

**30th Anniversary Seminar – Commonwealth Ombudsman
9 August 2007**

‘Investigating Corruption’

**Corruption, Maladministration and
the Ombudsman in 30 Years:
Five Predictions**

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Formerly, under the monarchy, the bureaucratic armies did not exist. Few in number, the clerks... directly served the king. ... [In modern times,] the clerks have become, in spite of our fine patriotic ideas, the employees of the government, and their superiors are buffeted by the winds of a power called a *minister*, who does not know from day to day whether he will be in office tomorrow. Since the routine of business must go on, a certain number of indispensable clerks survive; indispensable but at the mercy of the administration, they want to keep their positions. Bureaucracy, a gigantic power set in motion by dwarfs, is thus born.

**Honore de Balzac, The Bureaucrats, 1838
(North Western University Press 1993, pp14-15)**

Five predictions for the next 30 years

1. The Ombudsman won't be alone as a pillar of the Commonwealth anti-corruption system;
2. AND/OR: The Ombudsman's role will be enhanced as part of Commonwealth institutional strengthening in corruption prevention and investigation;
3. IN EITHER CASE: There will be less technical demarcation / fragmentation in integrity agency responses to (1) corruption versus maladministration, and (2) public interest complaints versus personnel matters;
4. There will also be greater coordination and streamlining between integrity agencies & line agencies;
5. Ombudsman recommendations will be effectively determinative.

1. The Ombudsman won't be alone

Some Core Public Integrity Institutions in Australia (2006)

	Auditor-General	Ombudsman	Police Complaints Authority	Police Integrity Com ⁿ	Anti-Corruption Com ⁿ	Crime Com ⁿ
NSW	1	2		3	4 (ICAC)	5
Queensland	1	2	3 (CMC)			
WA	1	2	3 (CCC)			
South Australia	1	2	3			
Commonwealth	1	2				3
Victoria	1	2 (inc. Office of Police Integrity)				
Tasmania	1	2				

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NSW	1	2		3	4 (ICAC)	5
Commonwealth	1	2		3 (ACLEI)		4
Queensland	1	2	3 (CMC)			
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Senate Legal and Constitutional Committee - 27 April 2006 Australian Commission for Law Enforcement Integrity (ACLEI)

Senator MASON — ... ACLEI applies to the AFP and the ACC. Is there a law enforcement gap with respect to other federal law enforcement agencies?...

Commissioner Keelty —... There is a gap here ... If we are serious about this, and if it is not just a quick fix, then the AFP could benefit in its investigations if the ACLEI had a wider remit than what is proposed in the Bill.

3.40 ... [T]here are limits to the effective jurisdiction of the AFP in relation to broader corruption or integrity issues that fall short of criminal behaviour.

3.48 ... [T]he committee considers that there is a strong rationale for ensuring that a wider group of law enforcement agencies are brought within [ACLEI's] jurisdiction, including Customs, the ATO and DIMA.

3.51 The committee also considers that a Commonwealth integrity commission of general jurisdiction is needed, and there is an accountability gap that would be closed by such a body. ... [C]onsideration should also be given to developing such a commission in the longer term.

- 1. The Ombudsman won't be alone as a pillar of the Commonwealth anti-corruption system – AND/OR**
- 2. The Ombudsman's role will be enhanced as part of Commonwealth institutional strengthening in corruption prevention and investigation**
 - The Ombudsman currently *is* the primary integrity pillar... the Commonwealth's only true 'general purpose' independent integrity agency;
 - This is even without expertise / resources to tackle corruption;
 - 'Administrative action':
 - (i) contrary to law;
 - (ii) unreasonable, unjust, oppressive...;... or
 - otherwise, in all the circumstances, wrong (s. 15(1)(a)).
 - Do we need to continue to bifurcate / duplicate institutions and approaches? 'Superombudsman' on a HREOC model / international model?
 - Public expectations, post-Cole Inquiry: elected officials (from '**administrative action**' to '**actions of a public official**').

3. Less technical demarcation / fragmentation in integrity agency responses

(1) corruption versus maladministration

- defective administration and corruption risk travel together;
- poor decisions / poor systems / poor culture / poor leadership / poor supervision / high corruption risk
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- **specific instances: e.g. procurement**
New Burnt Bridge Aboriginal Corporation & ATSIC – 1992-1996
 - orchestrated permissions (by non-Aboriginal staff) to waive tender requirements in favour of particular (non-Aboriginal) consultants;
 - largest contract \$221,000 - \$987,000;
 - no recognition by management that procedures breached, or significance of the breaches.
- ***ATSIC v Ombudsman, Federal Court 1995***, confirmed power to express adverse opinions about individuals, make recommendations re: disciplinary or criminal charges;
- all about acknowledging and addressing **corruption risk**.

2) public interest complaints versus personnel issues

- Outcomes and actions (e.g. discipline, prosecution, rotation, relocation) (New Burnt Bridge)
- Nature of complaints aired by officers – all just workplace grievances?
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- Nature of complaints aired by officers – workplace grievances?
- **Dealing with the personnel and human resources implications of disclosures and investigations:**
e.g. reprisals, recriminations (whether against w'blowers, other internal witnesses, or other innocent parties);

Ombudsman Act 1976, s. 5(2)(d) precludes investigation of 'action taken by any body or person with respect to persons employed...being action taken in relation to that employment';

Proposed s. 5(4A), in *Public Interest Disclosure Bill 2007*, concurrent jurisdiction with APSC re: detrimental action.

4. Greater coordination and streamlining between integrity agencies, and with line agencies

- One stop shop (cf. Complaints NSW; Queensland);
- Revision of role of 'out of jurisdiction' discretions, to prevent matters falling through gaps;
- Mandatory reporting of corruption and serious maladministration cases by line agencies:
 - Queensland: All agencies to CJC, CMC
 - Commonwealth precedent: AFP > ACLEI.
- Clearinghouse role for public interest disclosures by Commonwealth officers (whistleblowers):
 - Victorian precedent, revised *Public Interest Disclosure Bill 2007*; especially risks of detrimental action;
 - Especially significant for corruption / corruption risk ('victimless' crime, lower likelihood that public will identify).

5. Ombudsman recommendations will be effectively determinative

- Old days: negotiation, persuasion, s.15 reports were rare.
- The Smith Era: section 35A public reports – in the public interest.
- Sunlight the best disinfectant... bypass 'the club' and 'the govt', report direct to the public even if recommendations accepted...
- A lesson from anti-corruption inquiries.

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