

Don't Rock the Boat: the Commonwealth National Integrity System Assessment

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This paper is a preliminary report on the findings of the Commonwealth component of the NISA project. It commences with some background to the project, the methodology adopted and provides some observations about the level of corruption in Commonwealth administration. The paper covers a limited number of components of the integrity system – those that were considered to be the most important. The paper concludes with a discussion on how these components fit together to form a coherent system and a summary of tentative findings.

This part of the NISA project commenced in May 2002, although some preliminary had been done before then. In terms of the sequencing of the project, the Queensland component was completed first as a pilot, the Business Integrity Systems Assessment next and then the Commonwealth component. The New South Wales component is currently underway.

In the paper 'Integrity systems: Conceiving, describing and assessing' by A.J. Brown and John Uhr as a part of this study, the TI conception of what constitutes an integrity system is discussed at some length.

Looking at how the integrity system conception applies to the administration being examined, the overwhelming issue is the scope of the enterprise. The Australian public sector is highly complex, one dimension of that complexity is the division into three tiers of government. The original TI conception implicitly assumes a unitary system of government. This can be seen by some of the pillars (public participation in the democratic process and public awareness of the role of civil society) that transcend any one tier of government and others, like the accountability of the judiciary, being specific to one tier. Looking within the Australian federal administration, there are hundreds of institutions, thousands of pieces of legislation and an absence of generic systemic elements that apply uniformly across the jurisdiction. This makes the assessment process such a daunting process that by necessity, only the key integrity systemic elements have been closely examined.

Besides the issue of applying the model to a complex jurisdiction, there is also the issue of whether it is realistic to conceive of a set of finite systemic elements that aggregate to produce integrity. While the menu of items has a certain intuitive attraction, there is a question as to whether all the systemic elements have been covered. For example, in the Australian context, Parliament plays a crucial role and it could be argued that any assessment of integrity systems will need to look closely at its role.

Methodological issues

All of these issues bear upon the selection and implementation of the methodology of the study. Because the Commonwealth component was the second looking at a public sector administration, it follows upon the methodology developed for the Queensland component, the *Queensland National Integrity Systems Assessment*. The Queensland study commenced with a series of fact-finding interviews with 24

agencies, followed by focus groups. A questionnaire was developed but not widely circulated.

Some modifications to the approach were made for the Commonwealth study. Because the author¹ of the Commonwealth study had considerable experience of the Commonwealth's integrity arrangements, the interviews could dispense with much of the fact-finding function and were able to explore more deeply the attitudinal approaches to integrity among the participants. Interviews were conducted with representatives of eight agencies with central responsibility for integrity matters² and four agencies representative of line agencies³. Also, the questionnaire was further developed and circulated to a number of agencies, with ten agencies responding.

Before leaving the description of the methodology, there are some observations about the methodology that need to be made. First, the notion of an integrity system is not one that has universal understanding among all participants. Representatives of some agencies, particularly large line agencies like the Australian Taxation Office and the Department of Defence, made the linkages between the various elements that go to make up an effective integrity system. Many participants saw integrity in terms of a quality of the programs that their agency was running, rather than a quality that defined the totality of the way in which the federal level of government operated. Another aspect of this narrower perspective was the way in which many participants saw the issues of integrity among public sector employees as an issue not closely related to the issue of integrity of Ministers or members of Parliament.

Second, agencies were contacted and asked to nominate a representative to participate in the study. Consequently, the researcher was in the hands of the participants as to the knowledge and experience that they brought to the study. In some instances participants were very senior officers and able to synthesise the large amount of information necessary to provide answers to the questions that were put to them. In many cases, agencies had not internally brought together the systemic issues of integrity and were reluctant to expend the resources necessary to come to a point that could be seen as a collective view.

Finally, there is the extent to which asking senior officials to evaluate the effectiveness of integrity mechanisms for which they have responsibility leads to defensive responses. As will be outlined below, the Commonwealth has some very strong accountability and transparency mechanisms that mitigate the effect of this natural defensiveness – the administrative law package, annual report requirements,

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² Attorney-Generals Department, Australian Electoral Commission, Australian Federal Police, Australian National Audit Office, Australian Public Service Commission, Department of Finance and Administration, Office of the Director of Public Prosecutions, Office of the Commonwealth Ombudsman.

³ Australian Taxation Office, CSIRO, Department of Defence, Department of Education Science and Technology, Department of Employment and Workplace Relations

Senate Estimates Committees and the public reporting of the Ombudsman and the Auditor-General. To a significant extent, the keen researcher has access to a large range of public material that can enable responses to be verified. Also, some of the key integrity agencies like the Ombudsman and the Auditor-General have such a degree of autonomy that they are able to make robust evaluative comments that can be used to assess the degree to which the line agencies are being overly defensive.

Levels of corruption

One of the key aims of the NISA project was to look at a country that had a low level of corruption and to analyse why and how this was so. A preliminary step in the study was to reach some conclusions about the level of corruption in the Commonwealth.

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. Noting the propensity of the Commonwealth to concentrate on fraud rather than corruption, the Director of Australian Institute of Criminology, 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 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 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

Legislative provision**	Year	2002 - 03		2001 - 02		2000 - 01		2000 - 01		1998 - 99	
		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), ** Relevant provisions in the Criminal Code enacted recently

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) 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)
<u>Internal fraud</u>			
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
<u>External fraud</u>			
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, 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

A decentralised jurisdiction

When considering the notion of an integrity system, an important consideration is the uniformity of the systemic elements across the administration. Like many other public sectors in the developed world, the Commonwealth has been deeply affected by the changes in public sector management. Over the last two decades, it 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 Labor 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 integrity that have some negative aspects:

- Fragmentation of the bodies to deal with corruption and promote integrity;
- Complexity of accountability arrangements; and
- Potential for the 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 survey by the ANAO points 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 ANAO 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 survey 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.

It should not be assumed that the arrangements that the Commonwealth has for dealing with ethics, 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 their 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 the group of 'core' budget funded 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 ANAO, relatively little uniformity.

Some key components of the integrity system

The TI integrity system model lists a number of 'pillars'. In this paper not all of these will be described, rather it will focus briefly upon the following five areas that impact directly upon integrity and provide some commentary based upon the information gathered. The four areas are:

1. law enforcement;
2. promotion of an ethical climate within the public sector;
3. financial accountability; and
4. transparency.

Law enforcement

The Commonwealth has an array of offences dealing with defrauding the Commonwealth and bribing officials. The major ones are in Divisions 7.3 and 7.6 of the *Commonwealth Criminal Code Act 1995*. Many other statutes like the *Commonwealth Social Security Act 1991* and the *Income Tax Assessment Acts 1936 and 1997* contain offence provisions that relate to the broader area of integrity.

The Commonwealth law enforcement institutions that deal with integrity issues are the Australian Federal Police (AFP) the Office of the Director of Public Prosecutions (DPP) the Australian Crime Commission (ACC) and the judiciary. The AFP is a small police force in comparison to those in the states with some 2 800 sworn officers. Fraud and corruption are only a small part of the overall responsibilities of the AFP, with its major focus on terrorism, illicit drugs, international peace keeping and community policing in the Australian Capital Territory. By virtue of its legislative status, the DPP has significant autonomy to pursue particular cases, however, as noted in the statistics cited above, corruption related cases are only a small proportion of its workload although the number of cases of fraud that are also corruption is probably more significant. The Australian Crime Commission is a relatively small body with 116 sworn police officers – many of whom are seconded from state police services. It has extensive powers that could, theoretically, be used to tackle corruption. However, these powers are limited to dealing with organised crime and, with some minor exceptions, the ACC (and its predecessor the National Crime Authority) have focussed upon organised crime associated with the illicit drug trade.

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 ACC who had been seconded from state police services were corrupt; on 16 June 2004 the Minister Justice and Customs announced 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 in 1996 that had not been actioned.

Promotion of an ethical climate

The Australian Public Service(APS)⁴ 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.

In its *Statistical Bulletin* for 2002-03, the Australian Public Service Commission reports that as at 30 June 2003 there were 131,711 staff in the APS, spread across some 108 Departments and agencies. 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.

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).

The *Public Service Act 1999* also contains a provision for whistleblowing (Section 16), but this has been widely criticised as being weak The

⁴ Some of the material in this section is drawn from the Australian Bureau of Statistics 2002 *Australia Now: Year Book Australia 2002*.

Parliamentary Finance and Public Administration Legislation Committee observed in 2001 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 131 000 employees!

There is a vigorous and continuing public debate⁵ 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.

⁵ Indicative of the material published on this subject are the analyses by Richard Mulgan in 1998 and the Parliamentary Research Paper *Politicising the Australian Public Service?*

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 1 872 officers. 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 work within an employment framework with a heavy emphasis upon meeting government aims. The government does not see these ambiguities being of major significance; an article by Andrew Podger, the Australian Public Service Commissioner in 2002 is indicative of the arguments in support of these arrangements. Some incidents that aroused a vigorous public debate about the politicisation of the public service are the 'children overboard' affair, the debate around the advice the government received on weapons of mass destruction prior to the invasion of Iraq in 2003 and the Government's reaction to some comments made by the Commissioner of the Australian Federal Police about the likelihood of a terrorist attack on Australia⁶. These three incidents indicate that there is an active public debate about issues that are central to the issue of the ethical climate of Commonwealth administration.

Financial accountability

The Commonwealth has a highly sophisticated financial accountability framework that operates across Commonwealth administration, of which public procurement is one important 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 ANAO as well as the Joint Committee of Public Accounts and Audit.

The ANAO is highly regarded by the participants in the study 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 of this independence are reports on the outsourcing of information technology (Number 9, 2000-01) and the sale and leaseback of virtually all formerly owned Commonwealth property

⁶ An article in *The Age* newspaper 'Honest copper emerges victor' on 19 March 2004 gives an account of this incident.

(Number 53, 2000-01). Both these reports attracted a highly critical response from the Government.

The other elements in the financial accountability process are the myriad of procedures and guidelines. As well as those that explain the workings of the system, these include the procurement guidelines promulgated by the Department of Finance and Administration in 2002, and the Best Practice Guide promulgated by the ANAO, *Managing the risk*.

Complementing the comprehensive procurement guidelines, the Commonwealth's financial accountability system has a number of other features that 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 from 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 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.

Transparency

The Commonwealth has a complex and impressive array of transparency mechanisms. At a basic level there are highly specified requirements for what is included in agency annual reports, which are tabled in Parliament.

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.

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. Also, there have been criticisms of the wide discretions in the *Freedom of Information Act 1982* being used to unreasonably withhold sensitive information. An example of this comment is the press release by Senator O'Brien on 28 June 2004.

One of the Commonwealth's key transparency mechanisms is the Ombudsman. The Commonwealth Ombudsman's office was created under the *Commonwealth Ombudsman Act 1976*. Like the Auditor-General, the Commonwealth Ombudsman has a well-justified reputation for independence. An example is the controversial report written about the administration of Australia's detention centres that criticised the outsourcing of these facilities.

Having examined the array of transparency mechanisms it is tempting to draw the conclusion that the Commonwealth administration is open and accountable. Certainly this is the view that the government and participants in the study, by and large, have expressed. From the perspective of the researcher (or indeed an investigative journalist), it is clear that the transparency arrangements are such that there is still a lot of discretion as to what information goes into the public domain.

Coherence of the integrity elements

Having looked at the major elements of the Commonwealth's integrity system, it is now possible to look at the important issue of coherence. In particular, how these elements are matched to form some unifying process. The first of these unifying mechanisms is the Commonwealth's fraud control policy issued by the Minister for Justice and Customs 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).

One of the curiosities of the Commonwealth's approach is the way in which corruption is subsumed within its fraud control framework. The *Commonwealth Fraud Control Guidelines* 2002 define fraud as 'dishonestly obtaining a benefit by deception or other means'. 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 separately⁷ 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 wide-spread tax evasion and welfare fraud in the early 1980's. While there have been some high profile cases of corruption 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 above consideration is helpful in appreciating why the Commonwealth reports such low rates of corruption.

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;

⁷ 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.

- 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 agencies⁸ 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.

The survey of fraud control arrangements undertaken by the ANAO 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

⁸ The Department of Finance and Administration website contains lists of those 76 agencies covered by the FMA Act and the 112 covered by the CAC Act. However, there is no list of CAC Act agencies delineated by proportion of funding for operating expenses.

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 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 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 this information does not differentiate fraud from corruption and is of limited assistance to the external researcher.

The Commonwealth's fraud control policy performs the role of a bridge between the Commonwealth's law enforcement responsibilities and its financial accountability structures. The fact that it is issued under the authority of the primary financial accountability statute is of considerable significance. The link between the ethical structure and the fraud control policy is not as obvious.

Turning to the second of the mechanisms bridging across integrity systems, 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 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 a number of provisions that could relate to corrupt behaviour and an agency head (or delegate) can impose sanctions breaches of the APS Code of Conduct ranging from a reprimand to dismissal:

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'.

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

Having identified the links between the elements of law enforcement, financial accountability and ethical conduct, it is necessary to keep in mind that the Commonwealth's integrity system is without a central point of leadership. While the Public Service Commissioner takes an active role in promoting the values in the legislation, he does not cross over into the other dimensions of integrity. It has been noted a number of times in this paper that the Commonwealth has resisted attempts to create a watchdog institution like the Independent Commission Against Corruption or the Crime and Misconduct Commission that would be the publicly identified face of integrity.

Summary of findings

The Commonwealth National Integrity System Assessment study 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.

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