

ANTI-CORRUPTION AGENCIES IN AUSTRALIA

PURPOSE

To ensure Australia has effective legal and institutional capacities for preventing, detecting, exposing and remedying (including by prosecution) official corruption and corruption risks at all levels of government – especially through appropriate independent agencies.

THE PROBLEM

Anti-corruption agencies (ACAs) are a vital part of Australia's national integrity system, relied on by community and government to lead the exposure of official corruption, head off emergent corruption risks, and ensure action to build confidence in Australia's corruption resilience.

However there is growing confusion – in government and publicly – about the adequacy of Australia's institutional arrangements for fighting corruption, including:

- variable, inconsistent or missing **legal definitions of official corruption**;
- whether ACA's efforts are properly **prioritised, proactive** and **coordinated** with other agencies;
- insufficient confidence that action is being taken to deal properly with **individuals who engage in or benefit** from corrupt conduct that is uncovered;
- whether ACAs have the **right powers, sufficient resources** and **necessary independence from government**;
- adequacy of **accountability, oversight** and **performance assurance** arrangements; and
- gaps in **arrangements at the Australian federal government** level.

HISTORY AND PREVIOUS RECOMMENDATIONS

Under Articles 6 and 36 of the UN Convention Against Corruption (2004), the Australian Government has committed to having 'a body or bodies or persons specialised' in combatting corruption, through prevention and enforcement.

Australia has a long history of specialist anti-corruption agencies including the NSW Independent Commission Against Corruption (NSW ICAC) (1988), the Queensland Crime & Corruption Commission (1991), the WA Corruption & Crime Commission (1992), the Tasmanian Integrity Commission (2010), the Victorian Independent Broad-based Anti-corruption Commission (IBAC, 2012) and the SA Independent Commissioner Against Corruption (SA ICAC, 2012).

In 2006 and 2014, the **Australian Government** strengthened its anti-corruption capacity, establishing the Australian Commission for Law Enforcement Integrity (ACLEI, now overseeing Australian Federal Police (AFP), Australian Crime Commission, Australian Border Force and others) and then an AFP Fraud & Anti-Corruption Centre. Since ACLEI's inception, parliamentary committees have also called for 'a Commonwealth integrity commission of general jurisdiction'¹

and review of the integrity system 'with particular examination of the merits of establishing a Commonwealth integrity commission' with oversight of all Commonwealth agencies.²

This review has not occurred. Development of a **National Anti-Corruption Plan** was commenced in 2011 but was never finalised. Like state governments, the Australian Government takes a 'multi-agency approach',³ but one with significant gaps and weaknesses:

- Most federal agencies' anti-corruption efforts continue to go unsupervised (other than clear criminal conduct reported to the AFP), including around half of the total federal public sector not in the jurisdiction of the Australian Public Service Commission;
- There are no independent mechanisms supporting federal parliamentary integrity (other than AFP investigations into criminal conduct);
- Corruption prevention, risk assessment and monitoring activities are patchy and uncoordinated; and
- The criminal law enforcement focus of the AFP Fraud & Anti-Corruption Centre, while important, includes foreign bribery, anti-money laundering and other criminal cases, and cannot provide the necessary oversight of 'softer' or 'grey area' corruption investigation and prevention activity across the federal sector.

At the same time, across Australia at both **federal and state level**:

- Definitions of official corruption differ substantially, with confusion over the proper jurisdictions of ACAs highlighted by the High Court decision in *ICAC (NSW) v Cunneen*;⁴
- There are unresolved debates about how to ensure ACAs are proactive, focused on catching serious corruption issues before they turn systemic, and preventing corruption, rather than simply reactive, complaint-handling bodies;
- There are growing differences in the powers available to ACAs, e.g. ranging from the NSW ICAC's powers to conduct public hearings on any matter it chooses, to the SA ICAC (2012) having no power to conduct public hearings at all;
- Some ACAs have some prosecution powers and capacities (e.g. Queensland) when others have none (e.g. NSW), contributing to public scepticism when corruption is 'found' but action either does not follow or is delayed; and
- Debate continues over where ACAs and other integrity agencies 'fit' in our system of government, including how they are best oversights and kept accountable⁵ – often with little awareness of international trends and experience.⁶

Public confidence in Australia's integrity systems relies on clearer answers to all these issues. Transparency International's *National Integrity System (NIS)* approach⁷ – now well-known worldwide – is a strategic way of evaluating these problems. As well, a new TI *Anti-Corruption Agency Strengthening Initiative* offers new insights into possible solutions.

Along with 91 countries, Australia conducted a first exploratory NIS assessment in 2005,⁸ but is yet to join more than 45 countries who have conducted these assessments using a new 2009 methodology. Some states have since attempted their own similar reviews and assessments (e.g. Queensland 2009, Victoria 2010, South Australia 2012). It is time for a national approach.

TI AUSTRALIA'S POSITION

- **The Australian Government should establish a broad-based federal anti-corruption agency**, as one element of an enhanced multi-agency strategy – to ensure a comprehensive approach to proven and emergent corruption risks beyond the criminal investigation system, ensure effective anti-corruption oversight across the entire federal public sector, and support stronger parliamentary integrity.

- **Legal definitions of corruption** need to be overhauled by Australian and State parliaments, to make them simpler, nationally consistent, and more comprehensive for present-day contexts – not only for investigation and prosecution purposes, but prevention and resilience-building.
- **Australian governments should agree on, and implement, best practice principles for the powers and accountabilities of their ACAs** through the Council of Australian Governments (COAG) Law, Crime and Community Safety Council, including:
 - a. aspects of the scope of investigatory powers,
 - b. comprehensive frameworks for corruption prevention and resilience building,
 - c. responsibility for, and coordination with, prosecutions,
 - d. parliamentary and public oversight arrangements, and
 - e. ensuring bipartisan support for the independence of anti-corruption agencies, and for the content and implementation of anti-corruption strategies.
- **TI Australia is planning a new National Integrity System (NIS) assessment of Australia** as a major contribution to finding answers, filling gaps in our integrity systems, ensuring efficient and accountable integrity agencies, and supporting more effective prevention and remediation of corruption internationally. We call on Australian and State governments, including lead integrity agencies, to support this important initiative.

¹ Australian Senate (2006), *Provisions of Law Enforcement Integrity Commissioner Bill 2006* [and related measures], Report of the Senate Legal and Constitutional Legislation Committee, Parliament House, Canberra, May 2006, p.28.

² Parliament of Australia, *Inquiry into the Operation of the Law Enforcement Integrity Commissioner Act 2006: Final Report*, Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, July 2011, Recommendation 10.

³ Attorney-General's Department, *Discussion Paper: Australia's Approach to Anti-Corruption*, Prepared as part of the development of the National Anti-Corruption Plan, March 2012, p.12; Australian Government Response to the 2011 Report of the PJC on Australian Commission for Law Enforcement Integrity (February 2012).

⁴ See *ICAC v Cunneen* [2015] HCA 14 (15 April 2015); G Griffith, '*ICAC v Cunneen*: the power to investigate corrupt conduct', NSW Parliamentary Research Service, May 2015, e-brief 3/2015.

⁵ E.g. Hon Wayne Martin CJ, 'Forewarned and Four-Armed – Administrative Law Values and the Fourth Arm of Government', 2013 Whitmore Lecture, (2014) 88 *Australian Law Journal* 106; cf C Wheeler, 'Response to the 2013 Whitmore Lecture', (2014) 88 *Australian Law Journal* 740; A J Brown, 'The integrity branch: a 'system', an 'industry', or a sensible emerging fourth arm of government?' in M. Groves (ed.), *Modern Administrative Law in Australia: Concepts and Context*, Cambridge University Press, 2014, pp.301-325.

⁶ See e.g. *Jakarta Statement on Principles for Anti-Corruption Agencies* (2012), Jakarta, 26–27 November 2012 <http://www.unodc.org/eastasiaandpacific/en/2012/12/corruption-kpkl/story.html>.

⁷ See <http://www.transparency.org/whatwedo/nis>.

⁸ *Chaos or Coherence? Strengths, Opportunities and Challenges for Australia's Integrity Systems*, Final Report, National Integrity Systems Assessment (NISA), December 2005 http://transparency.org.au/wp-content/uploads/2012/08/nisa_final.pdf.