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

The Convention context

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

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

Correspondence: Ms Anne Mancini, mancini_anna@optusnet.com.au
Secretary, Accountability Round Table,
27 Valetta St
Malvern VIC 3144

Have agreed as follows:.....

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

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

"The purposes of this Convention are:

(a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;

(b) To promote, facilitate and support international co-operation and technical assistance in the prevention of and fight against corruption, including asset recovery;

(c) To promote integrity, accountability and proper management of public affairs and public property.

The question of compliance

We submit that, regrettably, the Australian Government has failed to address the agreed concerns and has failed to address the agreed purposes. In relation to Chapter 3 we submit that, regrettably, it has failed to comply with Article 36. It provides

"*Article 36. Specialised authorities*

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialised in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively[1] and without any undue influence. Such persons or staff of such body or body shall have the appropriate training and resources to carry out their tasks."

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

Such a system has not been established. Instead the Australian government created a specialised anti-corruption body, the Australian Commission for Law Enforcement Integrity (ACLEI), but narrowly confined its anti-corruption jurisdiction to the activities of three law enforcement bodies; initially, the Federal Police and the Australian Crime Commission and, recently Australian Customs. It does not have jurisdiction over public servants, members of Parliament, their staff, the judiciary or any bodies or persons making decisions or providing services involving the expending of public funds. The

[1] Emphasis added

Correspondence: Ms Anne Mancini, mancini_anna@optusnet.com.au
Secretary, Accountability Round Table,
27 Valetta St
Malvern VIC 3144

result is that there is no "body, bodies or persons specialised in combating corruption through law enforcement". [2]

Justification?

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

An attempted justification proffered from time to time for not creating broad-based Commonwealth body to address corruption is that there is no evidence of corruption in federal government. This is not so (see Annexures A and B). But even if it was so, such an argument would only have weight if

- Australia had a broad-based anti-corruption Commission with the power and the resources to investigate the existence and extent of corruption and

- it had investigated thoroughly and reported that there was no evidence[3],

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

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

Other justifications have been advanced for the current limited approach. In 2009, the Department of the Attorney –General lodged a detailed and closely argued submission with the ACLEI Parliamentary Committee[4]. An analysis of that submission is also attached (Annexure B). For reasons advanced, the justifications proffered do not, on examination, support the limited approach. Rather, on fair and proper analysis they support the wide approach.

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[2] One may speculate whether the reference to "law enforcement" in the Convention was a factor in the government choosing to limit the jurisdiction of ACLEI to law enforcement agencies. But the reference in the convention to "law enforcement" does not purport to define the jurisdiction of the required body or bodies. It requires that law enforcement be linked to the work of the body or bodies or people, or to be available to them, not that it be a limit on jurisdiction. The link is effectively a minimum requirement of any Integrity system set up to comply with UNCAC.

[3] Of course, if that was the situation, it does not follow that the government would be justified in abolishing such a body; for there will always be government corruption and it can have serious consequences for the domestically and internationally

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

Correspondence: Ms Anne Mancini, mancini_anna@optusnet.com.au
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Finally, if cost is a concern, assuming an annual cost of say $40,000,000, it would amount to $2.00 per Australian – a very low premium for a policy to address both a domestic and international problem.

The reality is that to satisfy Article 36, and the spirit and intent of the Convention, the Australian government should provide an adequately empowered and resourced Anti-corruption Commission which covers the whole of the public sector and its activities, including matters involving decisions and the provision of services flowing from an allocation of public funds and the activities of government agencies and of corporations operating overseas, including those such as AWB and Securency....

Regrettably, it must be accepted that the Australian Government has not as yet complied with a fundamental aspect of the Convention.

Correspondence: Ms Anne Mancini, mancini_anna@optusnet.com.au
Secretary, Accountability Round Table,
27 Valetta St
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Annexure A –

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

Executive Summary

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

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

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

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

- relevant definitions (including the definitions of corruption and malpractice),
- the adequacy of existing powers, including investigatory powers, and whether additional powers are required, and
- the adequacy of the educative, research and policy functions.

- the adequacy of the system for co-ordinating the work of all Commonwealth agencies involved in monitoring and investigating misconduct
- the resourcing needed to serve the comprehensive jurisdiction.

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.

Submission

The present Commonwealth government integrity system[5] includes Parliament (especially its committees), Courts, administrative review tribunals, Director of Public Prosecutions, oversight bodies such as the Ombudsman and the Auditor General, FOI and an independent anti-corruption body, the Australian Commission for Law Enforcement Integrity (ACLEI). During the 1970s, Australia introduced important reforms in administrative law and the last Parliament saw some important developments. However, the Australian government integrity system is no longer up to international best practice (or that of some Australian states). In particular, the jurisdiction of ACLEI is seriously limited. It has been confined to preventing, detecting, and investigating serious and systemic corruption issues in two Commonwealth law enforcement agencies: the Australian Federal Police and Australian Crime Commission. Australian Customs has been added to its jurisdiction this year.

The NISA Report of 2005[6] 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.[7]"

If that call had been heeded there would have been an appropriate independent body in existence able to investigate recent serious allegations made about the actions of Securency, Austrade and the Reserve Bank, and Defence Department contracts[8]. It is also unlikely that the Therapeutic Goods Administration would have failed to maintain a

[5] 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]

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

[7] 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).

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

record of gifts and other benefits received by staff.[9] Such an independent body would also have been available to any citizens who wished to raise their concerns about possible misconduct and, if there was, it could have been nipped in the bud. Instead conduct that has raised concern continued for a considerable time.

In reviewing the Commonwealth integrity system[10] the NISA Report identified a number of gaps and weaknesses. They were recently summarised as follows[11]

> "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'.[12] 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.'"[13]

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;[14] 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;[15] the commercialisation of government services and projects;[16] 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.[17] 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

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

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

[11] 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.

[12] NISA Report, above, p 35

[13] Ibid.

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

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

[16] 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.

[17] . pp. 51-54.

be needed to address the problems posed by climate change and the exhaustion of natural resources, including energy, water and phosphate.[18]

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

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

- corporations doing business overseas receiving direct or indirect assistance from the federal government and its agencies,
- the Reserve Bank and any corporations in which it has an interest and which do business overseas,
- the Defence Department,
- Austrade and Ausaid,[19] and
- the Therapeutic Goods Administration.

To acknowledge that fact, however, only highlights the unreality of the past approach – the approach also taken in Victoria but now abandoned. The past approach also ignores the reality that each year, the Federal Government purchases tens of billions of dollars of goods and services[20].

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."[21]

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

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[18] . p 55

[19] See fn. 11.

[20] 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).

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

inevitably to unproductive definitional debate and uncertainty about where to take concerns.

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

Recommendations of the Accountability Round Table

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

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

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

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

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

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

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

   If we understand these propositions correctly, it is being put that, rather than follow the broad-based overarching single body model (the model that experience has shown is necessary and best practice), the best course is to have a range of bodies and government initiatives which promote accountability and transparency.[22] The crux of the argument would appear to be that the better approach is to improve accountability of government and the transparency of government.
   The submission does not indicate what the requisite measures should be. The only topic referred to is Whistleblower Protection. This 2009 submission states that that the Department of the Prime Minister and Cabinet was developing its response to the Report of the House of Representatives Standing Committee on Legal and Constitutional Affairs' *Inquiry into Whistleblowing Protections within the Australian Government public sector.* We note that well into the year 2011, no Bill has been published and enquiries made on behalf of the ART have failed to elicit any information about the government's intention. Of course, the Department was not to know that that would happen when it made its submission. We submit that what is significant that the submission fails to identify and recognise the exponential growth in serious corruption risks which require genuine and rigorous regulation to provide accountability and transparency, matters discussed in the ART submission to the ACLEI Committee (Annexure A). Further in recent years, attempts have been made to improve accountability and transparency in several critical areas (e.g. FOI, lobbying, post-retirement employment and political funding), but, while there some improvements have been made, they have fallen well short of what is required.[23] Even if they were adequately addressed there would still be a strong case for a broad-based anti-corruption body because of the increased risk of corruption flowing from the commercialisation of government (See Annexure A). In such a situation, it should need fewer resources to carry out its work.

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

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

"Checks and balances" is an expression usually used to describe mechanisms designed to limit the exercise of power by the institutions concerned. How such limits could strengthen the anti-corruption system is not readily apparent. The quoted proposition is referring back to a list of 11 Commonwealth bodies, including ACLEI, the Federal Police, ACC, ACCC and A-G's department. It is not explained which is checking and balancing which and no evidence is offered as to how any of them other than ACLEI would see "checking" of any sort on each other as part of their role.

Limiting the exercise of power and distributing responsibility must make the task of monitoring government corruption and combating it more difficult. It is the antithesis of the desirable "one-stop shop" and co-ordinated approach and can only place unnecessary obstacles in the path of any citizen considering whether to draw corrupt activity to the attention of law enforcement authorities.

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

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

These criteria are not weighted and all criteria are related. The emphasis placed on individual criteria will differ according to the circumstances."

The other criterion stated, but not explained or justified, is that the jurisdiction of ACLEI should be to prevent corruption in only those government bodies that have law enforcement functions – even though, it is said, that there was no perception that the two original agencies over which it was given jurisdiction "had difficulties with corruption" .

Applying these criteria, the jurisdiction of ACLEI remains inadequate if it is to prevent corruption in law enforcement bodies and inadequate to satisfy Article 36 of UNCAC.

For as the Department's submission acknowledges, there are at least 40 Commonwealth Agencies that could be considered to have law enforcement functions and could come within ACLEI's proposed limited jurisdiction. They include (see Attachment A to the Department Submission) the Departments of Defence, Finance, Foreign Affairs and Trade, Treasury and the Therapeutic Goods Administration Agency. In recent years evidence has come to light of bribery by bodies and people that should have been under the watchful eye of at least two departments listed – Foreign Affairs and Trade (AWB) and Treasury (Reserve bank subsidiary, Securency). In addition, it has emerged that there has been for

some time a practice of accepting gifts within the Defence Department and the Therapeutic Goods Authority from people seeking very large contracts and approvals. Each body would satisfy the stated criteria.
The reality is that applying the Department's criteria, the jurisdiction of ACLEI falls short of what Article 36 requires.