National Integrity Systems

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Country Study Report

Australia 2004

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Executive Summary

The National Integrity System study of Australia is limited to the federal level of government and therefore deals with a restricted range of government activities. The statistical information from the police and the prosecution agencies indicates low levels of corruption being detected and prosecuted in the federal level of government. Nor are there any press reports of endemic corruption problems in federal administration. The systematic factors that were identified in the study as pointing to a low corruption administration were the highly sophisticated financial management arrangements, independent and highly regarded investigation, prosecution and judiciary processes, active and independent monitoring by the Ombudsman and the Auditor-General and an accountability hierarchy with the Australian Senate at its peak. However, as is described below, there are important caveats and these are such as to stop short of describing the Australian federal administration as having good anti-corruption systems.

The study did identify weaknesses. The most obvious is the lack of any watchdog anti-corruption agency at the federal level. Also, the approach of subsuming corruption within the fraud control arrangements means that some corruption activity may go unnoticed and that the prevention emphasis may be skewed towards fixing systems rather than on the cultural dimension. Transparency is an issue in that reporting mechanisms make it difficult to ascertain the exact level of corruption. This has policy implications for the government in that were systemic corruption problems to arise, they may not be recognised early enough. Associated with this are weak whistle blowing provisions, even though most other jurisdictions in Australia have enacted robust whistleblower protection legislation. The emphasis upon encouraging agencies to manage their own governance arrangements means that whole-of-government consistency in corruption prevention is compromised. Finally, the study noted the ongoing debate about senior civil servants being subject to political pressures that could impact adversely upon their capacity to fulfil their obligations to provide frank and neutral advice.

The study recommends that the federal tier of government in Australia would benefit from high-level leadership in integrity. In particular, the separation of anti-corruption strategy from the fraud control arrangements, more transparency in reporting corruption, protection of persons who wish to disclose improper behaviour and recognition at the political level it needs to actively promote integrity.

Country Overview

General

Australia[1] is a country with a population of 20 million, occupying a continent of 7.7 million square kilometres. Overall, population density is low (2.3 persons per square kilometre), exacerbated by the high degree of urbanisation – some 85% living in urban areas, mainly along the eastern seaboard. The population of Australia is predominantly white (95%), mainly of British descent, but with significant proportions from other European countries. The indigenous population makes up some 1.5% of the total. The predominant religion in Australia is Christianity with Muslims and Buddhists accounting for less than 1% each. Rates of church attendance have been in decline for some time. The official, and overwhelmingly predominant, language is English.

Literacy of the population is high, for persons over 15 years of age it is more than 99%. Some 10% of the adult population have a tertiary education and 34% post-secondary.

Australian Gross Domestic Product, as at June 2001, was AUD 672 billion (or USD 437 billion). Australia is an exporter, with its major exports, agricultural products, minerals and energy. Its main trading partners are China, Japan, Egypt, Korea, Indonesia and the former USSR countries. As at June 2001, weekly household income was AUD 427 for low-income households, AUD 720 for low-income households and AUD 1642 for high-income households. The proportion of income received by low-income households was 10% and by high-income households, 39%.

Government

It needs to be stressed that this study deals with the federal level of government in Australia. In this study the terms 'Commonwealth' and 'federal' are used interchangeably.

Australia has three tiers of government. At the lowest level are a multitude of local government entities that undertake community-based functions like running libraries, approving construction and organising garbage services. At the second tier are eight state and territory governments that manage utilities (water, electricity, transport), education, hospitals, police and courts. The federal tier of government, formed after federation in 1901, collects most of the taxation, has responsibility for the gamut of national functions: including the economy, defence, foreign affairs, customs, immigration, quarantine and communications. The federal level of Australian government also has responsibility for the large welfare sector, a national health insurance scheme and employment services.

The Commonwealth of Australia is a constitutional monarchy with the head of state the Governor-General who is appointed by the British monarch. It is a bicameral system of government with a House of Representatives and a Senate.

Government is formed by the party that can form a majority in the House of Representatives. All legislation needs to be passed by both Houses of Parliament, the Senate cannot amend appropriation bills and there is a mechanism in the Constitution for resolving disputes between the Houses by a double dissolution of Parliament and a joint sitting of both Houses.

The term of the House of Representatives is three years, although the Prime Minster can request the Governor-General to call an election before three years has elapsed. Senators are elected for a six-year term. Under normal circumstances, every three years there is an election for the House of Representatives and half the Senate.

In terms of *representation*, the House of Representatives represents the people in the States in proportion to their population (with the exception of the small State of Tasmania, where the constitution requires five seats). The Senate represents the people of the States equally. In terms of the *electoral* system, the House of Representatives and the Senate differ markedly in that the members of House of Representatives are elected on the basis

of geographic constituencies and the Senate through proportional representation based upon the six Sates and two Territories.

The Party System

Since very soon after federation, the Australian party system has been dominated by the contest between the left of centre Labor party and a coalition of the right of centre Liberal and National (formerly Country) parties.

Many minor parties have contested House of Representatives elections, but have not seriously threatened the dominance of the three major parties. There are currently a small number of independent members of the House of Representatives but they do not hold the balance of power.

The current Federal government is a Liberal National Coalition lead by John Howard. Labor governments rule in every State and Territory.

Since 1949 the use of proportional representation for Senate elections has given minor parties a realistic chance of winning Senate seats, and the major parties have rarely controlled the upper house since the election of 1964. Currently there are two left of centre minor parties (the Greens and the Australian Democrats) that, along with some independent Senators, hold the balance of power.

Federal Parliament

Parliament has five primary functions:

- To provide for the formation of a government.
- To make the law.
- To provide a forum for popular representation.
- To scrutinise the actions of government.
- To provide a forum for the alternative government.

After an election, the Governor-General sends for the leader of the party, or coalition, which has secured a majority in the House of Representatives, and commissions that person to assume the office of Prime Minister and to form a government. The incoming Prime Minister then goes about the process of finding members of his or her parliamentary party or coalition to serve as ministers in the Government. The office of Prime Minister is not recognised by the formal Constitution, being a conventional part of the constitutional arrangements.

It is customary for all Ministers to be members of parliament, and if a minister is not, it is obligatory for that minister to become an MP within three months of his/her appointment. Reshuffles of the ministry may occur at any time between elections. Ministers are invariably members of the same party or coalition as the Prime Minister.

In practice, government policy is determined by the most senior ministers meeting in a body known as Cabinet. Such meetings are chaired by the Prime Minister. The Governor-General does not attend such meetings. Cabinet is not a body that is recognised by the formal Constitution, being a conventional part of the constitutional arrangements. Despite this, Cabinet effectively controls not only the legislative program, but also the departments of state. In effect, therefore, Cabinet is the dominant political and administrative element in Australia's national government. Ministers not included in Cabinet are referred to collectively as the Outer Ministry.

The Australian Public Service provides policy advice to the Commonwealth Government and facilitates the delivery of programs to the community. The Australian Public Service is part of the broader public sector, which includes parliamentary staff, statutory authorities, a separate public service for each of the states and territories, and local government employees.

Criminal Justice

The criminal justice system consists of the state/territory and Commonwealth institutions, agencies, departments and personnel responsible for dealing with the justice aspects of crime, victims of crime, persons accused or convicted of committing a crime, and related issues and processes.

Each state and territory has laws and police, courts and corrections systems, while the federal criminal justice system deals with offences against Commonwealth laws. Criminal law is administered principally through the federal, state and territory police, the courts and state and territory corrective or penal services. There is no independent federal corrective service, and the relevant state or territory agencies provide corrective services for federal offenders.

The states and territories have independent legislative powers in relation to all matters that are not otherwise specifically vested in the Commonwealth of Australia, and it is the statute law and the common law of the states and territories that primarily govern the day-to-day lives of most Australians.

The eight states and territories have powers to enact their own criminal laws, while the Commonwealth has powers to enact laws, including sanctions for criminal offences, in relation to its responsibilities under the Constitution. Thus, in effect, there are nine different systems of criminal law in Australia. The existence of cooperative arrangements between the various states and territories and the Commonwealth, such as those relating to extradition or the creation of joint police services, helps address issues which have arisen out of the separate development of the various systems of criminal law. Over the past decade there has been a major effort to standardise criminal laws across all nine Australian jurisdictions. This process is not yet complete, but already there are common offences and penalties in many areas of the criminal law.

Policing in Australia can be differentiated between national and state/territory criminal justice issues. The Australian Federal Police (AFP) has primary responsibility for a wide range of criminal justice issues, of which fraud and corruption are only two.

State and territory police have responsibility for the array of offences in the criminal code – homicide, assaults, theft, fraud, etc. The AFP undertakes this function for the small Australian Capital Territory with a population of 350,000.

Australian Media

Australia has almost universal coverage by television and radio with a rapidly increasing penetration by the Internet. While there is an active print media, the penetration of newspapers is not as substantial as the electronic media.

Australia's media is primarily owned by the private sector but with a significant presence by a government operated public broadcaster – the Australian Broadcasting Commission (ABC). All the newspapers are owned and operated by the private sector. The public media in Australia is dominated by some large media enterprises, with Rupert Murdoch's News Corporation a major player.

A similar degree of domination by large broadcasters sees the enterprise controlled by Kerry Packer and his family (Publishing and Broadcasting Limited) having over 51% of the national television audience. There is a vigorous debate in Australia about the domination of the Australian media by a small number of private sector organisations. The federal government has a limited capacity to control the print media, but has constitutional authority to control broadcasting. It exercises this authority through the Australian Broadcasting Authority.

Corruption Profile

The federal government has been relatively free of corruption scandals. Before getting into the detail of why this is the case, a number of issues that impact upon the issue of the seriousness of the problem need to be addressed.

First, as noted above, Australia has three tiers of government. Not surprisingly, the nature of the issue of corruption varies with each tier of government. A good example is police corruption. The experience of the second tier of government in Australia – the states and territories – is quite distinct form the experience of the Commonwealth. In the 1980's, a Queensland state government fell amid exposure of high-level corruption in the police and government. Similar scandals befell the government in Western Australia in the same decade. In 1996, a New South Wales Royal Commission found systemic corruption in the police service. In all three jurisdictions, specific anti-corruption legislation was enacted, setting up authorities with special powers to investigate corruption.

Because most of the criminal justice activity occurs at the State and Territory level of government, the overwhelming majority of sworn police officers are employees of State and Territory governments. The number of sworn police officers working on Commonwealth enforcement is very small. As at June 2002[2], the Australian Crime Commission had 116 officers and the Australian Federal Police 1,459. This was only 3.6% of the 44,324 total sworn police officers in Australia.

Second, determining the level of corruption at the federal level is confounded by the emphasis the Commonwealth places upon fraud control. In particular, the unusual way the Commonwealth, for policy purposes, subsumes its anti-corruption activities under its fraud control arrangements. The issues about the definition of fraud and corruption, as well as an examination of the levels of reported corruption are dealt with in detail below.

Third, as in many developed countries, all jurisdictions in Australia have been affected by trend towards decentralization as an element of what is known as 'new public management'. Of all the jurisdictions in Australia, arguably the federal administration has been the most affected by these changes, and they have had a profound impact upon the way corruption is dealt with.

Finally, unlike the State and Territory levels of government, at the federal level, there is a clear distinction between corruption as a narrowly defined criminal offence and the treatment of more ambiguous activities – like conflict of interest and politicisation – as administrative issues.

The following paragraphs, deal with the themes mentioned above in more detail.

Fraud or Corruption?

The *Commonwealth Fraud Control Guidelines* 2002[3] define fraud as 'dishonestly obtaining a benefit by deception or other means'. Curiously, the definition of fraud used in the Guidelines includes (inter alia), 'bribery, corruption or abuse of office'.

The relevant legislation treats fraud and corruption quite separately[4] and it is reasonable to draw the conclusion that the Commonwealth legislature did not see corruption as a subset of fraud, nor fraud as a subset of corruption.

Notwithstanding that the *Commonwealth Fraud Control Guidelines* include corruption, there is a fundamental issue as to why the Commonwealth has chosen to emphasise fraud, to the almost total exclusion of corruption. Indeed, in conflating these two concepts in the one term 'fraud', that term then takes on a meaning well beyond that meant in normal discourse.

There would appear to be a number of possible reasons for this redefining of terms:

- The impetus for the Commonwealth's campaign against fraud was the community concern of widespread tax evasion and welfare fraud in the early 1980's. While there have been high profile cases of corruption, that are discussed below, being perpetrated by Commonwealth public servants, clearly the past and continuing emphasis is upon fraud being perpetrated upon the Commonwealth from outside sources; and
- The emphasis upon fraud, rather than corruption, has a closer fit with the administrative reform agenda pursued by successive Commonwealth governments. In particular, the policies on the contracting out of public sector services lend themselves more to a commercial rationale for dealing with potentially improper behaviour than those that are based upon a commitment to shared moral values.

The discussion above is necessary for appreciating why this jurisdiction is reporting low rates of corruption.

Levels of Corruption

Australia is not generally regarded as a country with a major corruption problem. It ranks eighth, in corruption free nations, in Transparency International's Corruption Perception Index for 2003.

As will be noted in the following paragraphs, it is very difficult indeed to come up with the answer to the question 'How much corruption is there in federal system of government in Australia?'

Noting the propensity to concentrate on fraud, the Director of Australian Institute of Criminology[5], Adam Graycar in 2000 estimated that the total amount of fraud in Australia is somewhere between A$3 billion and A$3.5 billion, that estimate including fraud at all levels of government and in the private sector. In the 2000/01 financial year, Australia's GDP was A$670 billion.

To try to get some more precise measurement, it is necessary to go to a variety of sources. The Annual Reports of the Australian Federal Police[6] show the following for the number of cases of fraud and corruption investigated.

Table 1 Cases investigated by the Australian Federal Police

Year	Number of corruption cases investigated	Number of fraud cases investigated	Estimated value of fraud cases investigated
2002 - 2003	24	208	(Not provided)
2001 - 2002	39	192	$252 million
2000 - 2001	40	272	$98 million
2000 - 2001	43	312	$207 million
1998 - 1999	143	308	$93 million
1997 - 1998	134	360	(Not provided)

Of course, not all cases that are investigated are prosecuted. The Annual Reports of the Director of Public Prosecutions[7] show the following for the number of prosecutions of cases related to fraud and corruption.

Table 2 Cases prosecuted by the Director of Public Prosecutions

Year	2002 - 03		2001 - 02		2000 - 01		2000 - 01		1998 - 99	
Legislative provision[8]	**S***	**I***	**S**	**I**	**S**	**I**	**S**	**I**	**S**	**I**
Imposition (s29B Crimes Act)	118	23	93	31	116	55	128	61	150	87
Fraud (s29D Crimes Act)	95	143	107	133	104	59	67	159	73	111
Bribery (ss73 & A Crimes Act)	-	1	1	1	0	1	1	4	1	2
Financial benefit by deception (Criminal Code s134.2)	15	32	10	3						
Obtaining financial advantage (Criminal Code s135.2)	730	1	19	0						
False information (Criminal Code s137.1)	4	0	1	0						
False Documents (Criminal Code s137.2)	7	0	0	0						
Corrupting benefits to C'wealth official (Criminal Code s142.1)	1	0	0	0						
Social Security Act	4681	3	5218	-	3953	-	3525	-	3638	-
*(S = Summary, I = Indictable)										

Looking at these statistics, a number of issues are of interest.

- The ambiguity of subsuming corruption within fraud is evident. What the AFP refers to as 'corruption' is clearly being dealt with predominantly by the fraud provisions in the Criminal Code;
- The quite extraordinarily low numbers for the incidence of bribing a Commonwealth official or paying corrupting benefits;
- The role of the AFP as investigator is limited to a relatively small proportion of the cases that are going through the prosecution process; and
- The preponderance in the prosecution of large numbers of cases of welfare fraud which are generally of quite small amounts and are handled by investigators in the payment agency, Centrelink, rather than by the police.

The information provided above does not really give any indication of the amount of what is reported, as fraud is corruption. Surveys by the Australian National Audit Office (ANAO)[9] found that a very significant extent of fraud was defined as 'internal' which would fall within the TI definition of corruption. The following table is reproduced from the report:

Table 3 Extent of fraud reported by surveyed APS agencies in response to ANAO's 1999-2000 and 2002-2003 surveys.

Financial years	Number of fraud allegations	Number of fraud cases	Value of fraud cases ($'000)
Internal fraud			
1997-98	1,310	352	1,039
1998-99	1,220	348	9,289
2000-01	2,271	1,605	1,690
2001-02	2,782	1,540	2,629
External fraud			
1997-98	5,775	3,510	152,137
1998-99	5,257	3,702	136,573
2000-01	7,328	4,002	115,127
2001-02	8,380	4,971	90,700

From this data, some observations can be made. Over the four-year period, 'internal fraud' was:

- 22.2% of the total allegations;
- 22.5% of the total number of cases; and
- 2.9% of the total value of the cases.

However, these observations have to be treated with caution. From the ANAO report itself:

- Not all agencies provided responses;
- Not all agencies that responded were able to provide information on the value of cases;
- There were inconsistencies in what was regarded as fraud with some 32% of agencies using an outdated definition of fraud; and
- In the later of the two surveys, 99% of the reported fraud against Commonwealth agencies was committed against 10% of agencies.

Even though this assessment is about the Commonwealth level of government, it is worth comparing the figures for corruption in another Australian jurisdiction. The New South Wales Independent Commission Against Corruption[10], in its annual report gives these figures for the number of allegations of corruption that were received by the Commission.

Table 4 Allegations of corruption received by the NSW Independent Commission Against Corruption

Financial Year	Total number of allegations received
2000 – 2001	2,058
2001 – 2002	1,852
2002 – 2003	2,593

Before leaving the discussion of the level of corruption against the Commonwealth, it is worth mentioning three recent cases that received considerable publicity.

The first is the case of David Muir, a contract accountant with the Department of Finance and Administration. In 1998 he used his access rights to the Department's computer system to transfer some A$8.25 million into a series of private accounts. Very little of the funds were recovered. In 2000, David Muir was found guilty of defrauding the Commonwealth and given a sentence of seven years.

The case of Nick Petroulias[11] was even more startling. He had been recruited into the Australian Taxation Office (ATO) in 1997 from the private sector and quickly rose to be First Assistant Commissioner (a very senior position, with only one layer of management between him and the CEO). Part of his duties was to crack down on tax evasion schemes. He also had authority to issue private binding rulings where the operators of complex financial schemes could get advice from the ATO whether the ATO considered the proposed schemes were within the scope of the taxation legislation. Petroulias left the ATO in early 1999, and in 2000 the Australian Federal Police arrested him. It is alleged that rather than controlling tax avoidance schemes, he used his authority to issue private binding rulings to assist in their marketing, and profiting form the arrangement. He has been charged with defrauding the Commonwealth and corrupt conduct. The case is being vigorously defended and, at the time of writing, had not been concluded.

In May 2002, Andrew Theophanous, the former Labor member for Calwell in the federal House of Representatives, was convicted of four charges of bribery and defrauding the Commonwealth. He was sentenced to six years jail, but served only 20 months. One of the charges was quashed on appeal. Theophanous was accused of seeking or obtaining thousands of dollars to help Chinese nationals with visa applications and other immigration matters. The charges also alleged that in one case Theophanous sought sexual favours from a woman.

Impact of 'New Public Management' Arrangements

Over the last two decades, the Australian Public Service has undergone substantial change, both in its internal management processes and in its methods of service delivery. These changes commenced in the Commonwealth public sector in with the election of a centre-left Labour government in 1983. The first raft of changes were internal with the substantial weakening of the central coordinating agencies, flattening of complex administrative hierarchies and the devolution of management authority to agency heads.

The changes continued, with gathering momentum, through the eighties and early nineties. Performance pay was introduced for senior executives, and the more commercial of the government agencies were privatised. The pace of change picked up considerably with the election of the Howard government in 1996. The major changes that have occurred since then are:

- **Employment** – the terms and conditions of employment, particularly remuneration, became subject to agency-specific agreements, rather than being set centrally. Heads of agencies appointments moved to direct decision of the Executive;
- **Management** – the introduction of accrual budgeting in the 1999-2000 Budget, an emphasis on reaching performance targets, the costing of government 'outputs' and the imposition of capital use charges, the devolution of responsibility to departments;
- **Service delivery** – a policy was introduced requiring the justification of why each public sector activity could not be provided by the private sector. Consequently all information technology infrastructure was outsourced, virtually all government property sold and leased back, and the Commonwealth Employment Service abolished with virtually all employment programs provided by the private sector and non-government agencies. Many agencies have moved to have human resources functions and internal audit provided by the private sector. In this process the Australian Public Service was reduced in size by some 12,000; and

- **Technology** – there has been a trend towards providing information and other services on the Internet.

There are a number of implications of these changes for dealing with corruption that have some negative aspects:

- Fragmentation of the bodies to deal with corruption;
- Complexity of accountability arrangements; and
- Dilution of public sector ethics.

Looking at fragmentation, at a policy level, the Australian Public Service Commission and the Department of the Prime Minister and Cabinet jointly share responsibility for ethics and values, Attorney-General's Department and Department of Finance and Administration jointly sharing responsibility for fraud control and no single agency taking responsibility for corruption.

At an investigation level, what was once the sole responsibility of the police is now shared with a large number of internal investigation units. Further fragmentation is occurring as small agencies contract private sector providers to undertake or assist in investigations.

The fragmentation is also evidenced by the varying degrees of priority being given to anti-corruption and fraud control programs within agencies. The ANAO surveys mentioned above point to wide variations in how seriously the programs are being taken. Clearly, anti-corruption and fraud control programs have to jostle for attention when managers are being held accountable for producing results in delivery.

The major challenge to the Commonwealth is operating effective anti-corruption and fraud control programs in an outsourced environment. The Australian National Audit Office iterates the 'good housekeeping' list of ways in which agencies can control fraud and corruption when services are being provided by the private sector. In the ANAO Surveys cited above, the Office asked whether agencies have formal policies and procedures for ensuring that consultants, suppliers and other third parties are aware of, and comply with their fraud control policies. Outsourcing arrangements are now virtually universal in Commonwealth agencies, yet 74% of agencies had not established such policies and procedures.

The outsourcing model raises accountability issues for anti-corruption and fraud control programs. The contractual basis of the arrangement is almost inevitably regarded as commercial in confidence. This makes review by external bodies, and the public, very problematic.

Also, one of the underpinnings of all anti-corruption and fraud control programs is the acceptance of agreed ethical values of the participants. Very few private sector organizations have an appreciation of the subtleties and complexities of public sector ethics.

The move towards providing services online and electronic financial transactions raises another set of issues for effective anti-corruption and fraud control programs. The technology provides the capacity for sophisticated security and audit functions. However, it also raises a whole new set of risks. One of the more obvious is the capacity to investigate suspect transactions in a complex information technology system. The number of investigators skilled in these techniques is still relatively small and Australian police services are finding it very difficult to keep them in the face of lucrative job offers in the private sector.

It should not be assumed that the arrangements that the Commonwealth has for dealing with fraud and corruption apply universally across the whole of the federal public sector:

- There is a wide variety of employment arrangements at the federal level. While the *Public Service Act 1999* covers the single largest group of employees, there are many statutory authorities that have the power to set their own terms and conditions. Consequently the public sector values that are an essential part of the *Public Service Act 1999* and the associated disciplinary procedures do not apply universally in the Australian government public sector. Also, employment

categories like those persons employed to serve Ministers and Members of Parliament have there own employment schemes;

- The financial management provisions in the *Financial Management and Accountability Act 1997* that provide the authority for the fraud control policies (and therefore the anti-corruption policies) similarly do not extend beyond a group of 'core' public sector agencies;
- The provisions of the Criminal Code dealing with fraud and corruption have a very wide application and cover most persons working for, or on behalf of the Commonwealth; and
- The extensive arrangements for the provision of services by the private sector are governed by an array of contractual arrangements, with, according to the Australian National Audit Office, relatively little uniformity.

Key Issues with Ethical Behaviour

In a large public administration like the Commonwealth government, it is not surprising that a wide *range* of corrupt and unethical behaviour occurs. As noted above the *level* of activity that enters the criminal justice system is low. As will be described in the following part of this study, the pillars of integrity are mostly robust, and in some areas very strong.

Having said that, there is a vigorous and continuing public debate[12] about what is termed the politicisation of senior levels in Commonwealth administration and failures in accountability processes. Not all of the issues raised in this debate refer to officers of the Australian Public Service (APS); it involves military officers, statutory office holders and the role of advisers to Ministers.

At the core of this debate are concerns that senior officials are placing more emphasis upon their obligations to be responsive to their Ministers than on requirements to be politically non-partisan, provide frank and fearless advice as well as acting in the broader public interest.

While not all the persons involved in this dilemma are public servants, the relevant provisions of the *Australian Public Service Act 1999* provide a useful illustration of the ambiguity facing senior officials. Subsection 10 (1) sets out the values of the Australian Public Service. There are 15 in total, but the ones relevant to this discussion are:

- (a) The APS is apolitical, performing its functions in an impartial and professional manner;
- (d) The APS has the highest ethical standards;
- (e) The APS is openly accountable for its actions, within the framework of Ministerial responsibility to the Government, the Parliament and the Australian public;
- (f) The APS is responsive to the Government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs.

A cursory analysis of these values indicates that there is the potential for conflict between (f) and the other three.

Also, this statement of intent needs to be read in conjunction with other provisions in the Act and other legislation. The heads of APS agencies are appointed by the Prime Minister (section 58) on fixed terms and can be dismissed at will (section 59). Below the level of the heads of APS agencies is a Senior Executive Service of 1872 officers[13]. While the majority of these officers have permanent appointments made by the Australian Public Service Commissioner, within that framework they are required to have individual workplace agreements (Division 3, Part VID, *Workplace Relations Act 1996*) where specific performance requirements are set out.

In summary, while senior public servants have a values framework in which to operate, they are working within an employment framework with a heavy emphasis upon meeting government aims. The government does not see these ambiguities being of major significance[14].

A good way of exploring this issue is to look at a number of recent incidents that have attracted public debate. The first is known as 'Children overboard'[15].

On 7 October 2001, the Minister for Immigration, Mr Philip Ruddock, announced to the media that 'a number of children had been thrown overboard' from a vessel suspected of being an 'illegal entry vessel' just intercepted by the Australian Defence Force. The 'children overboard' story was repeated in subsequent days and weeks by senior Government ministers, including the Minister for Defence, Peter Reith, and the Prime Minister, John Howard. The story was in fact untrue.

The sensitivity associated with the claim that children had been thrown overboard was that it was made at the beginning of and sustained throughout a Federal election campaign, during which 'border protection' and national security were key issues. That asylum seekers trying to enter Australia by boat were the kinds of people who would throw their children overboard was used by the Government to demonise them as part of the argument for the need for a 'tough' stand against external threats and in favour of 'putting Australia's interests first'.

The issue was examined at length by a Senate Committee. At the broadest level, the Committee has found that a number of factors contributed to the making and sustaining of the report that children had been thrown overboard. They included genuine miscommunication or misunderstanding, inattention, avoidance of responsibility, a public service culture of responsiveness and perhaps over-responsiveness to the political needs of ministers, and deliberate deception motivated by political expedience.

The Committee was highly critical of the responsible Minister (who resigned after the election and immediately took up a position with a defence contractor), Ministerial staff who intervened in administrative processes but who were not accountable to Parliament and senior public servants and military officers who knew that the story was false but failed to clearly indicate this to the responsible Ministers.

The second issue has been the debate around the advice the government received on weapons of mass destruction prior to the invasion of Iraq in 2003. This debate took place in the context of similar debates in the United States and the United Kingdom. The issue came to a head when Andrew Wilkie, an intelligence analyst with the Office of National Assessments, resigned and made public statements alleging political interference in the intelligence process. Specifically, he alleged that the Government ignored the qualifications in the intelligence reports that it had received to back up the case for war. A Parliamentary Committee [16] examined the issue and came up with an equivocal report – essentially the allegation had not been proved. In the light of the fact that no WMDs have been found and the doubts about the role intelligence agencies in the United States and the United Kingdom, many commentators are portraying the issue as one of politicisation of the intelligence services.

Another incident that has been interpreted as politicisation, was the Government's reaction to some comments made by the Commissioner of the Australian Federal Police. In March 2004 the Commissioner appeared on a national current affairs program and said that Australia's involvement in the Iraq war had increased the likelihood of a terrorist attack on Australia. As the Australian Federal Police plays a key role in counter terrorism and is the focal point for national criminal intelligence, the Commissioner's views received wide publicity. However, his views were contradicted immediately by the Prime Minister who argued that the threat of international terrorism had existed before the invasion of Iraq. The Minister for Foreign Affairs went further and said that the Commissioner was "expressing a view which reflects a lot of the propaganda we're getting from al-Qaeda". Press reports indicated that the Commissioner considered resigning[17]. Very soon after he issued a 'clarifying' press release[18] which has been widely interpreted as being released because of political pressure.

These three case studies are not meant to be exhaustive, but to indicate that there is an active public debate about issues that are central to the issue of the ethical climate of Commonwealth administration.

A National Anti-Corruption Body?

The obvious omission in the Commonwealth's law enforcement arrangements is the lack of an anti-corruption body. They exist in other Australian jurisdictions – the Independent Commission Against Corruption in New South Wales, the Crime and Misconduct Commission in Queensland and the Anti-Corruption Commission in Western Australia. Following allegations in the media that some police officers in the Australian Crime Commission who had been seconded from state police services were corrupt; the government announced[19] that it would set up a 'national anti-corruption body'. This announcement needs to be read carefully, because the body that is proposed will only look at corruption in the police working in the AFP and ACC and will not deal with corruption by officials as all the anti-corruption bodies listed above are empowered to do. This proposal is a belated acceptance of a proposal made by the Australian Law Reform Commission[20] in 1996 that had not been actioned.

The National Integrity System

Executive[21]

The head of state in Australia is the Governor-General who is appointed by the Queen upon the recommendation of the Prime Minister.

Prime Minister

The head of the executive is the Prime Minister, the other elements of the executive are the Cabinet and Ministers. The office of Prime Minister is not recognised by the formal Constitution, being a conventional part of the constitutional arrangements. The Prime Minister has the following powers:

- Nomination of the Governor-General;
- Is the sole source of formal advice for Governor-General;
- Advises the Governor-General when Parliament should be dissolved;
- Has responsibility for setting the date for House of Representatives elections;
- Allocates positions in the Cabinet; and
- Is chairperson of Cabinet.

Ministers

It is customary for all Ministers to be Members of Parliament (either from the House of Representatives or the Senate), and if a Minister is not, it is obligatory for that Minister to become a member within three months of appointment. Reshuffles of the Ministry may occur at any time between elections. Ministers are invariably members of the same party or coalition as the Prime Minister.

In most cases, new governments are formed after general elections have been held to determine the composition of the House of Representatives. A new government could also be formed on any occasion between elections if the majority party changes its leader, or loses its majority (e.g. as a result of a by-election), or is defeated in an important vote in the House.

Cabinet

In practice, Government policy is determined by the most senior Ministers meeting in a body known as Cabinet. Such meetings are chaired by the Prime Minister. The Governor-General does not attend such meetings. Cabinet is not a body that is recognised by the formal Constitution, being a conventional part of the constitutional arrangements. Despite this, Cabinet effectively controls not only the legislative programme, but also the Departments of State. In effect, therefore, Cabinet is the dominant political and administrative element in Australia's national government. Ministers not included in Cabinet are referred to collectively as the Outer Ministry.

The current Executive has 17 Cabinet Ministers (including the Prime Minister) and 23 Ministers and Parliamentary Secretaries in the Outer Ministry

Legislature[22]

Commonwealth legislative power is vested in the Commonwealth Parliament, comprising the House of Representatives (150 members) and the Senate (76 members).

Apart from the constitutional requirement that all financial legislation must originate in the House of Representatives, and that the Senate cannot amend such legislation, the two houses have similar powers. The fact that the Senate can reject financial legislation makes it one of the most powerful upper houses in the world.

Australia having a federal system means that the powers of the Commonwealth Parliament are limited to areas of national importance. Among the powers granted by the Constitution are trade and commerce, taxation, postal services, foreign relations, defence, immigration, naturalisation, quarantine, currency and coinage, weights and measures, copyright, patents and trade marks. High Court decisions and Commonwealth-State agreements have seen the Commonwealth gain influence in regard to various matters including industrial relations, financial regulation, companies and securities, health and welfare, and education.

More than half of Parliament's time is taken up with the *consideration of proposed legislation*. Between 150 and 250 bills are passed each year. Most bills are not contentious, either being 'machinery' legislation necessary for the orderly processes of government, or bills that propose alterations to existing legislation. Most of the bills are government bills; private members' legislation is rare.

The Parliament's scrutiny function is seen most obviously in the formal periods of Question Time, in both houses, that are a part of each day's sitting.

A range of parliamentary committees is established in order that Parliament's legislative, inquiry and scrutiny functions can be carried out more thoroughly and with the benefit of expert advice. These committees undertake the scrutiny of government operations as well as frequent inquiries into a range of current issues.

In Westminster system governments, such as Australia's, the Opposition has a recognised and formal status, being recognised in the Standing Orders of the Parliament and in legislation. The Opposition is seen as the *alternative government* and typically forms a 'shadow Cabinet' of MPs who prepare themselves to take on the reins of government.

The ethics requirements upon Members of the House of Representatives and Senators are quite specific and limited. Section 45(iii) of the Australian Constitution provides that if a Senator or Member of the House of Representatives directly or indirectly takes or agrees to take any fee or honorarium for services for services rendered in the Parliament to any person or State, the place of the Senator or Member shall thereupon become vacant.

The requirements on Parliamentarians centre upon the notion of 'pecuniary interests'. For members of the House of Representatives[23], Standing Order 196 prohibits a member from voting on a matter where there is direct pecuniary interest 'not held in common with the rest of the subjects of the Crown'. Because the rule does not apply to questions an a matter of public policy and most matters before the legislature are of a public policy nature, this prohibition has very limited effect. Standing Order 335 prohibits members sitting on a parliamentary committee if they have a direct pecuniary interest in the subject matter of the committee's deliberations.

Standing Order 329 requires that members disclose certain prescribed interests (shareholdings, assets, real estate) and failure to do so brings the member into contempt of the House. Registers are available for public inspection. The Senate[24] has similar procedures for the registration of interests and for the declaration of interests in mattes before the Senate[25]. The House of Representatives has a Committee on Members' Interests that monitors that the requirements of Standing Order 329 are fulfilled. The Senate has an equivalent committee on Senators' interests.[26]

Ministers are bound by the Prime Minister's guidelines[27] on Ministerial responsibility which relate specifically to their duties as Ministers. Chapter 5 'Ministerial Conduct' requires that Ministers complete the PM's statement of interest forms. The PM's guidelines are widely regarded as being self-serving and weak, as he has refused to dismiss Ministers who have had conflicts of interest as defined in his guidelines.

Political Parties

In the Commonwealth Parliament there are the following political parties:

- The left of centre Australian Labor Party.
- The right of centre Liberal Party.
- National Party (permanently in coalition with the Liberals).
- Greens.
- Australian Democrats.

A coalition of the Liberal Party and the National Party (as the junior partner) currently hold government because they have a majority of 8 in the House of Representatives. The Labor Party is in opposition. Because the Senate is elected upon a system of proportional representation, the minor parties (Greens and Democrats) hold the balance of power in the Senate – usually voting with the Australian Labor Party.

The party system in Australia is in a period of change:

- The demographic identification: ALP, working class; Liberal, business and National, rural interests is eroding;
- Mass membership in all parties is falling (with the exception of the Greens); and
- The two major parties are becoming more dependent on external funding for the running of sophisticated media campaigns. (The issue of public funding of parties is dealt with in the next section).

A major influence upon the way Australian political parties operate is the system of compulsory registration, compulsory voting (failure to vote attracts a small fine) and a preferential voting system. Parties do not have to expend energy upon registering voters and getting them out on polling days. That is done by the state. Preferential voting means that (for the House of Representatives, where the government is formed) voters list out every candidate in order of preference, and candidates with the least votes are eliminated until an absolute majority (50% + 1 vote) is reached. The practical effect of this is that independents and minor candidates find it extremely difficult to get elected and thus since federation in 1901, power has been shared by one of the two major political blocs. This stability has meant that besides the ebb and flow between the two major political blocs, a lot of political effort goes into getting pre-selected by a party. In 'safe' seats, ones that are nearly always won by the same party, the pre-selection battles are intense and accusations of unethical practices (like branch stacking) frequently occur.

Political Donations

As noted above, Australian political parties are highly active in seeking external sources of funding. This funding is predominantly from the business sector. The trade union movement has traditionally been a large donor to the Australian Labor Party, although it as well now obtains significant funding form the business sector. Under section 17(2) of the *Commonwealth Electoral Act 1918,* the Australian Electoral Commission is required, as soon as practicable after a federal election, to provide to the Minister for tabling in the Parliament a report on the operation of the Funding and Disclosure scheme in Part XX of the Electoral Act. The scheme does not place any limit upon the amounts that can be donated to political parties.

The purpose of the scheme is to prevent political corruption by making the financing of political parties and candidates as transparent as possible. As stated in the second reading speech which introduced disclosure legislation in 1983: 'it is simply naive to believe that no big donor is ever likely to want his cut sometime. Australians deserve to know who is giving money to political parties and how much'.

Notwithstanding the rules on political donations, there are frequently scandals about improper influence. The 'Manildra' case was one in which an Australian company producing ethanol received very favourable treatment from the government by virtue of protective tariffs placed upon the importation of industrial ethanol. The company was a prominent donor to the Liberal party[28]

Public Funding

The purpose of public funding of political parties was to avoid the problems of political parties having to raise large amounts of money to run campaigns – in particular the potential for political corruption. Registered political parties, independent candidates and Senate groupings which receive more than 4% of the total, formal, first preference vote are entitled to funding. Currently, the rate of funding is $1.84 per vote. Some A$33 million of public funding was paid to the political parties for the 1998 federal election.

There has been some criticism of the scheme in that it tends to favour the larger, existing political entities at the expense of the smaller parties which are struggling to gain recognition. A right wing, populist political movement (One Nation) went against this trend by obtaining enough support at its first entry into the federal political arena in the 1998 election and qualifying for public election funding. That short-lived political movement was the focus of investigation for providing misleading information about its status as a political party and the diversion of funds by its leader, Pauline Hanson, for her personal use. She was imprisoned but her conviction overturned upon appeal.

Australian Electoral Commission[29]

The Australian Electoral Commission (AEC) is responsible for providing Australians with an independent electoral service that meets their needs and enhances their understanding of, and participation in, the electoral process.

The organisation operates as an independent statutory authority under the *Commonwealth Electoral Act 1918* and is responsible for the federal electoral system in Australia. The Commonwealth Electoral Act was amended in 1984, which established the Commission with three commissioners. At 30 June 2002, these commissioners were:

- The Chairperson (who must be either a judge or retired judge of the Federal Court of Australia);
- The Electoral Commissioner, who is the Chief Executive Officer; and
- One other part-time, non-judicial member – currently the Australian Statistician.

The AEC operates over a wide geographical base, with a central office in Canberra and a head office in each State capital and Darwin. There are 150 House of Representatives electoral divisions and each has its own divisional office. The AEC has an unusually large number of statutory office holders. It has 861 staff a budget of some A$150 million. Some sense of the amount of data it handles is indicated by the 12.74 million Australian citizens on the electoral roll, and the 2.98 million transactions it deals with per year.

The Commission has a high degree of autonomy by virtue of its statutory independence. The AEC is subject to the oversight of the Joint Standing Committee on Electoral Matters (JSCEM). The JSCEM undertakes a comprehensive review of every federal election and it gives the AEC the opportunity to bring forward ideas for improvement over the electoral system and the committee considers those ideas and thus continual improvement can be made to the Australian electoral system.

Voter registration

The AEC is responsible for collecting information that forms the basis of the electoral roll. While citizens are legally required provide information for the electoral roll, the Commission is not in position to make it too difficult for people to enrol by, for example,

asking them to provide a lot of identity documents. The Australian National Audit Office recently examined the integrity of the electoral rolls – largely a review of the systems for collecting data and maintaining the rolls. The audit was generally supportive of the AEC with some suggestions for change being made[30]. (ANAO). The JSCEM conducted an inquiry into the ANAO findings and recommended the AEC move to rectify the shortcomings identified in the ANAO report.

Australian National Audit Office

The key legislative provisions relating to the Australian National Audit Office (ANAO) are contained in the *Auditor-General Act 1997*. Of prime importance is the clear statement that the Auditor-General is an independent officer of the Parliament (Subsection 8(1)). The powers and functions are set out in the Act along with a clear mandate to act with autonomy.

Schedule 1 of the Act sets out the terms and conditions of appointment of the Auditor-General. The appointment is made by the Governor-General, on the recommendation of the relevant Minister and is for a period of ten years (Subsection 1(1) of Schedule 1). (This period of appointment is very long; usually Commonwealth statutory appointments are for periods of five or seven years). Section 2 of Schedule 1 requires that the Minister have the approval of the Joint Committee of Public Accounts and Audit for the recommendation to the Governor-General.

The independence of the office is further strengthened by the provisions for removal from office. Briefly these are that the Governor-General can only remove the Auditor-General from office if both houses of Parliament agree. The grounds for dismissal are closely defined in the legislation and are misbehaviour, physical or mental incapacity or issues related to bankruptcy.

Sections 38 to 40 of the *Auditor-General Act 1997* authorise the establishment and funding of the Australian National Audit Office. An additional bulwark for the independence of the audit function is the guaranteed availability for Parliamentary appropriations in the legislation (Section 50) and the involvement of the Joint Parliamentary Committee for Audit and Accounts in the draft estimates for the funding of the ANAO (Section 53).

As at 30 June 2002, the ANAO had total operating expenses A$50 million and employed 256 staff.

The ANAO does a range of types of auditing [31]– performance audits, financial control and administration audits, financial statement audits and assurance and control assessment audits. It tables around 60 audit reports every year. As well the ANAO plays an active role in defining and promulgating best practice in a wide range of financial management areas and the current Auditor-General plays an active role in the debate about financial management.

Reports of the Auditor-General are tabled in Parliament and published on its website. As well, the reports go to the Joint Committee of Public Accounts and Audit which is a committee of the Commonwealth Parliament (jointly between the House of Representatives and the Senate), established by the Public Accounts and Audit Committee Act 1951 (the PAAC Act). The Committee is empowered to scrutinise the moneys spent by Commonwealth agencies from funds appropriated to them.

The PAAC Act provides that the Committee is appointed at the beginning of each Parliament, and that the Committee has 16 members, six of whom appointed by the Senate and ten appointed by the House of Representatives. The Committee has a majority of Government members, and, by convention, the Committee is chaired by a Government member. The Vice-Chairman is always a member of the Opposition.

The Committee has the capacity to determine its own work program and priorities. This power is derived principally from section 8(1)(b) of the PAAC Act, which enables the Committee to report to Parliament on any items or matters in the Commonwealth's Accounts and financial statements or in reports of the Commonwealth Auditor-General, *or*

any circumstances connected with them, to which the Committee thinks the attention of the Parliament should be directed. The other main sources of the Committee's work are described in sections 8(1)(abb) and 8(1)(d) of the PAAC Act, which provide that the Committee is to examine reports of the Auditor-General and to inquire into any question referred to it by the Parliament. The ability to consider and report on *any circumstances connected* with reports of the Auditor-General or with the financial accounts and statements of Commonwealth is one of the main sources of the JCPAA's authority - it gives the Committee the capacity to initiate its own references and, to a large extent, to determine its own work priorities. This power is unique among parliamentary committees and gives the JCPAA a significant degree of independence from the Executive arm of government.

Recent examples of work arising from each of these sources are:

- Report 325, The Midford Paramount Case (an inquiry referred by the Senate);
- Report 331, An Advisory Report on the Financial Management and Accountability Bill 1994, the Commonwealth Authorities and Companies Bill 1994 and the Auditor-General Bill 1994, and on a Proposal to Establish an Audit Committee of Parliament (a review of legislation referred by the House of Representatives and a related matter referred by the Senate);
- Report 336, Public Business in the Public Interest: An Inquiry into Commercialisation in the Commonwealth Public sector (a self-initiated inquiry).

The Committee is assisted by a full time secretariat, by observers from the Department of Finance and by observers and secondees from the Australian National Audit Office. The Committee also frequently employs consultants to provide advice on particular issues.

The ANAO is very highly regarded as an organisation of competence, integrity and independence. It has not hesitated to criticise the government for policy decisions that have, in the view of the Auditor-General, been in the best interests of the Commonwealth. Two examples[32] of this independence are reports on the outsourcing of information technology and the sale and leaseback of virtually all property. Both these reports attracted an extremely critical response form the Government.

Judiciary

At the peak of federal judiciary, is the High Court of Australia which is the superior court to all the supreme courts of the states and territories as well as the Federal Court. Below the Federal Court is the Federal Magistrates Court[33] and quasi-judiciary bodies, the primary one being the Administrative Appeals Tribunal.

High Court

The authority of the highest court[34] in the Australian judicial system stems from Section 71 of the Australian Constitution. The court came into existence upon federation in 1901. Broadly speaking, the functions of the High Court are to interpret and apply the law of Australia. A key role is determining matters relating to the constitutional validity of laws and to hear appeals from federal, state and territory courts. Decisions of the High Court are binding on all other courts in Australia.

Appeals to the Privy Council from decisions of the High Court were effectively ended by the combined effects of the *Privy Council (Limitation of Appeals) Act 1968* and the *Privy Council (Appeals from the High Court) Act 1975*. However, a right of appeal to the Privy Council remained from State courts, in matters governed by State law, until the passage of the Australia Acts, both State and Federal, in the 1980s.

High Court judges are appointed by the Governor-General upon advice from the Executive Council. The *Constitution Alteration (Retirement of Judges) Act 1977* ended the system of life tenure of High Court Justices. The Act required that all Justices appointed from then on must retire on attaining the age of 70 years.

Upon the filling of any one of the seven positions of the High Court, there is inevitably speculation about the political motives of the government of the day seeking to affect posterity by appointing a judge who would favour the appointing government's view of the world. One particularly contentious appointment was that of Lionel Murphy in 1975. He was formerly a reformist Attorney-General in a reformist government and he became a highly innovative and activist High Court judge. In 1983 press reports surfaced that he had acted improperly. This started a Parliamentary process of inquiry as to whether there were grounds for his dismissal. Lionel Murphy was charged, convicted then acquitted upon appeal but this did not end the speculation. The processes to attempt to dismiss him ground on inconclusively until 1986 when he died of cancer.

Federal Court

The Federal Court's jurisdiction is very wide, covering almost all civil matters arising under Australian federal law and some summary criminal matters. This jurisdiction stems from some 150 statutes enacted by the Commonwealth Parliament. Of the many issues that come before the Federal Court, those most directly relevant to integrity are:

- Consumer protection and issue relating to anti-competitive behaviour by companies – *Trade Practices Act 1974*;
- Review of decisions taken by Commonwealth officials – *Administrative Decisions (Judicial Review) Act 1977* and the *Administrative Appeals Tribunal Act 1975;*
- Taxation matters on appeal from the Administrative Appeals Tribunal;
- Matters to do with the regulation of the corporate sector – *Bankruptcy Act 1966* and the *Corporations Act 2001.*

Federal court judges, currently 46 in number, are appointed by the Governor-General, upon the recommendation of the Executive Council (Section 6) of the *Federal Court Act 1976*. They can only be removed by the Governor-General upon the recommendation of both Houses of Parliament.

Federal Magistrates Court

The Federal Magistrates Court of Australia[35] was established by the Commonwealth Parliament at the end of 1999. The court was established by the *Federal Magistrates Act 1999.*

The court is an independent federal court under the Australian Constitution. The establishment of the Federal Magistrates Court in 2000 marked a change in direction in the administration of justice at the federal level in Australia. Australia had not previously had a lower level federal court although a considerable amount of federal law work had been done in state and territory courts of summary jurisdiction.

The objective of the Federal Magistrates Court is to provide a simpler and more accessible alternative to litigation in the superior courts and to relieve the workload of those courts. Its jurisdiction includes a range of issues, the most workload is with family law (some 80%) and migration: matters. The court has 22 federal magistrates.

Administrative Appeals Tribunal

The Tribunal[36] is a quasi judicial independent body that is established by the *Administrative Appeals Tribunal Act 1975*. It is an organisation of 129 staff, 74 of whom are Tribunal members. Tribunal members can be judges or eminent members of the community.

The Tribunal reviews, on the merits, a broad range of administrative decisions made by Australian Government ministers and officials, authorities and other tribunals. The Tribunal also reviews administrative decisions made by some non-government bodies. Merits review of an administrative decision involves its reconsideration. On the facts before it, the tribunal decides whether the correct - or in a discretionary area, the preferable - decision

has been made in accordance with the applicable law. It will affirm, vary or set aside the original decision.

The Tribunal is not always the first avenue of review of an administrative decision. In some cases, it may not review decisions until after an internal review by the department or agency that made the primary decision. In other cases, review by the Tribunal is only available after intermediate review by a specialist tribunal.

The Tribunal reviews only decisions over which it has specifically been given jurisdiction, generally conferred by the legislation under which the original decision was made.

The Tribunal's jurisdiction is contained in over 395 separate Acts and Statutory Instruments[37], covering areas such as taxation, social security, veterans' entitlements, Commonwealth employees' compensation and superannuation, criminal deportation, civil aviation, customs, freedom of information, bankruptcy, student assistance, security assessments undertaken by the Australian Security Intelligence Organisation (ASIO), corporations and export market development grants

Civil Service

The Australian Public Service (APS)[38] provides policy advice to the Commonwealth Government and facilitates the delivery of programs to the community. The Australian Public Service is part of the broader public sector, which includes parliamentary staff, statutory authorities, a separate public service for each of the States and Territories and local government employees. As at February 2001, some 1,427,500 Australians, 15.7% of the employed work force, worked in the whole of the Australian public sector.

At 30 June 2003 there were 131,711[39] staff in the APS, spread across some 108 Departments and agencies[40]. While this is the largest group of Commonwealth employees, it does not include the military or those employed in independent government agencies like Australia Post and Telstra.

There are currently eighteen departments in the Australian Public Service. Each department is managed by a chief executive officer, or Secretary, who is responsible to the relevant Minister for the efficient, effective and ethical use of resources. The Minister, in turn, takes political responsibility for the actions of the department. Each department administers particular legislation that is specified in Administrative Arrangements.

Over the last two decades, the Australian Public Service has undergone substantial change, both in its internal management processes and in its methods of service delivery. Examples of management changes include the introduction of accrual budgeting in the 1999-2000 Budget, an emphasis on reaching performance targets, the costing of government 'outputs', the imposition of capital use charges, the devolution of responsibility to departments and more flexible employment practices. Examples of changes to service delivery include the trend towards providing information and other services on the Internet, increased contracting of service delivery to the private sector and the establishment of customer service charters.

The statutory basis for the Australian Public Service is the *Public Service Act 1999.* Among other things, that legislation provides*:*

- The employment authority (for all but the senior executive service and secretaries of departments) is the agency head (Section 22);
- A statutorily appointed commissioner to (among other things) promote the values and ethic of the APS (Section 41);
- The employment and dismissal authority for secretaries of departments is the Prime Minister (Sections 58 and 59);
- Procedures for the protection of merit in recruitment and advancement with an appointed Merit Protection Commissioner (Sections 49 and 50); and
- Clear statements of values (Section 10) and a code of conduct (Section 13).

Noting that the institutional arrangements around the *Australian Public Service Act 1999* place a lot of responsibility upon individual agencies, the functions outlined above are performed by the Australian Public Service Commission. This is an organisation of 186 staff with a budget of A$175 million[41]. It is headed by the Australian Public Service Commissioner. The Commissioner performs the important role of promoting the implementation of the values set down in the legislation.

The office of the Merit Protection Commissioner, established under section 49 of the PS Act, is an independent office located with the APS Commission. The Merit Protection Commissioner assists agencies to meet the requirements of the APS values and the APS Code of Conduct primarily through the administration of the statutory review of actions scheme. This includes inquiring into breaches of the code of conduct, the (limited) review of promotion decisions and the investigation of reports made under the whistle blowing provision.

In the 2002-03 financial year the following number of reviews of promotion decisions and reviews of action were handled:

- Promotion reviews – 193 requests for the establishment of promotion review committees were received;
- Applications concerning breaches of the Code of Conduct – 43 applications were received. Of these, 29 applications were reviewed; and
- Applications for review other than promotion reviews and those related to the Code of Conduct – 128 other applications were received. Of these, 54 were reviewed.

The *Public Service Act 1999* contains a provision for whistleblowing (Section 16), but this has been widely criticised as being weak A Parliamentary committee[42] observed that the scheme had the following deficiencies:

- The scheme only applied to half of the Federal public sector;
- Only public servants can raise issues, not members of the public;
- The nature of the matters that are covered by the scheme is vague;
- Reports can only be received by the CEO and Public Service Commissioner - the latter having no power to take remedial action; and
- The protection from reprisal is limited to those from within the agency relevant to the complaint.

The Committee found the whistleblower scheme to be inadequate but noted that all the parties to the scheme were quite satisfied with it. The Australian Public Service Commissioner has publicly reported that the scheme was working well. In the financial year 2001-02, he received 12 complaints, of which nine were found to fall outside the parameters of the scheme - all of this in a public sector of over 131000 employees.

The Commonwealth has enacted a package of administrative law protections that enable citizens to seek reasons for decision, review of decisions and access to documents.

Many statutory provisions that affect the lives and well being of citizens contain such provisions, for example the *Social Security Act 1991*, the *Income Tax Assessment Act 1997*, and the *Migration Act 1958.* More importantly, there are specific statutes like the *Administrative Decisions (Judicial Review) Act 1977* that gives a legal right to citizens for a review of a decision under an enactment, with some exceptions (Section 13), and enables the citizen can apply to a court for a review of the decision. Also the *Administrative Appeals Tribunal Act 1975* allows for the review of decisions in other enactments – like those mentioned above. Citizens have a right to access to documents by virtue of the *Freedom of Information Act 1982*. Under that statute, there is a presumption of access to documents unless specific exemptions apply (for example, section 36 allows an exemption for internal working documents. There are appeal rights to the Administrative Appeals

Tribunal, with the capacity for Ministers to ultimately refuse to release particular documents.

There have been criticisms[43] of the wide discretions in the *Freedom of Information Act 1982* being used to unreasonably withhold sensitive information. While the discretions to withhold information have always been present, the current criticisms are that the government is not acting within the spirit of the legislation by fully exploiting every avenue for non-disclosure.

It is noticeable that most of the enactments were made 10 to 15 years ago, at a time when there was pressure from legal and academic commentators to make the Commonwealth more directly accountable to the community. This impetus has largely dissipated. The administrative law package has come under pressure recently with the current government removing the rights of asylum seekers to review migration decisions.

Police and Prosecutors

Australian Federal Police[44]

The Australian Federal Police (AFP) was established in 1979 under the *Australian Federal Police Act 1979* to deal with more serious criminal matters on a national level, and to provide policing services to the ACT. It employs approximately 2800 sworn and unsworn members and has revenue of A$334 million. The AFP is responsible to the Federal Minister for Justice and Customs.

The duality of purposes – dealing with serious criminal matters at a national level and policing the territories – means that the AFP is a quite unique law enforcement agency. The first range of functions involves handling (this list is not exhaustive):

- Illicit drugs;
- People smuggling;
- Intellectual property;
- Child sex tourism;
- War crimes;
- Environmental crime;
- Electronic crime;
- Money laundering, including financing of terrorism;
- Peacekeeping (Solomon Islands, Cyprus and East Timor);
- Close personal protection of dignitaries; and
- The interface with international policing (Interpol and liaison officers in 22 countries).

This range of functions is somewhat analogous with the role of the Federal Bureau of Investigation in the United States. As well, the AFP undertakes community policing for the Australian Capital Territory Christmas Islands, Cocos (Keeling) Islands, Norfolk Island and Jervis Bay. The first of these, the ACT, takes up approximately one quarter of the AFP's human resources. These latter responsibilities mean that the AFP also undertakes policing of small to medium sized communities, requiring a very different set of skills.

The AFP has a significant degree of autonomy. The Commissioner and Deputy Commissioners are appointed by the Governor-General on commission (Sub-section 17 (1) of the *Australian Federal Police Act 1979*). They have terms of seven and five years respectively (Sub-sections 17 (2) and (3)). The grounds of removal of office are specified as misbehaviour, physical or mental incapacity, engaging in unauthorised paid

employment outside the duties of office, unauthorised absence from duty or bankruptcy (Section 18).

Under section 37 (2) of the *Australian Federal Police Act 1979*, the Minister may give written directions to the Commissioner with respect to the general policy to be pursued in relation to the performance of the functions of the AFP. Corruption is not mentioned in the current Ministerial Direction, although countering and otherwise investigating serious fraud is included.

The combined effects of Sections 8 and 37 is that the Commissioner has significant autonomy to fulfil the functions of the AFP and the Government can issue broad directions as to what areas the AFP emphasises.

Australian Crime Commission[45]

The *Australian Crime Commission Act 2002* came into effect on 1 January 2003. This brought into being the Australian Crime Commission (ACC) with the primary objective of strengthening the fight against nationally significant crime. The ACC brought together three agencies: the Australian Bureau of Criminal Intelligence, the National Crime Authority which was formed in 1984 to provide an effective countermeasure to Australian organised crime and the Office of Strategic Crime Assessments.

The ACC has access to special coercive powers to assist in intelligence operations and investigations. These powers are not exercised by police agencies and are necessary in circumstances where traditional law enforcement methods are not sufficient to combat sophisticated criminal activity. The ACC is endowed with coercive powers under its enabling Act. Use of the special coercive powers is authorised by the Board and exercised by independent statutory officers known as Examiners who are experienced legal practitioners. Almost exclusively, the focus of the Commission, and its predecessor the National Crime Authority, has been upon organised crime in the illicit drugs area.

There is a very close relationship between the ACC and the AFP. The Commissioner of the AFP is the Chairman of the ACC Board and a significant number of AFP officers among its seconded staff. Section 49 of the *Australian Crime Commission Act 2002* allows AFP officers to be seconded to the ACC. The relationship is very useful to the AFP because, through the association, it can bring an inter-jurisdictional focus onto some key areas of the AFP's functions. This is particularly the case with the illicit drugs dimension of the AFP's border protection role.

The relationship of the Australian Crime Commission to the integrity system can be looked at from two perspectives. In terms of being a crime fighting agency, while the Commission is a major player in Australian law enforcement, its focus is almost exclusively on external criminal threats and it has taken very little interest in corruption issues[46]. However, its extensive powers could potentially be brought to bear on this issue.

The other perspective is as the Commission as the target of corrupt activities. The Commission draws upon police from all jurisdictions. Consequently any weakness in the corruption mechanisms of those forces has an impact upon the Commission. Recent reports[47] have indicated that corrupt officers have penetrated the Commission and used the status and the intelligence available for corrupt purposes.

Before leaving the Australian Federal Police and the Australian Crime Commission, it is necessary to note that in 1996 the Australian Law Reform Commission published a detailed report[48] on the need for a body to investigate complaints about corruption in the AFP and the NCA. The government of the day did not act upon the recommendations.

Director of Public Prosecutions

The Office of the Director of Public Prosecutions (DPP)[49] was established under the *Director of Public Prosecutions Act 1983* and began operations in 1984. The Office is headed by a Director, who is appointed for a statutory term of up to seven years. As at June 2003, the Office had a budget of A$62 million and employed 471 staff.

The DPP is within the portfolio of the Commonwealth Attorney-General, but the Office effectively operates independently of the AFP, the Attorney-General and of the political process.

The primary role of the DPP is to prosecute offences against Commonwealth law, including the Corporations Law, and to recover the proceeds of crime against the Commonwealth. As noted earlier in this study, the number of corruption cases prosecuted is very small and the number of fraud cases prosecuted is significant.

All decisions in the prosecution process are made in accordance with the guidelines laid down in the Prosecution Policy of the Commonwealth[50]. The threshold issue in any criminal case is whether charges should be laid, or continued, against the alleged offender. Under the Prosecution Policy there is a two-stage test that must be satisfied:

- There must be sufficient evidence to prosecute the case (which requires not just that there be a prima facie case but that there also be reasonable prospects of conviction); and
- It must be clear from the facts of the case, and all the surrounding circumstances, that prosecution would be in the public interest.

The DPP is not an investigative agency. It can prosecute only when there has been an investigation by the Australian Federal Police or another investigative agency. The AFP deals only with the most serious and complex cases, with the vast majority of fraud cases being investigated by Commonwealth agencies like Centrelink (welfare cases), the Australian Customs Service and the Australian Taxation Office.

The regularly provides advice and other assistance during the investigative stage, particularly in large and complex matters. The DPP puts significant resources into this role, having frequent liaison meetings with investigators (some 650 in 2000/01) and participating in training courses (some 170 in 2000/01)[51]

Public Procurement

Before dealing with the specific issue of public procurement, it is first necessary to examine the highly sophisticated financial accountability framework that operates in Commonwealth administration, of which public procurement is only one part.

The core of the financial accountability system is statutory. Section 83 of the Constitution requires that all expenditure by the Commonwealth be appropriated by Parliament. Then there are the foundation statutes – the *Commonwealth Financial Management and Accountability (FMA) Act and Regulations 1997,* the *Commonwealth Companies and Authorities (CAC) Act,* the *Auditor-General Act 1997* and the *Public Accounts and Audit Committee Act 1951.*

The key institutional players in the financial accountability system are the policy-setting agency, the Department of Finance and Administration, the Auditor-General and the Australian National Audit Office as well as the Joint Committee of Public Accounts and Audit.

The other elements in this process are the myriad of procedures and guidelines. As well as those which explain the workings of the system, these include the procurement guidelines[52] promulgated by the Department of Finance and Administration, and the Best Practice Guides promulgated by the ANAO[53].

Complementing the comprehensive procurement guidelines, the Commonwealth's financial accountability system has a number of other features which make it very robust:

- The provision requiring the 'ethical use of resources' by Commonwealth managers (Section 44, *FMA Act 1997*);
- The requirement for every Commonwealth agency to have a fraud control plan (Section 45, *FMA Act 1997*). This has attached to it a regulation making power as well as the power to issue Ministerial directions which have the authority of

statute. Stemming form this head of power is the Commonwealth's fraud control policy and processes; and

- The requirement for every agency to have an Audit Committee (Section 46, *FMA Act 1997*).

While all those mechanisms are good, by far the most powerful is the overview of the Commonwealth's financial activities by Senate Estimates Committees. Noting that the government does not have a majority in the Senate, these Committees play a role in the integrity process that is difficult to overestimate. These Committees use the full powers of Parliament to regularly bring before them public officials and question them on public spending. Transcripts of the hearings are published online[54] and hearings are televised. These officials are under oath to answer questions and (theoretically) their Departments and agencies can have documents subpoenaed.

The Estimates Committees have developed a reputation for doggedly following through into the details of public sector administration. Ministers are present at the hearings and frequently complain that members use the process to grill officials on matters beyond the immediate issue of the expenditure of public funds. However, any neutral observer can only welcome the direct intervention of Parliamentary authority into the complexities of the Executive's administration.

Ombudsman[55]

The Commonwealth Ombudsman's office was created under the *Commonwealth Ombudsman Act 1976*. The Office describes its responsibilities as:

- Identifying problems from the approximately 33,000 complaints and inquiries it receives each year (around 60% of them being welfare based); and
- Identifying systemic, underlying issues such as poor practices, lack of supervision and guidance, and lack of training which also may relate to integrity issues.

The Ombudsman is appointed by the Governor General (Section 21), for a five-year term (Section 21) and can be removed only on the grounds of misbehaviour or physical or mental incapacity through agreement of both Houses of the Parliament (Section 28). No Commonwealth Ombudsman has been removed from office since the legislation was enacted in 1976.

The functions of the Office are to investigate the administrative actions of Commonwealth Agencies within certain limitations. For example, the Ombudsman may not investigate some actions related to Commonwealth employment, or the actions of judges and ministers.

The Commonwealth Ombudsman also performs the roles of:

- Taxation Ombudsman (section 4 of the *Ombudsman Act 1976);*
- Defence Force Ombudsman;
- Australian Capital Territory Ombudsman *(Ombudsman Act 1989 (ACT);*
- Inspecting the records of telephone interceptions by Commonwealth law enforcement agencies, the Australian Federal Police and the Australian Crime Commission (*Telecommunications (Interception) Act 1979*);
- Handling complaints about Australian Federal Police *(Complaints (Australian Federal Police) Act 1981)*.

The Office will deal with anonymous complaints. However, it will not normally investigate anonymous complaints unless the complaint raises a matter that warrants investigation and there is sufficient information in the complaint to enable it to conduct an investigation.

The *Commonwealth Ombudsman Act 1976* provides a comprehensive and layered approach to the reporting of the results of investigations. The first level provides for a report to the agency with the Ombudsman authorised to require a response, within a specified timeframe, to deal with any actions the Ombudsman may propose to remedy administrative problems identified (Section 15). Where the agency does not respond, the Ombudsman can refer the matter to the Prime Minister (Section 16). The Ombudsman can also refer matters to Parliament (Section 17) and even after reference to Parliament; the Ombudsman can also discuss with agency a resolution of the matter (Section 18).

Staffing of the Office is under the *Public Service Act 1999*, with staff numbering approximately 85 officers and it has a budget of around A$9 million. Most staff are investigative officers and situated in Canberra. There is a small office in each State and Territory.

Like the Auditor-General, the Commonwealth Ombudsman has a well-justified reputation for independence. An example is the controversial report[56] written about the administration of Australia's detention centres which criticised the outsourcing of these facilities.

Investigative/Watchdog Agencies

This study is limited to the federal level of government. There are no investigation or watchdog agencies that have been created to deal with corruption. The agencies that fulfil these tasks with in the federal level of government have been described above and are, primarily, the Australian Federal Police and the Director of Public Prosecutions. As noted elsewhere in this study, at the second tier of government there are these types of agencies. In New South Wales there is the Independent Commission Against Corruption, in Queensland the Crime and Misconduct Commission and the Corruption and Crime Commission of Western Australia.

Media

Australia's media has a very high degree of penetration into the lives of its citizens. The following data[57] gives an indication of this penetration:

- An estimated 99 per cent of Australian homes have television, with an average of about two television sets per household. A total of 1.27 million Australians had subscribed to one of Australia's three pay television networks by June 2000;
- An estimated 46 per cent of Australia's total adult population was accessing the Internet by May 2000. By October 2000, 50,000 customers were connected to broadband services, with predictions that by 2003 the number of Australian subscribers would grow to 600,000;
- By June 2000, there were an estimated 917 Internet service providers in Australia, more than double the figure for 1997;
- Australians are estimated to own nearly 30 million radio receivers (for a national population of 19 million), with 76 per cent of households owning four or more radios. There were 225 commercial (funded by advertising) and 286 community (publicly funded) radio stations in 2001;
- Australia's 12 national or State/Territory daily newspapers have an estimated total weekday circulation of more than 2.4 million;
- There are 38 regional dailies and some 470 other regional and suburban papers; and
- Of some 1500 magazines published in Australia, 30 have circulations of more than 80,000.

While the Australian media has a tradition of free expression and vigorous analysis of public policy, there is continuing debate about the concentration of media ownership. News Limited, the Fairfax group and Australian Consolidated Press are the dominant players in the print media. Illustrative of the degree of domination by this one enterprise, Newscorp controls[58]:

- 67.8 per cent of the capital city and national newspaper market;
- 76.1 per cent of the Sunday newspaper market;
- 46.6 per cent of the suburban newspaper market;
- 23.4 per cent of the regional newspaper market.

There are three commercial television networks and two state owned networks. All free-to-air television broadcasting in Australia is limited to these five outlets. The major public broadcaster is the Australian Broadcasting Commission (ABC) has been established as a statutory authority and is fully budget funded. There is a continuing, and often acrimonious, debate about the ABC's independence. The current conservative government alleges that the ABC has a left-wing bias. Defenders of the ABC point to budget cuts and the placement on the Board of persons sympathetic to the government as evidence that the government is seeking to compromise the neutrality of the broadcaster.

Over the past two decades, regulation of the electronic media has changed form being centrally controlled by the Commonwealth government (using its constitutional powers over telecommunications) to a regime of almost total self-regulation. The Australian Broadcasting Authority is the industry regulator and this body has been the subject of vigorous criticism that it is too closely aligned with the government. This debate is being driven by the ABC's *Media Watch* program[59] and it is indicative of the state of the debate about media independence that a major player is a program produced by the publicly funded national broadcaster.

Notwithstanding the serious issue about media ownership and government intervention in Australia, it is clear that the media takes a robust view about the activities of government and has been prepared to give detailed coverage to issues that are embarrassing to the government, including corruption.

Civil Society

Australian society is very similar to many liberal western democracies in that it has a vast and complex array of groupings that would fall within the commonly accepted definition of 'civil society'. The Australian Productivity Commission undertook a major research project into the cognate area of social capital. While the Commission did not undertake (its typical) quantitatively based study it reached the following conclusion about the Australian situation:

> 'Among other things, social capital, to the extent that it can be proxied by measures of 'trust', is high in continental Europe and particularly in Scandinavia, middling in some English-speaking countries (including Australia) and low in many developing countries. By some accounts, social capital has declined in some English-speaking countries over recent decades. As well as use in national level and international comparisons, indicators of social capital have been used in local level and contextual studies'[60].

The Report explicitly accepts that the Putnam thesis[61] about civil society in the United States applies in Australia. That is, the array of civil society mechanisms established in the late nineteenth and early twentieth centuries have been significantly eroded by changes in the nature of work, mass communication and other factors. Some elements of Australian civil society that have had an impact upon integrity are described below.

The organised labour movement has a long tradition in Australia and its political offshoot, the Australian Labor Party, has held office at all levels of government. Unlike in the United States, there has not been any broad association between the labour movement and

corruption. However, in two specific areas that association has been proven. One area is the waterfront unions, where in the early 1980s, a Royal Commission into the Federated Painters and Dockers Union, headed by Frank Costigan QC, established links between that union and organised crime and this eventually led to the establishment of the National Crime Authority. The second area, which is still a continuing problem, has been in the building industry. A recent Royal Commission[62] revealed a litany of illegal and unlawful practices. Essentially, the Commission found that the relevant union had been using standover tactics to extract financial benefits for its members. However, it should be noted that there are allegations that the wrongdoing is not all on the part of the unions and that the building industry associations are complicit in these arrangements.

Another area of civil action has been in the area of whistleblowing. Since 1991, Whistleblowers Australia[63] has actively campaigned on behalf of whistleblowers who have suffered for coming forward with allegations of corruption and misconduct. The Commonwealth has been the subject of this pressure, but has resisted enacting comprehensive whistleblowing legislation, even though it exists in every other jurisdiction in Australia. Transparency International has also been actively engaged in this debate.

Another area where civil society has been active has been in the area of civil liberties. Australia's policies on the mandatory detention of persons seeking refugee status has seen a number of community-based groups taking a prominent stance. The most high profile of these has been Amnesty International.

Regional and Local Government

This study is limited to the federal level of government, so consequently the description of these two tiers of government is limited.

Each Australian state (New South Wales, Queensland, South Australia, Tasmania, Victoria and Western Australia) experienced a period as a self-governing colony prior to the achievement of Federation. Under the constitutional arrangements that came into existence in 1901 significant powers were retained by the states, and these have been extended to the major territory governments.

The two major Territories in Australia are the Northern Territory and the Australian Capital Territory. They have their own legislative assemblies and administrations, and operate under authority ceded from the Commonwealth. The Australian Capital Territory is different from other state and territory governments in that it operates in both the second and third tiers of government, undertaking local government functions.

State Governments[64]

Each state governor is the representative of the Sovereign, appointed by the Sovereign on the advice of the relevant state premier. The governor exercises the executive power of his or her state on the advice of the premier. Other powers and functions are similar to the powers exercised at the Commonwealth level by the Governor-General.

In addition, governors have been invested with various statutory functions by state Constitutions and the *Commonwealth Australia Act 1986*, as well as under the Acts of the parliaments of the states. For example, governors may administer the prerogative of mercy by the reprieve or pardon of criminal offenders, and may remit fines and penalties due to the Crown in right of their state.

State governors act on the advice of the Premier of the state. The governors also possess what are referred to as 'reserve powers'. These may be used without the advice of the Premier, but are used only in times of political uncertainty.

Each state is governed by a ministry headed by a premier. The state Cabinet, chaired by the Premier, is the centre of political and administrative power in each state. Each state has a formal Opposition, with the same role as at the Commonwealth level, headed by an opposition leader.

Five of the six Australian states have a bicameral parliament. In Queensland there is a single house. The lower houses in New South Wales, Victoria, Queensland and Western Australia are entitled Legislative Assembly. In South Australia and Tasmania the term is House of Assembly. The title of all upper houses is Legislative Council.

The members of the parliaments of each state are elected by the residents of that state using either the alternative vote (preferential voting) or the single transferable vote variant of proportional representation.

The extent of state legislative powers is defined by the Commonwealth and state Constitutions, and includes education, police, public health, public transport, agriculture, roads and the overseeing of local government. In terms of integrity, the State and Territory governments have responsibility for law enforcement. Each jurisdiction has police force, a statutorily independent Director of Public Prosecutions and a judicial system. Criminal codes in Australia have been the subject of a long-term project of moving towards uniformity. As noted above, three states have statutorily based corruption watchdog agencies.

Local Government[65]

Local government has a limited constitutional position in Australia, being organised under state or territory legislation upon broadly similar lines across Australia. The main variation is the existence of various councils in the Northern Territory that are based on rural Aboriginal communities. There are no local councils in the Australian Capital Territory, where the territory government has direct responsibility for local services. Local government in Australia is unlike that in many other political systems, for it provides an unusually narrow range of services.

Each state and the Northern Territory have a number of local government areas, known variously as cities, towns, municipalities, boroughs, shires or districts. The generic local body is the council. In July 2003 there were 719 local councils. Most councillors and aldermen are elected by local residents, though councils may be dismissed by state governments and occasionally are.

Within each local government area various local services are provided, though there are many variations between states as well as between urban and rural councils. The Brisbane City Council is responsible for the provision of services across most of Brisbane; by contrast, many small rural councils provide a relatively small number of services. Among the local responsibilities are the management of health, sanitary and garbage services, road, street and bridge construction, water supply and sewerage, museums, fire brigades, harbour services and local libraries. The scope of local government duties differs a great deal around the nation, for in all states many of the responsibilities of a local nature are performed either directly by the state government or through semi-government authorities, known in Australia as statutory authorities. The provision of household water, for instance, is typically undertaken by a statutory authority operating under state legislation.

Anti-Corruption Activities

This section of the study will focus upon two elements of Commonwealth anti-corruption activity; the fraud control policy issued in 2002 and the revision of the Public Service Act in 1999 to define ethical responsibilities upon public servants. It will conclude with a summary of strengths and weaknesses of the Commonwealth's response to corruption.

Fraud Control Policy

The major element in the Commonwealth government's activities to deal with corruption is its fraud control policy[66] issued in May 2002. The policy was issued in the form of guidelines issued by the authority of regulations made under the *Financial Management and Accountability Act 1997* (FMA Act). As discussed in the narrative section of this Study, the Commonwealth has taken the unusual step of subsuming corruption within its fraud control framework. The exact mechanism for this can be found in Paragraph 2 of Guideline 2 where the definition, along with all the usual elements associated with fraud, specifically includes 'bribery, corruption or abuse of office'.

The 2002 policy was a restatement of a similar policy issued in 1994 and that, in turn, stemmed from a policy approach adopted by the Commonwealth government in 1987. The major changes with the 2002 policy over its predecessors were:

- A greater emphasis upon fraud control for outsourced functions;
- Elevating the fraud investigation competencies as a basis for mandatory qualifications;
- Shifting the responsibility for fraud control away from the central coordinating agencies;
- Attempting to remedy the unworkable fraud reporting requirements in the 1994 policy; and
- Reliance upon a legislated basis for the policy.

It needs to be noted that the authority of the policy stems from its legislative basis. However, the *Financial Management and Accountability Act 1997* only covers budget funded agencies. Other Commonwealth agencies are covered by the *Commonwealth Authorities and Companies Act 1997* (CAC Act). The policy does not purport to cover all of these agencies, many of which have a quasi-commercial status. There are certain implications of these coverage arrangements:

- There is a clear presumption that the fraud control mechanisms prescribed will be equally effective whether the agency is a large entity or a small advisory board;
- Effectively CAC Act agencies have an 'opt-in' facility, with those agencies which receive at least 50% of funding for their operating costs from the Commonwealth under the added pressure of the Minister to comply; and
- There is no easy way of determining which of the CAC Act agencies[67] have more than 50% of funding for their operating costs from the Commonwealth and which have less. Nor is there any mechanism established to report on compliance with the policy for any of CAC Act agencies.

The policy also covers the small Parliamentary Departments and the *Guidelines* write in the Presiding Officers with the same role as Ministers vis-à-vis those Parliamentary Departments.

Before leaving the issue of coverage, it is useful to note that the definition of the Commonwealth and of a Commonwealth employee in the Commonwealth Criminal Code is very broad and would comprehend all of the agencies discussed above.

The framework for dealing with fraud and corruption is quite comprehensive and the major components of the framework need to be examined. The first major element is prevention. The policy requires the application of risk management techniques linked to the Australian/New Zealand Standard, *Risk Management* (AS/NZS 4360:1999). All agencies are required to regularly assess their risks of fraud and corruption and prepare and implement plans for mitigating those risks. The requirement to produce this plan has a statutory base in Section 45 of the FMA Act and the policy requires CEOs to certify in agency annual reports that this process has been undertaken.

A survey of fraud control arrangements undertaken by the ANAO[68] found that:

- 36% of responding agencies had not undertaken a fraud risk assessment within the last two years as required by the policy;
- 15% of agencies covered by the FMA Act (where it is a specific requirement of s45) had not prepared a fraud control plan; and
- Of the agencies that had prepared a fraud control plan, 13% had not undertaken a fraud risk assessment.

The ANAO reviewed a sample of fraud control plans as part of the survey and found that few met all the criteria set out in the policy, some did not address fraud risks identified and a significant proportion did not include an adequate timetable for implementation nor responsible areas designated and mechanisms to monitor implementation were absent.

The fraud prevention component of the policy is almost entirely devoted to risk management and the application of risk management techniques to fraud control. Not only does the language of the policy omit any mention of corruption, the nature of the processes outlined are even more sensitive to the criticism that, to be effective, they need a significant law enforcement input. While it can be reasonably argued that examining and rectifying financial and management systems can significantly inhibit fraud, that argument is less persuasive when it comes to corruption. This is because the corrupt officer is much more likely to be actively seeking out the flaws in the system and using inside knowledge to subvert them. Thus the motivations and techniques are more closely aligned to the domain of criminal deviance than financial management and the input of skilled investigators is even more crucial.

The second major element in the fraud control policy is how cases are investigated and dealt with as they arise. The policy encourages agencies to investigate and prosecute fraud and states that individual agencies are responsible for investigation routine and minor cases of fraud with the more serious cases of fraud, go to the AFP for investigation.

The AFP is under intense resource pressure with its multitude of policing functions and is able to investigate only a proportion of the fraud cases that arise[69]. The other investigation resource comes from within agency resources. The availability of in-house fraud and corruption investigators varies across the Commonwealth, broadly falling into four categories:

- Many large agencies with a demonstrable risk of fraud have established units of investigators (mainly staffed by former police officers) and these units undertake a wide range of fraud investigations, from simple and routine cases through to quite complex cases. Investigators in these Units frequently deal directly with the Office of the Commonwealth Director of Public Prosecutions. Commonwealth agencies with such units include the Department of Defence, ATO, Centrelink, Department of Veterans' Affairs, Aboriginal and Torres Strait Islander Commission, Health Insurance Commission and the Department of Education, Science and Technology.
- Another group of agencies has established units of in-house investigators for the purpose of investigating offences against the legislation that they administer and these investigators can be used deal with fraud cases as they

arise. This group would include the law enforcement agenises: the AFP, NCA, Australian Customs Service. Other agencies in this category would include the Australian Securities and Investment Commission, Australian Quarantine Inspection Service, Department of Immigration, Multicultural and Indigenous Affairs.

- Many agencies, including most Departments of State, have established fraud control units with the function of undertaking the whole range of fraud control activities with one or two staff members possessing formal investigation skills. The relative infrequency of fraud cases arising means the investigators are able only to deal with relatively straightforward fraud cases because they do not develop the experience, nor have the infrastructure that is available to the agencies used to dealing with investigations regularly.
- The final category includes the multitude of medium to small agencies that do not employ anyone with formal investigation skills. These agencies have to rely on the AFP or engage investigators (at great expense) from the private sector.

It is almost inevitable that there would be tensions where there is a multiplicity of investigation bodies operating in the same arena. The policy sets out some broad criteria for the cases that should be referred to it. In brief, they are those where one or more of the following factors are present:

- Significant loss or damage to the Commonwealth's reputation;
- The offence involves the use of sophisticated techniques;
- Criminal conspiracy;
- More than one agency involved;
- Politically sensitivity; and
- Bribery, corruption, serious breach of trust.

The Commonwealth has developed a comprehensive set of investigation standards to be applied to fraud investigations. (As an indication of their usefulness, HoCOLEA (the Heads of Commonwealth Law Enforcement Agencies) has adopted the standards generally for all Commonwealth investigations). These Standards are not publicly available.

The purpose of the standards is to encourage consistent standards of investigation across the wide variety of in-house investigation units and where any investigation services are contracted in by a Commonwealth agency. The AFP undertakes a rolling program of quality assurance reviews of particular cases (Guideline 7) that have been investigated by agency internal investigation units. Under the policy, the reports of those reviews are submitted to the head of the agency and the Attorney-General's Department for inclusion of any observations in the annual report on fraud control to the Minister for Justice and Customs.

The third major element of the policy is the requirement for training and awareness-raising. Agencies are required to alert staff to the dangers of fraud and corruption. More importantly, the policy links to an elaborate set of employment competencies that are a part of the national training framework. The policy (Guideline 6) requires agencies that employ investigators to have them trained to a minimum competency standard and to obtain accreditation from a formally recognised training authority.

The final major element of the policy is the requirements for reporting. The policy (Guideline 8) sets down highly detailed and elaborate requirements for collecting data about cases. However, this information is submitted to the Commonwealth Attorney-General's Department, which analyses the information and prepares a report for the Minister for Justice and Customs. This information is not made public. Agencies are required to provide information on fraud in their annual reports, but as noted in the narrative section of this study, this information does not differentiate fraud from corruption and is if limited assistance to the external researcher.

Ethical Obligations upon Public Servants

In 1999, the Commonwealth Parliament enacted a totally revised legislative package for the employment of the Australian Public Service. In terms of anti-corruption activities the most important elements of this legislative package are the statement of values (Section 10), the code of conduct (Section 13) and the procedures for handling breaches (Section 15).

The distinction in the Act between the values[70] and the code of conduct is both deliberate and important. It is an attempt to be aspirational and to set down ethical requirements in terms of positive aims rather than a selection of behaviours that are proscribed. As the Commonwealth has moved rapidly away from uniform employment arrangements and a centralised human resources approach, this statement of values performs a crucial role in setting down what it means to be a public servant.

However, the framework has a sharper edge with the code of conduct. It includes[71] a number of provisions that could relate to corrupt behaviour, e.g., the employee must:

- Behave honestly and with integrity;
- Comply with all applicable Australian laws;
- Comply with any lawful and reasonable direction;
- Disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent);
- Use Commonwealth resources in a proper manner;
- Not make improper use of:
    - Inside information, or
    - The employee's duties, status, power or authority,

  in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person;
- At all times behave in a way that upholds the APS Values (Section 10 of the *Public Service Act 1999*) and the integrity and good reputation of the APS.

An agency head (or delegate) can impose the following sanctions for breaches of the APS Code of Conduct[72]:

- Termination of employment;
- Reduction in classification;
- Re-assignment of duties;
- Reduction in salary;
- Deductions from salary, by way of fine; and
- A reprimand.

The Commonwealth's fraud control policy does not provide any specific guidance to agencies as to when they should be contemplating a prosecution using that policy and when they should resort to administrative remedies, like using the disciplinary procedures of the *Public Service Act 1999*. Guideline 4 states 'agencies should consider prosecution in appropriate circumstances in accordance with the Prosecution Policy of the Commonwealth'. While the policy does not provide assistance on this issue, an attempt has been made by the Commonwealth to define what is a 'serious' crime and what is a 'serious' civil contravention – setting down criteria for each[73].

Before leaving the issue of ethical obligations, it is necessary to note that there is an Australian Public Service Commissioner appointed who has a statutory responsibility for promoting ethical values and there is an organisational structure to support the Commissioner.

Strengths and Weaknesses of the Commonwealth's Anti-Corruption Arrangements

It is worth repeating that this study has been restricted to the federal level of government, which, in Australia, only deals with a very limited range of government activities.

In assessing the strengths of Commonwealth's anti-corruption arrangements, the overwhelming issue is the lack of evidence that there is a significant corruption problem. Notwithstanding the cases mentioned in Section 1 of this study, the statistical information from the AFP and the DPP indicates low levels of corruption being detected and prosecuted. Nor are there any press reports of endemic problems in Commonwealth administration. With the exception of the issues relating to accountability, it is notable that the overwhelming majority of reports in the media about corruption are reports of cases that were detected internally. Also, every official interviewed in the course of this study expressed the view that corruption in Commonwealth administration is not a serious problem.

In terms of the systemic elements, the following arrangements are assisting in preventing corruption:

- There are highly sophisticated financial management arrangements with a statutory basis;
- Independent and highly regarded investigation, prosecution and judiciary processes;
- There is active and independent monitoring by the Ombudsman and the Auditor-General; and
- The statutory accountability arrangements are backed up by review by the upper house of Parliament, using its powers, and where the government does not have a majority.

Many of the weaknesses have already been discussed in this study. The major ones are:

- Subsuming corruption within the fraud arrangements means that some corruption activity may go unnoticed and that the prevention emphasis may be skewed towards fixing systems rather than on the cultural dimension;
- Reporting mechanisms make it difficult to ascertain the exact level of corruption. This has policy implications for the government in that were systemic corruption problems arise, they may not be recognised early enough;
- Whistle blowing arrangements are not convincing;
- The emphasis upon encouraging agencies to a manage their own governance arrangements means that whole-of-government consistency is compromised; and
- Continuing indications of problems of accountability of Ministers and Ministerial staff.

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[1] Most of this material has been sourced from the Australian Bureau of Statistics *Year Book Australia 2003* available online at: http://www.abs.gov.au/Ausstats/abs%40.nsf/94713ad445ff1425ca25682000192af2/4f7d3cec8f06a9f5ca256cad001f1393!OpenDocument. [Accessed 23 January 2003].

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[3] Minister for Justice and Customs 2002 *Commonwealth Fraud Control Guidelines* May 2002 (on-line): http://www.ag.gov.au/aghome/commprot/crjd/LECD/guidelinesmay.htm. [Accessed 1 August 2002].

[4] The offences for fraudulent conduct in the *Commonwealth Criminal Code Act 1995* (Division 7.3 of the Criminal Code) are part of the provisions for theft against the Commonwealth. Illustrative of these provisions is subsection 134.1 that makes dishonestly obtaining Commonwealth property by deception an offence with a maximum penalty of 10 years. The Division contains a range of other provisions all dealing with theft from the Commonwealth by deception.

Division 7.6 of the Criminal Code contains a number of provisions covering bribery and the providing or receiving of a corrupt benefit. Illustrative of these provisions is subsection 141.1 that makes giving a bribe to a Commonwealth official an offence with a maximum penalty of 5 years.

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[7] Director of Public Prosecutions. (various dates) *Annual Reports* (on-line): http://www.cdpp.gov.au/AboutUs/AnnualReports/ . [Accessed 31 May 2004].

[8] The *Crimes Act 1914* offences have been repealed and become similar provisions in the *Criminal Code Act 1995.* Some, like imposition, s29B (defrauding the Commonwealth by deception), have been abandoned altogether.

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