in 21 major recommendations. They are intended to both encourage good practice and discourage bad practice.⁹⁵ They are directed to ensuring continual improvement in Australia's integrity systems.⁹⁶ Other aims included: providing a benchmark for comparison between jurisdictions and against which changes in the effectiveness of the integrity system could be measured; and a basis for action by relevant Australian governmental and non-governmental agencies and organizations.⁹⁷

The report identifies core elements for national integrity systems. It takes up principles first identified in the famous Greek Temple model, as outlined by Jeremy Pope of Transparency International. These principles recognised that the answer to the question of corruption lay 'in a number of agencies, laws, practices and ethical codes.'⁹⁸ The primary public institutions comprise the three arms of government, the legislature, executive, and judiciary, and integrity personnel and agencies, such as the auditor-general, ombudsman, and watchdog agencies.

The NISA Report also distinguishes between institutions, and what it describes as 'distributed institutions' and 'dispersed strategies'. The distributed institutions include statutory measures covering codes of conduct, coordination of integrity organisations, disclosure of interests, protection of whistleblowers, strengthening FOI, and new measures to provide tertiary training in the field. The dispersed strategies include civic and community education, a national review of resourcing levels, parliamentary oversight methods, and evaluation of integrity systems. These strategies are directed, among other things, to raising awareness among individuals, and their capacity to combat corruption. This objective is extremely important, because corruption thrives where the cultural norms allow it. The NISA Model is likened to a 'bird's nest' because of the interlocking nature of the various elements; they can be individually weak, but through interdependence and connection, stronger as a whole.⁹⁹

A practical approach: applying the NISA Model in one state, and comparing its recommendations to the integrity systems in other states

The scope, potential effect and significance of the recommendations and their effect are best appreciated by theoretically applying the recommendations to a particular jurisdiction. For the purposes of this essay, the State of Victoria is chosen.¹⁰⁰ It has not as yet attempted a comprehensive approach, but is now facing the question of what approach should be taken to addressing the issue of government corruption. It should be noted that, at this point, neither of the major political parties in Victoria appear to be proposing the NISA Model.

It is not my purpose in this essay to argue that the NISA Model, or any other, should be adopted in Victoria (or elsewhere). My argument is that any community that is deciding to modify its integrity systems has, in the NISA Model, a template identifying best practice. As to the measures to be taken, it provides a checklist of mutually supportive proposals to consider. Its template should be adopted, unless there is good reason to the contrary, by action addressing the substance and aims of the recommendations. To achieve this, the measures taken must adequately address the setting and maintenance of ethical standards, institutional design and management, and legislative regulation and support.

If the recommendations of the NISA Report were adopted in Victoria some major institutional changes would occur. They would include the creation of: an anti-corruption commission;¹⁰¹ a governance review council to co-ordinate policies and the work of integrity institutions; standing parliamentary committees to oversee core integrity institutions; measures to ensure that the integrity institutions have the power to investigate any matter involving any decision or service flowing from an allocation of public funds; the position of integrity commissioner to advise parliamentarians; and the position of a parliamentary standards commissioner to investigate and report on complaints.

Specific recommendations for Victoria, based on the NISA Model, are set out in the Appendix (see p. 63).

CHAPTER 4: Australian integrity systems compared with the NISA Model

.....

The current state of integrity systems in Australia may be summarised in the following way.¹⁰²

The governments of Queensland, New South Wales, Western Australia and Tasmania have introduced permanent independent anti-corruption bodies. In addition, all jurisdictions have public officers, such as the auditor-general and ombudsman. They have considerable powers to investigate, and bring or refer proceedings against people who engage in government corruption and other misconduct. Victoria also has the OPI (Office of Police Integrity), and the newly-created body to address local government issues, the Local Government Investigations and Compliance Inspectorate. The Commonwealth has created the Australian Commission for Law Enforcement Integrity (ACLEI). It is responsible for preventing, detecting and investigating serious and systemic corruption issues in the Australian Federal Police and the Australian Crime Commission.¹⁰³

All jurisdictions now have FOI legislation of varying strength.¹⁰⁴ Western Australia also has an Information Commissioner to deal with complaints, to educate, and to guide. Significant reforms have been introduced in Queensland and New South Wales with the creation of the office of Information Commissioner, and a tightening of the grounds on which access may be refused. At the Commonwealth level, the proposal for an information commissioner has been adopted. Other changes have been before the Senate Finance and Public Administration Committee, which reported in March 2010.¹⁰⁵

Also, there are various codes of conduct for various public officials, of differing quality. Public sector management legislation of all jurisdictions set minimum ethical standards applying to all public officers.¹⁰⁶ Queensland has an Integrity Commissioner to advise, but only ministers, senior public servants and members of parliament have access to the Commissioner, not all public servants. New South Wales has an ethics adviser.¹⁰⁷ All jurisdic-

tions, other than South Australia, Tasmania, Northern Territory, and the ACT, have registers of lobbyists and codes of conduct.¹⁰⁸

In addition, all except the Commonwealth, the ACT and the Northern Territory have codes of conduct for members of parliament. All except Victoria and the Northern Territory have ministerial codes. The Commonwealth, Queensland, South Australia and Victoria have codes defining limits to post-separation employment.¹⁰⁹ Queensland, the Commonwealth, Western Australia and South Australia ban the direct holding of shares by ministers and parliamentary secretaries. All Australian jurisdictions maintain registers of members' interests.

Comparison of particular integrity systems with the NISA Model

The NISA Report critically examined Queensland, New South Wales and Commonwealth integrity systems.

In Queensland the following issues were identified.¹¹⁰ There was a weakness of the parliament as an integrity institution, because of the absence of an upper house. There was inadequate protection for whistleblowers, and no statutory obligations on employees to report suspected corruption. The Auditor-General was unable to conduct performance audits, and there were inadequacies in the system for review of administrative decisions. The integrity systems and standards do not apply to corporatised, commercialised or services contracted out. There was no body monitoring and reviewing the operation of the integrity systems, and the impact of changes in circumstances, because of the sunset clause imposed on the Electoral and Administrative Review Commission. There was an undue emphasis on legislative solutions, rather than practical and educative solutions, and no formal co-ordination between the integrity institutions. Inadequate resourcing of the integrity system was also identified as an issue, particularly for the standard setting and preventative elements.

As to the New South Wales system,¹¹¹ concerns were expressed about the independence and timeliness of reporting of the electoral funding authority, in relation to donations, expenditure and public funding to candidates. There was no positive ethical framework to assist ministers and public servants to navigate their new relationship at a time of the strengthening of

political control over public service appointments. There was concern about whether there needed to be a rationalisation of agencies to reduce duplication and increase efficiency, and a need for greater co-operation between agencies. Also, a lack of funding was found to create difficulties, in particular, in balancing the investigative and coercive functions on the one hand, and the educative and preventative functions on the other.

In reviewing the Commonwealth,¹¹² serious concerns were expressed relating to: ministerial standards and the roles of ministerial advisers; the inability to enforce ministerial and other parliamentary standards; and increased political pressure on senior civil servants. While accountability systems appeared to function with the senate at their peak, the role of the senate had been repeatedly attacked, over a long period, by executive governments of all persuasions. Inadequacies were found in the whistleblower protection and management scheme, as well as an under-reporting and potential concealment of the incidence of corruption; because, for the purposes of classification, 'bribery, corruption and abuse of office' are subsumed within 'fraud'.¹¹³ The absence of an anti-corruption body, and fragmented leadership of integrity systems, resulted in a lack of clear leadership and co-ordination. The report comments: 'There is now a clear case for a general purpose Commonwealth anti-corruption agency, which includes educative, research and policy functions.'¹¹⁴

Responses to the NISA Report

Research for this essay has not revealed public consideration of the NISA Report and its model by Australian governments. The Queensland government recently had the opportunity to consider them. As already noted, in 2009, the Queensland government reviewed its integrity system. Its discussion paper and report, did not, however, refer to the NISA Model, or the criticisms of the Queensland system expressed in the NISA Report. The government's report did, however, address some of those criticisms in a number of proposals¹¹⁵ to

- strengthen parliamentary scrutiny, including establishing a parliamentary inquiry into ways of improving the scrutiny of legislation through parliamentary committees.

- balance practical and legislative approaches; the proposals rely on legislative solutions (for example, undertaking to introduce legislative frameworks to regulate the lobbying industry, governing ministerial staff, on electorate officer employment and disciplinary processes, the declaration of MPs' and strategic office-holders' interests); and concurrently, on a practical level, establishing an ethical standards branch in the public service commission, appointing ethics contact officers in each agency, and mandating annual training in ethical decision-making. (It is not clear, however, whether such programs are intended to be available for members of parliament, ministers, or their staff.)
- extend the operation of the public sector integrity systems and standards to government services that had been corporatised, commercialised or contracted out (but query whether this extended to scrutiny of grant funded activity).
- hold regular people's question times, and a statement of intention to improve whistleblower protection. (There is, however, no indication of the detail proposed, and, in particular, whether it was intended that a statutory obligation would be placed on employees to report suspected corruption.¹¹⁶

Other strengthening proposals were to:

- strengthen the position and role of the Integrity Commissioner, including responsibility to oversee the lobbyists' register and code (instead of the Department of Premier and Cabinet)
- lower the threshold to \$10,000 (from \$100,000) for the publication of summaries of details of government contracts; to increase the reporting on the processes relating to the awarding of contracts; to publish all contracts over \$10 million; to appoint probity auditors for contracts over a set value
- ban success fees for lobbyists.¹¹⁷

It should be noted, however, that the government's report did not address or refer to flaws identified in the system by the NISA Report, such as the need for a body like the former Electoral and Administrative Review Commission,

to monitor and review the operation of the integrity systems, and formal co-ordination between integrity institutions; proposals directed to ensuring the adequate resourcing of the integrity systems; and performance auditing by the Auditor-General. Discussion of such matters would have been helpful.

Further explanation of two other proposals, would also have been helpful. To address concerns about the relationship between government and the lobbying industry, the Queensland government stated that it would 'put in place, entry measures requiring newly appointed public service officers and ministerial staff to disclose to employers, whether they have worked as lobbyists in the past two years.' It continued, 'This will increase the transparency of interactions between government and the lobbying industry and ensure any conflicts of interest can be appropriately managed.'¹¹⁸

This proposal appears to assume that situations in which persons seeking employment in the public sector, who have previously worked in the lobbying industry (but chose not refer to that fact in their CVs) will comply with the requirement. However one reads the proposal, it suggests a lack of concern about the potential for the corruption of government decisions inherent in a situation created by allowing employees to move between government and lobbying.

The Queensland Government also proposes that the rules for receiving and declaring gifts will be the same for ministers,¹¹⁹ members of parliament and public servants, and that the reporting threshold will be \$150 (retail value). This proposal will simplify and tighten the rules, effectively lowering a number of thresholds. It has the result, however, that those who wish to corrupt the system may continue to use the tried and true technique of 'grooming', with small gifts and favours, before offering or soliciting bribes.¹²⁰

The proposal is consistent with the narrow ambit of the question asked in the discussion paper, which was whether 'policies regarding gifts and hospitality should be the same for Ministers, members of Parliament and public sector employees ...'¹²¹ An examination of the 34 submissions received on the issue reveals that 10 of them argued either for a ban on receipt of gifts or a requirement that gifts received be regarded as the property of the state. Presumably, consideration was given to those options, and it would have been of considerable value to know why those options were rejected.

There is a common element in the approaches taken to the problem of corruption by Australian governments. While it may be said that all governments are aware of the problem, and plainly some governments have done considerably more than others to address it, no government has done all that could reasonably be done to contain corruption let alone maintain the momentum needed for that purpose.

The recent Queensland review is one example. Victoria, already lagging behind Queensland, provides another example. The recent reports of the Ombudsman on the Brimbank and Port Phillip Councils resulted in the creation of a specific standing body to deal with misconduct and corruption in local government. The result is that Victoria now has three bodies, each with its own area of operation: the Ombudsman, the OPI and the Local Government Investigations and Compliance Inspectorate. Was consideration given to a single standing anti-corruption and misconduct body? Would that not be simpler? Would it not be better if the citizens of Victoria knew there was one place to which they could take concerns about corruption in government—regardless of who was involved or the nature of conduct?

Why do governments seem to be reluctant to “war” against corruption? More specifically, why do some governments resist the establishment of a standing anti-corruption commission? And why do all governments fall short of implementing what is arguably the best practice such as that set out in the NISA recommendations?

Independent standing commissions

The NISA Report’s first recommendation is for the establishment of an independent standing anti-corruption commission. In those jurisdictions lacking such a body, establishing one would be a major institutional change. Where such commissions have been established, are they successful?

The recent evidence, referred to above, of serious misconduct in Queensland and New South Wales raises a number of questions. Does the continuation of corrupt conduct indicate that the model of a standing commission has not worked? If that is so, is the problem inherent in the model, or does it simply need strengthening, coupled with more resources?

Or does the revelation of the conduct, and the action taken by the standing commission, demonstrate the effectiveness of the model?

Does the relative paucity of examples of corrupt activity and other misconduct in other jurisdictions, where there is no such commission, suggest that the standing commission approach is not always needed? Or would the presence of such commissions have revealed corrupt activity in those jurisdictions? For they provide a place where people know they can take their concerns about misconduct of those in government, and have them addressed.

These questions cannot be considered and answered empirically.¹²² It may be argued however, that given the likely presence of corrupt conduct in all governments at some level, at any given time, the strong probability is that the operation of the standing commission model would result in greater disclosure.

One thing is reasonably clear; the measures taken in Queensland following *The Fitzgerald Report* changed the situation in that state from one of systemic corruption, to one of occasional corrupt acts. Premier Bligh, speaking at the Australian Public Sector, Anti-Corruption Conference posed the question:

If, after 20 years of operation, and some \$500 million spent in that time; if, after 80 misconduct investigations and 145 days of hearings last year; if, after numerous prosecutions and disciplinary action; and if, after all this, we really believe—some commentators are suggesting that nothing has changed, nothing has been achieved—then it’s time for a serious and radical rethink.’¹²³

She asked the audience to cast their minds back 20 years to when the Fitzgerald Commission was doing its work. After referring, amongst other things, to the fact that the former premier and five ministers were charged with criminal offences, she commented that:

As important and courageous as this work was, it was the analysis of the failure of institutions of Government, which exposed the cancer eating away at the foundations of our democracy.

In short, Tony Fitzgerald exposed evil lurking in the government.

A corrupt police service working hand in glove with criminals—protected, aided and abetted by a corrupt Police Commissioner—in turn protected by a corrupt Police Minister, himself protected and promoted by a corrupt Premier.

Singularly, they are startling and disturbing—let alone working together in an organised network of criminal activity.

But, of course, they were all, in turn, protected by a corrupted electoral system that was not based on one vote, one value.

A gerrymandered electoral system that so effectively protected the Government, it had carte blanche to do what it liked – confident that the powerful contempt of an angry electorate would never catch up with it.¹²⁴

On the same day, Tony Fitzgerald spoke about events since his report. His assessment was that, as a result of the actions of the coalition of Nationals and Liberals in the mid-1990s, the reform process had been interrupted and damaged. He also argued that the subsequent ALP governments lacked much of the ‘principled willingness’ required to confront the ‘dark past’ and maintain the momentum needed for reform.¹²⁵ He went on to describe the situation in politics as one where neither side of politics was interested in the issues, save for in the case of short-term, cynical political advantage. He concluded: ‘[Things are] better than they were, but it is a mistake to take it for granted.’¹²⁶ This remark highlights that constant vigilance and effort is required to contain corruption.

Recently, the Law Reform Committee of the Victorian Parliament considered some points raised about the operation of the New South Wales independent permanent anti-corruption body, ICAC. This occurred in the context of its review of the *Members of Parliament (Register of Interests) Act 1978*.¹²⁷ The committee’s primary focus was on measures that would best promote the ethical standards of members of parliament. They were not considering measures to be taken to deal with corruption in government generally. From the report, it appears that the criticism that was offered concerned difficulties in those cases where issues of parliamentary privilege arose. Paul Pearce, the Chair of the NSW Legislative Assembly’s Standing Committee on Parliamentary Privilege and Ethics spoke against the ICAC model as undermining the privilege and sovereignty of parliament. Two

other witnesses, the President of the NSW Legislative Council, and the Chair of the NSW Legislative Council Privileges Committee, acknowledged that the issue of parliamentary privilege was yet to be resolved, but expressed the view that the presence and role of ICAC had made members of Parliament better parliamentarians. Other witnesses supported the introduction of such a body. None sought to argue that ICAC had failed in any way.¹²⁸

The majority of the Law Reform Committee members recommended attempting to improve the current self-regulation system before considering more radical systems.¹²⁹ It expressed the view that ‘the primary advantage of external regulation is its perceived independence and strength.’¹³⁰

The Commissioner of ICAC, Jerold Cripps QC gave evidence. Asked about the performance of ICAC, he said:

You never know how much corruption there was to start with, you never know how much there is now and you never really know how much [of] what you did, stopped what might otherwise have happened.¹³¹

Asked whether all states should have an ICAC, he responded:

I keep getting asked this question and I keep answering it by saying, if you do not think public sector corruption is a problem in your State, or if you think it is, but you would rather keep it hidden, no, you should not have an ICAC, but if you think it is a problem and you do want to deal with it, the best way of dealing with it, I think, is to expose it.¹³²

I turn to the larger question, why do all governments hold back from implementing best practice such as that set out in the NISA recommendations?

CHAPTER 5: Why hasn't best practice been adopted in Australia?

Cost has been raised by those resisting proposals for the implementation of the NISA Model's key institutional proposal—the standing independent commission. And plainly there would be a significant financial cost for this, and more, for full implementation of the model. That will be quantifiable.

The annual report of the Queensland Crime and Misconduct Commission records a total expenditure for 2008 of \$37.8 million, and for 2009 of \$42.5 million.¹³³ The annual report of the Western Australian Corruption and Crime Commission records expenditures of \$26.3 million and \$25.4 million respectively for the same periods.¹³⁴

The New South Wales budget estimates for 2009-10¹³⁵ disclosed that total expenses for ICAC for 2008-09 totalled \$18.4 million, and the estimate for 2009-10 is \$18.8 million. To put those figures in some sort of perspective, they may be compared with the following New South Wales figures:

	(2008-09)	(2009-10)
<i>Department of Premier and Cabinet</i>	\$226.0 million	\$286.7 million
<i>Electoral Commission</i>	\$36.7 million	\$21.1 million
<i>Ombudsman's Office</i>	\$21.9 million	\$21.7 million
<i>Audit Office of New South Wales</i>	\$33.8 million	\$34.0 million
<i>Department of Arts, Sport, and Recreation</i>	\$611.7 million	\$634.3 million
<i>Events New South Wales Proprietary Ltd</i>	\$29.8 million	\$37.1 million ¹³⁶

On the basis of past experience in Australia, operating a standing independent anti-corruption body is likely to cost somewhere between \$20 and \$40 million per annum. Would that be too costly? On a per capita basis, it is next to nothing (between \$9 and \$10 per annum¹³⁷). Plainly, the individual's response will depend largely on his or her view about the importance of the issue. How does it compare, for instance, with the cost of promoting major events? What value does it bring to the community? However, if the position is accepted that corruption in government causes serious harm,

and has the potential to do so in most, if not all, areas of government, the economy and community life, at what point does action against corruption become too expensive? How is that issue to be assessed? What matters are relevant?

It is wrong to consider only the cost of establishing and running an integrity system. There are significant benefits in taking action, and heavy costs in not doing so—economic and otherwise. They have already been discussed earlier in this essay, concerning the question, 'why corruption matters?' The issues there identified show the range of potential losses likely to flow from inaction by government, and the corresponding benefits that will flow from appropriate action.

The economic losses cannot be quantified accurately. As far as the cost of corruption is concerned we know that 'payment of bribes are not publicly recorded.'¹³⁸ Corruption can cause the loss and wastage of government funds, and thereby damage the economy. It can affect the international and interstate competitiveness of economies.¹³⁹ Reducing corruption is likely to result in significant savings and economic benefits. These savings would be impossible to quantify, but must be borne in mind when assessing costs and benefits related to the control of corruption in government.

Reference was also made in chapter one to the damage corruption can cause to society. Not only can it seriously damage the reputation of key institutions, and erode the public trust in, and respect for these institutions, it can lead to a lowering of ethical standards generally.

There are also the costs that inevitably follow from taking inadequate action, or no action at all. If inadequate action is taken, and a situation of systemic government corruption develops, the cost of dealing with it will be considerable. It should be remembered that the Fitzgerald Inquiry was faced with just such a situation. Corruption was deeply embedded. That inquiry ran for a little over two years, from 26 May 1987 to 3 July 1989. As at the end of June 1989, the personnel engaged totalled 139, comprising:

'A Commissioner, two Deputies Commissioners, one Senior Counsel, four other members of the private Bar, six lawyers engaged on contract (formerly public servants or prosecutors from the office of the Director of Prosecutions), one lawyer from the public service, four accountants, five

research consultants and assistants, a Clerk to the Commission, the Secretary to the Commission and five administrative support staff, three investigative support officers, five information retrieval officers, two computer systems officers, a receptionist, 22 secretarial/keyboard staff and seventy-five police officers.’¹⁴⁰

The Fitzgerald Report also mentioned the difficulties faced by the Royal Commission. Much of the information needed to confidently make recommendations was not available, either to the commission, the government, or anyone else. Further, every time a commission is established, the wheel must be reinvented; skills and knowledge must be acquired afresh for each commission.¹⁴¹ Apparently, there were also problems for the police officers seconded to the commission. They faced unpleasantness and threats, from the department and colleagues, as the inquiry progressed (particularly in the early period).¹⁴²

In contrast, there are long-term benefits to be gained from setting up a comprehensive integrity system, including a permanent, independent standing anti-corruption body. The Queensland experience bears this out. Prior to the Fitzgerald Commission, there had been inquiries into alleged police misconduct, which had made recommendations to the government. After such inquiries, ‘organisational resistance—and amnesia—are likely to return once the initial flurry of reform activity generated by high profile enquiries dies down.’¹⁴³

And that is what occurred; none of the recommendations were implemented. No permanent body was established, independent of government, to monitor and report on implementation, or take action. Brendan Butler SC, the former chair of the Queensland Criminal Justice Commission, suggested:

One of the strongest arguments for establishing standing commissions of enquiry is that they provide a permanent mechanism for ensuring that reform stays on the agenda and that politicians and police departments do not revert to their old ways.¹⁴⁴

He went on to caution about the need to develop strategies for that purpose and the need to avoid any slackening in the effort to minimise the risk of corruption.

Another benefit of such an independent standing commission is that when allegations are raised about corruption in government, the government of the day will simply refer the allegations to the commission. Consequently, the debilitating debate that tends to follow as to whether, and to what extent, a bona fide investigation was being made, or had been made, is avoided—and the community can have confidence in the outcome.

Finally, in assessing the costs associated with the application of the NISA Model, it needs to be borne in mind that a number of the recommendations have the potential, by increasing exposure of corrupt activity, to significantly reduce the incidence of corruption at minimum cost. As a result it would reduce the workload and cost of the integrity institutions, given that their effect is to increase the risk of exposure for those considering corrupt activity. The recommendations of the NISA Model include:¹⁴⁵

- defining the jurisdiction of integrity institutions, by reference to matters involving any decisions or services, flowing from an allocation of public funds (recommendation 4)
- an independent presiding officer in each House of Parliament (recommendation 6), and bringing independence to the parliamentary select committee system (recommendation 7)
- enforceable codes of conduct (recommendation 8), together with proposals for education and training (recommendations 12,13,16)
- continuous disclosure obligation of gifts contributions and electoral expenses within the shortest practical timeframe and criminal sanctions against office-holders for breach of the obligation (recommendation 10)
- increased whistleblower protection (recommendation 11); simplifying and expediting FOI (recommendation 14).

Underlying the foregoing discussion is an issue that tends to be overlooked; its resolution is critical to the decisions to be taken in establishing and maintaining integrity systems. An integrity system is, and should be, intended to do more than simply identify and deal with existing government corruption. It should be directed to protecting the future by preventing the growth and spread of a contagion, which, once established in a community,

is likely to cause even greater damage. Expenditure incurred in setting up and operating such systems to prevent future government corruption is a form of insurance premium—it is money spent to address the risk, present and future, of serious damage that affects us all, directly or indirectly. In evaluating the cost burden to each of us we should bear in mind what we, as individuals, spend on insurance (home, contents, car, life, health, public liability, etc ...) every year.

In considering the adoption of an integrity system of any kind, we must keep at the forefront of our minds that we are attempting to address the present and future risk of corruption in our communities. In light of this assessment we can consider what further action is needed.

CHAPTER 6: The nature and extent of future corruption risk; further action; and conclusion

Is the risk of government corruption any greater now than it was in the 1980s and early 1990s, when the original independent standing commissions were established?

There is no reason to think that there has been any reduction in the number of people in our community who will succumb to the temptation of government corruption. Most, if not all, of the circumstances identified by the WA Inc and Fitzgerald Inquiries as carrying the risk of corruption continue to exist. Indeed, some of those circumstances have altered for the worse, increasing the chance of corrupt activity. For example, the discouragement of disclosure has been reinforced by the further politicisation of the public service and the changes to the numbers and the role of ministerial personal staff.¹⁴⁶ Perhaps the most notable difference, however, is that we appear to have significantly increased, rather than reduced, the opportunities for corruption, and the temptation to corrupt.

The ever-increasing need for political donations

The money spent by political parties on election campaigns keeps increasing. Ministers, shadow ministers and MPs spend more and more time and effort in seeking donations.

In recent years concerns about corruption have surfaced about the making of donations, and discretionary decisions by ministers in favour of the donors, happening within the same timeframe. For example, a fugitive from the Philippines received a visa after making a donation to the Liberal Party of \$10,000, and purchasing raffle tickets from the ALP for \$10,000. In 2004, a Senate committee investigated an allegation that the immigration minister had offered preferential treatment for visa applicants who made substantial donations. The minister denied the allegations. The committee commented on the 'lack of transparency and accountability' in the minister's 'decision-making process'.¹⁴⁷ Also, a deportation order was

revoked after a substantial donation was made to the then minister's party.¹⁴⁸ While no evidence was advanced showing that such donations influenced the decision-making process, such coincidences only damage the reputation of politicians generally, and confidence in our democratic system.

For some time political parties have relied upon dinners and other functions to raise funds. People have been invited to attend on the basis that, if they pay a large sum of money, they will have the opportunity to meet with ministers. The substantial sums charged are such that the people most likely to take up the opportunity are those whose commercial interests are likely to be affected by government decisions.

The Victorian Premier defended the practice, describing it, unfortunately, as 'speed dating.'¹⁴⁹ No politician engaged in this form of fundraising has said that no benefits whatsoever will flow to those who pay large sums of money. The process creates a situation where persons who wish to engage in corrupt behaviour are given every opportunity, and the political party concerned becomes indebted to the people who made donations.

On 7 December 2009, the Victorian Premier announced that the practice of providing private communication with ministers for a fee would be abolished.¹⁵⁰ But the issue remains. The major parties continue to pursue donations. The ALP, for example, still relies upon its Progressive Business (PB) organisation to raise funds. The Victorian ALP website¹⁵¹ states that membership:

... Provides opportunities for businesses to hear directly from our nation's leaders and policy makers. Membership empowers your business with the tool to be in sync with government direction.

The website also states that:

Each year, PB conducts a series of events that allow business leaders, together with Federal and State Ministers, to meet and confer on those issues impacting on the business community. PB members are given priority at all events and enjoy many benefits from being part of a wider Progressive Business community.

To find out more, one must join by paying a yearly membership fee: corporate membership costs \$1550 and business membership is \$990.

Business people will continue to pay to meet ministers. Similar practices are engaged in by the other major parties.¹⁵² The former premier Jeff Kennett has been quoted as saying, 'I've never seen such a corruption of the principle of governing for all.'¹⁵³ It is unclear whether the current political culture sees anything wrong in deriving financial benefits from elected office in this way.

Control and management of the flow of information to the media by government¹⁵⁴

Beginning with the Whitlam years, we have seen a gradual increase in the government control of information about its activities, and the obstacles placed by government in the path of media access to that information. This has occurred with governments of both persuasions. In 2003, it was observed that:

... The broad contours of the Australian PR State seem clear enough. At the national level, these include media advisers hired to assist ministers; those working in media units serving the overall government, and then the public affairs sections of public service departments, whose activities are coordinated by instruments imposing a whole-of-government integration of information disclosure activities.¹⁵⁵

The media in turn have become increasingly dependent, for economic reasons, on the supply of information by government.

In October 2007, the media pressure group, Australia's Right to Know, released the 'Report of the Independent Audit into the State of Free Speech in Australia', prepared by the former NSW ombudsman, Irene Moss. In a covering letter, Moss concluded that free speech and media freedom in Australia were being whittled away by 'gradual and sometimes almost imperceptible degrees'.¹⁵⁶

The Hawke and Keating governments had their own 'spin machine', the National Media Liaison Service (NMLS), which absorbed the Ministerial Media Group, and employed journalists to work as press secretaries for

ministers. The Howard Government developed its own version, by appointing additional media advisers to the staff of most junior ministers, who worked closely with the prime minister's office, and creating the Government Members Secretariat for the purpose of training government parliamentarians in dealing with the media and preparing materials.

The Rudd Government, soon after taking office, required a dozen statutory agencies, including the CSIRO, the Australian Institute of Marine Science and the Australian Research Council, to refer all strategic media relations, which related to the key messages of the government, to the Department of Innovation, Industry, Science and Research for consideration by the Minister. There have also been complaints of bullying tactics.¹⁵⁷

The activities of these media units have been described as 'clearly, party political'.¹⁵⁸ The ABC journalist, Kerry O'Brien, described the situation: 'This is the age of slick, media-trained polly-speak, of candour when it suits, and obfuscation, or of audience behind a wall of rhetoric or media manipulation when it is deemed necessary.'¹⁵⁹

There is a lack of reliable and complete information about the numbers of media advisers and staff employed by government, and the cost, but it is clear that both the numbers and the cost are considerable. Money has also been expended in preventing information reaching the media. For example, in 2003-06, the federal government, through the Federal Police, spent \$2,160,000 in the investigation of leaks from government. The decline in the number of leaks over that period pointed to the effectiveness of that expenditure.¹⁶⁰

Thus, the practice of parties in government has been to maintain ever-larger media departments, which attempt to control, with considerable success, the flow of information to the media and the public, and the way it is handled by the media.

The techniques used to control the flow of and handling of information include:

- the use of restrictions and obstacles
 - restricting the number of government employees with authority to speak

- requiring all questions to be in writing
- delaying responses to questions
- ignoring questions and offering answers of little value when given
- limiting opportunities
 - holding only short press conferences, holding them on short notice, and not allowing free-ranging questions
 - using talkback radio to release information, thereby avoiding questioning by the media
- manipulation
 - releasing bad news on big news days
 - punishing journalists who are seen by government media offices as not playing by the rules, and favouring the 'chosen ones'; for example, by giving access to off-the-record backgrounders, denied to others who are perceived as reporting in a partial manner.¹⁶¹
- how FOI requests are processed
 - charging large fees
 - excessive delay
 - narrow interpretation of grounds of exemption; erroneous reasons for refusal; inappropriate reliance on conclusive certificates; misleading responses.¹⁶²

'Spin' techniques are constantly refined. For example, it appears that the Rudd Government, in 2008, organised rosters of MPs who are briefed to be ready to deliver the message of the day to the waiting media, at the doors of Parliament House, while those not on the roster use less public entrances.¹⁶³

In part these developments are a response to the advent of shorter news cycles, the short grab, the media focus on conflict and the negative, and the decline in on-going investigative journalism. Those developments encourage the desire, and give the opportunity, to withhold information and hide any unpleasant news. Thus a considerable level of secrecy has been created, and can be maintained, to withhold information when it is politically expedient—aided by the politicisation of the public service.¹⁶⁴ This would be well understood by all participants, and would be reassuring to anyone wishing to corrupt others, and those receptive to corrupting influences.

The commercialisation of government services and projects

In the last 20 years, it has become the accepted practice that services previously provided by government, directly or through statutory authorities, be provided by commercial enterprises. This has occurred in areas such as power, water, transport, prisons, health and health insurance, telecommunications and the provision of infrastructure.¹⁶⁵

As part of this process, significant discretionary powers can be conferred upon ministers and others in government. In its 2004 report, Transparency International discussed an unsuccessful attempt to change the law affecting media ownership. The draft legislation proposed to confer on the relevant minister discretion to waive imposed restrictions on cross-media ownership. The report commented that: 'This might seem a recipe for corruption,' And, later:

'Ministerial discretion in areas where media proprietors have huge financial interests must be identified as constituting a clear risk of corruption. The temptation to do what a media owner wants in return for improved media treatment during an election campaign or a controversial war is great.'¹⁶⁶

The commercial stakes for the commercial enterprises, both in securing the agreements and negotiating the terms, are usually high in such situations. The profits to be made by the commercial enterprises providing government services depend upon the terms that can be negotiated and concessions obtained from government.

This applies particularly to a sophisticated form of business relationship that has been developed, the Public Private Partnership (PPP).¹⁶⁷ An alleged advantage is that such arrangements pass to the private partner the risks involved in an enterprise, whether it be building a court complex, re-designing and re-building a major railway station, or the provision of a desalination plant. Passing the risk to the private partner is no doubt seen as a good thing by governments, but it has to be paid for, and that involves negotiation. PPPs are particularly attractive to government, in part, because they do not create debts that must appear on the government balance sheet.

Governments have been reluctant to reveal the details of these transactions, claiming the protection afforded Cabinet documents and commercial confidentiality—the latter, even when the commercial partner does not claim it. A document of critical importance is the Public Sector Comparator, used to determine whether the PPP will deliver better value for money than the most efficient public sector procurement model. While monitoring by auditors-general occur, it appears to be confined to checking compliance with government guidelines and procedures, and recording the steps taken, including, the occasions when the Public Sector Comparator was modified during negotiations.¹⁶⁸

It is to be hoped that other governments will follow the lead of the Queensland Government, and make details of all contracts and crucial documents more readily available for public and parliamentary scrutiny. While that will significantly assist in exposing the facts, the potential for corruption will remain significant, because so much is at stake for private commercial interests.

New industries and trends in post-parliamentary and government employment

We now have a substantial lobbying industry. It recruits from the ranks of ministers, parliamentary secretaries and former public servants. So too do large firms of accountants and lawyers, and major corporations that deal with government. This is now common practice.¹⁶⁹ For example, those recruited to large corporations include:

- Federal MPs Larry Anthony, Peter McGauran, Geoff Walsh and Stephen Loosely
- state MP Evan Thornley, and former premiers Wayne Goss, Bob Carr, Alan Carpenter and Steve Bracks
- public servants and personal staff, like Meg McDonald,¹⁷⁰ Catherine McGovern, George Sinodinos (former chief of staff to former prime minister John Howard), Nick Campbell, Mark Elliot and David Miles; and, more recently, Tim Murphy, the former senior adviser to Kim Carr, the Minister for Innovation, Industry, Science and Research, who joined GlaxoSmithKline.¹⁷¹

People who have been recruited as lobbyists and consultants include:

- public servants, primarily from the Federal industry department and personal staff (identified in 2005 by Guy Pearse¹⁷²) who joined organisations representing the fossil fuel industry,¹⁷³ and ALP staffers Brett Miller, Danny Pearson, Tim Fawcett Senior, and Kieran Scheemann;
- MPs Graham Richardson, David White, Bill Forward, Christian Zhara, Kate Carnell and Michael Armitage; Nick Bolkus and Alexander Downer joined *The Bespoke Approach*.

This practice has not been viewed as corrupt, and corruption has not been alleged. The practice, however, poses significant corruption risks. It involves leading government figures, receiving financial benefits on retirement because of the experience, knowledge and networks acquired by them in office at public expense. It is a practice that provides a real opportunity for the corruption of the decision-making processes of government. If the risk of corruption were taken seriously, it would not be allowed.

An inadequate start has been made to address the problem. Codes have been introduced which require lobbyists to register and, on the register, to disclose their clients. Generally, they do not require prompt disclosure. They do not apply to the act of lobbying. As a result, they do not apply to commercial corporations and large accounting and law firms, which will at times, lobby government.

The ethical codes of the Commonwealth, Queensland, South Australia, Tasmania and Victoria impose limited time constraints¹⁷⁴ on former ministers and parliamentary secretaries in taking employment after retirement in areas in which they dealt as ministers, but they too are inadequate. For example, under the Prime Minister's Standards of Ministerial Ethics, a period of 18 months is required to pass during which, pursuant to an undertaking required of them:

They will not lobby, advocate or have business meetings with members of the government, Parliament, public service or defence force on any matters which they have had official dealings as Minister in their last 18 months in office.¹⁷⁵

The Queensland CMC in its report *Public duty, Private interests*, published in December 2008, recommended a quarantine period of two years for ex-ministers and 18 months for parliamentary secretaries, ministerial advisers and senior public servants.¹⁷⁶ This was implemented, along with a lobbyists' code of conduct, and codes of conduct for departmental and ministerial advisers. The code obliges serving public officials not to engage in activities with ex-officials in breach of the above quarantine period limits. Speaking at the 2009 Australian Public Sector Anti-Corruption (APSAC) Conference, the former head of the CMC, Mr Needham, commented:

But let us not think that the implementation of these recommendations will be the panacea which will resolve all these issues I have been talking about. There will always be those who will argue that the strict wording of the code doesn't apply to them, or will delude themselves that it doesn't apply to them.

The proper working of such codes depends not on a strict interpretation of the wording, but on an application of the ethical principles underlying them.¹⁷⁷

The latter comment highlights the problem of trying to address corrupt behaviour and other serious misconduct by using codes rather than legislation; codes will only provide guidance. Those, however, who are attracted to conduct that others would describe as corrupt or serious misconduct, will (if they are concerned) look for ways to interpret the codes to their advantage. In this instance, the critical concept of 'official dealings' is not defined. Thus the code still leaves open the option for ministers to work after retirement for remuneration in matters either outside or inside their portfolios, in which they did not have 'official dealings'. It does not prevent them engaging as lobbyists, or being involved in negotiations of business with politicians and public servants, whom they met and got to know while ministers—as long as the matter in question is not one in which they had 'official dealings'. Thus, the knowledge, experience and contacts in government that ministers and parliamentary secretaries acquire will continue to be highly attractive and valuable to lobbyists, because they can be engaged immediately on retirement, subject only to the embargo

on particular matters with which they had had 'official dealings' in the past.

The temptation to form a relationship with ministers will remain strong, as will the temptation to offer post-retirement employment to ministers, while they are still in office, to obtain an advantage. Thus, the present and proposed restrictions allow the situation to continue and, with it, give opportunities for corruption. Code requirements that ministers also undertake that they will not take personal advantage of information to which they have access as a minister do not address the problem. They attempt to do no more than preserve the confidentiality of information. Until drastic action is taken, however, this employment trend will continue, particularly in an environment of privatised government services and projects. It will continue to pose a serious corruption risk.

Growth in numbers and influence of ministerial staff and their unaccountability

A modern trend is the growth in the number of people employed on the personal staff of ministers: a jump from 304.3 in April 1989 to 444.6 in May 2006.¹⁷⁸ The personal staff include people who act as gatekeepers between the minister and the public service, who handle the press, who administer the minister's office (including deciding what information to pass on to the minister),¹⁷⁹ political fixers or issues managers,¹⁸⁰ and policy advisers.¹⁸¹ They, however, at least at a federal level, cannot be questioned by Parliament because of the acceptance in that parliament of the so-called 'McMullan principle.'¹⁸² Thus, at the federal level, and in any other jurisdiction where the McMullan principle applies, ministerial staff act in secrecy and escape parliamentary scrutiny and Parliament is denied information critical to its scrutiny of the conduct of Ministers – for example, the Children Overboard Affair.¹⁸³ It should be noted that the Victorian government recently asserted the right to deny a parliamentary committee the opportunity to question ministerial staff. The right has been disputed by the Liberal Party¹⁸⁴ and the issue is yet to be resolved.

Future environmental sustainability challenges and vested interests

The past unsustainable economic development of developed countries has manifested itself in a number of ways, including greenhouse gas pollution (with the likely consequences of global warming and climate change), destruction of eco-systems, and 'the tragedy of the commons' (the depletion of shared, limited resources of the land, sea and air). We also appear to have declining reserves of oil and phosphate. In the meantime, countries like China and India are rapidly developing their economies, and their need for the earth's resources is increasing significantly. Addressing these issues will require difficult decisions to be taken by governments, decisions likely to significantly affect the profitability of major businesses, industries and the operation of markets. Those owning, or operating in, such businesses, industries or markets will be tempted to use corrupt methods to defend or advance their interests: and some will succumb.

Each of the above developments has significantly increased the opportunity for corruption, and the temptation to corrupt. We can have no confidence that those we have elected or will elect to government will take steps to address them. The future risk of corruption is, therefore, serious. If we are to take this risk seriously, we must introduce the best integrity system available. At present that appears to be one embodying the features of the NISA Model. Its aims, principles and features should be adopted unless there is good reason not to do so. But in considering the question of taking action, there are two further questions that need urgent attention. Is the NISA Model sufficient, or does more need to be done? Notwithstanding the difficulty, what attempts should be made to minimise future risks of corruption?

Further action: strengthening the NISA Model

Generally, non-government parties and independents are inadequately resourced and this limits their capacity to hold government to account. Also, they would be greatly assisted if the considerable uncertainty about ministers' accountability obligations were resolved. None of the Australian codes of conduct currently spell out the accountability obligations of ministers, including the circumstances in which ministers might be held personally

culpable. The Commonwealth Code, the Ministerial Standard of Ethics¹⁸⁵ has not addressed the so-called McMullan principle. This creates a conflict for ministers in meeting the responsibilities set out in that code.¹⁸⁶

The Australasian Studies of Parliament Group Working Party attempted to address these issues in its revision of the Prime Minister's Code of Conduct.¹⁸⁷ It also argued against the so-called McMullan principle¹⁸⁸ and proposed that ministers should facilitate the appearance of their personal staff before parliamentary committees.¹⁸⁹

The working party defined six accountability levels, including accepting personal culpability, and the issue of resignation. Concerning personal culpability, its proposed code stated:

Ministers are expected to accept personal culpability for their own acts and omissions and those of:

- the heads of department and their personal staff, and
- other instances in which they participated or of which they were aware or should have been aware;

In determining whether a minister is personally culpable, ignorance of the matter does not excuse the acts or omissions of the minister where the minister should have known or should have ensured the matter was drawn to the minister's personal attention. Without limiting the circumstances in which ministers should have known of any matter, they are deemed to have the knowledge of their heads of department and others who report directly to them and all members of their personal staff.¹⁹⁰

As to resignation, it stated:

Resignation is appropriate where a minister has lost the confidence of the House of Parliament or the Prime Minister in the minister's capacity to satisfactorily discharge the responsibilities of the office. In the rare event that a minister declines to act on advice to resign, the Prime Minister may recommend to the Governor-General that the minister's commission be withdrawn, after which the minister ceases to hold office.¹⁹¹

The judiciary

The NISA Report does not point to any integrity issues directly affecting the judicial arm of government. This is understandable because there is little complaint about the integrity of the judicial arm of government, and long-standing systems and rules strongly serve that integrity. But, in some jurisdictions, there are two issues adversely affecting the factor that is critical to the integrity of the judicial arm of government—the independence of judicial officers. They not only have the potential to affect the appearance and reality of the independence of judges, but also create opportunities for corruption.

The first issue is court governance. With the exception of the federal courts and the courts of South Australia, the administration of the courts is under the direct and detailed control of the executive branch of government. This is the traditional system. Generally, in such systems, the CEO of a court, and all staff (including the personal staff of judges) are employees of the executive. In Victoria, for example, the CEO of the Supreme Court is responsible to the Secretary of the Department of Justice after consultation with the Chief Justice. IT systems containing extensive sensitive and confidential information (including internal policy discussions within the courts, and draft judgements) are provided, controlled and monitored by the Department of Justice. This department is a mega-department, and also serves the majority of litigants that come before that court. Together, the Department of Justice and the Economic Review Committee of Cabinet determine a detailed budget for the courts, and what resources (and what level of resources) will be provided to them, including the mix of staff available to the courts and judicial officers.¹⁹²

The Fitzgerald Report referred to this issue in the following passage:

The independence of the Judiciary is of paramount importance, and must not be compromised. One of the threats to judicial independence is an over-dependence on administrative and financial resources from a Government department or being subject to administrative regulation in matters associated with the performance of the judicial role. Independence of the Judiciary bespeaks as much autonomy as is possible in the internal management of the administration of the courts.

It is not appropriate to devise any detailed scheme in this report to address this particular difficulty. The potential dangers should be recognised and consultations should take place between the Government and the Chief Justice. The Government should give the closest attention to any request or comments that the Chief Justice or the Chairman should make as to the introduction of any procedures which in the administrative field will better reflect the Judiciary's independence.

Independence is such an important requirement that, not only must it actually be present, but also it must be seen to be present.¹⁹³

The traditional model challenges both the reality and appearance of independence of the judicial arm of government as part of the integrity system. It also happens to be a very poor form of management because responsibility and authority are not held in the same hands.¹⁹⁴ It also involves duplication of staff and effort, and unnecessarily complicates and wastes the time of the heads of jurisdiction and judicial officers.

Turning to the other issue, legislation in Australia generally includes provisions for acting judicial appointments. These are usually appointments for a limited period of time and with the possibility of re-appointment. That situation inevitably compromises the reality and the appearance of the appointee's independence. In Queensland, Western Australia and Tasmania the occasions for such appointments are limited. In the first two states mentioned they are limited to the absence of a judge, or where the chief justice certifies the need for acting appointments for the orderly and expeditious exercise of jurisdiction.¹⁹⁵ In Tasmania, such an appointment is made where a situation of a temporary nature has arisen (or is likely to arise) and renders it necessary or desirable to appoint an acting judge.¹⁹⁶

In other states, a general discretion is given to the Governor in Council. The most troubling example of the latter category is to be found in Victoria, where the legislation imposes no restrictions on appointments by the Governor in Council to a pool of acting judges, and vests the decision to select acting judges from that pool solely in the hands of the attorney-general. While the attorney-general has drawn up guidelines that identify circumstances for the use of such a power, they do not have legal force.¹⁹⁷ Under such a

regime it is legally possible for an attorney-general to replace all judicial officers with acting appointments. The issue arises elsewhere; for example, in administrative tribunals, which conduct merit reviews. In the case of the Victorian Civil and Administrative Tribunal, a substantial majority of judicial members have been sessional members. There are alternatives available, operating elsewhere, that maximise the independence of judicial officers appointed for renewable terms.¹⁹⁸

Strengthening the content of proposed codes of ethics

The NISA Report argues for codes of ethics to be provided for all engaged in government and public activities, that they be statutorily based, and that there be mechanisms for enforcing them.

An important discussion of codes of conduct is to be found in the recent report of the Victorian Parliament Law Reform Committee, *Review of the Members of Parliament (Register of Interests) Act 1978*. It proposes the adoption of a statute by the Parliament of Victoria containing a statement of values, and a statement of rules of conduct for members of parliament, based on those values.¹⁹⁹ In doing so, it is building on the Queensland approach. The proposed statement of values and the rules of conduct, however, could be considerably strengthened if the moral bases for them were also spelt out. The Commonwealth code of ethics for ministers, *Standards of Ministerial Ethics*, published by the Rudd government shortly after it was elected, attempted this by referring to ministers as being 'being holders of public office ... entrusted with considerable privilege and wide discretionary power' and stating that public office is 'a public trust'.²⁰⁰ The Commonwealth text does not, however, elaborate upon the assertion of 'a public trust', or describe its moral basis.

The application of the trust concept to government is not new. It has at various times since the eighteenth century been used to describe the relationship between governments and those they govern.²⁰¹ In the United States of America, the public trust doctrines have been applied by its courts to safeguard the environment from detrimental decisions of government. It draws on the strong analogy of the relationship between fiduciaries and beneficiaries under private law. Like fiduciaries, those entrusted with public

office are entrusted with power over the affairs of individuals, by or on behalf of those individuals, who thereby render themselves vulnerable to the decisions made by the public office holders.

It would strengthen the moral force and understanding of codes of ethics in this area and, therefore, their effectiveness, to state in such codes that the obligations identified in the code of ethics flow from the fact that the people have entrusted the ministers and members of parliament with power to act on their behalf and in their interest. As a result, they have an obligation, at all times, to act honestly and in the interests of the people, and to give priority to those interests over their own.

Such a statement would give those we elect a clearer understanding of the nature of their offices, their responsibilities and duties. It could also assist those elected to public office to resolve the inherent conflicts in their position arising from their pursuit of political power.²⁰² A similar approach could be adopted for codes of ethics and conduct for any persons who serve as public officials.

Increasing scrutiny: strengthening FOI legislation

In addition to the procedural recommendations of the NISA Report, the reforms made to FOI legislation in Queensland and New South Wales would significantly improve the operation of FOI legislation in other jurisdictions. Those reforms have included: the creation of the Office of Information Commissioner (whose role is to consider complaints, and to guide and monitor), significant tightening of the definition of exempt documents (including cabinet documents and commercial documents), and extending the operation of the legislation to councils and statutory corporations. Such changes would significantly strengthen the right to information under FOI legislation and properly increase scrutiny.²⁰³

Minimising opportunities and temptations

If we had the political will, we might be able to reduce the risk of corruption by making a number of significant changes to the way we are governed, and the way government services are provided. This would remove many of the new opportunities mentioned in this essay on which the toxin of corruption

can feed. But there does not appear to be any sign of enthusiasm among governments or the major opposition parties to make such changes.

There would also be a significant reduction in the risk of corruption if the community were to support:

- the public funding of political parties and their election campaigns (ideally assisted by free time and space in the media), thereby enabling donations and gifts to be banned
- the banning of employment of ministers, parliamentary secretaries, members of parliament, their personal staff, and public servants, by lobbyists and other organisations, for the purpose of lobbying government.

As to the latter, this might seem an extreme approach in terms of general employment conditions and practices, but employment as ministers, parliamentary secretaries, members of parliament, ministerial advisers, and public servants, is not ordinary employment. People in those positions are entrusted by the members of our communities with the power to make, or propose, momentous decisions on our behalf. Why are we not entitled to expect high standards of behaviour and that adequate steps are taken to avoid creating or allowing situations where there is potential for conflicts of interest? Those situations provide opportunities for corruption. Further, to allow such employment is to allow people to obtain personal financial benefit from the knowledge and experience gained, while in that position of trust. If the two steps above were taken, the environment in which our political representatives and public servants operate would be significantly changed and the opportunities for corruption would be significantly reduced.

It should be noted that the issue of funding and donations has been receiving earnest consideration both federally and in Queensland and New South Wales.²⁰⁴ Media publicity would suggest that there was considerable support at a federal political level for the public funding of political parties and their election campaigns, and the banning of donations and gifts to the political parties. But so far it has proved too difficult to reach agreement. The progress of the federal debate highlights the problem that the discussion has been confined largely within the political parties and among their parliamentarians.

It has not had the benefit of an independent assessment, with community involvement. The best approach to achieving a satisfactory result would be to have an independent body such as the Australian Law Reform Commission conduct an inquiry, which would include consultation with all concerned, including the voters. Bearing in mind that these are issues of relevance to the states and territories as well, the state and territory law reform commissions might also be engaged.

Conclusion

Any community wishing to adopt measures to address the present and future risk of corruption and other official misconduct has to decide whether it wants to be serious about the task or not. The reality is that there is a false economy in half-measures in dealing with such risks and, if action is to be taken, it should be taken comprehensively.

Any community would do well to consider the recommendations of the NISA Report, and any other recommendations, which would strengthen their integrity systems. The NISA recommendations should be considered on the basis that their aims, principles and substance should be adopted unless there is good reason to the contrary—that is, the onus should be on those who might wish to argue against their adoption to demonstrate why they should not be adopted. That proposition applies particularly to any recommendations directed to reducing secrecy.

But the focus of our attention should not be confined to the integrity systems, and their strengthening and reform. Each community should address, and try to eliminate where it can, any circumstances and trends which have created corruption opportunities and temptations. And on all these issues, we should be entitled to expect leadership of integrity from those to whom we have entrusted the power to represent us, and govern in the public interest.

APPENDIX: Applying the NISA Model in Victoria

The following are the key elements of the integrity system that would apply in Victoria if it adopted the NISA recommendations.²⁰⁵

A. Core institutions

1. Integrity and anti-corruption commission

The Victorian Government and Parliament would establish a new independent statutory authority. It would act as a comprehensive lead agency for the investigation and prevention of official corruption, criminal activity and serious misconduct, and have the statutory responsibility to promote integrity and accountability, as well as investigate wrongdoing. The official name of the commission should reflect its active, positive responsibilities, rather than solely reflect its role combating crime, misconduct and corruption.

Its jurisdiction will encompass:

- all state officials, at all levels, including employees of state-owned corporations, and any other persons involved or implicated in wrongdoing affecting the integrity of government operations
- all state parliamentarians and ministers (on the request of the Parliamentary Integrity Commissioner (see below) or the presiding officer of either House, or where, in the opinion of the agency head, an important matter of public interest would otherwise go without investigation.

In defining the jurisdiction, the Victorian Government and Parliament would review:

- operational definitions of corruption to include any type of serious misconduct with the potential to seriously affect public integrity, and to revise reporting, monitoring and prevention policies accordingly
- the legislation defining the jurisdictions of integrity institutions to ensure that they have jurisdiction over any relevant matter involving

any decisions or services flowing from an allocation of public funds, or the exercise of statutory or prerogative powers, whether the service providers are categorised as public, private, commercial or corporate.

The integrity and anti-corruption commission would be empowered and required to:

- initiate inquiries as well as receive and investigate complaints from any source
- exercise concurrent jurisdiction, participate in a statutorily-based investigations clearing house with other agencies, share all relevant information with other Commonwealth and state integrity institutions; conduct co-operative investigations with them, including delegating its own investigatory powers when, in either its or their opinion, their own jurisdiction is also involved.

2. A governance review council

The Victorian Government would establish a governance review council by statute. Its membership should include the heads of all Victoria's core integrity institutions.²⁰⁶ It should have expert committee representation and an independent chair. Its role would be to:

- promote policy and operational coordination among the main core integrity institutions²⁰⁷
- co-ordinate research, evaluation and monitoring of ethics, accountability and administrative review legislation,
- report to the public on the 'state of integrity' in Victoria
- ensure operational cooperation and consistency in areas critical to the effectiveness of the integrity system, such as public awareness, complaint handling, workplace education, prevention, advice, and the sharing of information between the public integrity bodies
- foster co-operation between public sector and private sector integrity bodies
- provide advice to governments and the public on institutional reform and law reform to maintain and develop the integrity systems of Victoria

- sponsor comparative research, evaluation and policy discussion regarding integrity systems elsewhere.

The governance review council should have a permanent secretariat.

B. Supervision of core institutions

1. Oversight mechanisms: a parliamentary responsibility

The Victorian Parliament would establish a system of independent public oversight for all integrity institutions, consisting of:

- a standing multi-party parliamentary committee, supported by staff
- either a standing public advisory committee, or a program for public participation in annual or three-yearly parliamentary reviews

C. Strengthening integrity institutions: parliament

1. Enforcement of parliamentary and ministerial standards

The Victorian Parliament would establish, by statute, a comprehensive regime for articulating and enforcing parliamentary and ministerial standards, including:

- a code of conduct, required by statute, for each House of parliament, presiding officers, ministers (including ministerial staff), prepared through a public process, and formally adopted and published
- the appointment of the presiding officer in each house by a two-thirds majority, the vote being by secret ballot
- a multi-party ethics and privileges committee in each house, responsible for preparing and updating the codes for that House, including its presiding officers, and the ministerial code (involving consultation by the two committees, and the government).

The parliament would also establish two offices: that of a parliamentary integrity adviser, and a parliamentary standards commissioner. The parliamentary integrity adviser would be appointed by the government, in

consultation with the ethics and privileges committees of both houses. The role of the integrity adviser would be to:

- give guidance to members, ministers and their staff on integrity matters
- maintain and publish material-interest registers of members, ministers and staff
- give confidential written advice on conflicts of interest, probity of allowances and entitlements and like matters.

The parliamentary standards commissioner would be appointed by the government on the joint recommendation of the ethics and privileges committees, and a joint resolution of both houses. Salary would be fixed by an independent remuneration tribunal. The appointment would be for a minimum term of five years. Early dismissal would require a two-thirds majority of a joint sitting of parliament, and on the basis of proven misbehaviour or incapacity. The parliamentary standards commissioner would have the power to receive complaints from any person, and to initiate any investigation on his or her own motion, concerning any possible breach of a parliamentary or ministerial code of conduct, or equivalent matter. In performing this role, the commissioner would have the power to:

- make such enquiries as he or she sees fit
- enter premises
- compel evidence
- reach such opinions as to the facts, and make such recommendations as he or she sees fit
- refer matters to other relevant official bodies for joint or independent investigation
- make reports of any investigations (in the first instance to the ethics and privileges committee, and/or the premier and, where in the public interest, to the parliament and the public.

2. Independent parliamentary select committees

The Victorian Parliament would adopt a procedure for the initiation of inquiries by select parliamentary committees, and appointment of com-

mittee chairs, directed to encouraging bi-partisanship in the conduct of parliamentary business, and reducing the control of the executive over such enquiries.²⁰⁸

D. Raising awareness and capacity

1. Statutory basis for codes of conduct for other public institutions

The Victorian Government and Parliament would put in place legislation applying to all officials and office-holders, irrespective of whether they are appointed or elected, requiring the development, monitoring and implementation of enforceable codes of conduct, relevant to the mission and circumstances of the institution concerned, and based on consultation with staff and the community. Such codes should reflect minimum content (defined by statute), community-wide values, and include mechanisms showing how rewards, incentives and sanctions are linked to standards of behaviour. They should also reflect and ensure the mutual support between core institutions and other institutions. They should include the following requirements:

- organisational integrity capacity-building to be a core statutory object
- there be relevant consultation with other integrity institutions to achieve coherence
- managers promptly inform senior management, and senior management promptly inform the relevant integrity agency in all cases where a reasonable suspicion is formed that corruption, official misconduct, organisational impropriety, serious maladministration or a similar integrity lapse has occurred
- at least once every five years, there be an evaluation by each organisation of the operation of its codes of conduct, including a formal survey of at least ten percent of employees, the results to be provided to core agencies, and to be used to review and update the codes of conduct.

2. Education and training

Recommendations for education and training:

- minimum integrity education and training standards for public sector agencies, publicly-listed companies, private companies and civil society organizations; and for the development of advanced training programs in those areas by higher education institutions
- civic education programs, both school-based and adult, focusing on ethical decision-making and awareness of public rights to complain, to access official information and seek independent review of official decisions.

E. Reducing the opportunity for secrecy

1. Effective disclosure of interests and influences

The Victorian Government and Parliament would take steps to review and, where necessary, establish new standards for systems for regulation and disclosure of material interests (including direct or indirect political parties' gifts and contributions received, and electoral expenses), based on:

- continuous disclosure within the shortest practical timeframe
- immediate publication, and updating of interest disclosures, by relevant registrars and/or regulators via on-line disclosure registers
- advertising campaigns raising awareness of mechanisms for accessing such information to those entitled to know.

The new standard should be supported by criminal sanctions against office-holders. This would require any new personal, or other material interest, to be disclosed, other than in circumstances where those entitled to know have reasonable opportunity to become aware of the interest, prior to relevant decisions (such as voting in an election).

2. Whistleblower protection and management

The Victorian Government and Parliament should enact legislation which will facilitate whistle blowing by current and former employees about integrity concerns, that is at least consistent with the Australian Standard 8004-2003,²⁰⁹ in addition to the following principles:

- a statutory obligation for employees to report suspected corruption, fraud, defective administration or other integrity lapses to a person able to take action
- the criminalisation of reprisals against whistleblowers, where their actions were a factor of any significance in the detrimental action taken (whether official or unauthorised)
- the provision of a statutory defence to legal action for breach of confidence, official secrets or defamation, where the whistle was blown to an authority empowered to take action, or where it was to the media, in circumstances where this was objectively reasonable
- training for managers in the avoidance, detection, investigation and prosecution of reprisal action
- statutory requirements for all organisations to develop and promulgate internal disclosure procedures
- each core integrity agency, in each sector, to be given a statutory whistleblowing co-ordination role, to which all significant disclosures by employees must be notified; the duties of the role would include guidance on effective investigation, resolution and management, and a discretion to investigate alleged reprisals.

3. Freedom of information (FOI)

The Victorian Government would revise its FOI laws to better respect the principle of a public 'right to know' by:

- establishing the principle that its citizens are entitled to free and immediate access to such government records as they may request, without a formal application, except in circumstances in which it can be demonstrated that release would specifically damage or compromise someone's rights or legitimate interests (other than those of public officials or agencies); or the public interest (other than as defined simply by the self-interest of public officials or agencies); or pose an unacceptable risk of such damage
- giving a public agency the choice of releasing the record or making their own application for non-release of the record to the review

agency (the information commissioner, ombudsman, or other independent body or office), where the public agency had required a formal application to be made because of its assessment of risk of damage, and then reaches a decision to reject the application for any reason other than privacy, or personal (but not commercial) confidentiality.²¹⁰

F. National reviews

1. Access to administrative justice

There should be a national review, in which all governments would join, of the current substantive administrative law remedies available to citizens aggrieved by decisions by public officials and bodies. The process should include extensive public participation.

2. Integrity and local government

The Victorian Government should join with the Commonwealth and other governments to fund a comprehensive review to identify the most effective framework for building integrity system capacity at the local and regional levels of government. The review should recognise the under-resourcing of local government, its growing responsibilities, and the increasing complexity of public institutions at the regional level.

G. Resourcing

The NISA Report makes recommendations for the provision of adequate resourcing of the proposed integrity systems, and for ongoing assessment and research. An examination of all Australian jurisdictions reveals that implementation of these recommendations would involve significant changes in each of them, particularly in those jurisdictions which do not have independent standing anti-corruption bodies.

Acknowledgements

I thank Professor Coghill and Genevieve Grant for their review of, and comments on, earlier drafts of the essay, and Professor Charles Sampford, Greg Thompson and Liz O'Keefe for their review of, and comments on, the penultimate draft. I also thank Professor David Yencken for his advice and guidance on text, structure and presentation. My thanks also go to Emma Gordon Williams for accepting the challenge of copy editing my drafts, and for her counsel. Last, but not least, I wish to thank my wife and family for their patience and support; they thought that I had retired.

Endnotes

- 1 New York *Times*, 7 November 1904, <http://query.nytimes.com/mem/archive-free/pdf?_r=1&res=9805E1D7123AE733A25754CoA9679D946597D6CF> (12/04/2010)
- 2 *ibid.*
- 3 Premier Anna Bligh, speech to the Australian Public Sector Anti-Corruption Conference, 29 July 2009, <<http://www.thepremier.qld.gov.au/newsroom/speeches/anti-corruption.aspx>> (11.04.2010). Measures included a Green Paper and *Report on Integrity and Accountability in Government*, discussed later in this essay.
- 4 Tony Fitzgerald Q.C., <www.abc.net.au/news/stories/2009/0129/263951.htm> (11.04.2010)
- 5 *Integrity Commission Act 2009* (Tasmania)
- 6 Premier Mike Rann, <<http://www.adelaidenow.com.au/news/in-depth/south-australia-needs-an-icac-says-director-of-public-prosecutions/story-fn2sd-wup-1225786697915>> (11.04.10)
- 7 State Services Authority website, <www.ssa.vic.gov.au>; links 'Systems and organizational reviews' and 'current reviews' (28.04.2010)
- 8 As a result, the operations of enterprises such as the Australian Wheat Board and Securrency International are not considered.
- 9 A slight modification of that used by Professor Charles Sampford: 'the abuse of entrusted power for personal or party political gain.' See C Sampford; 'Ethics and Leadership as the under emphasised elements of Governance Reform' World Ethics Forum Conference Proceedings, p.xii, Institute for Ethics Governance and the Law, Griffith University, 2007, <<http://www98.griffith.edu.au/dspace/handle/10072/18592>> (11.04.2010) He described integrity as 'the use of entrusted power to further the values it claims to advance'.
- 10 R. Thakur, 'The Cancer of Corruption', *Newsletter of United Nations University*, Issue 34, November-December 2004, <http://update.unu.edu/archive/issue34_10.htm> (11/04/2010)
- 11 See 'What are the costs of corruption?' <www.transparency.org/news_room/faq/corruption_faq#faqcorr4> (11/04/2010)

- 12 In 2005 it was said by the chief of the FBI Public Corruption Unit, Special Agent Dan O'Brien, that the Government Accountability Office had estimated that at least 10% of funding for federal government programs was lost to public corruption and government fraud every year—tens of billions of dollars. <<http://www.fbi.gov/page2/june05/obrien062005.htm>> (11/04/2010).
- 13 *Olmstead v United States* (1927), 277U.S., 438, 485, Brandeis, J.
- 14 *Commission of Inquiry into Possible Illegal Activities and Associated Police Misconduct (The Fitzgerald Report)*, Queensland, 1989, p.126
- 15 J. McMillan (Commonwealth Ombudsman), 'Chaos or Coherence? Strengths and opportunities and challenges for Australia's Integrity Systems', speech Parliament House, Sydney, 9 December 2005. A speech launching the National Integrity Systems Assessment (NISA) Final Report.
- 16 *ibid.*
- 17 As Theodore Roosevelt put it—see endnote 1
- 18 *The Fitzgerald Report*, pp.82-85
- 19 *ibid.*, pp.85-117
- 20 *WA Inc. Royal Commission Report (The WA Inc Report)*, 1992, <<http://www.slp.wa.gov.au/publications/publications.nsf/inquiries+and+commissions?openpage>> . I.I. (28/04/2010)
- 21 *ibid.* , I.I.5
- 22 *ibid.*, at I.I.I.8-I.I.I.13; note also the use of bank funds to save the Teachers' Credit Society at I.I.I.14
- 23 *ibid.*, at I.I.2
- 24 (*The Fitzgerald Report*), p.6
- 25 *The WA Inc Report* at I.I.4
- 26 *ibid.* at I.I.25
- 27 *ibid.*
- 28 *ibid.*
- 29 *The Fitzgerald Report*, p.127
- 30 *WA Inc Report*, at 2.5
- 31 *ibid.* at I.I.30
- 32 a parliamentary convention that members refrain from making reference in parliament to matters before the courts to avoid prejudicing the fair trial of those matters.
- 33 *The Fitzgerald Report*, p.120
- 34 *ibid.*, p.129
- 35 *The WA Inc Report* at 2.1.6
- 36 *The Fitzgerald Report*, p.134
- 37 *ibid.*
- 38 *ibid.*, p.142
- 39 *The WA Inc Report* at I.I.24
- 40 *The Fitzgerald Report*, pp.96-117
- 41 *The WA Inc Report* at I.I.; I.I.6 – I.I.21
- 42 *ibid.* I.I.I.14 - I.I.20
- 43 *ibid.*
- 44 *ibid.* at I.I.20.
- 45 *The Fitzgerald Report*, p.123

- 46 *ibid.* pp.123-5
- 47 *The WA Inc Report* at 2.4.2
- 48 *ibid.*, at 3.8-3.9
- 49 *ibid.* For example, the purchase by SGIC, proposed by Burke and Parker, for \$285 million, from interests associated with Robert Holmes a Court of shares in BHP at I.I.9. See also Northern Mining Corporation and other transactions, at I.I.25-26
- 50 *ibid.* at I.I.25
- 51 *The Fitzgerald Report*, 138-9
- 52 *ibid.*, p.139
- 53 *ibid.*, p.91
- 54 *The WA Inc Report*, p.I.I.7
- 55 *ibid.* at I.I.28
- 56 *ibid.* at I.I.17
- 57 *ibid.* at I.I.22-I.I.24
- 58 *ibid.* at I.I.16.
- 59 *The Fitzgerald Report*, 18
- 60 *ibid.*, pp.299-300, p.180
- 61 *The WA Inc Report* at, 4.9.1
- 62 *ibid.*, at 3.5
- 63 *ibid.*, at 3.4
- 64 *Fitzgerald Report*, 133
- 65 *The WA Inc Report* at 4.6
- 66 *The Fitzgerald Report*, p.133
- 67 *The WA Inc Report* at I.I.31
- 68 M. Sawyer, N. Abjorensen and P. Larkin, *Australia: The State of Democracy*, Sydney, Federation Press 2009, pp.185-6
- 69 Cited in B. Hindess, *Corruption and Democracy in Australia*, Democratic Audit Report No3, p.8, <<http://democratic.audit@anu.edu.au>> (28/04/2010)
- 70 *ibid.*, p.202
- 71 *ibid.* The highest figure achieved for members of parliament in annual surveys between 1979 and 2009 was 23 (federal, 2008) and 20 (state, 1979 and 2008). The lowest for both was 9 (1997). Nurses have enjoyed the highest ratings (86 to 94). See <http://www.roymorgan.com/news/polls/2009/4387/> (11/04/2010)
- 72 See http://www.transparency.org/policy_research/surveys_indices/cpi/2009 (28/04/2010)
- 73 Law Reform Committee of the Victorian Parliament, *Review of the Members of Parliament (Register of Interests Act 1978) Minority Report*, (2009) Melbourne, p.1
- 74 *op. cit.*, Sawyer et al, p.194
- 75 *ibid.*, pp.185-86
- 76 Special Minister of State and Minister for Finance and Deregulation, 'Joint Media Release' 24/2008, 2 July 2008, <http://www.smos.gov.au/media/2008/mr_222008_joint.html> ; since replaced by a committee of three senior retired public servants but the auditor-general retains the power to review advertising after the event. <http://www.smos.gov.au/media/2010/mr_202010.html> (28/04/2010)
- 77 *op. cit.*, Sawyer et al, p.189
- 78 *ibid.*, p.188

- 79 *ibid.*, Sawyer et al, citing ANAO, 'The Administration of Contracting Arrangements in Relation to Government Advertising to November 2007', ANAO Report No. 24, 2008-09, pp.15-16; Fiona Childs, 'Federal government advertising 2004-05', *Parliamentary Library Research Note No 2*, Parliament of Australia, 2006-07; Sally Young and Joo-Cheong Tham, 'Political finance in Australia: A skewed and secret system', *Report No. 7, Democratic Audit of Australia*, 2006, p.81 (see table 4.4)
- 80 For details, see Sawyer et al, pp.188-89
- 81 *ibid.*, p.195
- 82 See footnote one above and <<http://www.abc.net.au/news/stories/2009/07/17/2628812.htm>> (11/04/2010)
- 83 <www.icac.nsw.gov.au/.../3284-corruption-matters-issue-no34-november-2009> (11/04/2010)
- 84 Robert Needham, 'Public Duty, private interests: pre-separation conduct, post-separation employment and lobbying', a paper delivered at the APSAC Conference 2009, pp2-5, <<http://www.apsacc.com.au/abstracts09/day1session3streamc3.htm>> (11/04/2010)
- 85 *ibid.*
- 86 For a recent discussion see John Birmingham, 'Failed State', *The Monthly* (December 2009-January 2010, pp31-2
- 87 *Report on an Investigation into corruption allegations affecting Wollongong City Council*, pp.8-13 <<http://www.icac.nsw.gov.au/publications-and-resources/investigations-publications>> (11/04/2010)
- 88 L Rangott, 'On preventing corruption: some comments based on recent ICAC investigations into Wollongong City Council and the NSW Fire Brigades', address to APSAC Conference, 29 July 2009, <www.apsacc.com.au/2009conference/2009papers.htm> (11/04/2010)
- 89 *Investigation into the alleged improper conduct of councillors at Brimbank City Council* (Ombudsman Report), <<http://www.ombudsman.vic.gov.au/www/html/83-parliamentary-reports-2009.asp?intLocationID=83>>, 2009, p.166 (11/04/2010)
- 90 *ibid.*, p.169
- 91 *ibid.*, p.170; gifts included Mont Blanc pens, and a diamond pendant (p.172)
- 92 *ibid.*, p.190
- 93 See the *Age* website, <<http://newsstore.theage.com.au/apps/newsSearch.ac>> (search "Brimbank" in archive) (11/04/10)
- 94 Key Centre for Ethics Law Justice and Governance, Griffith University, and Transparency International, *National Integrity Systems (NISA) Final Report: Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, December 2005.
- 95 The recommendations are summarised in the Executive Summary at pages iv to vi. The details of the recommendations are at pp.92-96.
- 96 *ibid.*, pp.i-iv
- 97 *ibid.*, p.2
- 98 *ibid.*, p.i
- 99 Sampford et al 'From Greek Temple to Bird's Nest: Towards a Theory of Coherence and Mutual Accountability for National Integrity Systems' 64 (2) *Australian Journal of Public Administration*, pp.96-108, 2005 and Sampford 'From Greek Temple to Bird's Nest: Mapping, Assessing and Understanding National Integrity Systems' (paper), 13th

- IACC conference, Guatemala City, Guatemala, November 14-18, 2006
- 100 The recommendations are drafted in the report as recommendations for the Commonwealth.
- 101 There have been calls for an independent broad based anti-corruption commission. See call by Davis for investigation www.vic.liberal.org.au (12/04/2010); call by the Public Land Development Select Committee in 2008 in its report into government land sales and development including the Kew Cottages, Final Report 2008, p.12; also in 2007 the Legislative Council passed a motion calling on the Law Reform Commission to report on the need for an Anti-corruption Commission, see The Greens website, <http://www.vic.greens.org.au/news/media-releases-past-years/add-or-edit-media-releases-2007/greens-call-for-victorian-anti-corruption-body?searchterm=anti+corruption+commission> (28/04/2010)
- 102 Based on Queensland Government Discussion paper, Integrity and Accountability in Queensland, (Queensland Discussion Paper)(2009),Table 1.1 'How does Queensland compare?', p 17. and Response to Integrity and Accountability in Queensland, (Queensland Report)Appendix A, p 17
- 103 <<http://www.aclei.gov.au/>> (30/04/2010)
- 104 For further details see relevant FOI websites in each jurisdiction.
- 105 For the Report, <www.aph.gov.au/senate/committee/fapa_ctte/index.htm> (30/04/2010)
- 106 *op.cit.*, The NISA Report, pp.63-67
- 107 *ibid.*, p.72.
- 108 Fully operational in Victoria from 1 December 2009
- 109 Victoria's new lobbyist code (see clause 7) prohibits lobbying activities by former ministers or cabinet secretaries for 18 months after they cease to hold office, in respect of matters relating to their official dealings in the last 18 months in office. A similar approach is taken for parliamentary secretaries, but the periods are reduced from 18 months to 12 months. see code at <www.lobbyistsregister.vic.gov.au>
- 110 NISA Report, pp. 21-23
- 111 *op. cit.*, pp.24-30
- 112 *op. cit.*, pp.31-36
- 113 *op. cit.*, p35
- 114 *op. cit.*, pp.35
- 115 Queensland Report, p 8-13
- 116 *ibid.*
- 117 *ibid.*
- 118 *ibid.*, p 9
- 119 *ibid.* Ministerial advisers are not mentioned in the relevant section of the Report but it is presumably intended that they will also be required to report gifts over the same threshold of \$150.00, as at present; see Queensland Ministerial Handbook, cl 3.3 <www.premiers.qld.gov.au/publications/categories/policies-and-codes/handbook.>(04/05/2010).
- 120 Lewis Rangott, address to APSACC, 'Preventing Corruption: Some Comments Based on Recent ICAC Investigations into Wollongong City Council and the NSW Fire Brigades', p.6.
- 121 Queensland Discussion Paper, p.13

- 122 Law Reform Committee of the Victorian Parliament, *Review of the Members of Parliament (Register of Interest) Act 1978*, December 2009, 3-3.
- 123 <www.crikey.com> 29 July 2009 (12/04/2010)
- 124 *ibid.*
- 125 <www.news.com.au/Courier mail/story/023739258499-96-310200.html> (12/04/2010)
- 126 *ibid.*
- 127 Law Reform Committee of the Victorian Parliament, *Review of the Members of Parliament (Register of Interest) Act 1978*, (2009)
- 128 *ibid* Majority Report pp.104-107; and Minority Report pp.2-3
- 129 *ibid.* Majority Report p.107
- 130 *ibid.*, p.105
- 131 *ibid.*, Majority Report, p.17
- 132 *ibid.*, Minority Report, p.3
- 133 Annual Report 2008/2009, <www.cmc.qld.gov.au> (5 May 2010)
- 134 <www.ccc.wa.gov.au/publications> (12/04/2010)
- 135 See Budget Paper 3, www.budget.nsw.gov.au (12/04/2010)
- 136 *ibid.*
- 137 Assuming a population in Queensland as at September 2009 of 4,450,400; see Australian Bureau of Statistics, 3101.0 - Australian Demographic Statistics, Sep 2009, <www.abs.gov.au/auststats/abs@.nsl/inf/3101.1> (28/04/2010)
- 138 'Can the costs of corruption be quantified?' www.transparency.org/news_room/faq/corruption_faq#faqcorr4 (12/04/2010)
- 139 Comment of Vladimir Rott, 'Corruption—how and why to avoid it' name of conference, Prague, 11 November 1998, <http://vjrott.com/prog-nov98-esce-ti-vjr.pdf> (12/04/2010)
- 140 The Fitzgerald Report, p.15.
- 141 *op. cit.*, pp.23-24
- 142 *op. cit.*, p.15
- 143 Brendan Butler SC, Chairperson, Criminal Justice Commission, 'Is the Standing Commission of Enquiry A Successful Model for Anti-corruption Commissions?', presented to the International Society for the Reform of Criminal Law Conference, Canberra, Australia, 27 August 2001, p.4
- 144 *op. cit.*, p.4
- 145 NISA Report, pp. 94-98
- 146 See The Fitzgerald Report, pp.130-131, and Geoffrey Barker, 'The public service', in Hamilton and Maddison, *Silencing Dissent*, Sydney, Allen and Unwin, (2007) pp.124-147
- 147 *op. cit.*, Sawyer et al, p.198
- 148 *ibid.*
- 149 ABC News, www.abc.net.au/news/stories/2009/2009/08/06/2647993.htm ; the relatively recent phenomenon, describing functions where single people meet, have a series of brief conversations with each of the others present in the hope that they might find someone with whom they could enjoy a close long-term relationship.
- 150 Royce Millar, 'Brumby rethinks 'cash for chat fundraisers' *The Age*, 8 December 2009
- 151 <http://www.alpvictoria.com.au/Events/Corporate-Events/About-Progressive-Business.html> (28/04/2010)
- 152 On 16 April 2010, the Liberal Party held a "Business Observers' Forum' at which, a payment of \$4000.00 would secure a private briefing with a federal or state minister; Royce Millar, *The Age*, 16 February 2010, <www.theage.com.au/.../for-sale-access-to-senior-liberals-20100415-shlv.html.> (13/04/2010)
- 153 *op. cit.*, Royce Millar, 8 December 2009
- 154 See Pearson and Patching, 'Government, Media Relations: A "Spin" Through the Literature', Bond University, 2008
- 155 *op. cit.*, p.2, citing I. Ward, 'An Australian PR State?' *Australian Journal of Communication*, 30(1), 2005, pp.25-42
- 156 *op. cit.* p.6
- 157 *op. cit.* pp.20-21
- 158 *op. cit.* p.22
- 159 *ibid.*
- 160 *op. cit.*, pp.24-26
- 161 *op. cit.* pp.26-28 and pp.35-38
- 162 Victorian Ombudsman, Annual Report 2006, 69, Transparency International, 'Overview of Freedom of Information in Australia', http://www.transparency.org.au/freedom_of_information.php (12/04/2010)
- 163 *op. cit.*, Pearson and Patching, p.38
- 164 For example, the 'children overboard' and the AWB kickback affairs. See Barker in Hamilton and Maddison, pp.133-39
- 165 Ray Bange, 'Build it and they will come: Infrastructure corruption risks' (paper), Australian Public Sector Anti-corruption Conference 2009, <www.apsacc.com.au/abstracts09> (12/04/2010)
- 166 Transparency International, Global Corruption Report, 2004,p.157, <www.transparency.org/publications/gcr> (12/04/2010)
- 167 Peter Fitzgerald (who was engaged by the government of Victoria to review the State's PPP policy in 2003), 'PPPs—The Next Thing or Big Mistake?' Address to Fabian Society, 29 March 2006, <www.Fabian.org.au/1053.asp> (12/04/200); John Quiggin, 'Risk, PPPs and the Public Sector Comparator', *Australian Accounting Review*, Vol 14, No 2, 2004, p.51
- 168 For example, Victorian Auditor-General's Office website <www.audit.vic.gov.au> (12/04/2010) 'Report on the New Women's Hospital' (Executive Summary), 30 July 2008. It noted that the Public Sector Comparator had been amended at three different stages; for the investment evaluation report, the business case stage and 'at contractual close'.
- 169 Melissa Fyfe, *The Age*, 9 August 2009, 'In the murky world of lobbying, mateship is king' <<http://newsstore.theage.com.au>> ; Adele Ferguson and Eric Johnson, *The Age*, 6 February 2010, 'The Persuaders' and "Lobbyist control plans in disarray", <<http://newsstore.theage.com.au>> and the *Sydney Morning Herald*, 27 February 2010, 'The other drug war—the politics of big business' <<http://www.smh.com.au/>> ; Rick Wallace, *The Australian*, 22 July 2009, 'Who's who of Labor in the lobby business' <<http://www.theaustralian.com.au>> (28/04/2010)
- 170 See Clive Hamilton, *Scorcher*, Melbourne, Black Inc Agenda, 2007, p.121
- 171 Adele Ferguson and Eric Johnson, *The Age*, 27 February 2010, 'MP's ex-aide escapes

- lobbying ban' <<http://newsstorer.theage.com.au>> (28/04/2010)
- 172 Guy Pearce, *The business response to climate change: case studies of Australian interest groups* (doctoral thesis), Canberra, ANU, 2005, discussed in Clive Hamilton, Scorcher, Melbourne, Black Inc Agenda, 2007, pp3-12
- 173 Clive Hamilton, *ibid*.
- 174 See 'Inter-jurisdictional comparison, No. 2: Post Separation Employment' in the links to the Queensland Government report 'Response to Integrity and Accountability in Queensland' at <<http://premiers.qld.gov.au>> (28/04/2010)
- 175 'Ministerial Standards of Ethics' (2007), p 5, <http://www.dpmc.gov.au/guidelines/docs/ministerial_ethics.pdf> (28/04/2010)
- 176 Queensland CMC, 'Public duty, Private interest' (2008), recommendation 5, p. x <www.cmc.qld.gov.au> (28/04/2010)
- 177 Needham, *op. cit.*, p.8
- 178 Dr Anne Tiernan, *Power without responsibility*, Sydney, UNSW Press, (2007), p.244
- 179 See also generally, Barker in Hamilton and Maddison, *op.cit.*, pp.124-147
- 180 *op. cit.*, p.77, p.145
- 181 *op. cit.*, p.125
- 182 In 1995, Senator the Honourable Bob McMullan (ALP, Australian Capital Territory), when Minister for Trade argued that ministerial staff are accountable to the minister and the minister is accountable to the parliament and, ultimately, the electors and that, therefore such staff should not be called before parliament to answer questions. . See generally, Ian Holland, *Politics and Public Administration Group*, Research Paper no.19 2001-02, 'Accountability of Ministerial Staff?' <www.aph.gov.au/library/pubs/rp/.../02rpr19.htm> (28/04/2010). Assuming that the accountability obligations are accurately described, the argument does not address the question of the obligations of staff to provide information to the parliament of relevance to inquires being conducted by it, including those relevant to their minister's accountability to the parliament.
- 183 *op. cit.*, ch 9
- 184 Liberal Victoria website, 'Brumby Engaged in Cover-up Over Madden Scandal' (media release), <http://www.vic.liberal.org.au/News/MediaReleases/tabid/159/articleType/ArticleView/articleId/1686/BRUMBY-ENGAGED-IN-COVERUP-OVER-MADDEN-SCANDAL.aspx> (25 April 2010). The only other occasion that appears to have been recorded in Victoria occurred in 2002; see Holland, *op. cit.*, text associated with his fns 3 and 93
- 185 *op. cit.*
- 186 Ministerial Standard of Ethics, above, at, '1.3 (iii) . Ministers must accept accountability for the exercise of the powers and functions of their office—that is, to ensure that their conduct, representations and decisions as Ministers, and the conduct, representations and decisions of those who act as their delegates or on their behalf—are open to public scrutiny and explanation.' <http://www.dpmc.gov.au/guidelines/docs/ministerial_ethics.pdf> (28/04/2010)
- 187 Accountability Round Table website, 'Be Honest Minister', <www.accountabilityrt.org>, p.30 (25 April 2010)
- 188 Until recently applied only in the Federal Parliament. It appears that it was invoked in Victoria in March 2002 before the Upper House Select Committee on the Urban and Regional Land Corporation Managing Director. See Holland, *op.cit.*(at his fns 3, and 93).
- 189 'Be Honest Minister', p.44. Other recommendations to improve the accountability of the executive to the Parliament are made in 'Be Honest Minister'; see also David Yencken and Nicola Henry, 'Democracy Under Siege', Melbourne, The Australian Collaboration, 2008
- 190 *op. cit.*, p 29
- 191 *op. cit.* p.30
- 192 See papers of Chief Justice John Doyle, AC, Chief Justice Diana Bryant, The Chief Justice Terence Higgins, and Justice TH Smith, on the topic 'Court Governance and Judicial Independence' at the Judicial Conference of Australia Colloquium 2006 <<http://www.jca.asn.au/colloquium/2006.html>> (29/04/2010)
- 193 *The Fitzgerald Report*, p.134
- 194 See Alford, Gustavson and Williams, 'The Governance of Australia's Courts: a Managerial Perspective', Australian Institute of Judicial Administration Inc, (2004)
- 195 Supreme Court of Queensland Act 1991, section 14; Supreme Court Act 1935 (WA), section 11
- 196 Supreme Court Act 1887 (Tasmania)
- 197 Constitution 1975 (Vic), section 80D
- 198 The Hon. Carl. B. Ingram, Chief Justice of the High Court of the Republic of the Marshall Islands, 'The length of Terms of Judges in the Pacific and its Impact on Judicial Independence', paper delivered to the 18th Pacific Judicial Conference, June 15-18, 2009, Tahiti, French Polynesia.
- 199 Law Reform Committee, Parliament of Victoria, 'Review of the Members of Parliament(Register of Interests Act 1978', Recommendations 3 and 4, pp xi – xiii, List of Recommendations.
- 200 Ministerial Standards of Ethics, above, clauses 1.1 and 1.2
- 201 Paul Finn (as he then was), 'A Sovereign People, A Public Trust' in *Essays on Law and Government*, (Australia) Law Book Company (Vol 1), 1995, p.1 and 'Integrity in Government' (1992)Public Law review 243; Report of the WA Inc Enquiry, 1992, paras 1.2, 3.1.7, 4.4; Evan Fox-Decent, 'The Fiduciary Nature of State Legal Authority', (2005-2006) 31 Queen's Law Journal, 259; Mary Wood, 'Advancing the sovereign trust of government to safeguard the environment for present and future generations', (2009) 39 Environmental Law 43; and discussion by Doyle, CJ of the trust principle in Question of Law Reserved (No.2 of 1996) SASR 63 referring to the offence of misconduct in public office as involving an 'abuse of the trust placed in the officeholder'. Also in the context of native title, the discussion of the application of trust principles to native title issues, Toohey, J., in *Mabo v Queensland (No 2)* (1992) 175 CLR 1. As to the judicial power being held on trust see Gleeson, CJ, 'The rule of law and the Constitution', Boyer Lectures (2000) ABC Books, p.125
- 202 There is currently before the Victorian Parliament a Bill, the Members of Parliament (Standards) Bill 2010, <www.austlii.edu.au/au/legis/vic/bill/mopb2010308/> . It is a significant improvement on the existing legislation, the
- 203 Members of Parliament (Register of Interests) Act 1978. It does not attempt, however, to articulate the moral basis for its statement of values and code provisions. See Queensland and New South Wales government websites, <www.qld.gov.au/right>

- to-information> and www.ombo.nsw.gov.au/foi%20review.htm (29/04/2010). As to claims of 'commercial in confidence' as a basis for refusing access to documents, see the Victorian PAEC Report. 35. 'Enquiry into Commercial in Confidence Material and the Public Interest' <www.parliament.vic.gov.au/paec/default.htm> (30/04/2010)
- 204 op. cit. Queensland Report, p.13, and Parliament of NSW, Final report: Public funding of Election Campaigns, <www.accountabilityrt.org/node/65> (5 May 2010)
- 205 op. cit., NISA Report, pp. 92-102
- 206 Here identified as the ombudsman, auditor-general, anti-corruption commissioner, public service head, the parliamentary standards commissioner, etc ...
- 207 In Victoria this would include the ombudsman, the OPI and the new independent statutory authority
- 208 A base procedure put forward was one empowering members to initiate such inquiries on the basis of each member holding five votes that could be cast in favour of establishing an inquiry in any one calendar year, with 25 votes needed to establish an enquiry; and for the committee chair to be appointed by election with a two-thirds majority of the committee; op. cit., NISA Report, Recommendation 7, p.96
- 209 Available at <www.aph.gov.au/house/committee/laca/whistleblowing/.../attachmenta16.pdf> (30/04/2010)
- 210 This effectively reverses the onus of proof.