UN Global Compact Network Australia

2023 Australian Dialogue on Bribery and Corruption

Future frontiers in Australian integrity frameworks

Keynote Address: The Launch of the National Anti-Corruption Commission

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National Anti-Corruption Commissioner

I acknowledge the traditional custodians of the lands on which we meet today, the Gadigal people of the Eora nation; I pay my respects to their elders, past, present, and emerging, and also to all First Nations people among us today., wh

Thank you, Ross, for your generous introduction, and thank you all for your warm welcome. This event presents a great opportunity for me to engage with an audience invested in integrity issues. It also a privilege to speak in the premises of this distinguished firm; I visited them when they were located in the old MLC building, near where the current octagonal tower stands south of Martin Place, in the 1960s, when my father's great friend, who would later become my uncle, WRD Stevenson, was a senior partner.

At the opening ceremony of the National Anti-Corruption Commission, in Canberra just a fortnight ago, I observed that the people of our country are no longer prepared to tolerate practices which might once have been the subject of, if not acceptance, at least acquiescence. Australians have clearly expressed a desire for accountability, transparency, and integrity in our institutions. Since the first Corruption Commission in this country was established, in this State, in

1989, public perceptions have wrought a sea change in what government agencies are prepared to tolerate, and the standards on which they insist. Every state and territory has followed NSW in establishing a Corruption or Integrity Commission, and now there is – many say, at last – a federal anti-corruption agency with general jurisdiction in respect of Commonwealth agencies and public officials.

The theme of today's event is Future Frontiers in Australian Integrity Frameworks. In this keynote address, I will seek to outline my approach, priorities and aspirations for the new Commission, and also to make some observations about the implications for the corporate sector, business and lawyers, and the future of integrity in governance. The contemporary relevance of these issues is highlighted by the recent conclusion of the NSW ICAC that a former premier engaged in corrupt conduct, the report of the Robodebt Royal Commission, and the ongoing revelations concerning the conduct of firms retained as consultants to Government.

Corruption is essentially about the misuse of public power, position, or property, at least usually for private purposes. Corruption diverts government resources, reducing the amount available to deliver the services and benefits they are intended to fund. Corruption erodes public trust in government and the institutions of state, and undermines democracy. This is equally so, whether it is done by those who are popular or those who are unpopular, those who are in government or those in opposition, by public servants or by consultants.

It is when private interest influences the exercise of public power that corruption occurs. Although not the only form of corrupt conduct, conduct that is in breach of public trust lies at its heart. The concept of public trust recognises that public powers are conferred on public officials for the public benefit. It will be a breach of that trust if a power is not exercised honestly for the purpose for which it is conferred. At least most breaches of public trust will involve the use of a public

power for a private purpose. On the other hand, mere mistakes, incorrect decisions, and even negligent maladministration, are not in themselves corrupt conduct.

The mission of the National Anti-Corruption Commission is to enhance integrity in the Commonwealth public sector, by deterring, detecting and preventing corrupt conduct involving Commonwealth public officials, through education, monitoring, investigation, reporting and referral.

The Commission's jurisdiction is concerned with corrupt conduct that involves Commonwealth public officials. While much of the public debate and media clamour has been concerned with parliamentarians, I expect they will form a relatively small if prominent part of our activities. The Commission's jurisdiction extends far beyond them, and although the touchstone of the jurisdiction is the involvement of a Commonwealth public official, it has significant implications for business and the corporate sector, not least because of the scope of the definition of Commonwealth public official. That definition includes not only Parliamentarians, but also *staff members of Commonwealth agencies*. In turn, the definition of staff member of a Commonwealth agency includes not only individuals employed by, but also *those engaged in assisting the agency* (which as it seems to me could easily capture consultants retained by an agency), and *contracted service providers* under Commonwealth contracts administered by the agency (which would capture individuals involved in delivering services on behalf of the Commonwealth under a contract). In the light of the extent to which Government has in recent years retained external consultants, and the extent to which the delivery of many Commonwealth services is outsourced to contracted service providers, this is a large field, which I expect will attract considerable interest from the Commission.

Moreover, corrupt conduct within the scope of the Act extends beyond the conduct of public officials to the conduct of any person that adversely affects a public official's honest or impartial exercise of powers or performance of duties; thus it captures conduct by individuals dealing with Government who endeavour improperly to influence Government decisions.

A primary function of the Commission is the investigation of conduct that could involve serious and systemic corruption. It is through detection, investigation and reporting that corrupt conduct is exposed, and through the risk of such exposure that more corrupt conduct is deterred. Anyone can refer a question of whether there has been corrupt conduct involving a public official to us. We will assess every matter that is referred to us, to see whether it is within jurisdiction (that is, that a Commonwealth public official is involved), whether the conduct alleged could amount to corrupt conduct, and whether it should be investigated.

Not only can anyone refer corruption issues to the Commission, we can also investigate matters of our own motion. The Commission is obviously already aware of a number of matters which have been mentioned in the media and elsewhere as potential subjects for investigation. We will assess all the matters of which we are aware, to decide whether they should be investigated.

That does not mean that we will investigate every matter that is referred to us, or of which we become aware. In deciding whether and if so how to deal with a matter, we will consider the seriousness and scale of the conduct, whether there is a realistic prospect of finding corrupt conduct, whether there have been other investigations of it, and whether it is preferable that another agency investigate it. Above all, we will be concerned with whether and to what extent a corruption investigation by the Commission is likely to add value in the public interest.

The Commission's focus will be on issues of corruption that are potentially on the concept of serious or systemic. Elsewhere, I have indicated that "serious"

requires something that is significant; it involves something more than "negligible" or "trivial", but it does not have to be "severe" or "grave". These notions are drawn from authorities on the concept of "serious harm" in defamation law. "Systemic" means something that is more than an isolated case; it involves a pattern of behaviour, or something that affects or is embedded in a system.

We will more likely be interested in investigating matters that have current practical relevance, rather than those that are historic.

We may decide to investigate some matters in order to clear the air, even if there does not appear to be a significant prospect of a finding of corrupt conduct. So it is important to appreciate that the fact that we open an investigation does not imply that there is necessarily corrupt conduct.

We conduct corruption investigations, not criminal investigations. There are other agencies for criminal investigations. If we are satisfied there has been corrupt conduct, we will issue a report with a finding to that effect. Such a finding is a serious one, not lightly to be made. But it is important to recognise that conduct can be corrupt without being criminal, and that we do not make findings of criminal guilt, to which different rules of evidence and proof apply. If we uncover evidence of criminal conduct, we may refer it to a prosecuting agency. But it is precisely in the area where it may not be possible to establish criminal conduct to the high criminal standard of proof that the Commission's work can be most important in enhancing integrity – by investigating and exposing corrupt conduct, even where it cannot be prosecuted in a criminal court.

The Commission recognises the importance of exposing corrupt conduct to the public, and of making the public aware of corrupt conduct. We are also conscious that our work should be subject to public scrutiny. And so we will operate with as much transparency as we can. However, there are necessarily constraints on

what can permissibly or properly be done openly. We will conduct public hearings in accordance with the legislation, when the circumstances and the public interest justify an exception to the general rule that they be held in private.

As well as investigation, the prevention of corruption, through educating the public sector and the public, is an important part of our work. The Commission will provide guidance and information to help public officials understand and address vulnerabilities to corruption, and to help agencies and Governments avoid falling off the integrity track. And the Commission will also conduct public inquiries into corruption risks and vulnerabilities, and measures to prevent corruption, in Commonwealth agencies and in Commonwealth programs. For example, we may conduct a public inquiry into risks and vulnerabilities, not involving a specific allegation of corruption, in a program in which contractors are used by a government agency to deliver benefits intended for members of the public.

In this forum, it is appropriate also to say something of the role of lawyers. Last week, in an article in *The Australian*,[1] Chris Merritt wrote that while the major players in the Robodebt saga had gained plenty of attention, nobody should forget that it might never have happened but for two other factors. "The first is that weak government lawyers averted their eyes as their agencies inflicted unlawful practices on vulnerable people. The second factor is just as bad: the systems aimed at holding government legal services to an acceptable standard simply did not work." Merritt's words called to mind an article in the Winter 2023 issue of the journal of the ACT Law Society,[2] in which Justice David Mossop of the Supreme Court of the Australian Capital Territory explained that in the United Kingdom, government lawyers operate under formal guidance that the standard

[1] Chris Merritt, "Robodebt casts cloud over government lawyers" *The Australian,* 14 July 2023.

[2] The Hon Justice David Mossop, "Government Lawyers and the Rule of Law", *Ethos, Issue 268: Winter 2023*, pp40-45

of a "respectable legal argument" is sufficient foundation for government action; that advice should be formulated in terms of legal risk, rather than a conclusion as to what the law is; and that only if there is "no respectable legal argument that can be put to a court" should they advise that the proposed action is unlawful – and even then, only after reference to more senior managers.[3]

The tendency to express advice in terms of risk – that a particular course has high, medium or low legal risk, often defined in percentage terms – rather than in terms of what the law is, is not confined to the United Kingdom, nor I suspect to government lawyers. A minister, or a board of directors, given advice that a course involves high legal risk, can nonetheless decide to take that risk. They might well be less inclined to do so if the advice was that, in the opinion of the lawyer, the proposed course of action was unlawful, even if it was unlikely that anyone would ever be able to mount a challenge to it. A related practice is providing a draft advice to the client which, if undesired by the client, is not finalised.

Mossop J's view, which I respectfully share, is that it is the duty of a lawyer to provide the client with the benefit of the lawyer's legal opinion, not a risk assessment. The lawyer should form an opinion as to what the law is and requires, and so advise the client. Of course, that advice can be hedged with reservations – "a different view is arguable", "my opinion might turn out to be incorrect", and "there is no knowing what the High Court might do". But ultimately, the client should receive the lawyer's opinion on the law, which the lawyer is trained and qualified to provide, and not a risk assessment, which the lawyer is not qualified to give and which is in reality speculative.

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[3] House of Lords, Select Committee on the Constitution 9th Report of Session 2022-23, *The roles of the Lord Chancellor and the Law Officers*, Ordered to be printed 14 December 2022 and published 18 January 2023, esp at [140]-[141].

I do not mean to stigmatise these practices as necessarily corrupt; but they are corrosive of integrity. Integrity in governance is fundamental to ensuring that decisions are made and actions are taken in the public interest, unaffected by private interest; and that resources intended to be applied the benefit of the community reach their destination, and are not diverted or eroded.

Not very long ago, I somewhat despaired for the future of integrity in governance. But today, I am much more optimistic. The confluence of the expressed will of the people for more robust and rigorous integrity in the governance of the Commonwealth, the election of a government with a mandate to act on that will and with an agenda to strengthen integrity across the Commonwealth public sector, and the adoption by the leadership of the Australian Public Service the objective of ensuring that the public service embraces a pro-integrity culture, provide a unique opportunity to make this an inflexion moment, when we can make an enduring difference in the ethics and integrity of the governance of the Commonwealth. To seize this moment, to instil a culture of transparency and integrity, and to harden the Commonwealth public sector against corruption, we all have a role to play.

The Commission is an instrument for enhancing integrity, and we will be fearless, but fair, as we go about that business. The widespread interest in and support for the establishment of the Commission, including within the Commonwealth public service, has been notable and encouraging. But we cannot achieve this objective alone. it will require the support of other institutions and individuals. We must embed in our institutions, from the top down and at every level, a culture in which the giving of honest if unwelcome advice and reports is not dissuaded, but encouraged, and in which all embrace making decisions and giving advice honestly and impartially, on the evidence and the merits, in the public interest and without regard to personal interest; reporting honestly, without embellishment or omission; and accepting responsibility, including for the inevitable mistakes.

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