

Safeguarding Integrity in Government

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In case anybody has momentarily forgotten the fact, Australia is in the middle of a federal election campaign.¹ That means that attention is presently concentrated upon politics, a human pursuit which is important, intriguing, messy, competitive; think of your own adjectives. While there are, of course, honourable politicians, I suggest that the political process would rarely be described as either principled or seemly. Indeed, my dictionary provides the following meanings of politician. First, one who is active in party politics. Secondly, one skilled in political government or administration. Thirdly, one who holds a political office. Fourthly, a seeker or holder of public office who is more concerned to win favour or to retain power than to maintain principles. Fifthly, one who seeks power or advancement within an organisation by unscrupulous or dishonest means. Lastly, and this is said to be a rare use, an expert in politics or political government.

If that sounds cynically despondent, consider this. I have worked from the Macquarie Dictionary — the second revised edition indeed — which provides current common usage of the Australian language. It tells us what those who speak our language think of politics and its practitioners.

The Commission I head is of necessity apolitical but, taking a broader view than that, what must be remembered and stressed is that politics and elections are a means to an end, namely democratic government. It is government that matters, not politics, and it is an important aspect of government that I wish to discuss today. That aspect is integrity and how it may be effectively protected.

Corruption is, of course, the antonym of integrity. How much government corruption is there in Australia? In the nature of things precise figures cannot be provided, but two things can be said. One is that our government institutions are far more virtuous and dependable than is the case in most other parts of the world. Secondly, standards of rectitude are not as good as the people demand, and their will must prevail.

As to the first aspect, let me provide one area by way of example. This country has a grave problem with political donations, large sums of money given to political parties in such circumstances as to engender an expectation of benefits from government. That was most recently and spectacularly documented in the West. Five individuals gave the party in power nearly \$5 million in total within a five year period. Each dealt with government and each prospered. Not everybody would see the elements just related as being unconnected. Like instances could be given for other States. But the Australian situation is paltry and insignificant compared to like problems elsewhere.

In France, high officials seriously talk about the need for a general amnesty against prosecution for the making of illegal political donations. They say that otherwise almost no practised politician will be left standing, and democracy will falter. In Italy, the scandals have been of stupendous dimensions leading to the political demise of the powerful head of the Socialist Party within the last few weeks. Others have fallen and more will follow. The news this morning spoke of three Ministers likely to resign as a direct result of this scandalous state of affairs. Putting the matter simply, expenditure on the Milan underground system approached double what it should have been through featherbedding, kickbacks and donations by contractors which were secretly but formally shared between all significant political parties. The Italians, on this occasion, showed a genius for administration and formalised the process so that everyone took a cut. And that is only two European countries. If time permitted we could visit Japan where the problem is almost certainly worse again, and the United States where few who are neither wealthy nor bought can today enter Congress.

I take the opportunity to urge, yet again, that an effective disclosure regime for all but nominal political donations must be put in place in relation to all three levels of government throughout Australia. Much remains to be done at State and local government level. In relation to the Federal level, new and stricter political donation laws are receiving their first test of strength in the current election. Their

1. House of Representatives and half-Senate elections were held on 13 March 1993.

effectiveness will need to be monitored closely. The public will no longer tolerate attempts by the main political parties to wash money through companies in foreign jurisdictions and thereby circumvent their duty of disclosure. There must be better laws across the board and they must be enforced. Otherwise there is precisely no reason why Australia cannot sink to the depths which have been experienced in so many other parts of the world. Anything less than effective laws effectively enforced is bound to reduce confidence in government and its institutions, and that confidence is something that we all wish to see strengthened.

The demand of the people for integrity in government is manifested in Royal Commissions and other inquiries in every Australian State within the last five years. It is reinforced by the shocking revelations which have emerged from, at least, Queensland and Western Australia. That demand of the people explains the existence of bodies such as the Criminal Justice Commission in Queensland and the Independent Commission Against Corruption (the ICAC) in New South Wales.

The latter body came into existence nearly four years ago, in March 1989. It is a statutory Commission, independent from Government but accountable to Parliament, which exists to minimise corruption in the public sector of Australia's most populous and most prosperous State.

The Commission seeks to achieve its objective by using a three-pronged approach. The first prong is investigations and reports which expose and measure problem areas. The second is corruption prevention by which administrative and other systems are improved so as to reduce corruption opportunities to a practicable minimum. And the third is public education through which people are taught that each of us can contribute, that each of us can make a difference.

Often the three approaches are used in combination, each with the other. Let me give you an example which goes back now a couple of years. It was commonly asserted in Sydney for many years past that if you needed a driver's licence, did not have one and could not drive then, if you were prepared to pay and could make contact with the right people, the licence was yours for the asking. That matter was investigated by the then Deputy Chief Magistrate of New South Wales about twelve years ago. At that time, the going price was ten shillings which was supposedly paid to the driving examiner to look after the instructor's car during the course of the test. It was, of course, a bribe. And the Lewer report, as it was called, demonstrated that this was a widespread practice. Unfortunately, the then Department of Motor Transport, which was responsible for the issue of licences, persuaded the then Minister that the whole thing was a storm in a teacup. They made some changes and pretended to make a few others. After a short respite, the old habits resumed.

By the time we did our work, the price had gone up to \$30 but otherwise the practices were very much the same. The matter was important in a couple of respects. First, it was a well known practice which led to widespread cynicism amongst the populace and, secondly, it was enormously dangerous. The rule of thumb so far as corrupt examiners were concerned was that if somebody had paid and did not actually crash the vehicle beyond repair during the course of the test, they got a licence. If however the vehicle was wiped out, then the deal was off, and no refund was paid.

The ICAC conducted a major hearing and issued a report in which the practices were documented. The problem area was precisely defined and suggestions were made as to the sorts of changes that were necessary to fix up the situation. In parallel with that, commencing about half way through the hearing process and before the report was published, our corruption prevention people started working with the Roads and Traffic Authority (the RTA) in order to implement the sorts of changes that were necessary at a level of fine detail. That was a major and parallel exercise. Fortunately, the RTA (unlike its predecessor) was determined to fix the problem. To their great credit, RTA management tackled the demonstrated deficiencies in the system with extraordinary vigour, such that it can now be said with confidence that apart from occasional individual aberrations against which nobody can safely provide a guarantee, the systemic difficulties of the past, the institutionalised corruption, is entirely behind us.

The ICAC also did a lot of educational work. This was done in the particular case with various ethnic minority groups because we found they were being preyed upon in a very large way. Newcomers to this country, in effect whatever their qualifications, tend to start off fairly low in the employment heap and very often in jobs where they need a licence. In some of those communities there were so-called leaders, godfather figures, who could 'arrange' matters. Frequently they put the individual in touch with corrupt instructors and told these newly arrived migrants that the way the thing was done in this country was to pay and you would get a licence. The test would be conducted by a friendly (and corrupt) examiner and the natural consequences would flow.

It was necessary to put a lot of effort into educating these minority groups. We did that by devising a positive message which was, 'exercise your rights'. If you can drive, the licence is a right in this country and there is no need to go through any back doors. We did not, you will note, go for negative messages

like, 'if you pay a bribe you'll get imprisoned', for two reasons. One is that negative messages do not work. People want to be empowered, want to have their own position reinforced. Secondly, it is probably not true anyway. So in that case we used each of the three techniques — investigation and report, corruption prevention, and education — with very great success.

The most visible work the Commission does is that related to investigations, although you will have gathered from what has been said that, in my view, corruption prevention and education are at least as important because they tackle problems in a long term way. But so far as investigations are concerned, which is where from time to time the flak tends to fly, the methods used are inquisitorial, using that word of course without its pejorative overtones. An inquiry is conducted pursuant to stated terms of reference with a view to ascertaining and reporting the true facts and making remedial recommendations. There are no parties, as before the courts, nobody is charged, there is no onus of proof upon anybody, and the normal rules of evidence do not apply. The process must be undertaken rationally and fairly and all irrelevant considerations must be put to one side. But the object is to ascertain, to record and to recommend. It is only through witnesses that this can be done. Not all find that to be a pleasant experience. Accordingly, the power should only be exercised where necessary.

I ask you to consider the following which is taken from an English Royal Commission on Tribunals of Inquiry conducted by Lord Salmon who reported in 1966:

The history of inquiries to which reference has been made shows that from time to time cases arise concerning rumoured instances of lapses and accepted standards of public administration and other matters causing public concern which cannot be dealt with by ordinary civil or criminal processes but which require investigation in order to allay public anxiety. These cases vary in importance, urgency and complexity and may relate to matters of local or national concern.

The key phrase I think is, 'to allay public anxiety'. To do that is of course to restore faith or, if you like, to safeguard. That may be done by an authoritative report that finds and states that everything is in order. Some Commission reports have been to that effect and they are most useful. Another way of restoring faith, and that which is the more frequent outcome of our investigations, is by identifying what has gone wrong and saying how the problem can be fixed. Now that cannot be done in secret. If the point is to allay public anxiety, the public must know what is being done and have faith in the process.

So the approach must be open and visible. A second requirement is that a remedial approach be adopted. There is precisely no point in simply saying what went wrong. It is essential to fix the system. Finally, and most importantly, independence is paramount. There will be no public faith in decisions made by a body investigating government if that body is perceived to be biased as it must be if it is seen as a creature of government.

Great benefits flow from having a standing body such as the ICAC. Some of them are practical in nature; for example, cost-effectiveness. The Commission's most expensive investigation, which was into the sale of supposedly confidential government information, cost a little less than \$3 million. The report was, and is, of great importance. It has aroused international interest. It disclosed an enormous trade in information which we as citizens had provided to various government agencies, which government promised to keep secret, but failed to do so. Over one hundred public officials were identified as having been corrupt. That is in one state, and there is no reason to believe that that represents the entirety. Nor is there any reason to believe that the same sort of thing is not going on throughout this country at both Federal and State level. The amounts of money involved were very large. A number of these public officials were making more in illicit payments than they were being paid through their wages. Some made as much as \$100,000 in illicit payments over three years. Of course, they were not paying tax on that money. The Tax Office has issued over \$2 million worth of assessments, and the process is continuing. I could go on giving this sort of detail but perhaps to little effect. What it comes down to is that the Australia Card debate of several years ago was simply theoretical. The fact is that the trade in our secrets was privatised long ago.

Australian governments, having been put on notice that these personal details are being bartered and sold, must now solve the problem. It has been identified and measured and it is for them to now fix it. The report contains various recommendations in that respect.

Now that provides an idea of the results that were achieved for about a little less than \$3 million. You will have gathered from press reports that the other Royal Commissions I have mentioned cost between five and ten times as much, in some cases for insignificant return. The reason is quite simple. It is that if you have a standing body, then expertise is developed such that when a problem arises it can be quickly and effectively tackled. Any ad hoc solution is always expensive and every Royal Commission is ad hoc.

Another practical reason why a standing body is useful is that such a body can pursue matters so that reports do not just lie on shelves. A Royal Commission becomes *functus officio* when its report is tendered. The ICAC does not, and the maintenance of a continuing reform program manifestly brings results. Indeed, to have a body which has an education charter enables its head to speak on occasions such as this in a manner that a Royal Commissioner may think to be inappropriate.

And there is yet another reason which has squarely to do with good government. Experience shows that if a corruption scandal erupts, whether or not the concern expressed is justified, and whether it has to do with a sports boss and the criminal justice system or the collapse of a State Bank, and if the head of government is said to be involved in any way, the effect upon the business of government is crippling. We have seen that in various parts of this country over the past few years. When there is a body such as the ICAC to which such matters can be referred, much of the drama goes out of the issue, at least unless and until a hearing is held and a report provided. By furnishing an impartial arbiter which can investigate what it will, Parliament has taken the corruption issue largely off the political agenda. The proof of this is that the last election in Sydney was the first for many decades in which corruption issues were largely lacking. That is surely a good thing. Take those issues away because they are being effectively dealt with and the people can concentrate on issues which are fundamentally more important.

The ICAC is not best considered as an alternative to Royal Commissions which are appointed by government, work to government, according to terms of reference dictated by government, and government decides what to do with reports received, there not being any obligation even to make them public. The ICAC reports direct to the Parliament, not through a Minister but direct to the presiding officers. Its reports must be made public and they are based upon terms of reference which the Commission works out for itself. We are required by statute, and naturally inclined, to do all of our work in the public interest. We do not, in any sense, work for the government of the day.

The Commission is perhaps best considered alongside the Auditor-General and the Ombudsman. The first of these has responsibility for integrity in government finances. The second seeks to achieve integrity in administrative decision making. The new body which creates a triumvirate improves integrity in government generally by fighting corruption in particular.

Any body which is funded by and close to government but required by statute to be independent from government, is bound to cause displeasure from time to time. That is the case with Auditors-General, with Ombudsmen and with the ICAC. It is also true of other independent bodies; for example, the various Directors of Public Prosecutions, the Australian Broadcasting Authority, the Administrative Appeals Tribunal and, indeed, even the courts of the land. If independence is not just a matter of theory but is exercised in practice, then there will be from time to time awkwardness caused because an important function of government, whatever it may be, is disclosed as being inadequately performed. It is the need for that demonstration to occur which imposes the requirement of independence. Only a non-partisan body can be authoritative and will enjoy public confidence. Periods of disharmony between government and independent officers are, accordingly, inevitable. If they were never encountered, the only available conclusion would be that the independent officer was not doing his or her job properly.

The fact of that disharmony, the inevitability of it occurring from time to time, of course brings one to Parliament. It is Parliament that creates all of these bodies and it is Parliament which must look after them. When relations between a particular government and an independent officer, say an Ombudsman, become strained, then protection and support must be vouchsafed by Parliament. Why is this so? First, because parenthood brings responsibilities. Secondly, because those not directly affected can appreciate that the proper performance of functions, simply doing the job laid down by legislation, can involve the making of inconvenient decisions. Thirdly, because the Parliament directly distils and reflects the will of the people in a way that government and the bureaucracy never can and never will and, as has been mentioned, a body such as the ICAC is an outgrowth of a particular demand of the people, that demand being, of course, for improved integrity in government.

Can I conclude on a personal note. For nearly five years, from March 1984, I was an independent statutory officer of the Commonwealth as Director of Public Prosecutions. History shows that government did not applaud everything that my office did, but I always knew that Parliament was available and its members would take the long view. That makes it a special pleasure for me to be back here today talking about the independent office in Sydney which I now head, and the important work that it is doing.

Questioner — I am a visiting fellow at the Australian National University. I was fascinated by your talk. It raised an interesting question for me. Why is the Public Service of New South Wales so corrupt?

Where do people learn to act in the way that they do? What is really being done within the public sector organisations to change those patterns of behaviour so that we do not have to have an independent investigative arm looking at government forever? In the long run, I think the integrity of the Public Service really rises from inside the Public Service and integrity will never really reach the levels that you want if you still have to sit and watch government from the outside.

Mr Temby — As to the first part of that question, there was a perception that New South Wales, and, in particular, Sydney, was a corrupt place and that perception was certainly abroad fifteen, ten or even five years ago. There was some justification for it. Most members of the audience will remember that the Chief Magistrate in Sydney went to prison for perverting the course of justice, that a Prisons Minister was sent to prison for letting prisoners out of prison for money, that a deputy police commissioner was forced into early retirement after some unhappy dealings between himself and gambling interests, and other examples, which are less well known to all, are certainly known to me.

I come from Perth and I would have said that things in Perth were so much better than in Sydney, but that now has to be doubted. I think the people of Brisbane would have said five years ago that things there were so much better than in Sydney, but that now has to be doubted — and so we can go on. There is no reason to think that Sydney is worse than other parts of the country. Indeed, partly because of the work we have done, it may now be better. The problem is one that will always be encountered as long as you have got fallible human beings, which means forever. That is why we consciously talk about minimisation rather than expungement, because you will never achieve perfection in these areas.

Having said those things, I do not want to sound as if I am knocking the country that I belong to because on everything I know it is not just better than our neighbours, but better than almost anywhere else you can look. The corruption problem in Australia is bigger than we would wish and the public are demanding change, but you are better off here than in most other places. I do not know about Canada.

As to the second part of your question, I agree that the best solutions are those that people find for themselves with assistance from others. That is why we place such stress upon both education and corruption prevention. The educational work aims at changing attitudes and it is directed not just at the public generally but also at the public sector. We do all sorts of things — seminars, surveys and so on. It is the sort of hard, unexciting work that does bring results.

The corruption prevention function is highly important. It is a helping hand function which says to departments and agencies: 'If you have got a problem which is of unique proportions, if you want to come to us, we can provide you with a device as to how you might get over it'. That is always advisory work; we never impose solutions on anybody. In all of our reports we make suggestions but we do not impose solutions for the very reasons the professor alluded to. The solution you impose upon somebody does not belong to them and it will not work. You have to work with people and help them find solutions. We are doing that all the time.

Finally, I agree with what I think was implicit in the question which was that, ultimately, a body such as the ICAC should be working to put itself out of a job, just as dentists ought to be doing through fluoride. Unhappily, they are not, because what dentists are doing is giving us flasher orthodontic treatment all the time. What you need to do with an ICAC is to make sure that it does not keep on expanding its areas of responsibility; it does not keep on finding new flash areas of minor corruption. The point should be reached where enough has been done to render a body such as the ICAC unnecessary. That point will be reached when the public make the judgment the body is no longer needed. That point will not be reached for a few years yet.

Questioner — Would you comment on two aspects of the fight against corruption? In your lecture, you tended to concentrate on the formal institutions of government. Firstly, have you got any observations to make on the role which the media plays in the exposure or the identification of corruption or, indeed, in the business of creating a climate which makes it difficult for corruption to flourish, or, if it flourishes, ensures that it is denounced with suitably florid language? Secondly, have you any observations on the place of whistleblowing in the fight against corruption? Is it a valuable element in the armoury or is it a bit of a distraction?

Mr Temby — As to the media, one needs to be careful about nostalgia, but I think that more and better investigative journalism of an accomplished sort was being done in this country ten or five years ago than is the case today. The Commission enjoys good relations with the media and we strive hard to have a professional course of dealings with journalists. We make it an article of faith to do this all in an open, up-front way. We do not work through backdoor revelations. We do not leak, and we never have.

The media are very important to us in getting the message across. The only criticism I have is that, for reasons that are understandable but still unfortunate, there is often a tendency to deal with individuals rather than issues, which is to say, to sensationalise. Our stress is always upon issues, although you have to tell the stories by relating what individuals have done.

As to the other question, again I cannot give you a simple, enthusiastic response to that. These things can be said: the New South Wales Parliament has had introduced a whistleblower protection bill. I think it is fair to say that we have contributed significantly to its introduction. Certainly, we have made submissions to government, both before and after the bill was introduced, as to its improvement.

We rely upon complaints from the public. A very high proportion of the complaints we get from the public are sincere. The complainants may often have reached a mood of malevolence. Nonetheless, their sincerity in bringing the complaint forward is, in a very high proportion of cases, undoubted. Many of the complaints are also, it has to be said, entirely unjustified.

A typical complaint is against the local council. It is based upon the contention that the neighbour has been allowed to construct a building or change a zoning in a manner which is perceived as being unorthodox. The complainant says that that is such an absurd, flagrant, irrational reaction that the only possible explanation is that the 'fix' is in — that somebody has paid a bribe. The fact is that, once you understand how government works, you find that so often such decisions are made, and perfectly properly made. So, to us, the typical complainant is misguided, or even completely wrong, but sincere.

I have absolutely no doubt that people such as that must be protected. I have no doubt that the test must be that of good faith, not good faith coupled with justification, because if you add that second element you are going to be punishing people for bringing forward something and seeking assistance where their sincerity is undoubted. That is the sort of approach that needs to be taken in relation to whistleblowers. I think that, in a general sense, legislation should encourage them and legislative and other measures should be taken to protect them, but they are never going to be the most important sources of information for any law enforcement or similar body.

A great deal of our work comes from the provision that says that, if corruption is suspected, the head of agency must tell us about it. When they tell us about it — which they do not want to do but they have to because they think we are about to find out about it — we pull in the files and we then find out what has gone wrong, if anything has. It is the top insiders who really know what has been going on.

Questioner — I was interested in your comments early in the piece about disclosure legislation. Is it going to be enough for political parties and political entities actually to go through a disclosure process, or will we need to go further? Even when we are aware that somebody has donated \$1 million or whatever to a party, there is still a connection that is made there — a dependency of a type. Will disclosure be enough, or do we need to go further?

Mr Temby — For my part, I would consider an effective disclosure regime to be an enormous step forward. I suspect it would suffice, because in this country the dissemination of information is widespread and the people are not inclined to be devoid of scepticism. It is the case that in some places more is done. In California, for example, as well as disclosure legislation there is compulsory registration of lobbyists. The nature of the interests that the donor represents also has to be disclosed. You can then, by using simple data handling techniques, run programs to work out who has got money from what interests and how they have voted. But that is probably of greater importance in parliaments where you do not have high levels of party discipline. Where you do have high levels of party discipline, I am not sure that such sophisticated approaches are necessary. So I think that effective disclosure should suffice. One has to keep looking. I may be wrong, in which case you have to do something more.

Questioner — I would be interested in your comments on the effect of administrative law on your job. We find in the Australian Public Service — it is possibly the same in a number of other public services — that even if you catch somebody with his hand in the till, so to speak, it is very difficult to then sack that person. It is a very complicated process. I would be interested in your comments on the effect of administrative law on that. You mentioned that there were one hundred public officials found guilty of corruption in the selling of government information. How many of those people are still public servants?

Mr Temby — As to the second part of that question, I do not have precise figures but I can say that disciplinary action has been taken — in almost every case, a sacking; in some cases, where no money changed hands but the rules were broken, something less. Disciplinary action has been taken in a very large number of cases — I do not know exactly how many cases — but in a very large number of cases

and certainly in the majority of those cases. A number of those who were sacked have appealed and to date all the appeals have been unsuccessful. That is heartening.

Having said that, let me say that we are frustrated by what we see as being a weak-kneed attitude on the part of some industrial and like tribunals which do not appear always to understand the critical importance of the public being able to have confidence in the integrity of the individuals with whom they are dealing. If there has been a lapse of standards, coupled with, as we often find, a lack of an appreciation that the standards have been departed from — which amounts to moral blindness — it is very hard to see how such a person can continue as a public servant with whom members of the public can reliably and safely have dealings. So there is frustration there.

The additional frustration is that, when somebody who is sacked appeals successfully, then inevitably it is seen as a failure on the part of the ICAC, which is ludicrous. Our power is limited to recommending that consideration be given to disciplinary action. We do not take the disciplinary action. Once again, it is always left to the department or the agency concerned. It is their staff. They must make the decision. We do not make them do it. They do not always follow our advice. All we say is: 'You should think about it'. But, if there is a successful appeal against a sacking and the individual is reinstated, then inevitably the outcry is that it is a failure of the Commission. That is very frustrating indeed.

Questioner — I was interested in the subject of integrity. Recently, in the Commonwealth bookshop, I saw a publication on selection procedures in the Public Service. It indicated that people on committees who are selecting people for promotion are not allowed to take into account integrity in the criteria for selection. I was wondering how we define integrity.

Mr Temby — I do not find that easy to understand. As a general proposition, it is possible for any job to define the selection criteria that are appropriate. We certainly take integrity as being of high importance; we obviously must. If there are doubts cast on integrity, even if absolute proof is unavailable, then we reserve the right to terminate employment. So I do not understand why it is that integrity should not be taken into account.

The way in which you do it is more difficult. That gives rise to a real dilemma. You will understand that in and around this area there are all sorts of dilemmas, both legal and ethical, that arise. It is difficult territory. People have to stop and think through problem areas. For example, if you say that it is important that public servants should enjoy integrity — and that is a proposition with which we would all agree — then how do you measure it? Do you say that anyone who has not actually been convicted is deemed to be a person of good integrity? That is an available approach — apart from the fact that it is simply stupid. We all know people who are devoid of integrity who have never been to prison and who have never been convicted of anything. Indeed, some of them go to church. But, when you know them, you know that they are people who do not have integrity.

It is hard to get referees to talk about such matters. I do not think you can do much more than talk in terms of reputation. It seems to me that people who enjoy good integrity are very likely to have a reputation for that. Although the other side of the coin does not have exactly the same shape, where people have a reputation for poor integrity, typically, there will be justification for that reputation. It has to be said that that is not always the case. It can be the case that rumours — salacious or otherwise — well up around somebody, and that procedure can be a bit less than fair. But I do not know of a better way of doing it and I think it is something that has to be done.

I am mindful of that, in particular, so far as police are concerned. The effective police officer who goes out, does a job, gets arrests and all the rest of it will not be liked by the criminals with whom he deals. They can easily, by making unjustified complaints against that police officer, cause question marks to be put against the reputation for integrity. So it is a quite difficult area. But, police apart, it is perhaps not terribly hard.