Malkara Consulting

Proposed Commonwealth Integrity Commission

Submission by Malkara Consulting
“Some trust fund prosecutor, got off-message at Yale, thinks he’s gonna run this up the flagpole, make a name for himself, maybe get elected some two-bit, congressman from nowhere, with the result that Russia or China can suddenly start having, at our expense, all the advantages we enjoy here. No, I tell you. No, sir! Corruption charges! Corruption?!! Corruption is government intrusion into market efficiencies in the form of regulations. That’s Milton Friedman. He got a goddamn Nobel Prize. We have laws against it precisely so we can get away with it. Corruption is our protection. Corruption keeps us safe and warm. Corruption is why you and I are prancing around in here instead of fighting over scraps of meat out in the streets”.

“Corruption is why we win”.

(Source: Movie Syriana. Danny Dalton speaking to lawyer Bennett Holiday)
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Corporate Profile

Malkara Consulting\(^1\) is a consultancy firm that specialises in the provision of training and advice in relation to money laundering, terrorist financing, bribery and corruption, sanctions, fraud, financial investigations and risk management. The training and advice is designed to increase the effectiveness of current financial crime prevention systems and to target harden organisations from the threat of organised crime and terrorism by explaining and demonstrating how money laundering and other financial crimes work.

Failure to implement measures to prevent financial crime can have adverse cost implications on both domestic and international institutions and for international trade. Unfortunately, many institutions do not appropriately assess the risk financial crime poses to them. Their response is formulated around compliance based systems which are designed to ensure that they meet relevant national and international laws. Compliance systems designed to satisfy the law, while important, do not completely address all aspects of financial crime risk. They contain gaps which expose an organisation to being a victim of financial crime or a perpetrator of crime.

Malkara Consulting understands financial crime risk. Our experience is based on investigating financial crime committed by national and international crime groups. We design training workshops which focus on improving effectiveness. Effectiveness is the extent to which an organisation mitigates the risks and threats of financial crime.

As a consultancy firm, Malkara Consulting assesses effectiveness using a fundamentally different approach to assessing technical compliance with relevant laws. It does not involve a box ticking exercise which checks to ascertain if specific requirements are met. In assessing effectiveness, Malkara Consulting examines if the financial crime compliance system of an organisation is working. In relation to our training workshops, technical compliance is incorporated into the training framework and material.

Malkara Consulting conducts business primarily in Australia, South East Asia and Africa.

Further information can be obtained by contacting: enquiries@malkaraconsulting.com

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\(^1\) Malkara is an Australian Aboriginal word meaning “shield”.

Thursday, 31 January 2019

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Mr Chris Douglas, APM
Company Director

Chris Douglas a former Australian police officer who served for 31 years with the Australian Federal Police (AFP), Australia’s national police agency. With the AFP, Chris Douglas worked in intelligence and operational units initially in Sydney and later in Perth where he was involved in the conduct of investigations into drug trafficking, people smuggling, human trafficking, corruption, organised crime and fraud, particularly tax evasion. He has extensive experience in the investigation of money laundering and in the conduct of financial investigations including the tracing and recovery of funds laundered offshore.

Based on his experience, Chris has designed and delivered investigation training programs (financial investigations, money laundering, bribery and corruption) to law enforcement agencies (various crime commissions, police and customs agencies) revenue agencies, financial intelligence units, prosecutors, judges and financial intelligence units from Australia, Indonesia, Malaysia, Nigeria, New Zealand, Sri Lanka, China, Pakistan, Singapore, Fiji, and the United Arab Emirates.

In 2014 Chris Douglas worked in the Financial Crime Services area of the National Australia Bank Ltd, reviewing Anti-Money Laundering & Counter-Terrorism Financing (AML/CTF) policy and designing and delivering training on money laundering, corruption, sanctions, terrorist financing and fraud to staff engaged in CDD/KYC and sanctions monitoring and reporting.

Since 2015, Chris Douglas has been a consultant to the United Nations Office on Drugs and Crime in Nigeria where he engaged in capacity building of local law enforcement agencies including the National Drug Law Enforcement Agency, the Nigerian Financial Intelligence Unit and the Special Control Unit Against Money Laundering.

Chris Douglas is also a director of Africa AML & Financial Services which is based in Southern Africa.

Chris Douglas holds a Bachelor of Business Degree (Accounting) from Edith Cowan University in Australia, a Graduate Certificate in Applied Management and is a graduate of the 73rd Police Management Development Program from the Australian Institute of Police Management. He has completed
a Triad Course and Financial Investigations course both conducted by the Hong Kong Police in Hong Kong.

In January 1994 Chris was awarded an Australia Day Medallion from the AFP Commissioner recognizing his dedication and competence in relation to proceeds of crime investigations. In 2007 he was awarded a second Australia Day Medallion recognising his dedication and competence in the pursuit of money laundering investigations

In June 2012 Chris received during the Queen’s Birthday Honours Awards, Australia’s highest police honour, the Australian Police Medal (APM), for distinguished service in the field of investigations and management of economic crime and special operations and for the delivery of financial investigation training within Australia and overseas.
Executive Summary

On 13 December 2018, the Australian Government announced the introduction of a Commonwealth Integrity Commission (CIC) and released a paper “A Commonwealth Integrity Commission— proposed reforms” for public comment. The proposed CIC model if implemented will be ineffective in combating corruption in the public sector and inefficient. The splitting of the CIC into two divisions, one to investigate corruption within law enforcement agencies and the other to investigate corruption in the public sector which includes Ministers, members of parliament and their staff, is based on a flawed assessment of where the most significant corruption risks are and the impact of those risks.

Before implementing a commonwealth anti-corruption body, the Commonwealth Government should conduct an anti-corruption risk based assessment to determine the risks and their impact to the Australian Government, Commonwealth departments and agencies and major contractors it deals with. The anti-corruption risk assessment should determine the level of resources committed to the CIC, including staff, equipment and funding. Comparisons with other State anti-corruption bodies are irrelevant as those agencies do not deal with powerful and resourceful international organisations as the Commonwealth does.

The new body should have a name that reflects its country of origin and the nature of its work. The name Commonwealth Integrity Commission implies it main function is anti-corruption prevention. The name of the organisation should be the Australian Anti-Corruption Commission.

The proposal limits the power of the public sector integrity division to investigate corruption by denying it the authority to make arrests, ground and execute search warrants, seize material, undertake controlled operations and use assumed identities. The proposal left open for discussion whether telephone intercepts and listening devices should be made available to the public sector integrity division.

To combat corruption effectively, the proposed CIC should have all the powers available to the Australian Federal Police and the Australian Criminal Intelligence Commission. With all teams within the CIC having access to those powers. The use of any specific power should not be determined by the category of person being investigated, but by their capability and complexity of the criminality involved. In deciding to split the CIC into two components, the Government has not taken into consideration the capability of those who could be involved in paying bribes. Threats to Commonwealth Government information, projects and people originate from government employees and managers; organised crime, corporations, contractors and foreign intelligence agencies.

The CIC should have access to a full range of investigative powers as recommended in the United Nations Convention against Corruption, including the power to make arrests, obtain and execute search warrants, seize evidence, undertake controlled operations, use assumed identities and obtain and use electronic surveillance devices including telephone intercepts, listening devices and tracking devices. Therefore, the proposal to split the CIC into a Law Enforcement Integrity Division and a Public Sector Integrity Division should be abolished.
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There should be no limitation on whom, when and how the CIC will investigate and what powers it will and will not use. As an independent body, like other law enforcement agencies, it should have the discretion to decide who it investigates and how it will undertake an investigation. All hearings conducted by the CIC should be held in public except where there is a risk to the safety of any person or the progress of an investigation will be impeded or jeopardised. Malkara Consulting agrees that the CIC findings of corruption against any person should be made by a court.

The recovery of proceeds of corruption using conviction based and civil forfeiture legislation are powerful tools. Currently, the AFP undertakes proceeds of crime action on behalf of the Commonwealth. In relation to cases investigated by the CIC, that agency should be responsible for the recovery of the proceeds of corruption relating to cases it investigates. To assist the CIC in the fight against corruption, a two tier unexplained wealth regime should be introduced by the Commonwealth Government. The first tier would be the current UEW framework. This requires an offence to be identified before the provisions can be utilised. While the second tier which will be based on the Commonwealth signing the UNCAC, will apply only to individuals and companies subject to Commonwealth constitutional authority. Similar to the UEW laws that exist in some of the States and Northern Territory it would not require a trigger offence to be present to operate.

The Commonwealth intends to introduce an offence of failing to prevent corruption, into the foreign bribery framework. The Government should consider introducing the law to also cover all Commonwealth departments and agencies. The managers of those departments and agencies must be held accountable to the government to prevent corruption. What is intended to be applied to the private sector in relation to foreign bribery should also apply to the Commonwealth Government for all corruption offences.

Currently the AFP is responsible for the investigation of foreign bribery offences. It is inefficient and perhaps ineffective to have two Commonwealth agencies investigating corruption. Corruption is not borderless. With the formation of the CIC, that agency should have sole responsibility for investigating all forms of serious corruption including offshore corruption committed by Australians and Australian companies. The responsibility of investigating foreign bribery offences currently undertaken by the AFP should be transferred to the CIC.

To prevent the growth of serious corruption, Commonwealth corruption law should be extended to federally registered political parties, trade unions and associations. The law should be further enhanced by making it an offence to use an instrument subject to Commonwealth jurisdiction, in the commission of a corruption offence anywhere. Instruments should include Australian fiat and digital currency and payment systems. This will enable the Commonwealth to undertake an investigation into corruption that impacts on Australia’s national interest, no matter who is involved or where it occurs.

The CIC should, when formed, be proactive and undertake corruption investigations on the basis of intelligence it has developed. This should include the use of human source teams to recruit informants in the business sector and a community engagement team to promote anti-corruption policies and the role of the CIC.
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The CIC should be Australia’s representative on all international anti-corruption forums. Corruption cannot be defeated without having trained and qualified people. An anti-corruption training academy should be established within the CIC in conjunction with an Australian university, to deliver various anti-corruption training programmes to national and state agencies and to foreign agencies. The latter particularly where Australia has strategic interests or where it intends to develop a strategic interest. Australia should lead the fight against international corruption and to that end, the CIC, supported by state and territory anti-corruption agencies should be equipped to promote and support the development and operation of an international anti-corruption court. The Commonwealth Government should push to permanently host the international anti-corruption court in Australia.

A major risk to the Commonwealth Government is in the area of procurement. The Commonwealth should institute a national policy banning from bidding for or obtaining any contract by a company, person or a company managed by a person, who have come to notice for corruption and other serious offences.

Government departments and agencies are also put at risk by corruption recycling. Officers dismissed or who are allowed to resign after being investigated for corruption but with no charges having been laid, can continue to obtain employment with other government bodies. A national corruption register administered by the CIC should be established to enable all Government departments and agencies at all levels to establish the background of the people it intends to employ.

The CIC model proposed by the Australian Government will not be capable of responding to current corruption threats to the Australian public service and to ministers, members of parliament and to their staff. The model lacks tactical and strategic vision in relation to national and international corruption. The Australia Government should seize the opportunity that developing a national anti-corruption body presents – that is, to develop the country into a world class leader in the fight against corruption.

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31 January 2019
1. **Background**

1.1 On 13 December 2018 the Commonwealth Government announced the introduction of a Commonwealth Integrity Commission.

1.2 In response to the announcement, the Commonwealth Attorney-General’s Department issued a discussion paper “A Commonwealth Integrity Commission—proposed reforms” and welcomed public comment on the proposed reforms. This submission is made in response to that request.

2. **Introduction**

2.1 The announcement that a Commonwealth Integrity Commission will be established is a major step forward in the fight against corruption in Australia. The extent of corruption is unknown. And while the paper refers to various sources indicating that corruption is low in Australia at the Commonwealth level of Government; the sources referred to have ignored the threats posed to Government. The draft proposal calling for the establishment of the CIC has been made without taking into consideration national and international corruption risks and strategic developments in the anti-bribery and corruption prevention area. What has been proposed is very short sighted and designed to place limitations on the power of the Commonwealth to pursue corruption matters.

2.2 The Commonwealth Government is a major component of the Australian economy and Australia is a middle ranked global power. By not having a fully capable CIC with a broad reach, the Commonwealth is abrogating its responsibilities to prevent corruption in Australia. And to some extent, perhaps not fulfilling its international obligations. The CIC proposed is not what should be expected from a country who is a member of the Organisation for Economic Co-operation and Development (OECD) and the Financial Action Task Force (FATF).²

2.3 The CIC must be able to tackle corruption at the Commonwealth level as other law enforcement agencies are authorised to do in relation to serious crimes, for example drug trafficking and money laundering. The CIC should be empowered with a broad range of powers in accordance with international standards and the anti-corruption framework include a wide range of offences to enable the CIC to strike when and how it chooses. It should not be hamstrung by unnecessary artificial barriers. A simple glance at existing anti-corruption measures, reveals that it is already too overly bureaucratic, which adds costs to the enforcement of the law and impedes the development of efficient government.

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² The Financial Action Task Force (FATF) is an inter-governmental body established in 1989. The objectives of the FATF are to set standards and promote effective implementation of legal, regulatory and operational measures for combating money laundering, terrorist financing and other related threats (e.g. corruption) to the integrity of the international financial system. [http://www.fatf-gafi.org/about/](http://www.fatf-gafi.org/about/)
2.4 This paper will outline what the structure of the CIC should be, including a recommended name change and the expansion of its role to include corruption committed by Australians and Australian companies offshore.

2.5 This paper uses case studies to highlight and explain how recommendations made in this report will operate. The case studies, unless indicated otherwise, are fictitious.

3. Change of Name

3.1 The name of the proposed Commonwealth Integrity Commission identifies and defines the role of the new agency in Australia. However, once established there is no doubt that the CIC would be involved in pursuing inquiries offshore under Mutual Assistance in Criminal Matters arrangements and via the AFP liaison network. The agency will also be likely to represent Australia at international conferences and forums on corruption issues. It is therefore appropriate that the agency have a name identifying not only its primary purpose, but also its country of origin.

3.2 Malkara Consulting considered recommending changing the name to the Australian Integrity Commission. However, the abbreviation AIC could be confused with another Commonwealth agency, the Australian Institute of Criminology or non-government agency for example: the Australian Islamic College or a process for example: “Claim for Assistance for Isolated Children form” (referred to as the AIC).

3.3 It is not the potential confusion with the abbreviation that prevented recommendation of the title Australian Integrity Commission. The use of the word Integrity in the title identifies two issues. There are at least two bodies in Australia with a role in preventing corruption namely the “Integrity Agencies Group” of the Australian Public Service Commission and the Integrity Coordinating Group (WA). The existence of another agency with the abbreviation AIC might cause confusion in the minds of the public particularly those who want to report corruption. The other issue is the use of the word integrity in the title. It implies that the major role of the agency will be in corruption prevention via the setting and monitoring of standards and education. When the primary role of the CIC is the investigation of corruption.

3.4 It might be viewed as a minor issue. However, fighting corruption requires that the role, functions and limits of an agency be clearly identified and outlined. And it starts with a name. And as will be explained later, the proposed CIC will provide an opportunity for Australia to play a larger role in the fight against global corruption. It is therefore appropriate the new agency has a name that identifies with Australia.

3.5 Consideration should be given to changing the title of the CIC to the Australian Anti-Corruption Commission (AACC).
4. Risk Based Approach: Understand the Threats

4.1 A risk based approach (RBA) should be the cornerstone of any response to crime prevention. The assessment of risk ensures that the most serious threats are identified and appropriate measures implemented to mitigate their impact. Without a risk based approach, resources can be wasted, with mitigation measures being applied to threats that are not serious, or worse, a serious threat is not identified and no measures are applied to counter it. The use of RBA is common in many industries and is a mandatory requirement to be adhered to by reporting entities under the Commonwealth Anti-Money Laundering and Counter-Terrorism Financing framework. It is therefore surprising that the Commonwealth Government, while requiring the private sector to apply RBA to combat money laundering (including proceeds of corruption) has not applied a risk based approach to the development of the proposed CIC.

4.2 The proposal calls for the establishment of two components within the CIC, namely a law enforcement integrity division and a public sector integrity division. It is intended that the law enforcement integrity division will incorporate the existing structure, jurisdiction (subject to inclusion of other agencies\(^3\)) and powers of the Australian Commission for Law Enforcement Integrity (ACLEI). The rationale behind the inclusion of the ACCC, APRA, ASIC and ATO under the jurisdiction of the law enforcement integrity division, is that they have elements that resemble law enforcement bodies\(^4\). And according to the proposal, these agencies together with the traditional law enforcement agencies already subject to ACLEI authority, may be “targeted by people or corporate entities or organised crime groups seeking to evade regulatory systems and enforcement action”. The proposal further records: “This combination of access to powers, information and influence presents a heightened risk and a need for enhanced scrutiny and integrity oversight arrangements”. While they are real risks, are they the only risks that exist to Commonwealth agencies and are those agencies the only agencies with information that would be of interest to organised crime? We believe the answers to both of those questions is no. There are many other Commonwealth agencies that have a regulatory role (for example in issuing licences or granting approvals) and are at equal or perhaps greater risk of being targeted by organised crime, corporate entities and foreign intelligence agencies. Given the value of the information many of the non-law enforcement agencies hold or the value of the projects that they must consider for approval or to licence, a very strong argument could be made that they have a higher risk of corruption.

4.3 By splitting the CIC into two components, the Government has attempted to apply, albeit incorrectly, a risk based approach to corruption prevention at the Commonwealth level. The approach is flawed. Measures designed to prevent

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\(^3\) ACCC, APRA, ASIC and ATO

\(^4\) Significant coercive powers and access to highly sensitive information
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risk, in this case, corruption risk, must be proportionate to the identified risks and the impact a risk would have should it occur. No attempt has been made to correctly identify all of the corruption risks facing the Commonwealth and the impact they would have. It is in the opening paragraphs that the proposal asserts that current arrangements to prevent corruption have “proven successful because the Australian public sector is consistently ranked as a low corruption jurisdiction and that there is generally accepted that there is no evidence of systemic or endemic integrity issues in the federal public sector”. It is important to note that Australia’s ranking and that of other countries is based on perceptions. And the absence of evidence could mean that the Australia Government is not looking in the right places or is not looking hard enough. Current contractual arrangements recently entered into with foreign companies by the Commonwealth Government, which are referred to below, strongly suggest it needs to look harder for corruption. Corruption is a hidden crime. Those conducting the bribes and those receiving them are highly unlikely to report their criminal activity. The Australian Government must be proactive and seek it out. It would be foolish for Australia to base its national response on our international anti-corruption ranking and the lack of evidence.

4.4 The proposal also states that the Commonwealth public sector is made up of a broad and diverse range of agencies, functions and officeholders. According to the proposal, services provided by the Commonwealth are quite different to state governments. Supporting that argument, it states that the Commonwealth Government is responsible for distributing significant funds, but often does so through the State Governments or Commonwealth statutory agencies or services. This argument is used by the Commonwealth to argue that it would therefore not be “appropriate to have a ‘one-size-fits-all set of significant coercive powers (ACLEI’s powers are akin to those of a Royal Commission’s) for the broad range of public service office-holders and entities engaged to perform public functions”. While it is true the Commonwealth does use various Commonwealth agencies and States and Territories to distribute funds, what has been overlooked is that decisions made in relation to how, to whom and when the funds are distributed can be corruptly influenced. And it is entirely incorrect to assert that the Commonwealth Government is quite different from other forms of government in Australia. The argument posited, ignores the flip side of Commonwealth operations. The Commonwealth is a major procurer of services and products which are used to undertake its operations. And every year the amount of goods and services procured by the Commonwealth Government increases with a recent example being defence acquisitions. And as will be argued later, a one size fits all approach is an appropriate model for a national anti-corruption body but supported by other elements in the organisation.

Need for a Risk Based Assessment

4.5 The major corruption risks facing the Commonwealth will not be known until a national anti-bribery and corruption risk assessment has been undertaken. An
example and a precedent for the assessment of crime risk at the Commonwealth level is the National Threat Assessment on Money Laundering 2011\(^5\). No discussion about the role, structure and staffing of the proposed CIC should be undertaken until an ABC risk assessment has been completed by the Commonwealth Government.

4.6 The law enforcement integrity division has been proposed on the basis of a combination of risks involving the powers, information and influence of individual agencies. No reference was provided for how those criteria were identified. Missing from the decision to divide the proposed CIC into two divisions is the impact of any potential act of corruption. Potential impact of an act of corruption will determine any response. An ABC risk based assessment would include the likely impact which would provide a better understanding of how the Commonwealth should respond to corruption at the federal level. While an agency having the power to intercept phone calls or insert listening devices would seem to be high risk to corruption, the likelihood of it occurring and impact of that risk if it occurred needs to be assessed.

4.7 For example, a decision to misuse or not use an electronic surveillance device or unlawfully release information pertaining to it, would have serious consequences for an investigation and potentially in relation to someone’s life. However, a corrupt payment made to a minister or to ministerial staff or department officers resulting in the acquisition of a major defence asset could have far more significant consequences, namely loss of life if the asset sinks or crashes (personnel risk) and/or found to be totally unsuitable for the purpose it was acquired (significant financial risk).

4.8 In relation to influence, the question is influence over what? How is that defined? Is influence meant to mean the level of influence that a department has over Commonwealth Government decisions? Then surely large departments as measured by the number of staff employed would have the biggest influence? Departments such as the Department of Human Services and Department of Defence would need to be included? Or is it measured by the size of their expenditure? Then Defence ($31.2 billion), Department of Human Services (social security and welfare - $176 billion & health - $78.8 billion) and Education ($34.7 billion) would need to be included in any list of influencers. Or is influence measured by the authority held by an organisation? Corruption risk exists along all components of the law enforcement and prosecution services supply chain. In relation to investigations, the Commonwealth Director of Public Prosecutions has the ultimate authority in deciding who will or will not be prosecuted for Commonwealth offences in Australia. The decision is not made by Commonwealth law enforcement agencies. Corruption in the DPP could result in a prosecution being abandoned or serious charges withdrawn and replaced by less serious charges.

4.9 If the criteria powers, information and influence as identified by the Government are viewed objectively in relation to every Commonwealth Government department agency, contractor etc, a different list of agencies would be the result. The following table lists the agencies that perhaps should be included using the criteria set by the Government.

### Agencies

- Australian Criminal Intelligence Commission
- Australian Federal Police
- Australian Transaction Reports and Analysis Centre (AUSTRAC)
- Department of Home Affairs
- prescribed aspects of the Department of Agriculture and Water Resources (DAWR)
- Australian Competition and Consumer Commission (ACCC)
- Australian Prudential Regulation Authority (APRA)
- Australian Securities and Investments Commission (ASIC)
- Australian Taxation Office (ATO)
- Australian Building & Construction Commission
- Australian Sports Anti-Doping Authority
- Australian Geospatial Intelligence Organisation
- Australian Security Intelligence Organisation
- Australian Secret Intelligence Service
- Defence Intelligence Organisation
- Australian Signals Directorate
- Office of National Assessments
- Reserve Bank of Australia
- Australian Postal Corporation
- Indigenous Land Corporation and its three subsidiaries
- All Commonwealth Service Providers listed in the CIC proposal
- Fair Work Commission
- Office of the Director of Public Prosecutions
- Australian Bureau of Statistics

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6 Malkara Consulting does not agree with the approach undertaken by the Government but to work with it the original list of agencies has been retained. From a risk assessment perspective, the list is totally meaningless without other criteria being included. Agencies added to the list appear in green.
Commonwealth Integrity Commission - Malkara Submission

- Future Fund Management Agency
- Australian Communications and Media Authority

4.10 In relation to influence, what is being discussed is potential impact. And in determining what influence means, we have adopted the most serious outcome when allocating departments and agencies in the above table. In making the selection we have stripped from the debate any emotion or assumptions. And in the past there has been significant emotions and assumptions expressed by third parties in relation to perceived law enforcement corruption, particularly by those in and out of Government who are not aware of the very stringent controls that are in place and how various systems operate. The assessment of how effective those controls are, would normally be taken into consideration when preparing an anti-bribery and corruption risk assessment.

Major Corruption Risks

4.11 There are three major corruption risk areas at the Commonwealth level, namely:

a. Information
b. Licensing and approvals and
c. Procurement activities

4.12 Information risk has been covered above. The Commonwealth performs a major role in approving or licensing various activities. Major areas requiring Commonwealth approval either at department or ministerial level include:

- Immigration
- the environment including water management
- foreign ownership
- energy regulation
- heritage approvals
- sea dumping
- offshore petroleum activities
- broadcast & telecommunication rights
- transport
- fisheries management
- importation and exportation of goods

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7 Not intended to be an exhaustive list. All areas of Government at risk of corruption. See the Guardian Australia article “Housing fraud widespread within Australian defence force – documents”. https://www.theguardian.com/politics/2016/mar/30/housing-widespread-within-australian-defence-force-documents


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Many of the players involved in those industries, particularly the international companies, have incomes larger than many countries (some rank in the top 100 world economies) and have very complex offshore corporate structures making it almost impossible to identify many beneficial owners and the movement of funds. The involvement of the Commonwealth Government in these processes has grown significantly since World War 2 and no attention has been paid by any report into the potential corruption risks associated with these activities. The potential corruption risks associated with those activities is much higher than the risks identified for law enforcement agencies. While not suggesting that any company mentioned in this submission will engage in corrupt behaviour, the reality is that many companies in the industries referred to have previously engaged in illegal or corrupt behaviour.

4.13 In 2016 the Select Committee into the Establishment of a National Integrity Commission considered an opinion published in 1993 which, in an argument against the need for a national integrity commission, advised that corruption at the Commonwealth level was low compared to the Australian States because the Commonwealth Government was more concerned with broad policy issues that didn’t lend themselves to bribes, kickbacks or decisions and the key decision makers are more “physically remote” from the day to day decisions where corruption occurs\(^9\). That view was inaccurate in 1993 and remains so today. Corruption of a policy issue can have detrimental impact on the Australian economy, an individual Australian State or Territory, the environment etc. And those involved in the decision making particularly those occupying senior positions in Commonwealth departments or agency or Ministers in cabinet level are at high risk of being corrupted. The opinion did not take into consideration the corruption risk associated with Commonwealth procurement\(^10\).

4.14 Procurement of goods and services is a major corruption risk facing the Commonwealth Government and agencies. The Commonwealth Government is the biggest single purchaser of goods and services for its own use in Australia. With the Department of Defence being the largest procurement agency. Australia is embarking on a defence building program, the biggest undertaken since the Second World War and the sums involved are staggering. For example:

a. $50bn for new submarines, $35bn for frigates and $3bn for offshore coastal patrol vessels. With upgrades to bases and training facilities and

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\(^10\) For example, major defence procurements before 1993 included 8 ANZAC frigates, 6 Collins Class submarines and 75 F/A-18 Hornet aircraft. A 1994 Industry Commission Defence Procurement report stated: “Buying goods and services for the Australian Defence Force (ADF) is a basic part of national defence. It involves very large expenditure: nearly $5 billion a year or about half of total defence outlays”. https://www.pc.gov.au/inquiries/completed/defence-procurement/41defenc.pdf
spending on skills enhancement projects, the estimated total cost is $89 billion

b. While the Australian Army is due to get new Boxer infantry fighting vehicles at an estimated cost of $5 billion and 1,044 medium and heavy trucks, 872 modules and 812 trailers worth $1.4 billion and 450 infantry fighting vehicles

c. The Royal Australian Air Force is being equipped with new stealth fighters, maritime patrol aircraft and drones.

d. Over the 2017/18 financial year, the Commonwealth Government spent approximately $19.7 billion enhancing Defence Force capability.

4.15 In December 2017 Fairfax Media reported on defence department staff colluding with contracting companies to “design handsomely-paid jobs with requirements tailored to their own experience”\textsuperscript{11}. The report further advised that the Department of Defence awarded contracts to various companies without a competitive tender process and with little justification that the contracts represented value for money. While there might exist valid grounds for a department to issue a contract without a competitive tender process being involved, the acquisition of any good or service should be easy to justify if questioned. Which in many instances appears not to have been the case? According to the report, departmental guidelines for buying goods and services were not followed, with breaches of procurement practice and "maladministration" occurring over several years. 80 procurements breached the guidelines, while 45 procurements of those were unable to be examined because of missing paper work. The report does not list the value of the contracts involved. Poor project management systems, complacency or a culture of non-compliance are major corruption risks to any government department or agency. And this issue represents another example of corruption risk within Commonwealth agencies.

4.16 In addition to the high risk of corruption in procurement, there are corruption risks in other areas of defence. For example:

a. In December 2018, the Sydney Morning Herald reported that the Department of Defence admitted that over the past two years over 32,000 non-public service employees were given government security clearances by the Defence department\textsuperscript{12}. This is despite Australian Government policy requiring the issue of security clearances to be kept to a minimum. The article identifies the high-level of work outsourced by


the department. But the most astonishing aspect of the article was the admission by the department that it does not track the number of contractors working on its projects. The outsourcing of staff is common in all Commonwealth Departments. And those seeking to work for a department are required to have a security clearance with the level determined by the position and work they will be undertaking. Obtaining a security clearance is a rigorous process and anyone seeking to engage in a crime involving any Australian department would consider using corruption to obtain one. Corruption activity could be targeted at the Australian Government Security Vetting Agency or anyone of the 23 private companies used to outsource security vetting. These companies are not referred to in the draft CIC proposal.

b. The international defence industry is one of the most corrupt industries in the world. While the level of corruption varies between the different companies, the reality is, some of the companies the Australian Government has contracted with to provide defence equipment have a history of engaging in corruption. If those companies were individuals, they would never be given security clearances and the government would not deal with them. Yet the Australian Government continues to do so without an anti-bribery and corruption assessment being undertaken in relation to each acquisition or demanding if the people in authority in those companies that have engaged in corruption in the past have been removed.

4.17 Other than the threat posed by corporate entities, the Commonwealth faces corruption risks from organised crime and foreign intelligence agencies (including allies, friends and potential foes) to use corruption to source industrial and military information. While China and Chinese companies are frequently mentioned as being a threat to Australian interests, it is worth remembering that our allies also constitute a threat to our industrial, political and military secrets. And all of those foreign agencies use bribery to achieve their objectives.

13 Further information into the involvement of organised crime in the public sector see: “Understanding and responding to serious and organised crime involvement in public sector corruption” a report issued by the Australian Institute of Criminology in October 2018 http://www.aiic.edu.au/files/Understanding+and+Responding+to+Serious+and+Organised+Crime+Involvement+in+Public+Sector+Corruption+Report.pdf


17 This is acknowledged in foreign legislation. For example, the UK Bribery Act provides a defence for a person charged with a bribery offence to prove that the person’s conduct was necessary for either the proper exercise of any function of an intelligence service, or the proper exercise of any function of the armed forces when engaged on active service.
In relation to the corruption risk posed by organised crime in Australia, the Australian Criminal Intelligence Commission warned as recently as July 2018 that: “Corruption of public sector officials has substantial multiplier effects and benefits for organised crime. There may be significant links between corruption in the public sector and organised crime groups that, by their very nature, remain hidden. The key challenge in identifying and investigating corruption is that corrupt conduct occurs in secret, between consenting parties who are frequently skilled at deception”\(^\text{18}\). Like fighting any disease, the identification of corruption requires the application of a process of elimination using a range of intrusive measures by an agency dedicated to combating it. It would be a mistake to think that organised crime has not infiltrated the public sector.

5. **Bribery Involves Two Main Actors**

5.1 Corruption is not a solo criminal activity. In any act of bribery there are two major players. The person receiving the bribe (referred to as passive bribery) and the person making the bribe or offer (referred to as active bribery). The focus of the CIC proposal has been on passive bribery. The proposal has not considered the threat posed by active bribery, which an ABC risk management assessment would consider and identify.

5.2 It is a mistake to assume that the risks involved in passive bribery are the same for active bribery. They are entirely different with the main difference between the two being capability. As outlined in section 4 above, the Commonwealth engages in very high risk industries and with some organisations that have a history of either unethical or corrupt behaviour. Defence is just one industry. Other high risk industries were outlined above, but significant amongst them is oil and gas and foreign ownership of Australian property. Companies involved in defence and oil and gas exploration and delivery have enormous resources. Some are amongst the top 100 global economies.

5.3 It is important to understand the capability of each group in the active bribery category because the role, powers, structure and resources of the CIC will be determined by it. It should not be determined by the capability of the passive actors. Some of the companies operating in Australia and competing for Government contracts provide advanced surveillance, communications, information and cyber security technology.

5.4 The following table provides a snapshot of the capability that major corporations, organised crime groups and foreign intelligence agencies could expect to use when undertaking corruption activities against Australia’s national interests.

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Capability

1. Secure means of communication equal to or better than the capability of Australian agencies to penetrate. Many defence companies are manufacturers of highly complex secure communication equipment.

   Multiple SIM cards and phones offshore in corporate or false names and using encryption technology

2. Organised crime and corporate entities have the ability to muster or contract as many staff that are needed to counter the efforts of law enforcement. Often the numbers employed by organised crime groups dwarf human resources available to Australian police and crime agencies. For example, while police are conducting surveillance on a suspect (noting it can involve 6 to 8 operatives to follow one suspect), organised crime employs people to identify and follow police surveillance

3. Ability to arrange meetings offshore in secure locations

4. Access to bank accounts and payment systems located in major financial centres and offshore secrecy jurisdictions

5. Ability to acquire and use complex corporate structures to hide the movement of funds; the persons involved and ultimate beneficial owners

6. An abundance of financial resources to tap into

7. Access to false identities

8. Use of nominees or intermediaries including professional nominees operating in secrecy jurisdictions

9. Technology to detect listening devices & tracking devices

5.5 The following case studies highlight the above issues:

**BAE & the Saudi al-Yamamah Case**

Al-Yamamah, Britain's biggest ever arms deal, involved the sale of 72 Tornado planes, 30 Hawk trainer jets and 30 other trainer planes by the UK Government (via BAE) to Saudi Arabia for £43 billion. To conceal payments to Saudi royals and intermediaries, BAE set up Novelmight Ltd, a front company with the help of the Swiss bankers, Lloyds TSB in Geneva.

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19 BAE's secret money machine. [http://www.theguardian.com/baefiles/page/0,,2095840,00.html](http://www.theguardian.com/baefiles/page/0,,2095840,00.html)

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Security at the new company’s premises included video surveillance cameras and encrypted communications (fax and phone system). While a UK electronic specialist was sent to scan for listening devices. Once secure, all records containing payments to offshore agents were then shipped from the UK to Geneva.

Novelmight was later closed down and re-registered in the British Virgin Islands, a well known tax haven. Swiss lawyers also set up offshore companies for agents to receive their payments, often into Swiss accounts.

BAE set up a second front company Poseidon Trading Investments Ltd, also incorporated in the BVI, to handle the Saudi commission payments for Al-Yamamah deal. Approximately £1bn is believed to have been passed through its accounts to Saudi agents, facilitated by Lloyds TSB.

A slush fund was used by BAE to disguise corrupt benefits for Saudi officials who went on vacation trips to the US and Europe. The then head of the Saudi air force, Prince Turki bin Nasser (who was arrested in November 2017 in Saudi Arabia for corruption), along with family members, were provided with unlimited shopping, plane tickets and free holidays by BAE. Two front companies used by travel agents working for BAE arranged the payments and holidays.

BAE used Red Diamond Trading Ltd also incorporated in the British Virgin Islands to channel payments via company accounts in London, Switzerland and New York. Funds were sent to agents in South America, Tanzania, Romania, South Africa, Qatar, Chile and the Czech Republic and to UK citizens who were working as consultants for BAE.

In 2018 BAE won the contract to build Australia’s Hunter class frigates.

**Karachi Affair**

In 1997, an investigation was launched into the sale of 3 Agosta class submarines by Direction des Constructions Navales (DCN, later known as DCNS, now Naval Group) to Pakistan. A car bomb explosion in Karachi, Pakistan, on 8 May 2002, killing 14 people, including 11 French employees of DCN exposed the corruption scandal. The Pakistani chief of Naval Staff later admitted that bribes were paid by DCN. The bribes and kickbacks where paid to middle men who distributed them to Pakistani officials to ensure the deal went through.

Naval Group has been awarded the contract to build 12 Attack class submarines for Australia.

**Supply of Submarines to Malaysia**

In 2010, French authorities launched an investigation into the 2002 sale by DCNS of three submarines, including two Scorpene class, to Malaysia. Allegations of corruption relating to the sale arose following the murder of a 28-year old Mongolian interpreter in 2006 by two officers of the Malaysian Special Branch. Four people are being prosecuted in France for their part in using bribery over the sale of the submarines. Two of those charged are
former chairmen of DCNI. Investigation concerns the payment of 30 million Euro for “technical assistance” to an associate of the former Malaysian defence minister (and later Prime Minister). Payments were made through a series of shell companies, including one based in Hong Kong.

DCNS now known as the Naval Group has been awarded the contract to build 12 Attack class submarines for Australia.

**ZTE Chinese telecommunications company**

According to news reports which referred to documents filed in the District Court of Dallas, ZTE the Chinese telecommunications company was established partly as a front for military intelligence and has been linked to corruption in 18 countries. According to the Sydney Morning Herald, China’s Ministry of Aerospace founded ZTE as a front to send officers abroad under non-diplomatic covers such as scientists, businessmen and executives for the purpose of collecting intelligence.

**Siemens**

The Siemens corruption case involved the payment of $1.4 billion in bribes by the company to government officials and civil servants in Asia, Africa, Europe, the Middle East and the Americas. For decades paying bribes was the accepted way of doing business at Siemens. Funds were channelled through bank accounts held by intermediaries and agents masking as consultants (Dubai and Hong Kong). The company had a code of ethics that required senior officers to act responsibly and with integrity. However according to a German prosecutor, the Siemens compliance programme existed only on paper.

In March 2018, a former Siemens executive pleaded guilty in connection with a bribery case dating back two decades involving payments to Argentine government officials over a $1bn contract for national identity cards.

In Australia, Siemens provides systems that power and control the Royal Australian Navy’s Anzac class frigates; power and propulsion for the Royal Australian Navy’s Canberra class landing helicopter docks, and configuration management software and support for the Australian Army and Navy.

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22 Financial Times. (2018). Former Siemens executive pleads guilty in $100m bribery case. [https://www.ft.com/content/6482c2f2-289c-11e8-b27e-cc62a39d57a0](https://www.ft.com/content/6482c2f2-289c-11e8-b27e-cc62a39d57a0)

Kellogg, Brown & Root (KBR)

In 2008, it was alleged that KBR had avoided paying hundreds of millions of dollars in US federal Medicare and social security taxes by hiring workers through shell companies based in the Cayman Islands (a tax haven). In 2009, KBR pleaded guilty to multiple criminal counts for violating U.S. foreign corruption laws by bribing Nigerian officials. KBR agreed to pay a settlement of $402 million for bribing Nigerian government officials to win more than $6 billion in contracts for liquefied natural gas facilities.

The US Federal Contractor Misconduct Database (FCMD) lists 39 instances of misconduct by KBR since 1995 and an additional 16 instances of alleged misconduct pending resolution.

Kellogg, Brown & Root is a Commonwealth Government Service Provider.

In March 2018, Naval Group signed a Design Services Subcontract (DSSC) with KBR to support the design of the future submarine construction yard in Adelaide.

5.6 In presenting the above examples, Malkara Consulting is not implying or suggesting that any of the companies mentioned are currently engaging in corruption anywhere or will engage in acts of corruption in the future. However, the case studies do highlight the corruption risks involved and demonstrate the extent that companies will go to pay bribes and win business with some of those companies operating in Australia.

6. Future CIC Capability

6.1 It is clear from the proposal that the Commonwealth Government CIC model wants the “minimalist approach” to combating corruption. The nature of the corruption threat should determine the level of resources and the type of powers that should be available to the CIC. And that threat must be assessed from the perspective of the bribe taker and the bribe payer. And as explained above, the capabilities of those intending to pay bribes and hide the payment of a bribe can be significant.

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27 KBR revenue breakdown by business segment: 39.1% from Engineering & Construction, 7.9% from Technology & Consulting and 53.1% from government services. A breakdown of KBR revenue shows the company earns 8.0% of total revenue from Australia.

6.2 In the discussion paper, the Australian Government has proposed:

a. access to telecommunications and surveillance device powers by the CIC public sector integrity division will be part of the consultation process on the proposed model

b. the CIC will not investigate direct complaints about Ministers, Members of Parliament or their staff received from the public at large

c. the Public Sector division will not be able to exercise arrest warrants, hold public hearings, or make findings of corruption, criminal conduct or misconduct at large.

CIC Investigative Powers

6.3 What is evident is that the decision by the Commonwealth Government to create two divisions in the proposed CIC and restrict the powers available to pursue public sector corruption, is designed to protect the reputation of government ministers and members of parliament. Whether an agency is established to be a specialist law enforcement body or has a unit that undertakes a law enforcement role, the minister responsible for that body, does not get involved in any of the operational planning or decision making. To do so, could amount to interference or worst-case scenario, pervert the course of justice. But in relation to other areas of Government, Ministers are more directly involved and for major matters involving Government policy and direction, often make the final decisions. What the Commonwealth CIC proposal is attempting to do is to protect ministers who might get caught up in a corruption scandal, when one or more of their staff or public servants employed in the department, he/she is responsible for, engages in an act of corruption. This approach proposed by the Australian Government is something that would be expected from a developing country rather than a member of the G20 (including the G20 Anti-Corruption Working Group), OECD (including the OECD Working Group on Bribery) the Financial Action Task Force and the APEC Anti-Corruption and Transparency Experts’ Working Group.

6.4 The decision to split the CIC into two components and restrict the powers available to the public sector division, defies logic. The discussion paper argues that the law enforcement division needs the powers mentioned in the paper because people employed in those agencies with access “to coercive powers and knowledge of law enforcement methods are better able to disguise corruption and corrupt conduct and can have a greater impact”. While the same powers available to the law enforcement division are not fully available to the public sector division because they “reflect the different nature of the corruption

29 In relation to the restriction on arrest warrants not being able to be exercised requires clarification. Does it mean that people subject to the jurisdiction of the public service division cannot be arrested or simply cannot be arrested under warrant? Though later in a chart appearing on page 4, it has been made clear that the public integrity division cannot make arrests, enter/search premises, seize evidence or hold public hearings.
risk in the areas it will oversight”. It is clear that this provision has been drafted by those without any knowledge or experience in investigating corruption. The corruption risk posed to non-law enforcement agency staff by private sector organisations and foreign intelligence agencies have not been taken into consideration. And no account has been made of the capability of those who would pay bribes to public officials.

6.5 The use of telephone interception, listening devices and electronic surveillance (tracking) devices has proven to be essential tools in the investigation of crimes where there is no direct victim for example: drug trafficking and corruption. Often from experience, they are the tools that have had the most impact in evidence collection. This is true even in situations where criminals have maintained well exercised communications discipline. In relation to the deployment of electronic surveillance resources, the major overriding criteria that should be used is the nature of the crime involved and the capability of those involved.

6.6 Telephone intercepts and listening devices can:

a. record direct evidence against those involved in corruption (for example in a forward looking proactive investigation the bribe payer and the bribe receiver are recorded discussing aspects of the crime – either the method and/or type of payment or the activity that the bribe receiver is to undertake or not undertake as the case maybe).

b. establish a previously unknown link between those involved and the nature and strength of their relationship (for example, information is received that a public servant is engaging in corruption with a service company that continually wins contracts with the department, but no link can be found with the company as the company is using third party intermediaries).

c. identify unknown telephone numbers (in corruption cases it is very common for those engaging in active bribery [the payer] to use multiple SIM cards and phones. And to protect themselves will provide their target with a new phone to make and receive calls).

30 Rex “Buckets” Jackson who when he was the NSW Minister for Prisons set up a scheme for the early release of prisoners and released some prisoners in return for bribes. The scheme and involvement of the minister was detected by the Australian Federal Police who were legally intercepting the phone of underworld figure Fayez (Frank) Hakim. Sydney Morning Herald. https://www.smh.com.au/national/nsw/time-runs-out-for-disgraced-prisons-minister-20120101-1ph9s.html.

31 For example, frequently change phones and SIM cards and use short coded conversations.

32 Telephone interception was used to gather evidence in relation to Lukas Kamay, (former NAB banker), and Christopher Hill, (former Australian Bureau of Statistics (ABS) employee). Record seven year jail sentence for perpetrator of Australia’s worst instance of insider trading. file:///C:/Users/Malkara%20Consulting/AppData/Local/Packages/Microsoft.MicrosoftEdge_8wekyb3d8bbwe/TempState/Downloads/Record%20seven%20year%20jail%20sentence%20for%20perpetrator%20of%20Australia’s%20worst%20instance%20of%20insider%20trading%201.pdf.
d. identify the time and place of future meetings and secure meeting places that can be covered by physical surveillance (photographs of people meeting to engage in corruption can be important evidence. Information of any intended meeting place is usually captured initially by an electronic device)

e. record the use of coded conversations which when decoded can be used in evidence. While use of short conversations which are crypted can be used as circumstantial evidence in relation to a potential ancillary offence for example money laundering

f. identify the method of any payment or offer (the bribe) and how it is hidden or disguised (laundered)

g. explain the method of corruption especially where fake invoices, foreign shell companies, false names and addresses are used

h. often a carefully concealed listening device in premises (e.g. a corporate office) or carried into a meeting by a co-operating co-offender will be the only means available to secure evidence of a crime

i. Identify the location of proceeds of crime, who was involved in laundering it and who ultimately controls it

j. Identify attempts to conceal or destroy evidence or identify collusion between witnesses in regard to what evidence they would provide during a hearing or interview

6.7 If it is intended to mean that those who are subject to investigation by the public service division cannot be arrested, then that would be a major impediment to

33 Andrew Theophanous MP was the first federal MP to be convicted of accepting bribes involving the receipt of money, or sought sexual favours, in return for helping Chinese immigrants with their visa applications. He was secretly tape recorded during a meeting with a National Crime Authority informer. The ignominious end of a not-so-brilliant career. https://www.theage.com.au/national/the-ignominious-end-of-a-not-so-brilliant-career-20020523-gdu8bz.html


35 This occurred during a WACCC investigation code named Operation Neil in 2016. Interesting to note that the department involved initially reported to the WACCC before that agency commenced its investigation, that as a result of its internal investigation serious issues regarding procurement practices existed with there being little or no evidence found of adherence to the basic tenets of good procurement and contract management which was compounded by inadequate administration and record keeping practices. The department in its report to the WACCC failed to address the conduct of any particular public officer involved. Serious misconduct was then uncovered by the WACCC. Had the WACCC not undertaken an investigation using a full range of covert evidence gathering techniques, it is unlikely the extent of the criminality would have been uncovered. https://www.ccc.wa.gov.au/sites/default/files/Report%20into%20bribery%20and%20corruption%20in%20maintenance%20and%20service%20contracts%20within%20North%20Metropolitan%20Health%20Service.pdf
the investigation of corruption. Arrest is normally an act of last resort and is undertaken to:

a. Prevent a repetition or continuation of a corruption offence (particularly where there is a pattern of corruption e.g. Commonwealth official releasing to a tenderer for payment, details of other tenders over the course of several different projects, which are meant to be kept confidential[36]).

b. Prevent witnesses from being tampered with

c. Where an alleged offender is a flight risk (for example a foreign national employed by a large international arms supplier bribes a senior defence force member in order to win a contract. Both the ADF member and the foreign national may be inclined to flee Australia’s jurisdiction)

d. Prevent the loss, destruction or alteration of evidence (for example a corrupt public servant has evidence on a portable hard drive which can easily be destroyed and he/she is arrested to prevent the loss of data).

6.8 The searching of a suspect’s premises (house, car, boat etc) can lead to the discovery of important evidence. Similar to not being able to arrest public servants and those people covered by the jurisdiction of the public integrity division, would have a major impact on the success of a corruption investigation.

6.9 The following examples highlight the risk to a corruption investigation if the CIC public integrity division is denied the power to arrest suspects and/or search and seize evidence37:

Case Example 1
A senior public servant involved in the selection of a new information system provider for their department, accepts a bribe from one of the tenderers on the understanding he will recommend the selection of that firm to his department. The firm involved in the act of corruption instructs the public servant that he will be given a debit card to access an account that will be set up offshore. The public servant is to obtain his bribe payment by accessing the account via an ATM. He is instructed that he is not to use a debit card issued by an Australian bank at the same time he uses the ATM nor is he to use the foreign debit card to purchase any goods or pay for any service in Australia. It is to be used to obtain cash only. The bribe payer has


[37] All of the examples given are fictitious and any resemblance unless specified, to any real person, entity or event is merely coincidental and not intended.

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decided to use this method to reduce its risk of being caught if the public servant is exposed.

Use of the debit card attached to an offshore account held in a secrecy jurisdiction restricts the amount of cash the public servant can withdraw at any one time and therefore the amount he can “splash around”. And being in a secrecy jurisdiction it makes it harder to trace. The account is held in the name of an international business company which has been obtained from a different secrecy jurisdiction. The public servant is also given a SIM card and a new phone to use should he need to contact anyone in the firm. The SIM is for an overseas phone number.

The public servant has come to the attention of the CIC. The CIC makes inquiries with all Australian based financial institutions and other than an account used to receive his salary and a credit card account, he has no other known accounts. Surveillance has identified the public servant using an ATM but there is no record of any funds being withdrawn or deposited into his known Australian accounts. All the owner of the ATM can advise is that a card has been used to access a foreign bank account and the amount of money withdrawn. He receives a notice from the CIC to attend a hearing (and to bring along relevant documents, assuming the notices will have that power). Upon receiving the notice to attend, the public servant, as advised by his bribers, cuts up the debit card and destroys it. He then disposes of the SIM and mobile phone. All of these items would have been important evidence but because the CIC couldn’t search him or his premises, they no longer exist. His handler who is a foreign third party agent hired by the company to manage the public servant leaves Australia uninterrupted by the CIC.

Arrest of the public servant and/or a search of his premises and immediate examination before a hearing would have increased the chances of evidence being recovered and the identity of the handler being known before he evaded capture by Australian law enforcement agencies.

Case Example 2

Referring to the events outlined in case example 1. The public servant, after destroying all evidence, then books a flight online and does a “Christopher Skase”. He departs Australia for an overseas location. He has been placed on “PACE alert” and Australian Border Force at the airport notify the CIC (assuming that CIC will be able to initiate alert requests) that the person is leaving Australia. The CIC advise that they do not have the authority to stop

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38 Assuming the public sector integrity division of the CIC will have a power to demand information from a financial institution.
39 Assuming the public sector integrity division of the CIC will have the power to conduct physical surveillance on a public servant.
the public servant leaving Australia. The AFP at the airport is contacted but they decide not to take any action as there is no arrest warrant in existence and after being briefed on the case by the CIC, decide that while there might exist suspicion of the public servant being involved in a corruption offence, to make an arrest they need reasonable grounds to believe that he is involved in an offence. To search the public servant for evidential material relating to corruption, the AFP needs a search warrant for a person which does not exist. Satisfied that the public servant might be carrying currency (only requires reasonable suspicion to search a person leaving Australia for currency) they undertake a search of the public servant but only find travel documents and an Australian debit card issued to him. The public servant is allowed to proceed overseas on a one way trip\(^\text{41}\).

**Case Example 3**

A public servant with access to information relating to the forthcoming federal budget is friends with a journalist. The public servant communicates information to the journalist by telephone. The journalist has a SIM card in a false name which is used to contact the public servant. Information about the budget is being leaked and published by the journalist which has caused alarm in the department and with the relevant minister. A manager of the public servant has observed that person leaving their desk during the day and walking out of the office to use a public pay phone located nearby. This is despite the fact the public servant has a private mobile telephone. A search of phone records for the mobile phone held by the public servant\(^\text{42}\) reveals that the person has called and been called 6 months previously by the journalist but there has been no recent contact. The CIC wants to intercept calls being made from the public phone box to identify who the public servant is calling and what is being said. But the CIC does not have the power to undertake interception of telephones or to place a listening device inside the phone booth or inside the public servant’s car or home.

**Case Example 4**

A member of the Defence Ministers staff is a passionate anti-communist and concerned about the growth of Chinese influence and military activity in the Pacific region. She is also a devoted Christian and the reported restrictions on the rights of Christians to practice their faith in China upset her. Over time she is befriended via political contacts by a Chinese person who claims to be from Taiwan. This person also claims to be a Christian and detests the

\(^{41}\) It is not always possible to obtain the extradition of a person from overseas. Which is rendered harder when evidence is destroyed. Note the article: Ones that got away: alleged killers on the run. [https://www.smh.com.au/national/nsw/ones-that-got-away-alleged-killers-on-the-run-20180727-pdzu1w.html](https://www.smh.com.au/national/nsw/ones-that-got-away-alleged-killers-on-the-run-20180727-pdzu1w.html). If it is difficult to extradite some murderers back to Australia, extraditing persons involved in corruption will not be any easier.

\(^{42}\) Assuming the public sector integrity division of the CIC will have the power to request phone records and meta data from telecommunications companies.
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Communist party of China. During discussions, this person from Taiwan informs the member of staff that Taiwan would be better protected if it could build its own diesel electric submarines. But it lacks the technology that Australia has access to from foreign submarine providers. Wanting to help her friend and protect Taiwan against threats from mainland China, the member of staff copies information pertaining to the new Attack Class submarines being designed by the French Naval Group for Australia and passes it on to him. She obtains the information from the Defence Minister's office, which he receives from time to time from the Department of Defence. Unbeknown to the member of staff, the person claiming to be from Taiwan is from the Peoples Republic of China but has residency status in Australia. This person while having a job in Australia, is an agent of influence employed by the Ministry of State Security of China.\(^{43}\)

The CIC has been briefed by ASIO of the contact being made between the staff member and the MSS agent. Information obtained by ASIO is inadmissible in court. The CIC wants to obtain telephone intercepts and listening devices to capture any evidence of illegality between the staff member and the MSS agent. But it does not have the power to do so. It also wants to insert a tracking device into the staff members car which would enable the agency to track the movements of the suspect and identify meeting places. But the agency does not have the power. The CIC suspects that the staff member keeps at her home copies of the information stolen from her minister before handing it to the MSS agent. This is important evidence. Unfortunately, the CIC does not have the power to obtain a search warrant to search her premises and to seize the evidence before it is handed over to the MSS agent.

[ASIO could brief the AFP or the CIC could obtain assistance from the AFP but why should either situation have to occur? A national anti-corruption body should be able to pursue corruption in any area of government where it occurs and if necessary, totally independent of any other body.\(^{43}\)

6.10 The proposal does not state that the public sector integrity division cannot undertake controlled operations and use assumed identities. But there is no reference to it being able to do so either if the CIC is created as per the proposal. Controlled operations and the use of assumed identities are important tools in the investigation of corruption, regardless of who is involved. Without their use, it will be very difficult to gather corroborating evidence against the co-accused whether they are the bribe receiver or bribe paying.

6.11 The following example highlights the use of controlled operations:

Case Example 5

A public servant suspected of receiving a bribe has been summoned to appear before a CIC hearing. During questioning the public servant admits that he has been offered money to provide confidential information about Australian exports and imports before it is released to the public. The public servant has been given a number to call by a person he knows only by the name of “Rick”. He does not believe that Rick is the contact’s real name and thinks he is working for someone else. The CIC suspects the information might be destined for someone who trades in Australian currency or commodities. According to the public servant, the instructions he received were specific. He was to print the information (not email it), make a phone call and arrange to meet someone who will collect the information from him.

In the above circumstances, the CIC investigation would benefit from the organisation being able to undertake a controlled operation by allowing the public servant to make the phone call and take the information to the meeting. But as the CIC public sector integrity division does not have the power to undertake a controlled operation the opportunity to identify the other party and apprehend them is forgone.

Case Example 6

An ASIS officer has been deployed to Asia to gather intelligence on people smuggling syndicates operating there. He has obtained knowledge of the large sums of money that are earned with every boat of migrants smuggled to Australia and their method of operations. While Australian Government policy has stopped the movement of illegal boats to Australia, people smugglers are earning huge amounts of money trafficking people from Africa and the Middle East to Europe. Captured by the lifestyle living in Asia brings to wealthy people, international criminal groups operating in Asia with links to Australia and Europe have recruited the ASIS agent to work for them. These crime groups want him to deploy to northern Africa and migrant exit points from Asia (e.g. Turkey) and provide assistance in how they or other groups (upon payment by them for his services) can detect and avoid intelligence operations undertaken by UK and other European countries against them. The crime groups know that European intelligence agencies have infiltrated migrant groups and possibly some of the crime groups and they want effective counter-intelligence strategies to defeat them.

Inserting undercover officers into the migrant groups to gather evidence against the rogue ASIS officer would be a useful investigation technique. Doing so would involve undertaking a controlled operation and the use of assumed identities.

The Inspector General of Intelligence and Security has the power to enter premises, inspect documents, demand the production of documents and
question people. The IGIS does not have the power to hold a hearing, arrest anyone, issue search warrants or seize evidence. But none of those powers would be useful anyway, as the rogue ASIS agent is operating offshore. Beneficial to an investigation into this matter if it occurred, would be the power to conduct a controlled operation and acquire an assumed identity. However, the IGIS does not have the power to undertake a controlled operation or use assumed identities. If the proposed CIC became involved in the investigation neither would it have the power to undertake controlled operations or use assumed identities.

[The IGIS and/or CIC could obtain assistance from the AFP to undertake the investigation but why should that situation have to occur? A national anti-corruption body should able to pursue corruption in any area of government wherever it occurs.]

6.12 The following example highlights the potential of the public sector integrity division of the proposed CIC using all of the powers referred to earlier:

**Case Example 7**

The Department of Defence is seeking to replace a class of capital warships with a new larger and more capable warship. Three ship builders are competing for the contract. The favoured design is European with European communications systems, combat systems and weapon systems. The Navy prefers the ship to be equipped with US weapons (anti-aircraft and anti-ship missiles) and European weapons (e.g. torpedoes); and US communication and combat systems that are in current operation.

The Australian Government wants all of the ships in the class manufactured in Australia. The Minister for Defence is keen to make an announcement of the successful bidder as soon as possible and before two elections which are scheduled to be held. One election in a state where the majority of the work will be undertaken and the other a Federal election. Marginal seats are at risk and the announcement of a major defence contract will assist the Government in securing those seats.\(^{44}\)

The suppliers of current weapons, communication and weapons systems know that they will be chosen to equip the new warship. No other suppliers will be considered. No competitive bidding process for them to worry about.

\(^{44}\) This is an example of political corruption where a minister is able to influence projects and spending that benefit the political party, he/she represents.

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And therefore, amble opportunity to increase the price they each charge for those systems\textsuperscript{45}.

Staff within the Navy and Department of Defence are under pressure to complete their evaluation. One of the companies tendering a warship design has been involved in past corruption but that information is ignored. The competitive evaluation process has simplified defence acquisitions so staff just get on with it \textsuperscript{46}. No consideration is given to undertaking a comprehensive anti-bribery and risk assessment on all of the bidders or equipment providers. In the haste to complete the evaluation, notes of conversations in person or by telephone are not made and minutes of meetings are not taken or only contain very brief details of what was discussed and agreed upon.

After the competitive evaluation has been completed the Government decides on a particular design at an estimated cost. The warship is not in operation in any country including where the builder is located. It is a design concept but the Government of that country is committed to building it. The Federal Government also decides that the contract for the new warship will be signed when 80% of the design drawings are complete\textsuperscript{47}.

The decision to enter into a contract with only 80% of the design work completed pleases the builder as it will be able to increase the cost of the project due to unexpected price increases caused by rises in cost of materials, labour and design changes. It might even enable the ship builder to “offload” additional fixed costs in relation to the operation of their shipyard in their home country, while it waits for the government there to finally commit to a contract.

The various equipment suppliers are also pleased with the decision made by the Australian Government to commit to a contract without all design work being completed. It might enable them to increase the price they will charge.

\textsuperscript{45} Cost increases can be justified by slight modification to a design or software update or an increase indirect costs etc

\textsuperscript{46} The competitive evaluation process used to select the Attack Class Submarines and the Hunter Class future frigates makes no reference to the Department of Defence being required to assess the corruption risk involved with the projects including any builder or supplier. Australian National Audit Office: Future Submarine — Competitive Evaluation Process


\textsuperscript{47} Not an unusual occurrence. For example, in relation to the Collins Class submarines: “Construction of the hull began in 1989, when only 10 percent or so of the construction drawings were complete. ASC has stated that starting the Collins production before the design and drawings were much further complete was a fundamental mistake, resulting in costly modifications and rework when changes were made to the design”. Rand: Learning from Experience: Lessons from Australia’s Collins Submarine Program

https://www.rand.org/content/dam/rand/pubs/monographs/2011/RAND_MG1128.4.pdf Modifications and rework of what has been completed provide opportunities for the payment of kickbacks which are concealed in overcharging by suppliers.
for the supply and installation of their equipment because of the unknown final design and the changes they will have to make to their systems. When the contract has been signed, the price initially quoted has increased. Production of the warship will be undertaken in modules with some modules being produced in states outside of the state where the ships will be assembled. The entire warship could be produced in one Australian State, but the Government is keen to share the work around the country. This decision was the result of intense lobbying by other Australian ship yards, State Governments and unions. As production of the warship progresses, there are delays in construction due to poorly drafted designs which caused a main module to the ship being incorrectly constructed. It will not fit onto the main body of the ship. With the hull completed, the ship is launched and the fitting of equipment commences. The cost of supplying and fitting the communication equipment and warfare systems have increased primarily due to “upgrades to the software involved in each system”.

The constant cost increases have caught the attention of the media and the opposition spokesperson on defence matters. The defence minister gives vague incomplete answers when asked during question time. There is very little information available to the public on the Department of Defence website and on the websites operated by the ship builder and equipment suppliers. An audit by the Australian National Audit Office identifies a lack of transparency over the entire contract process, the use of vague specifications, cost increases to many components with no rational explanation and an unwillingness by several contractors to cooperate fully.

Concerned about the project and the lack of transparency, the opposition defence spokesperson refers the matter to the CIC for investigation.

The CIC is unprepared to undertake the investigation. It was never set up to handle an investigation of this magnitude. The budget and staffing levels were set with reference to comparable State anti-corruption bodies that do not deal with multi-billion dollar defence projects involving many hundreds of contractors from Australia and overseas, with a lifespan of a decade or more. With contracts and sub-contracts that refer to complex systems and procedures.

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48 Note that the plans for the Hobart Class destroyers purchased from Navantia contained errors, omissions, were not up to date or contained all the necessary information needed to construct the ships. About the AWD Project: [http://australianmade defence.com.au/resources/about-the-awd-project/](http://australianmade defence.com.au/resources/about-the-awd-project/)

Based on the experience of the law enforcement integrity division, investigators in the public sector integrity division know that obtaining telephone intercepts and listening devices before undertaking any overt action, can produce direct evidence against those involved. For example, a common tactic is for telephones of suspects to be intercepted and then monitor what they say and to whom, before a person appears before a hearing and after any person summoned has appeared at a hearing. But as the public sector integrity division does not have the power to obtain a telephone intercept warrant or a listening device warrant, then those investigation methods cannot be used.

The public sector integrity division considered undertaking a controlled operation and inserting one or more undercover officers (former Navy personnel) with assumed identities into the project to gather intelligence and evidence but it lacked the power to do so.

The CIC issues notices to various government and private sector organisation (assuming it can in relation to private entities) demanding they produce all documents pertaining to the construction of the warship. The CIC is inundated with thousands of documents which are carefully analysed. Though the investigators cannot be certain they have all of the material needed because they do not have a power to search any premises. They have to rely on those who have the documents to produce them to the CIC in accordance with the notice. And while the people served with the notices might provide documents in good faith, there is always the risk that they might not provide important material on the grounds that they did not realise it was covered by the notice.

The vague contract and design specifications which necessitated changes to contract specifications and subsequent increases in price of many items attracts the attention of CIC investigators. As they know, the use of vague specifications, incomplete designs and changes to existing designs are just some of the methods used to conceal the payment of bribes. Poorly kept notes that do not explain the price increases on a number of items and short minutes of meetings between public officials and contractors and subcontractors further increase the suspicion of CIC investigators. And the employment of a member of the Minister staff by the successful ship builder just after tenders closed has also attracted interest from investigators.

Having analysed many of the relevant documents, the CIC commences a private hearing into the warship project. Defence department staff and

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50 A common tactic also involves only partly examining a suspect before a hearing and then let them go. Their movements are traced and conversations are recorded with the intention of capturing any incriminating information against them and/or any co-accused involved or someone else who was not previously known but who had a role to play in the criminality. Then after a period of time, the person part examined is recalled and any additional information is put before him or her. This is particularly useful where evidence of the person giving false evidence before the earlier hearing has been captured.
defence force personnel associated with the project deny any wrong doing during the hearings. Their stories appear to be consistent but without electronic surveillance it is difficult to obtain any evidence that contradicts their version of events. There are however gaps in their evidence because some of them are unable to refresh their memories from the vague notes and minutes that do exist.

The former member of the Defence Minister’s staff was called before a CIC hearing where he was asked about why he left the Minister’s employment and chose to work for the shipbuilder who won the tender. This person accompanied the minister when he and other staff visited the sites of all tenderers and received confidential briefings on their submission including capability and costs. He was also asked about any information he took with him or used when he resigned and joined the shipbuilder including any information he remembered from the on-site visits he attended. An intercept of his phone and the Defence Ministers phone would have been useful investigation tools, but as it was not available to the CIC, no evidence could be obtained.

Notices to produce documents and attend hearings were served on relevant contractors involved in the project (assuming the CIC will have the power to do so). Almost all of them cooperated fully with the inquiry. Some were confused by the notices and did not produce every document initially. Though one large contractor, a foreign company responsible for an important electronic component of the ship, which also had significant cost increases, did not cooperate fully. That contractor claimed that many of its documents associated with the project were located offshore and held by a subsidiary of the company operating in a secrecy jurisdiction and it would not produce them.51 And three key foreign managers involved with the initial contract negotiations and management of their side of the project, have been reassigned to other projects overseas. A new government affairs manager has been appointed by the company and he will attend the hearings on the company’s behalf. The CIC not having a power to search premises, is unable to enter the premises in Australia occupied by the contractor and search for any documents not disclosed as demanded.52

The Minister for Defence is summoned before the hearing to give evidence. He is aware that it is a private hearing and what he says will not be disclosed to the public. Which is very important given the election is due later that year. During his evidence, in response to the entire project and the associated delays, frequent changes and cost blowouts, he places the entire blame onto managers and staff within the Navy and the Department of Defence. Had

51 This is known as playing the jurisdiction game. Many large international defence companies own subsidiaries in tax havens or secrecy jurisdictions. This practice is undertaken for many reasons including tax minimisation, asset protection and to protect the interests of creditors.

52 Unable to follow a simple rule in compliance and law enforcement: “Trust but verify”.

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the hearing being a public hearing, perhaps the Minister would have accepted responsibility for the project; including all of the problems that he had control over, namely the timeframes involved, the final selection of the winning bid and contracts entered into by the Commonwealth Government.

While it cannot make any findings of corruption, the CIC is unable to reach any conclusion in relation to the investigation. Was the project poorly conceived and managed or were there acts of corruption involved? Many of the public servants hauled before the hearing feel bitter. Though they can take comfort from the fact the hearing was held in private. The opposition, the media and the public are not convinced. To them, there is no smoke without fire.

An investigation is a search for the truth. And to find the truth an organisation must have at its disposal all of the investigation tools necessary to enable it to reach a successful conclusion. In the above scenario, there may have been no corruption involved. With the people involved in the project committing no offence at all. And while their innocence is presumed until proven guilty, reputations can be tarnished as rumours spread through an organisation that is or has been investigated about what happened.

A public hearing into an allegation of that magnitude has a number of benefits. It significantly increases transparency which is a major deterrent to corruption. All senior people including ministers are held to account for all aspects of a project, whether they be good or bad. And they should be held accountable. They earn high salaries and other benefits to compensate them for the risk of holding the office they occupy. Performance must follow reward. And an open inquiry increases the prospective that all public agencies will improve and do better on future projects.

6.13 Australian signed the United Nations Convention against Corruption (UNCAC) in December 2003 and ratified it on 7th December 2005. Relevant to the CIC discussion is paragraph 3 of Article 30 of UNCAC “prosecution, adjudication and sanctions” and paragraph 1 of Article 50 “special investigative techniques”. The UNCAC addresses both domestic and international corruption relating to a party to the convention.

6.14 Paragraph 3 of Article 30 states:

“Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in...”


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accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences”.

6.15 While paragraph 1 of Article 50 states:

“In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived there from”.

6.16 Australia is legally bound to comply with UNCAC. However, parties to the convention are allowed discretion in how it will be applied and the extent of its application in their jurisdiction. The use of the word “shall” in both paragraphs referred to above might mean that those aspects of the UNCAC are not compulsory. It could be seen as more of an advice rather than a mandatory requirement. Whether Australia is in violation of UNCAC if it implements the current CIC proposal is debatable. However, the UNCAC represents international anti-corruption best practice for a country to follow. And if Australia wants to continue to be rated lowly for corruption risk and position itself as a global leader in fighting corruption, then it must implement the UNCAC as it was intended. Systems to combat corruption should be as effective as possible and not some half-hearted poorly thought out approach adopted only because of the application of political pressure. Otherwise the name of Australia penned to the UNCAC is mere window dressing.

6.17 It is perhaps timely to recall the words of Mr Luke Arnold Director, Law and Justice Section, Governance Fragility & Water Branch, Department for Foreign Affairs and Trade at the Seventh Session of the Conference of the States Parties to the UN Convention against Corruption on 7 November 2017:

“its focus on function over form helps guide States Parties to develop effective legislation and institutions to combat corruption and to facilitate effective international anti-corruption cooperation”.

What the Commonwealth Government has outlined in the draft CIC proposal contradicts the advice given by Mr Arnold. The new
Commonwealth anti-corruption body must have the flexibility to investigate corruption anywhere the interests of the Commonwealth are threatened by that crime, unrestrained from artificial barriers that impede operational effectiveness and efficiency.

Investigating direct complaints about Ministers, Members of Parliament etc

6.18. The recommendation in the proposal that the CIC will not investigate complaints made by members of the public against Ministers, members of parliament and their staff is difficult to reconcile. Experience with State anti-corruption bodies and international anti-corruption bodies clearly identifies Government ministers and members of parliament as being major perpetrators of corruption. And in relation to State ministers and members of parliament being exposed for corruption, their activities in the majority of cases only came to light because of state anti-corruption agencies initiating investigations. Therefore, an argument could be raised that the reason for the low level of corruption cases at the Federal level has been due to there being no national agency independently and proactively looking for corruption. Or the lack of appetite by past Liberal and Labor Federal Governments to expose corruption. References made to Australia having low corruption are irrelevant. Some of the reasons why that perception exists are the absence of a dedicated agency looking for corruption and the fact that corruption, like commodity crimes (such as drugs) are not reported. An example supporting that claim is Al Grassby, former Labor federal politician and past Minister for Immigration during the Whitlam Government. Al Grassby allegedly had links to ’Ndrangheta (or Calabrian Mafia) and that he had used his influence to interfere with a National Crime Authority investigation into the Mafia. The worst allegation against Grassby was that he was paid to do the bidding of the mafia, in particular to discredit Barbara Mackay, wife of missing anti-drug campaigner Donald Mackay. Any federal government with a thirst for identifying and combating corruption would have vigorously pursued those allegations.

6.19  To be effective, a Federal anti-corruption body must be totally independent and transparent. All information about corruption at the Federal level should be referred by the public to the CIC in the first instance. The CIC should then assess the information, including seeking additional information from other sources and then decide on whether to conduct an investigation or refer the information to another body. When the CIC refers a matter to another body to investigate it should still retain overall supervision of the process. Without the CIC having the independence and authority to pursue corruption relating to a minister, a member of parliament or their staff received from a member of the public, there is a very high risk of the matter being leaked to those criminally involved or to the media. And a high risk will exist that information concerning who reported the information being communicated to that corrupt minister, the member of parliament or staff as the case maybe. Far too often sensitive information is leaked out of the office of ministers and departments. A recent example is the tip off to the media that the Australian Federal Police was
intending to raid the office of the Australian Workers Union over donations to the Get Up organisation.\(^{54}\)

6.20 A major anti-money laundering and counter terrorism financing strategy involves the treatment of Politically Exposed Persons (or PEPs). PEPs are defined by AUSTRAC, the AML/CFT regulator and Financial Intelligence Unit as being:

“individuals who occupy a prominent public position or function in a government body or international organisation, both within and outside Australia. This definition also extends to their immediate family members and close associates”\(^ {55}\).

A close associate would include staff who work for a Government minister or member of parliament. It could also include their driver and any house keeper that they may have.\(^ {56}\) Australia’s AML/CTF framework is based on the Standards issued by the Financial Action Task Force (FATF) of which Australia is a member. According to the FATF

“many PEPs hold positions that can be abused for the purpose of laundering illicit funds or other predicate offences such as corruption or bribery.”\(^ {57}\)

Recognising that a PEP has a higher ML/TF risk, reporting entities in Australia (for example financial institutions) have to apply additional AML/CTF measures before commencing a relationship and during the life of the business relationship. Given that the FATF and AUSTRAC recognise the higher risk posed by PEPs, including their potential to launder the proceeds of corruption and bribery, why has the Commonwealth Government decided to apply a lower standard when it comes to reporting any illegal behaviour associated with them?

6.21 The other issue that would need to be determined, and not mentioned in the proposal, is the assessment of any suspicious matter report filed with AUSTRAC by a reporting entity in relation to an Australian domestic PEP. Is the new CIC going to have access to AUSTRAC information in a similar manner to the AFP and ACIC? And what procedure does the CIC follow in relation to the receipt of an SMR referring to a PEP? Unless the legislation is changed, the CIC if granted access, would not be able to communicate the information to

\(^{54}\) ABC. Michaelia Cash office tip-offs about AWU raids set to be referred to the DPP. Australian Broadcasting Commission [https://www.abc.net.au/news/2018-07-30/michaelia-cash-awu-raids-tip-off-referred-to-cdpp/10051612].


\(^{56}\) International corruption cases have involved politicians using their bodyguards, drivers and butlers to move and hide corrupt payments. In this regard, they are used as nominees to protect the true beneficial owner.

any person or agency not authorised to receive it, particularly a non-law enforcement body.

Public vs Private Hearings

6.22 The law enforcement integrity division of the CIC will be allowed to conduct public or private hearing into corruption involving a law enforcement agency. However, in relation to the proposed public sector integrity division, it will only be able to hold private hearings. The question therefore begs why the double standard? Why is the Commonwealth subjecting one type of employee to public exposure and not another? Where is the fairness in the process especially given that the greatest serious corruption risk vests in the public sector division? It appears the restriction on the public sector integrity division only holding private hearings is designed to protect the reputation of Government ministers and members of parliament should senior managers or staff in a department they are responsible for or members of their own staff are implicated in a corruption investigation and are called before a hearing to give evidence. Politicians should show leadership in this field and learn to accept that while in parliament they will attract false claims of impropriety being made against them. It is part and parcel of the job. No different to police officers in Australia who have had their reputations attacked by false or exaggerated claims made at times by members of the public or by defence counsel in court. It is unpleasant but part of the job. Something that politicians will have to get used to.

6.23 It is unfair and unjust to have two different systems and adds complexity to a system that is unnecessary. All hearings, other than where the safety of a person will be jeopardised or the progress of an investigation impeded, should be held in public. In making that recommendation, reference is made to the famous words of Louis Dembitz Brandeis, associate justice of the United States Supreme Court, who said:

“Publicity is justly commended as a remedy for social and industrial diseases. Sunlight is said to be the best of disinfectants; electric light the most efficient policeman.”

While Justice Brandeis wasn’t talking about government corruption when he made that statement. But his words spoken over 100 years ago have relevance today in corruption prevention. People facing allegations of corruption in public hearings have an opportunity to explain the circumstances. Corruption exposed via public hearings increases public trust in Government institutions. Getting corruption out in the open enables and many cases forces Government departments and private organisations to implement changes that not only prevent corruption, but also improve areas of management and leadership. And public exposure of corruption and those allegedly involved

59 And note, he was not a Judge at the time when he uttered that phase.
assists other government mandated processes for example: money laundering prevention. Australian reporting entities\textsuperscript{60} do not have access to confidential law enforcement information. They rely on public information to assess AML/CTF risk and other financial crime risks to enable them to meet their legal obligations\textsuperscript{61}. Public hearing into corruption greatly assist them in that process which in turn enables suspicion of criminal matters to be reported to AUSTRAC.

Findings of Corruption etc.

6.24 Only the law enforcement integrity division will be able to make findings of corruption, criminal conduct or misconduct. The public sector integrity division will not be able to make such findings. Again, why the double standards between two different types of public officers? The only explanation is that findings of corruption etc against senior officers or staff of a department or staff working for a Minister or member of parliament might tarnish the relevant minister or member of parliament.

6.25 It is unfair and unjust to have two different systems for federal employees, particularly a system based on an incorrect assessment of where the real corruption risks are.

6.26 The administration of justice should be as efficient as possible. Allowing one component to hold public hearings and not the other component, adds complexity to a system that is unnecessary.

7. Staffing Levels

7.1 According to the proposal released by the government, the size of the proposed CIC will be approximately 150 staff. The only reason given for that projected number of staff was: “the kinds of factors that will contribute to the final cost will be the estimated size of the CIC’s jurisdiction”. And then the proposal advised “The number of individuals within the public service (i.e. employed under the Public Service Act), statutory agencies, Commonwealth corporations and Commonwealth companies, as well as parliamentarians and their staff is close to 250,000 people”. Which means that the size of the CIC would be determined by the number of people on the Commonwealth Government payroll. Had the use of the word “jurisdiction” been given a wider meaning than simply staff numbers, the size of the CIC would be determined by other factors.

7.2 Reference is made in the proposal to the staff size of various State anti-corruption agencies. Comparisons to these and similar organisations is irrelevant. The governments those agencies represent, face different corruption risks.

\textsuperscript{60} AUSTRAC. What is a ‘reporting entity’? \url{http://www.austrac.gov.au/key-concepts}

\textsuperscript{61} Particularly in relation to domestic PEPs.
7.3 As explained above, the structure, functions, powers and size of the proposed CIC should be primarily **determined by the size and nature of the corruption risk**. And corruption risk can only be determined when an anti-bribery and corruption risk assessment has been undertaken. Forming an organisation and any national anti-bribery and corruption strategy before the results of an ABC risk assessment shows poor judgement and sets a very poor example to other governments and to industry. Though, at the Commonwealth level, it has been common for the Government, and Government agencies in the past to make decisions about major projects without any consideration of the corruption risks that might be involved. It is advised that this approach to federal government acquisitions and the development of new agencies should improve.

7.4 In addition to the size of the public service and other Commonwealth funded positions, the following corruption risks should be considered in deciding CIC staffing levels:

a. Size (staff, financial resources and capability) of companies that supply to the Commonwealth
b. The business structures of those organisations and whether they are unnecessarily complex for the work undertaken
c. Complexity of the projects in which the Commonwealth is involved
d. Whether companies that supply to the Commonwealth have in place anti-bribery and corruption programmes that can be relied upon.
e. The ability of companies that are providing goods or services to the Commonwealth to use technology to counter the investigative capability of the CIC
f. Environment Commonwealth agencies operate in for example high risk activities (ASIS involvement in countering people smugglers) or high risk jurisdictions known for corruption (e.g. Defence, DFAT and AFP officers operating in Pakistan, Vietnam or China)
g. Number of investigators including specialist staff (forensic accountants, lawyers, computer forensic specialists, crime scene

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62 During World War 2, the US Federal Bureau of Investigation employed over 500 forensic accountants to examine cases of fraud procurement identified by other Government auditors and investigators. Australian law enforcement agencies are grossly understaffed in relation to forensic accountants and in some cases are poorly utilised, as their capability and role is misunderstood. The CIC would need a significant body of forensic accountants to support investigations including asset forfeiture investigations.
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examiners, electronic specialists and physical surveillance officers) needed to respond to and deter significant corruption risks.

7.5 It is interesting to note that the Commonwealth Government will spend in 2018/19 $36.4 billion on defence to protect the nation. Yet Australia faces no known military threat. While, in relation to corruption, where significant threats do exist, the proposed Commonwealth approach lacks substance and not capable of meeting those threats.

7.6 The following example highlights the risk of not allowing the CIC to pursue referrals of corruption about ministers and members of parliament made by members of the public and incorporates the benefits of allowing the public sector integrity division the power to utilise electronic evidence gathering and search warrants:

Case Example 8

Two members of the Commonwealth Parliament represent the same Australian State. Both of them have long distances to travel between Canberra and their respective capital city or major regional town. At times due to the non-availability of commercial flights, the two regional MPs must charter an aircraft to travel to and from their respective locations. The MPs are entitled to a travel allowance which in most years, despite their travel, is unspent.

A staff member working for one of the MPs bribes the owner of a charter aircraft company to provide false invoices for air charter flights which will not be made. It is not known if the staff member is acting on instructions from one or both MPs or if both regional MPs will use the illegal scheme. In return for producing the false invoices, the charter aircraft owner will receive a kick back from each claim and also be guaranteed to receive additional genuine flights that will be steered his way. According to the staff member, while it is expected that MPs will use commercial travel where available, he will ensure that the MPs travel when it is not available. Arguments can also be used that charter flights were necessary to ensure the security of sensitive information the MPs carry and of the MPs themselves or simply the MPs will be instructed to travel when there is no commercial flight available.

The charter operator in accordance with the agreement provides false invoices. And provides genuine services for the MPs, an additional number having been given to him as per the agreement. To support the false invoices other internal records of the air charter company, need to be altered or

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63 To undertake physical surveillance of one suspect for 8 to 10 hours requires 6 to 8 operatives. For surveillance conducted over a 24 hours/7 days period – up to 30 operatives for one suspect are required.

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created. For example, fees and charges for use of airports and maintenance records for the aircraft that is used. The more an aircraft is used, additional hours are consumed undergoing maintenance of it. The owner of the company instructs a maintenance manager to alter the records to show the additional but fake flights the aircraft had made and the extra time spent on maintenance. The manager is not happy with having to fraudulently alter aviation records. He had seen how friendly the boss was with certain politicians at the aerodrome and suspected they were involved.

Rather than contact the Civil Aviation Authority, the maintenance manager reports what he knows to the CIC.

The information is specific and has identified offences relevant to the jurisdiction of the CIC. However, as the CIC does not have the power to investigate complaints received from the public in relation to MPs, it refers the information to the Independent Parliamentary Expenses Authority (IPEA). The IPEA has no power to make an arrest, no questioning powers; no power to hold hearings, enter premises, seize evidence or make formal recommendations.

The IPEA if it has reasonable suspicion of corruption, can refer a matter to the CIC. But this information has come from the CIC despite the fact the information relates to fraud and corruption and also involves criminal activity against Australian aviation law. The IPEA decides to conduct an audit and demand the production of documents. This alerts those involved in the commission of the offences.

The IPEA after conducting its audit, refers the matter back to the CIC.

The approach to the incident is flawed due to the inability of the CIC to investigate complaints made by a member of the public against a Minister, member of parliament and staff. And valuable time wasted due to an unnecessary restrictive investigations caveat.

Had the CIC not been prevented in conducting an investigation and had access to the full range of investigation tools referred to above, it could have:

- After an initial assessment and inquiries including an interview of the maintenance manager, ground an affidavit for the interception of all phones used by the charter aircraft owner and a listening device warrant for all premises used by the company and the owner
- Following the interview of the manager and hopefully securing his assistance, record all conversations between him and the charter flight company owner. [The manager could wear a listening device into all meetings or listening devices could be installed in all areas they have met previously or both.]
• After being satisfied that telephone interception and listening devices will not produce any further information at that time, the charter aircraft owner is summoned to a hearing. Phone calls he makes and receives prior to his attendance at the hearing and post hearing attendance are recorded. Intercepted calls include phone calls made to a staff member employed by a Commonwealth MP.

• Analysis of phone records reveals contact between the charter flight owner and the MP staffer.

• During the CIC hearing, the charter flight owner admits to receiving a bribe from the MP staffer and explains how the scheme works.

• A search warrant executed on premises occupied by the aircraft charter company and the company owner identifies and leads to the seizure of evidence.

• Telephone intercepts and listening device warrants are obtained for the MP staffer and his phone, premises and car. He is recorded telephoning a male person and telling him that the “federal CIC” is investigating him and that he should ditch everything and keep his mouth shut.

• A search of phone records reveals that the person called by the MP staffer operates a printing business in a regional city in which the MP lives. CIC investigators are aware of methods used to inflate expense claims so that someone can receive a kickback. A printing business with high levels of wastage, different printing methods involving different types of ink and paper of various quality; is an ideal vehicle to be used to issue inflated invoices or fake invoices for printing.

• The MP staffer is summoned to appear before a CIC hearing. He is questioned about the bribery scheme involving aircraft charter company. He admits to bribing the owner. When asked if he is aware of or has an involvement in any other expense reporting schemes, he claimed he has admitted all he knows. The MP staffer is then played the recordings made of him making phone calls to the manager of the printing shop.

• After questioning about the printing expense scam, the MP staffer is questioned about his knowledge about the involvement (if any) of the two MPs in both scams.

For further information see65.

8. Recovery of Proceeds of Corruption

CIC Undertaking POC Recovery

8.1 Currently, the AFP has the authority to commence and conduct proceeds of crime litigation on behalf of the Commonwealth. That role is undertaken using the Criminal Assets Confiscation Taskforce (CACT) which is a multi-agency task force led by the AFP. Prior to the establishment of the CACT, the role was undertaken solely by the Commonwealth Director of Public Prosecutions. To ensure that all elements of an investigation, including the recovery of any proceeds of crime (the benefit received by the bribe receiver e.g. a bribe and the benefit received by the bribe payer – any profit on being awarded a contract for example); then the CIC should be granted authority to pursue proceeds of crime litigation in relation to every investigation undertaken by the organisation.

8.2 Those opposing the view in 8.1 above would argue that any action to recover the proceeds of a corruption offence could be pursued by the AFP, upon referral from the CIC. That process which does occur between the ACIC, AFP and state police has caused practical difficulties in pursuing civil forfeiture. The major impediment is the difficulty in conducting a criminal investigation in parallel to a proceeds of crime investigation. Particularly when there are restrictions on the information that can be conveyed due to secrecy provisions and operational security. Conducting a parallel financial investigation in conjunction with the predicate offence investigation (i.e. corruption) is the international standard published by the FATF\(^{66}\). Similar issues will arise when the CIC is established. Except that the problem will be compounded, when it is an AFP or ACIC officer/s that is being investigated for corruption.

8.3 Since its inception, the AFP has not provided sufficiently qualified and competent staff to enable the CACT to be effective. Investigators are not trained to international standard in relation to proceeds of crime recovery and there are insufficient forensic accountants employed to support civil forfeiture investigations\(^{67}\). Investigators sent to the CACT do not undergo a selection process like other specialist teams do and are often rotated out of the teams after two years resulting in the loss of knowledge and expertise. The effectiveness of the new CIC to combat corruption should not be hamstrung by the actions and resources of another agency. The most efficient and effective model pertaining to the recovery of proceeds of crime in relation to corruption matters is for the CIC to have sole responsibility and authority.

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\(^{67}\) The AFP Perth Office which once has three forensic accountants in CACT now has none and has to rely on a forensic accountant based in the AFP Adelaide Office for financial analysis.
8.4 The Proceeds of Crime Act 2002 (POC Act) is a very powerful piece of legislation. There are several provisions enabling the restraint and forfeiture of proceeds of crime and instruments of crime. Unexplained wealth laws are an important tool in the recovery of proceeds of corruption. But at the Commonwealth level, they have not been used. Commonwealth unexplained wealth laws are contained in Section 20A (unexplained wealth restraining orders) and Part 2-6 (unexplained wealth orders) of the POC Act. The major impediment in the use of UEW laws is the requirement that there exists a “trigger offence” to ground a Section 20A restraining order. This is due to the constitutional restrictions of Commonwealth power. The need for a trigger offence means that Commonwealth UEW laws are not genuine UEW laws. UEW laws should be able to be used without reference to or the need to establish any offence.

8.5 When UEW laws are mentioned, it generates a lot of discussion by those opposed to them. Some of it is emotional and at times totally inaccurate. The reality is, based on experience, any person who has never been involved in crime can explain the source of their wealth if they had to. In fact, they never have to explain anything, because investigators and forensic accountants charged with pursuing UEW investigations, can assess very quickly from raw data, the major sources of a person’s income and wealth. And agencies undertaking UEW investigations or similar investigations, given their limited resources and time, do not waste it on pursuing unproductive investigations.

8.6 Commonwealth UEW laws were initially grounded to counter serious crimes such as drug trafficking. And the laws were considered and drafted with drug investigations in mind. However, the constitutional restriction does not apply to forfeiture action undertaken by the Commonwealth in relation to people and organisations under the Commonwealth’s jurisdiction. As Australia is a signatory to the United Nations Convention Against Corruption, it can rely on its external affairs power to enact UEW laws that do not require a trigger offence.

8.7 Article 20 illicit enrichment of the UNCAC states:

“Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase

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68 The POC Act contains provisions that are reverse onus requiring a person who property has been restrained to explain the source of their wealth and establish it was also not used to commit crime.

69 External affairs power is provided in section 51(xxxix) of the Australian Constitution Act 1901 which enables the federal parliament to enact laws which relate to an international treaty or convention to which Australia is a party.
8.8 Illicit enrichment is also known as unjust enrichment. In Australia it is referred to as unexplained wealth. Accountants refer to it as unexplained income.

8.9 As UEW provisions are an important tool in the fight against corruption, they should be applied in appropriate cases with other investigative mechanisms. The Commonwealth Government in its design of a national anti-corruption body should consider implementing a new two tier UEW framework involving:

a. The current UEW framework for potential application in relation to non-corruption offences and corruption offences involving those persons or organisations not covered by Commonwealth jurisdiction

b. A new framework involving the introduction of UEW laws similar to existing laws that operate in the many Australian States and the Northern Territory, without having to need an offence to be committed to trigger the provisions. This new framework could be implemented for persons and organisations covered by Commonwealth jurisdiction with the Commonwealth’s authority based on its adoption of the UNCAC.

9. Offences

9.1 The introduction of the proposed offences is supported. The only comment is the definition of “serious corruption” which is defined to mean conduct punishable by an offence with a penalty of 12 months or more. A Commonwealth offence with a penalty of imprisonment not exceeding 12 months is a summary offence. While an indictable offence is an offence which is punishable by a period of imprisonment greater than 12 months. A corruption offence could hardly be described as being a serious corruption offence if it is a summary offence. Suggested amendment would be to include corruption offences that are indictable offences. Or it is our recommendation that the term “serious” in relation to corruption have at least the same meaning as serious found in other Commonwealth legislation. For example, the definition of serious offence in the Proceeds of Crime Act 2002. This will ensure a degree of consistency in relation to Commonwealth criminal law.

9.2 In addition to the proposed offences, it is recommended that an offence of failing to prevent corruption be introduced and applied to Commonwealth Departments and agencies. The UK Bribery Act has an offence for commercial

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70 Section 4H Crimes Act 1914.
71 Section 4G Crimes Act 1914.
72 Proceeds of Crime Act Section 338 Dictionary.  http://www6.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/poca2002160/s338.html#lawfully_acquired. The provision is quite extensive, however in very brief summary form, it refers to a range of indictable offences punishable by imprisonment for a period of 3 years or more.
organisations that fail to prevent corruption. What is proposed here is an 
offence that would apply to any **person, department or agency covered by 
Commonwealth jurisdiction** and **any organisation doing business or has 
tendered to do business with the Commonwealth**. The fault element for the 
offence should be similar to the provisions that apply to current criminal money 
laundering laws and include three levels: full knowledge, recklessness and 
negligence.

9.3 The UK Bribery Act contains a defence to an organisation facing prosecution 
for failing to prevent corruption. It is a defence if the organisation can prove it 
had in place adequate procedures designed to prevent persons associated with 
their organisation (including authorised agents and third parties) from 
undertaking such conduct.

9.4 Whether an organisation had in place adequate procedures would be a matter 
for a court to determine. However, one area where the Commonwealth could 
target harden itself against corruption would be the mandatory introduction of 
ISO 37001 Anti-Bribery Management Systems by all Commonwealth 
departments and authorities. And to insist that all organisations doing business 
with the Commonwealth have in place systems that meet ISO 37001.

10. **Jurisdictional Coverage**

10.1 The proposed CIC is being designed to have a very limited jurisdictional reach. 
It is evident from the limited number of contractors that have been identified 
and the restrictions placed on the public sector integrity division. It is our view 
that it is not wise to restrict the operational reach of the CIC because no one 
can predict the future, particularly the type and size of corruption risks and 
threats that will exist. It would not be possible for the CIC to investigate all 
corruption offences, but it should be in a position where it can **pick and choose 
the cases it will pursue to achieve maximum impact** and refer others to 
various Commonwealth agencies and state anti-corruption bodies where 
appropriate.

10.2 To ensure that the CIC has a broad investigation anti-corruption reach, it is 
recommended that the following measures be implemented together with the 
formation of the CIC:

a. **Commonwealth anti-corruption law should apply to federally registered 
trade unions, associations and federal political parties and associated 
entities pertaining to both or either a trade union, an association or 
political party**

b. **Include the use of various instruments, directly or indirectly, to commit 
corruption as separate criminal offences, namely Australian currency 
(fiat and digital currency) and all methods using Australian currency for 
example, telegraphic transfers, money orders and payment systems 
covered by Commonwealth law.**
10.3 A healthy democracy requires corruption free political parties. The greatest corruption risk at the Federal level of Government is institutionalised corruption occurring within an Australian political party. A political party can be vulnerable to corruption due to a lack of finance; alleged poor governance and corporate culture which makes enemies of internal staff; potentially inappropriate relationships with an external party; influence and activities of organised crime; foreign entities being allowed to contribute funds to an Australian party, excessive threshold declaration levels after which donations must be declared and use of vetting processes that do not properly assess whether a staff member has a mental illness, undeveloped inter-personal relationship skills or previous history of misbehaviour. There are numerous ways funds intended to be used in corruption can be diverted to a political party in violation of laws governing donations and expenditure.

10.4 While the corruption risk factors pertaining to vulnerable employees identified by IBAC (2015) refer to public sector employees, they are relevant to staff employed by political parties. Probably more so given the highly competitive nature of the cut and thrust environment of Australian federal politics.

10.5 The Royal Commission into Trade Union Governance and Corruption (2014-2015); Royal Commission on the Activities of the Federated Ship Painters and Dockers Union (1980-1984); The Royal Commission into the Activities of the

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77 Parliament of Australia. Donations and electoral expenditure. [https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Quick_Guides/ElectionFundingStates](https://www.aph.gov.au/About_Parliament/Parliamentary_Departments/Parliamentary_Library/pubs/rp/rp1819/Quick_Guides/ElectionFundingStates) Threshold reporting levels are easy to evade. For example, during the Watergate scandal a director of a US ship building company paid 6 employees “special bonuses” and then instructed them to make donations to the fund to re-elect President Nixon in the amount of the bonus.

78 Any of these conditions can be exploited by a person or organisation seeking to influence a member of a political party with the ultimate intention being to bribe the person. A common corruption technique is grooming and people with certain personalities, social or financial problems are vulnerable. For further information on factors commonly associated with a public sector employee’s susceptibility to organised crime cultivation refer to The Independent Broad Based Anti-Corruption Commission of Victoria (IBAC) in its 2015 report “Organised crime group cultivation of public sector employees”. Subsection 4.4 Vulnerable Individuals and section 5 Organised Crime Cultivation Strategies [https://www.ibac.vic.gov.au/docs/default-source/intelligence-reports/organised-crime-group-cultivation-of-public-sector-employees.pdf?sfvrsn=3](https://www.ibac.vic.gov.au/docs/default-source/intelligence-reports/organised-crime-group-cultivation-of-public-sector-employees.pdf?sfvrsn=3)

79 The methods involved are similar to money laundering methods and require investigators with specialist training to unravel them. Accounting for Corruption: Abuse of Rank & Privilege: [file:///C:/Users/Malkara%20Consulting/Documents/Accounting%20for%20corruption_Abuse%20of%20Rank%20and%20Privilege.pdf](file:///C:/Users/Malkara%20Consulting/Documents/Accounting%20for%20corruption_Abuse%20of%20Rank%20and%20Privilege.pdf)
Australian Building Construction Employees' and Builders Labourers' Federation (1981), and the Royal Commission into the Building and Construction Industry (the Cole Royal Commission 2001-2003); clearly indicate the need for a permanent body to investigate allegations of corruption within or by a union that might occur from time to time. There is no logical reason by unions and associations should not be included in the jurisdiction of the CIC. Corruption destroys confidence that people have in unions, it deters people from joining them and can result in good and effective people leaving a union. Well run unions and associations with reputations for being corruption free add value to the Australian community.

10.6 Extending corruption offences to include the use of various Commonwealth issued instruments or instruments subject to Commonwealth regulation, would considerably expand the jurisdictional reach of Commonwealth corruption law. An amendment of that nature would cross over the corruption laws of the states and territories of Australia. However, it is not suggested here that the Commonwealth should investigate all corruption matters in Australia. What is intended by the proposed incorporation of specific instruments of crime into Commonwealth corruption law is to give the Commonwealth the option to pursue a particular corruption allegation that is in the national interest\(^80\). For example: a crime syndicate in Australia bribes a member or members of an Australian sporting team playing overseas to fix a game. Or an Australian company seeking to expand in an emerging market, bribes a scientist overseas to prepare an environmental report that supports the company and not local indigenous land owners whose land the company wants to mine.

10.7 The Commonwealth’s jurisdiction should be as broad as possible because it will never know just when or where Australia’s national interest will be impacted by corruption. For example, in relation to the construction of the Hunter Class frigates, over 500 Australian businesses have been pre-qualified to be part of the supply chain\(^81\). Acts of corruption which result in the supply of substandard components or services could occur at any stage of that supply chain\(^82\). The Commonwealth should have the jurisdiction and power to investigate where corruption does occur. And defence companies and suppliers to other

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\(^{80}\) This recommendation is similar to Commonwealth money laundering laws contained in Division 400 of the Criminal Code Act 1995. Commonwealth money laundering laws apply to the proceeds of crime derived from the commission of an indictable offence against the laws of the Commonwealth, State, Territory or similar foreign offence. Instruments of crime apply to indictable Commonwealth, Territory and similar foreign offences and in limited circumstances to State indictable offences. The provision enables the state and territory police forces to tackle money laundering using a variety of offences, including Commonwealth law, when there is a need to do so. The Commonwealth as a result of the wide application of the laws, has not taken over the investigation of all money laundering offences in Australia.


\(^{82}\) This is at least acknowledged in the UK. Note the article: MoD corruption 'leaves troops with substandard equipment' https://www.telegraph.co.uk/news/uknews/1450428/MoD-corruption-leaves-troops-with-substandard-equipment.html
Government departments often deal with global companies or tap into global supply chains. And Commonwealth Government and agencies engage in numerous construction projects which can involve corruption. For example, the building of onshore and offshore immigration detention centres.

11. Proactive Approach

11.1 The real extent of corruption in Australia is unknown. While reports of Australia having a low corruption rating are a positive sign, it is important to remember that the rating is based on perceptions. Not on the actual number of corruption cases exposed. Detecting corruption depends on information being received from numerous sources including auditors, co-workers, managers, whistle-blowers etc. But it also requires anti-corruption bodies to be proactive and search for corruption. To expose serious corruption the CIC will need to be proactive. Potential measures could include:

a. Employing a special human source team trained in relevant industries and processes that are frequently used by the Australian Government

b. Develop an industry engagement team to raise the profile of the CIC and work with the human source team in identifying people who potentially might be able to covertly assist the commission in its work

c. Frequently holding information sessions in all Commonwealth departments and agencies on corruption

d. Undertaking or overseeing mandatory integrity tests involving drug testing, asset declarations and contact reports for all agencies falling within its jurisdiction not just law enforcement agencies

e. Initiating corruption investigations based on intelligence it has developed from information received from various sources

12. Foreign Bribery

12.1 While the proposal to create a CIC is focused on domestic corruption, no discussion about a future national anti-corruption body would be complete without some consideration about how foreign corruption is investigated by Australian authorities. Currently allegations of corruption committed offshore by Australians and Australian companies are investigated by the Australian Federal Police. The term foreign corruption is a misnomer. It is meant to relate to illegal activities involving corruption committed outside of Australia by Australians and Australian companies. But Australian firms operate in an increasingly connected global world, using global financial systems and communication systems, involving the massive movement of finance, goods, services, people and technology. And many Australians and Australian

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83 For a summary of where corruption can occur during a construction project see Loughborough University paper: Corruption in construction projects [https://core.ac.uk/download/pdf/2740002.pdf](https://core.ac.uk/download/pdf/2740002.pdf)
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businesses that operate offshore also conduct business in Australia and with Commonwealth Government agencies and departments. Corruption does not stay offshore. Any Australian firm or individual that engages in corruption offshore is also likely to engage in corruption in Australia against the Commonwealth or a State or Territory government.

12.2 While the AFP has improved its response to allegations of foreign bribery, the changes have not significantly increased the capability of the organisation to handle foreign corruption offences. And unfortunately, those changes have been driven in response to external forces such as the OECD Working Group on Bribery. Corruption in the UN Oil for Food Program which involved the Australian Wheat Board, should have been the catalyst for change, but the AFP was slow to move. Past leadership within the AFP on combating foreign corruption has been lacking. The organisation has not taken a strategic view of foreign corruption issues, for example:

a. The AFP overseas liaison network while positioned to support drug trafficking and terrorism, does not align with the fight against corruption in some areas. For example, the only AFP office in Africa, a high risk continent for Australian firms who operate there, is located in Pretoria, South Africa. It is far removed from major areas where many Australian firms operate.

b. A network of alliances with foreign anti-corruption organisations operating around the world, particularly in high risk countries has not been formalised. Forming very close partnerships with these agencies would enable the AFP to obtain their assistance in relation to foreign bribery cases when needed.

c. The number of staff employed on foreign bribery investigations is inadequate and they are often committed to higher priority work when required and moved to other areas to enhance their skills and career. The latter results in a loss of corporate capacity and corporate knowledge in the bribery and corruption field.

d. There is an insufficient number of forensic accountants employed by the AFP to support investigation areas in particular foreign bribery cases. And in some cases, the few highly qualified forensic accountants the agency does have are not being appropriately utilised.

e. Intelligence is not geared towards supporting proactively, the AFP role in relation to foreign corruption offences.

84 For example, Malkara Consulting Pty Ltd operates in Australia, Asia (registered in Singapore) and Africa (through alliances in Nigeria, Kenya and Botswana).

85 Surprisingly the AFP does not have office located near major drug trafficking hubs (e.g., Ghana and Nigeria in West Africa and terrorism (Kenya and Somalia in East Africa).
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f. Computer forensics resources are allocated to higher priority investigations namely terrorism and drug trafficking which cause delays in foreign bribery investigations. And it is questionable whether the AFP has the capacity to capture the electronic evidence of a major Australian company should it need to do so and analyse it.

Opportunity to Revamp National Anti-Corruption Arrangements

12.3 The CIC proposal put forward by the Commonwealth Government is an opportunity for Australia to re-design and revamp its approach to combating corruption, not just in Australia but also in relation to foreign corruption. The risk of Australian firms engaging in foreign corruption will increase, with the implementation of the Commonwealth Government’s recently announced Defence Export Strategy. The international defence supply industry is one of the most corrupt industries in the world. And for Australian firms to compete successfully, they will be tempted to pay bribes or pressured into paying bribes in order to secure contracts.

12.4 One national agency with responsibility for the investigation of corruption at the Commonwealth level of Government and in relation to foreign corruption would have many advantages:

a. The investigation of foreign corruption could be aided by the use of public or private hearings conducted by the CIC. This is a power that the AFP does not have in relation to the investigation of foreign bribery offences.

b. The new agency would have the opportunity to select and train investigators to handle complex bribery and foreign bribery cases. For example, in addition to investigator training, operators would be trained in procurement practices, international trade, international payment systems and national and international funds and asset concealment techniques. Currently, AFP investigators are not trained in most of those matters.

c. Resources could be moved between national and foreign bribery investigations when required which will speed up investigations, not hamper them.

d. Enable expertise across national and foreign bribery investigations to be developed and shared among agency teams, with no loss of skills and knowledge due to investigators being transferred to investigate other types of offences or moved on to another area for career enhancement.

e. Develop a greater understanding of corruption typologies and build a knowledge base for use as a resource by staff.

f. Enable an investigation into an entity that has engaged in both national and foreign corruption to be investigated by one agency and the totality of the criminality presented to a court for consideration without delay caused by artificial barriers resulting from responsibilities being split between agencies.

g. Develop an intelligence division devoted to the identification of corruption particularly offshore, including the use of electronic evidence gathering and specially trained human source operatives with the knowledge and skill to work in high level business areas and complex corporate and financial arrangements.

12.5 During World War II Australia fielded two armies. The regular Army known as the Australian Imperial Force and the Militia. It took wartime experience for Australia to realise that having two armies with different uniforms and levels of training and equipment to understand that the model was not effective or efficient. Australia today only has one army with two components, the regular army and the army reserve. A model similar to the Navy and Airforce. It makes no sense on any grounds to have two federal agencies involved in the investigation of corruption. Corruption involving Government agencies and authorities and foreign corruption should be investigated by one national agency.

13. Becoming an International Anti-Corruption Leader

13.1 Although Australia rates low on corruption, the country is not seen as a world leader in combating that crime. In many areas and industries, Australia has a poor standard of corporate governance, which create a breeding ground for corruption. The proposed CIC presents another opportunity and that is for Australia to develop into an anti-corruption world leader. To be seen as the country that other foreign governments (or opposition groups where the government is endemically corrupt) not only respect but look to for assistance and advice in protecting their country against corruption. While non-government organisations make a valuable contribution to fighting corruption, assistance from a middle level power such as Australia can make a real difference. And in doing so, enhance Australia’s international interests and support Australian business operating in high risk corrupt environments.

13.2 In building the new CIC, the Commonwealth Government should consider:

a. Assigning the new CIC whether undertaking a foreign bribery investigation role or not, as the Commonwealth Governments representative on all national and international anti-corruption forums.

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87 Recent examples include the Royal Commission into Trade Unions (which also identified unethical practices pursued by private sector firms) and the Banking Royal Commission.
b. Development of an anti-corruption academy in the CIC in partnership with an Australian University\textsuperscript{88} to deliver a range of anti-corruption programmes for CIC staff, Commonwealth, State and Territory departments and agencies and for foreign governments. The training programmes for foreign governments and agencies could be delivered in Australia or offshore under a foreign aid programme\textsuperscript{89}.

c. The CIC should form alliances with other similar agencies in Australia and offshore to enable it to gather intelligence about Australian firms operating illegally, to share corruption techniques and methods of investigation\textsuperscript{90}.

d. How the formation of a national anti-corruption body can support the development and operation of any international anti-corruption court should it be formed\textsuperscript{91}. Australia should push for the establishment of the court and lead its development and operation. Consideration should be had to Australia permanently hosting the international anti-corruption court.

e. Implement a national policy banning any Commonwealth Government department or agency from dealing with or entering into any arrangement with any entity that has been involved in corruption or is managed by a person/s who have been involved in corruption or other serious offences. The ban should extend to preventing any entity or person that has previously been involved in corruption from bidding on a Commonwealth tender. A similar but more limited initiative was proposed by the UK Government at the 2016 Anti-Corruption Summit in London\textsuperscript{92}. It is an initiative that the Australian Government should pick up on, build on and drive it forward nationally and internationally.

\textsuperscript{88} The relationship between the Australian Defence Force Academy and the University of New South Wales is an example.

\textsuperscript{89} The primary objective of the training would be to target harden foreign Governments and their departments against corruption. However, improving the protection of Australian aid funds given to foreign governments from corruption and countering the influence of foreign governments who use bribery to secure contracts and influence political decisions, would be two secondary objectives.

\textsuperscript{90} It is important to identify those foreign anti-corruption agencies that engage in corruption. Malkara Consulting is aware of at least one national anti-corruption investigation body in an African country that invites departmental heads into their office and demands money from them, otherwise they will investigate the department for corruption, whether or not there is any intelligence or evidence of corruption in that department.

\textsuperscript{91} The Case for an International Anti-Corruption Court. \url{https://www.brookings.edu/wp-content/uploads/2016/06/AntiCorruptionCourtWolfFinal.pdf}

14. National Corruption Register

14.1 The recycling of corrupt public officials in Australia is an issue that needs to be addressed. The extent of the problem just like corruption is unknown, because it is not being examined. Officers found to have been corrupt during past police royal commissions or enquiries have managed to obtain work in other government departments. At least one AFP officer whose employment was terminated following the Harrison enquiry later obtained employment with a local government in NSW. At the commencement of the Royal Commission into the WA Police Service in 2002, an amnesty for a limited time was offered to current and past police officers. Subject to certain exceptions and conditions, police officers and former police officers who had been involved in corrupt or criminal conduct could avoid prosecution, or if they were still serving, be allowed to resign if they admitted to being involved in corruption and disclosed knowledge about the involvement of other officers. At least one former WA Police officer, and more are suspected, obtained employment in a senior position with a Commonwealth Government department. Once a former corrupt officer is employed in another agency, there is a risk that the officer will recruit other officers who have been found to be corrupt into the same agency. Other police officers who were dismissed or who resigned following corruption related investigations or investigations into very serious misconduct have been known to obtain employment as investigators with Australia Post or with the Australian Taxation Office.

14.2 Acts of corruption or serious misconduct by Commonwealth, State and Territory public officers who have not been convicted of an offence for those acts but who have been dismissed from government service, do not appear on police criminal records. Any future government employer or firm engaged in contract work for the government wanting to establish if a potential employee has an adverse past, would not discover past indiscretions from a criminal records search. This has two serious potential ramifications for those agencies employing officers found to have been corrupt or having engaged in serious misconduct. It places those departments and staff at risk of the officer continuing with his/her corrupt behaviour in the new organisation. And if that person did not intend to act unlawfully in the new organisation, it places them at high risk of being corrupted should a third party (criminal organisation they

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94 Findings of the Harrison Inquiry into the Australian Federal Police. [https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id:%22media/pressrel/4DE30%22](https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p?query=Id:%22media/pressrel/4DE30%22)

95 Royal Commission into whether there has been corruption or criminal conduct by any Western Australian Police Officer. Final Report. Volume 1. [http://www.parliament.wa.gov.au/Intralinks/libpages.nsf/WebFiles/Royal+Commission+into+whether+there+has+been+any+corrupt+or+criminal+Conduct+by+Western+Australian+Police+officer+final+report+Volume+1+part+1/$FILE/WA/police+vol+1+part+1.pdf](http://www.parliament.wa.gov.au/Intralinks/libpages.nsf/WebFiles/Royal+Commission+into+whether+there+has+been+any+corrupt+or+criminal+Conduct+by+Western+Australian+Police+officer+final+report+Volume+1+part+1/$FILE/WA/police+vol+1+part+1.pdf)
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previously dealt with) discover their previous misbehaviour, why they were dismissed and where they now work.

14.3 There appears to be an absence of communication between federal and state agencies involving the exchange of information pertaining to government employees who are dismissed for corruption or serious misconduct. A national register of officers who have been dismissed for corruption or serious misconduct should be established to ensure that they are prevented from gaining employment with another Commonwealth, State or Territory organisation or from obtaining a national security clearance, without that behaviour being known and assessed\(^{96}\).

14.4 Any national corruption register should be maintained by the CIC. Access to the register would be restricted to only a limited number of authorised officers working within the human resource departments of Commonwealth, State and Territory governments or agencies. Or alternatively each Commonwealth, State and Territory Government department or agency seeking to employ any person can forward a request to the CIC to ascertain if the person has been investigated in the past for serious misconduct and the results of that investigation.

15. Organisational Chart

15.1 The organisational chart for the proposed CIC based on the comments in this report appears below.

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\(^{96}\) Past inappropriate or unlawful behaviour is not meant to be an automatic disqualification from future government service or from getting a security clearance or upgrade to a security clearance but it must be known. Either disclosed by an applicant and verified or discovered following a personal vetting check.
15.2 The National Anti-Corruption Division would focus on the investigation of all serious corruption offences involving any department, agency or contractor, political party, trade union or association the Commonwealth has jurisdiction over. While the Foreign Anti-Corruption Division would investigate allegations of corruption committed by Australian companies, Australian citizens and residents committed offshore. Both divisions would comprise various multi-disciplinary teams involving solicitors, forensic accountants, intelligence analysts and investigators.

15.3 The Computer Forensics team should have sufficient computer specialists and equipment to enable it to conduct an electronic audit of some of the largest computer systems operated by corporations in Australia. Far too often during fraud and corruption investigations conducted in Australia, an investigation is put on hold because there is insufficient IT capacity to examine electronic systems for evidence. This has been due to an underinvestment in computer forensic services, the growing use of various systems to store data and the increase in demand from other crime types.

97 At present, any Commonwealth agency seeking to image the electronic evidence held by many of Australia’s largest companies (for example tax audit or foreign bribery investigation – including computer systems, all mobile phones, tablets etc) would struggle due to a lack of capacity. Seizing the electronic evidence of a large corporation and storing it in systems held by the AFP or the ATO for later examination would be like trying to store the contents of Sydney harbour in a bath tub. Any new Commonwealth Integrity Commission must have extensive IT forensic capacity and an abundant number of specialists to work through the material without undue delay.

98 For example: in gaming consoles; tablets; mobile phones; USBs of various descriptions, smart TVs, cloud based systems etc.

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16. Conclusion

16.1 The proposed CIC model is based on a flawed view on where the most significant corruption risks are and the impact of those risks. This has impacted on the structure of the proposed CIC. The division of the CIC into two investigative components with different responsibilities and powers will result in an ineffective approach to combating corruption and the adoption of a system which will not be efficient.

16.2 All areas of Government are at risk of corruption with only the degree and impact varying amongst and within Commonwealth departments and agencies. To combat corruption effectively, the proposed CIC should have all the powers that are available to the AFP and ACIC. With all elements within the CIC having access to those powers unrestrained from artificial barriers imposed as a result of an inaccurate assessment of risk and impact.

16.3 The proposal lacks tactical and strategic vision to successfully fight corruption. No attention has been paid to the hostile or competitive environment Commonwealth agencies operate in or to the capability of organisations, organised crime or foreign intelligence agencies to successfully use corruption techniques or fend off investigations.

16.4 It is inefficient to have two Commonwealth agencies tasked to investigate corruption. It would be more effective and efficient for one national agency to investigate national and international corruption on behalf of the Commonwealth Government. The Commonwealth Government should use the opportunity to advance Australia as a world leader in combating corruption by establishing a world class anti-corruption training academy and support the establishment of an international anti-corruption court.

17. Recommendations

17.1 In relation to the proposed CIC as outlined by the Commonwealth Government, the following recommendations are made:

a. The CIC should be known as the Australian Anti-Corruption Commission

b. Before implementing a Commonwealth anti-corruption body, the Commonwealth Government should conduct an anti-corruption risk based assessment to determine the risks and their impact upon the Australian Government, Commonwealth departments and agencies and major contractors it deals with

c. The proposal to split the CIC into a Law Enforcement Integrity Division and a Public Sector Integrity Division should be abolished

d. The CIC should have access to a full range of investigative powers as recommended in the United Nations Convention against Corruption, including the power to make arrests, obtain and execute search warrants, seize evidence, undertake controlled operations, use
assumed identities and obtain and use electronic surveillance devices including telephone intercepts, listening devices and tracking devices

e. There should be no limitation on whom, when and how the CIC will investigate and what powers it will and will not use. As an independent body, like other law enforcement agencies, it should have the discretion to decide who it will investigate and how

f. The CIC should have full access to AUSTRAC information via the TRAQ II database in a similar manner to the AFP

g. All hearings conducted by the CIC should be held in public except where there is a risk to the safety of any person or the progress of an investigation will be impeded or jeopardised

h. The CIC should not be able to make findings of corruption against any person

i. The level of resources committed to the CIC, including staff, equipment and funding should be based on the corruption risks confronting the Commonwealth and the impact of those risks as identified in the anti-corruption risk assessment

j. The recovery of proceeds of corruption in relation to cases investigated by the CIC should be pursued by that agency using both criminal and civil based forfeiture regimes where appropriate

k. A two-tier unexplained wealth regime should be introduced by the Commonwealth Government. The first tier would be the current UEW framework. While the second tier which will be based on the Commonwealth signing of the UNCAC and apply only to individuals and companies subject to Commonwealth constitutional authority. The second tier UEW would operate without the need to establish an offence

l. An offence of failing to prevent corruption should be introduced not just in relation to foreign bribery offences but also for all Commonwealth departments and agencies. What is intended to be applied to the private sector should also apply to Commonwealth Government departments and agencies

m. Commonwealth corruption law should extend to federally registered political parties, trade unions and associations

n. Commonwealth corruption law should include an offence of using an instrument subject to Commonwealth jurisdiction in the commission of a corruption offence anywhere, including Australian currency and payment systems

o. The CIC when developed must be proactive and deploy human source teams to recruit informants in the business sector and operate a community engagement team to promote anti-corruption policies and the role of the CIC. Staff selected for the CIC must be chosen on the basis
of having a history of past performance involving the achievement of significant investigative and prosecution results and undergo stringent personality and other tests before being selected. Staff should not be chosen solely on the basis of their resume, written application and an interview

p. The CIC when formed should be proactive and undertake corruption investigations on the basis of intelligence it has developed

q. The responsibility of investigating foreign bribery offences currently undertaken by the AFP should be transferred to the CIC

r. The Australian Government should seize this opportunity to develop the country into a world class leader in the fight against corruption and not be a mere follower of other nations and organisations. The CIC should be Australia’s representative on all international anti-corruption forums. To that end, an anti-corruption training academy should be established within the CIC in conjunction with an Australian university, to deliver various anti-corruption training programs to national and state agencies and to foreign agencies. The latter particularly in countries where Australia has strategic interests or is developing strategic interests

s. The CIC, supported by state and territory anti-corruption agencies should be equipped to promote and support the development and operation of an international anti-corruption court. The Commonwealth Government should push to permanently host the international anti-corruption court in Australia

t. A national policy should be implemented banning a company, person or a company managed by a person, who have come to notice for corruption and other serious offences from bidding for any Government contract or from being awarded a contract where there is no competitive bidding process involved

u. A national corruption register administered by the CIC should be established

v. The Commonwealth should develop an anti-corruption body modelled on the organisational chart listed in paragraph 15 above.