Chapter 6

Chair's comments and recommendations

6.1 The Chair notes that a number of issues arose from the work of the Australian Federal Police (AFP) Oil-for-food Taskforce (Taskforce) and the Australian Securities and Investment Commission (ASIC) investigation.

Issues arising from the Taskforce

6.2 The Chair acknowledges that, during the course of the inquiry, the committee received very little public evidence about the operations of the Taskforce. Moreover, the Chair emphasises that very little information was provided on the Hastings advice and the reasons for shutting down the Taskforce. However, as noted in chapter 4, the Taskforce failed to meet any of its terms of reference. Many millions of dollars of public money had been put into the Taskforce with no outcome. The work of the Taskforce did not result in a single prosecution, in fact, not a single charge was laid. This leads the Chair to question why so much money was placed into a process that resulted in no defined outcome and what lessons have been learned from the failures of the Taskforce.

6.3 The Chair accepts that the Taskforce faced a number of challenges, including:

- evidence from the Cole inquiry from witnesses had to be recollected; and
- the AFP did not have a coercive power to compel a witness to give evidence and encountered legal challenges when it attempted to have material released to it by ASIC.[1]

6.4 The first of these challenges leads the Chair to question whether a royal commission is the best means of conducting an initial investigation into alleged criminal activity. The second challenge raises the issue of the use of coercive powers in criminal investigations and what further actions could be taken to improve cooperation between agencies.

Issues arising from the ASIC investigation

6.5 As noted in chapter 5, in May 2010, ASIC decided not to pursue any criminal investigations, preferring to concentrate on possible infringements of civil penalty provisions related to directors' duties. The civil penalty cases were targeted at six former officers of AWB Ltd. Two of these cases were dropped on grounds that it would not have been in the public interest to pursue them. ASIC did not provide a further explanation as to why it would not have been in the public interest to pursue those cases.

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1 AFP, *Submission 3*, p. 3. See also, AFP, 'The AFP responds to questions posed by The Age', *The Age*, 7 June 2012, http://www.theage.com.au/national/the-afp-responds-to-questions-posed-by-the-age-20120606-1zwhe.html?rand=1338988643281 (accessed 16 February 2015).

6.6 The Chair notes that the two successful cases were achieved with the consent of the defendants. Outside of the statement of agreed facts and the joint submission as to penalty, no evidence was tabled in court and therefore ASIC did not have to publicly make out a case. As the two remaining cases are pending court hearings, the Chair reserves her judgment on the outcomes of the ASIC investigation. However, the Chair notes that better foresight and planning may have resulted in a more wide-ranging and cost-effective investigation by incorporating more of the AWB Ltd contracts and providing better direction to the investigative team, thereby increasing the chance of a successful outcome.

6.7 As with the Taskforce, the Chair accepts that ASIC faced a number of challenges in its attempt to pursue AWB Ltd and its officers, including:

- the institutions that ASIC needs for support often consider white-collar crime to be a lesser offence;
- the maximum penalties are not high enough and the punishments are not strong enough to act as effective deterrents; and
- the high costs of investigating and prosecuting large corporate entities for potential contraventions make it harder for ASIC to justify pursuing these entities, given the parallel imperative to raise funds for the government.[2]

6.8 The Chair takes the view that these challenges lead to the question of how best to investigate and prosecute white-collar crime.

Investigating and prosecuting white-collar crime

6.9 Before determining how to best investigate and prosecute white-collar crime it is first necessary to examine the value of using a royal commission such as the Cole inquiry as an investigatory body.

The use of a Royal Commission as an investigatory body

6.10 This inquiry has evinced serious limitations in the use of a royal commission to investigate potential criminal conduct if prosecutions are to proceed. As noted in chapter 4, the AFP explained that one of the biggest challenges faced by the Taskforce was that the oral evidence gathered in the Cole inquiry was not in a form that would have been admissible in a court of law and therefore a great deal of time was spent trying to reconstruct this evidence.[3] ASIC also submitted that the findings of royal commissions are not always based on evidence that is admissible in court.[4]

6.11 As noted by the Australian Law Reform Commission (ALRC), in its review of the Royal Commissions Act 1902, by its very nature, a royal commission is a 'fishing expedition'. The ALRC explained that royal commissions require broad

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2 Mr John Addis, 'Why ASIC lets the big fish go', *The Sydney Morning Herald*, 25 February 2014, http://www.smh.com.au/business/intelligent-investor/why-asic-lets-the-big-fish-go-20140225-33diw.html (accessed 19 February 2015).

3 AFP, *Submission 3*, p. 3.

4 ASIC, *Submission 2*, p. 17.

coercive powers to ensure that the issues and facts to be investigated are fully canvassed. Royal commissions are executive inquiries and not judicial in nature and therefore principles such as due process are less relevant.[5] However, this creates a problem when a royal commission recommends that judicial proceedings should be pursued, such as with the Cole inquiry. The Cole inquiry report quoted Justice Owen, who stated that 'a finding that the law has been breached is of no effect until it has been made by a court of competent jurisdiction'.[6] The Chair accepts that the need to reconstruct evidence imposes a heavy burden on investigatory agencies and may even act to skew a subsequent investigation towards specific findings, closing down possibilities of pursuing other avenues of investigation.

6.12 The Chair notes that another problem with using a royal commission as an investigative body is that the scope of a royal commission's inquiry is limited to its terms of reference, as established by the executive of government. As stated by the solicitor to the Cole inquiry (in response to a letter by the then Shadow Minister for Foreign Affairs, Trade and International Security, the Hon Kevin Rudd):

> …it is not the function of a commissioner to determine his terms of reference. Seeking amendment to clarify terms of reference, or to address peripheral and anomalous circumstances which arise during the course of an inquiry may be regarded as appropriate conduct by a commissioner. However, it would not be appropriate for a commissioner to seek amendment of the terms of reference to address a matter significantly different to that in the existing terms of reference. The suggestion…that the Commissioner should seek amendments to the terms of reference to enable him to determine whether Australia has breached its international obligations, or a Minister has breached obligations imposed upon him by Australian regulations falls, with respect, within the latter category.[7]

6.13 It follows that although royal commissions provide for a public inquiry, as explained by Dr Scott Prasser of the University of the Sunshine Coast:

> …royal commissions…can be established for politically expedient reasons such as to show concern about an issue, give an illusion of action, show responsiveness to a problem, co-opt critics, reduce opposition, delay decision-making, and reassert control over a policy agenda.[8]

6.14 The Chair takes the view that, in investigating possible criminal activity, it is important to remove the potential for political influence in order to give the

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5 ALRC, *Making Inquiries: a new statutory framework*, Report 111, October 2009, pp. 252–253.

6 Justice Owen quoted in Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. 159.

7 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. 164.

8 Dr Scott Prasser, 'Royal Commissions in Australia: When Should Governments Appoint Them?' in *Australian Journal of Public Administration Vol. 65 Issue 3*, 01/09/2006, p. 34.

investigation as broad a scope as possible and the greatest chance of success. This is a relevant consideration when determining the efficacy and appropriateness of a royal commission for such an investigation.

6.15 A final issue associated with using a royal commission as an investigatory body is the cost. The ALRC noted that:

> There is no requirement in the *Royal Commissions Act* for the Australian Government, Royal Commission or other public inquiry to produce information or reports on the predicted, ongoing or final cost of an inquiry.[9]

6.16 However, the costs associated with royal commissions can be significant. The cost of the Cole inquiry was approximately $10 million,[10] but other inquiries, such as the Royal Commission into the Building and Construction Industry, cost as much as $76.68 million, not including the travel and accommodation costs of the legal team.[11] The Chair takes the view that, in investigating and prosecuting white-collar crime, these resources could be better, and more effectively, spent.

The role of the AFP in investigating international corporate crime

6.17 In October 2012, the OECD's Working Group on Bribery (working group) published a report that pointed out that of 28 foreign bribery cases that had been referred to the AFP, only the Securency/Note Printing Australia case had led to prosecutions and 21 cases had been closed down without any charges being laid.[12]

6.18 The working group expressed serious concerns about the extent to which the offence of bribing foreign officials had been enforced, recommending that:

> …the AFP take sufficient steps to ensure that foreign bribery allegations are not prematurely closed, and be more proactive in gathering information from diverse sources at the pre-investigative stage. Alternate charges or jurisdictional bases should be considered where appropriate. Co-ordination and case referrals could be improved with clear, written arrangements between the AFP and relevant Commonwealth and State-level government agencies and law enforcement bodies. Concurrent or joint investigations with Australian and foreign authorities should continue to be systematically considered. Corporate liability provisions should be applied where appropriate and coupled with on-going training…ASIC's experience and expertise in investigating corporate economic crimes should be tapped to assist the AFP to prevent, detect and investigate foreign bribery where

9 ALRC, *Making Inquiries: a new statutory framework*, Report 111, October 2009, p. 33.

10 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. 197.

11 ALRC, *Making Inquiries: a new statutory framework*, Report 111, October 2009, p. 212.

12 OECD, *Phase 3 report on implementing the OECD anti-bribery convention in Australia*, October 2012, p. 8.

> appropriate. Steps should be taken to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases.[13]

6.19 In 2013, the head of the AFP's fraud and anticorruption unit, Ms Linda Champion, explained that the matters being investigated by the unit have been both complex in nature and have dealt with large corporations and their officers, who are very clever and very litigious. It follows that the AFP is limited in its capacity to bring in alleged suspects before all the facts have been assessed. Ms Champion noted that investigations may be spread across a number of foreign jurisdictions meaning that the evidence-gathering process is both lengthy and expensive, especially given that any evidence would have to meet the relevant standards to be admissible in court proceedings. Finally, Ms Champion pointed to a number of developments that had been put into place since the working group's report, including the establishment of a new framework for foreign co-operation through an anti-corruption taskforce and the introduction of a panel of experts to oversee the decision making process.[14]

6.20 However, the Chair notes that Ms Champion's comments do not address the recommendations of the working group which go towards better coordination between agencies. The Chair agrees with the recommendations that the AFP could better co-ordinate with other agencies and considers all the recommendations could be extrapolated to cover all white-collar crime, not just foreign bribery offences.

The role of ASIC in investigating corporate crime

6.21 In its recent report into ASIC, the Senate Economics References Committee (Economics Committee) stated its view that:

> …there needs to be a shake-up of how complex fraud, bribery and corruption is addressed in Australia. There has been considerable public discussion about the perceived failure of ASIC and the AFP to address such cases effectively. Instead of having a deterrent effect, the committee is concerned that the current arrangements send the wrong message about the likelihood of these cases being pursued. It is essential that the law enforcement framework promotes confidence in Australia's corporate and financial institutions.[15]

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13 OECD, *Phase 3 report on implementing the OECD anti-bribery convention in Australia*, October 2012, p. 5, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 23 February 2015).

14 Ms Linda Champion quoted in article by Georgia Wilkins, 'AFP head of fraud unit explains lack of prosecution success', *The Sydney Morning Herald*, 9 November 2013, http://www.smh.com.au/business/afp-head-of-fraud-unit-explains-lack-of-prosecution-success-20131108-2x73p.html (accessed 23 February 2015).

15 Senate Economics References Committee, *Report into the Performance of the Australian Securities and Investments Commission*, June 2014, p. 376.

6.22 Mr Nick McKenzie opined that to find the best way of achieving a strong deterrent effect, Australia may have to look to the United States of America or the United Kingdom. Mr McKenzie explained that:

> …in the United States, people who blow the whistle on corporate misconduct are given rewards. There are also disincentives for covering up corporate misconduct. It would seem to me that is a far better way to deal with these sorts of cases. Had ASIC or the AFP had the power in the AWB case, it would be to come to some sort of a negotiated outcome with the company where the company accepts liability for its misconduct, be it criminal or civil. It pays a large fine. It acknowledges something to the Stock Exchange, shareholders and the public, and then we all move forward, rather than having investigations that go for years, that cost a lot of money and that are tied up within the courts.[16]

6.23 The Chair accepts that there is some merit to Mr McKenzie's proposal and would encourage an investigation into how Australia could work towards such an outcome. However, the Chair notes that some of the problems faced by ASIC and the AFP stemmed from a lack of communication between the two agencies where one held the corporate expertise and the other was experienced in pursuing criminal prosecutions. The Economics Committee acknowledged that ASIC has entered into a number of memoranda of understanding with domestic and international agencies to provide the legal and practical framework for more cooperative working relationships. However, the Economics Committee explained that to 'ensure the law enforcement framework works, the working relationships between agencies need to be well-functioning and any overlaps in jurisdiction managed effectively'.[17] In the opinion of the Chair, memoranda of understanding are just one step in the process. What is needed is an attitudinal change in the investigating agencies, so that the relevant agencies are absolutely committed to working cooperatively in order to successfully prosecute crimes.

A specialised agency to investigate and prosecute white-collar crime

6.24 On 3 October 2013, the Deputy Leader of the Australian Greens, Mr Adam Bandt MP, drafted a press release calling on the government to conduct an inquiry into whether the ASIC and the AFP are properly enforcing Australia's laws dealing with white-collar crime. Mr Bandt argued that:

> The inquiry should consider whether Australia needs to establish a separate body akin to the UK Serious Fraud Office or the US Securities and Exchange Commission.[18]

6.25 The Chair sees the merit in this suggestion and takes the view that ASIC could continue to pursue matters in a civil jurisdiction while the investigation and

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16 Mr Nick McKenzie, *Committee Hansard*, 16 October 2014, p. 28.

17 Senate Economics References Committee, *Report into the Performance of the Australian Securities and Investments Commission*, June 2014, p. 368.

18 Mr Adam Bandt MP, *White-collar crime a test for Abbott: Bandt*, Press Release, 3 October 2013, http://greens.org.au/white-collar-crime-test-abbott-bandt (accessed 24 February 2015).

prosecution of white-collar crime could be delegated to a specialised agency. A specialised agency could help to overcome any communication and cooperation issues that may result from a multi-agency taskforce.

6.26 As noted in chapter 5, ASIC submitted that, in November 2008, Justice Robson of the Victorian Supreme court ordered a stay of ASIC's civil penalty proceedings against five of the six defendants on grounds that criminal proceedings were imminent and the criminal proceedings would rely on evidence that was substantially the same as in the civil proceedings. In effect, Justice Robson reasoned that it would be unfair to require a defendant to expend resources on defending a civil case when he or she needs those resources to defend a criminal charge of a similar nature.[19] If other courts followed similar reasoning, this would mean that the specialised agency would have to complete its case against perpetrators of white collar crime before a civil action could be commenced, bringing in statutory limitation issues. The Chair takes the view that the proposed inquiry into the need for a specialised agency to investigate and prosecute white-collar crime would need to examine whether section 1317K of the *Corporations Act 2001* (Cth) should be amended to allow ASIC to apply to a court to have the limitations period suspended pending the outcome of a criminal trial.

6.27 In 2008, the Administrative Review Council (ARC) published a report that examined coercive information-gathering and other investigatory powers of various Commonwealth bodies. The ARC noted that such powers were important administrative and regulatory devices for government and many agencies used them to compel the provision of information, the production of documents and the answering of questions. However, the ARC commented on the problems caused by the use of material gathered using coercive powers in subsequent proceedings, concluding that:

> Among the matters that should be taken account of in legislation are the taking of evidence on oath or affirmation and the admissibility of the evidence taken at the examination in subsequent proceedings.[20]

6.28 Mr John Watson, in an article in *The Sydney Morning Herald*, explained that although admissions cannot be used directly in court, the use of leads that may result in convictions is a 'grey area'.[21] The Chair notes that this problem associated with the use of coercive powers to obtain evidence is fraught with danger until such time as the *Evidence Act 1995* (Cth) is amended so as to clarify the law. The proposed inquiry into a specialised agency, while examining the value of providing the new agency

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19 ASIC, *Submission 2*, p. 18.

20 Administrative Review Council, *The coercive information-gathering powers of government agencies*, Report number 48, May 2008, p. 43, http://www.arc.ag.gov.au/Documents/a00Final+Version+-+Coercive+Information-gathering+Powers+of+Government+Agencies+-+May+2008.pdf (accessed 24 February 2015).

21 Mr John Watson, 'More powers, fewer rights', *The Sydney Morning Herald*, 26 February 2013, http://www.smh.com.au/national/more-powers-fewer-rights-20130225-2f1zj.html (accessed 24 February 2015).

with coercive powers, could also inquire into clarifying the law pertaining to evidence gathered using coercive powers.

Recommendation 1

6.29 The Chair recommends the Australian Commission for Law Enforcement Integrity launch a broad inquiry into the structural, recurrent failings of the AFP to properly investigate and prosecute foreign bribery and corruption and the merits of establishing a specialised agency to investigate and prosecute the commission of white-collar crime by Australian individuals or corporate entities regardless of where the alleged crime took place.

Lessons learned

6.30 In assessing what went wrong with the Oil-for-Food Programme (OFF Program), Mr Michael Costello, in an article in *The Australian*, argued that:

> The two possibilities that have emerged are at the heart of the issue. The first possibility is that the government knew what was happening and is covering it up. That may or may not be true; and even if it is true, it may never be proved. But it is the second possibility that is unfortunate for the Government, and that is if it is not guilty of a vast cover-up, then it must be guilty of culpable negligence and incompetence.[22]

6.31 Mr Paul Kelly, also writing for *The Australian*, argued that although the responsibility for compliance with UN sanctions ultimately lay with the government of the exporting nation, Australia did not have adequate mechanisms to ensure sanctions were upheld. AWB Ltd took advantage of this 'governance and policy failure' and 'Australia has paid grievously'.[23] The Cole inquiry also highlighted that AWB Ltd 'has cast a shadow over Australia's reputation in international trade'.[24]

6.32 As noted in chapter 4, Mr Agius believed that DFAT knew about the trucking fees, even if they did not know that they were a sham.[25] However, as noted above, DFAT relied on the argument that it was simply a 'post box' for the contracts and did not have the expertise to investigate individual contracts.[26] The Chair takes the view that this argument does not pass muster. As noted in chapter 2, the sanctions, under UN Resolution 661, placed the onus on individual states to prevent their nationals from trading with, or making funds available to, the government of Iraq or persons or bodies within Iraq, except in relation to the provision of materials for medical or

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22 Mr Michale Costello, 'Cole commission's direction challenges PM's complacency', *The Australian*, 17 February 2006.

23 Mr Paul Kelly, 'The real scandal', *The Australian*, 29 November 2006.

24 Commissioner Terence Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, 24 November 2006, Attorney-General's Department (Australia), vol. 1, p. xi.

25 Mr John Agius SC, *Committee Hansard*, 16 October 2014, p. 21.

26 See Ms Gillian Bird, DFAT, *Senate Foreign Affairs Defence and Trade Committee, Estimates Hansard*, 3 November 2005, p. 6.

humanitarian purposes and foodstuffs, in humanitarian circumstances.[27] Moreover, in 2002, the *Commonwealth Fraud Control Guidelines* required agencies to refer all instances of potential serious or complex fraud offences to the AFP. A serious and complex matter is, amongst other things, one that could result in:

- significant or potentially significant monetary or property loss to the Commonwealth;
- damage to the security, standing or integrity of the Commonwealth or a Commonwealth agency;
- harm to the economy, resources, assets, environment or well-being of Australia; and
- conflicts of interest and/or politically sensitive matters.[28]

6.33 At the very least, DFAT should have been sufficiently apprised of the UN sanctions and contractual requirements to be alerted by the trucking fees to make proactive inquiries into their legitimacy. More broadly, the Australian government and its officials are vested with governing in the best interests of Australia; they must not themselves engage in misconduct or corruption and, in the view of the Chair, have an inherent duty to report misconduct and possible corruption if they become aware of it. AWB Ltd's abuse of the OFF program demonstrates the impact which even an allegation of misconduct can have on the reputation of a country and the grievous effect it can have on the country's international trade relations.

6.34 The committee did not have access to the records and evidence available to the Taskforce and, as such, it would be imprudent for the Chair to attempt to determine the culpability or otherwise of DFAT or, more generally, the Australian government. In the opinion of the Chair, it is likely that the problems with the OFF program stemmed from a misguided approach to Australia's obligations under the sanctions regime, rather than corruption *per se*. However, the Chair takes the view that executive government and its agencies must be transparent in their dealings with individuals and companies.

6.35 On the responsibility of Commonwealth agencies and Commonwealth public servants to report potential crime and misconduct, the Chair is aware that since the AWB matter, the Australian Public Service (APS) Code of Conduct, enshrined in the *Public Service Act 1999*, requires Commonwealth public officials to 'behave honestly and with integrity in connection with APS employment', 'act with care and diligence'

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27 UNSC, *Resolution 986 (1995) on authorization to permit the import of petroleum and petroleum products originating in Iraq, as a temporary measure to provide for humanitarian needs of the Iraqi people*, adopted by the Security Council at its 3519th meeting on 14 April 1995, S/RES/986 (1995), http://www.refworld.org/docid/3b00f19a18.html (accessed 3 February 2014).

28 Attorney-General's Department, *Commonwealth Fraud Control Guidelines 2002 issued by the Minister for Justice and Customs as Fraud Control Guidelines under Regulation 19 of the Financial Management and Accountability Regulations 1997*, May 2002, paras 4.19 and 4.20.

and 'comply with all applicable Australian laws'.[29] Further, the *Public Interest Disclosure Act 2013* (Cth) (PID Act) facilitates the 'disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector'.[30] Section 29 of the PID Act defines 'disclosable conduct' as conduct by an agency, public official or contracted service provider that falls under one or more items in the following table:

Disclosable conduct	
Item	**Kinds of disclosable conduct**
1	Conduct that contravenes a law of the Commonwealth, a State or a Territory.
2	Conduct, in a foreign country, that contravenes a law that: (a) is in force in the foreign country; and (b) is applicable to the agency, public official or contracted service provider; and (c) corresponds to a law in force in the Australian Capital Territory.
3	Conduct that: (a) perverts, or is engaged in for the purpose of perverting, or attempting to pervert, the course of justice; or (b) involves, or is engaged in for the purpose of, corruption of any other kind.
4	Conduct that constitutes maladministration, including conduct that: (a) is based, in whole or in part, on improper motives; or (b) is unreasonable, unjust or oppressive; or (c) is negligent.
5	Conduct that is an abuse of public trust.
6	Conduct that is: (a) fabrication, falsification, plagiarism, or deception, in relation to: (i) proposing scientific research; or (ii) carrying out scientific research; or (iii) reporting the results of scientific research; or (b) misconduct relating to scientific analysis, scientific evaluation or the giving of scientific advice.
7	Conduct that results in the wastage of: (a) relevant money (within the meaning of the *Public Governance, Performance and Accountability Act 2013*); or (b) relevant property (within the meaning of that Act); or (c) money of a prescribed authority; or (d) property of a prescribed authority.

29 *Australian Public Service Act 1999* (Cth), s. 13.

30 *Public Interest Disclosure Act 2013* (Cth), Long title.

8	Conduct that: (a) unreasonably results in a danger to the health or safety of one or more persons; or (b) unreasonably results in, or increases, a risk of danger to the health or safety of one or more persons.
9	Conduct that: (a) results in a danger to the environment; or (b) results in, or increases, a risk of danger to the environment.
10	Conduct of a kind prescribed by the PID rules.

6.36 Whilst AWB Ltd was neither an agency of the Commonwealth nor a contracted service provider, reforms such as these may go some way to reducing the likelihood of Commonwealth agencies and officials proffering the kind of 'post-box' defence given by DFAT at the Cole inquiry and then at Senate Estimates hearings. The Chair takes the view that section 29 of the PID Act could be extended to include any conduct by Australian individuals and corporate entities that would amount to disclosable conduct.

Recommendation 2

6.37 The Chair recommends that the Commonwealth government consider amendments to section 29 of the *Public Interest Disclosure Act 2013* (Cth) to expand the definition of 'disclosable conduct' to include conduct by Australian individuals or corporate entities, regardless of where the conduct took place.

Lessons learned from the Taskforce

6.38 When asked what lessons were learned by the AFP as a result of the Taskforce, the AFP claimed that it could not have achieved a better outcome given the challenges that it faced. The AFP went on to state that it has taken steps to improve the ability to share information with partner agencies to improve coordination and cooperation, citing the purchase of software for enhanced data-mining and analysis of bulk data, the development of a best practice guide to legal professional privilege and the creation of a dedicated AFP-hosted Fraud and Anti-Corruption Centre (FAC Centre). The AFP explained:

> The FAC Centre delivers a collaborative Commonwealth multi-agency approach to the Australian Government's law enforcement capability and response to fraud and corruption, and aims to deliver greater protection over Commonwealth revenues and minimise loss of funds. This approach has engendered greater coordination and cooperation between the partner agencies, and in particular has greatly enhanced the sharing of information and resources in order to better target law enforcement priorities across the Commonwealth.[31]

31 AFP, *Answers to written questions on notice (received on 26 February 2015), 18 February 2015*, Question 8.

6.39 As noted in Chapter 2, in September 2007, the *International Trade Integrity Act 2007* (Cth) was passed. This Act introduced new offences for individuals and corporations in relation to:

- omissions to provide material information or the provision of false or misleading information, in connection with a UN sanctions regime;
- the import or export of goods in contravention of UN sanctions without valid permission; and
- acts that are otherwise in contravention of a Commonwealth law enforcing UN sanctions.[32]

6.40 In the opinion of the Chair, these offences would have strengthened the criminal cases against AWB Ltd and its officials.

The need for greater transparency

6.41 As noted by Ms Georgia Wilkins, writing for *The Sydney Morning Herald*, critics of the AFP's role in corporate matters have argued that the AFP have failed to uphold basic levels of transparency and accountability. Ms Wilkins suggested that, as taskforces are paid for with public money, the public has an interest in knowing that everything that needs to be investigated is investigated. Ms Wilkins went on to quote Dr Kate Hall, an associate professor with the Australian National University School of Law, who said:

> We need good reasons for when the AFP fails to take action, and how things are proceeding.[33]

6.42 The Chair agrees with the view that the AFP and other government agencies must accept that they are working 'for the people' and therefore their primary roles are to protect and inform the public. The Chair notes that the AFP failed to properly inform the public as to why it decided to close down the Taskforce. The AFP has not acceded to either formal or informal requests for the release of the Hastings advice, upon which the decision to close down the Taskforce was said to be based. On 11 March 2015, the committee formally requested to see the relevant parts of the Hastings advice *in camera*. The Chair had hoped that any doubts about the motivation behind the closure of the Taskforce, including the concerns voiced by Mr Ross Fusca, could be put to rest. However, the AFP respectfully declined the request 'in the interest of maintaining legal professional privilege and public interest immunity of the document concerned'. As a result, the Chair considers that ongoing doubt will inevitably linger over the motivations of the AFP in closing down the Taskforce, as the Chair cannot find conclusively that the Taskforce was not shut down prematurely, nor conclude that the Taskforce was shut down solely on the basis of valid legal (and not political) grounds. The Chair therefore takes the view that the Senate should

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32 Senate Standing Committee on Legal and Constitutional Affairs, *Inquiry into International Trade Integrity Bill 2007 [Provisions]*, August 2007, pp 2, 5 and 9.

33 Georgia Wilkins, 'AFP head of fraud unit explains lack of prosecution success', *The Sydney Morning Herald*, 9 November 2013.

request the AFP to produce the Hastings advice and, failing that, the committee should reserve the right to insist on the production of the Hastings advice at a future time, potentially as part of a future inquiry.

Recommendation 3

6.43 The Chair recommends that the Senate order the AFP to produce the legal advice provided by Mr Hastings QC to the AFP, or parts thereof, that show the legal grounds and reasons for the closure of the Taskforce.

6.44 The Integrity Commissioner, supported by ACLEI, is responsible for preventing, detecting and investigating serious and systemic corruption issues in the Australian Crime Commission, the Australian Customs and Border Protection Service and the AFP.[34] As noted by Mr McKenzie and Mr Baker in an article in *The Age*:

> Australia's existing national anti-corruption body, the Australian Commission for Law Enforcement Integrity, can probe misconduct in only certain policing agencies and is unable to investigate impropriety involving public servants or politicians.[35]

6.45 Further, the Chair notes that outside of the estimates and committee inquiries processes, there is a distinct lack of public transparency in relation to the work of ACLEI and the bodies for which it has oversight.

6.46 As noted in chapter 2, the Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity (Parliamentary Joint Committee) examined the risks of corruption stemming from Australia's law enforcement operations. The Parliamentary Joint Committee report noted that one of the many consequences of corruption is a loss of international reputation and standing, together with other associated negative impacts. The report noted that agencies with a law enforcement function, such as the AFP, have a high public profile and play a central role in developing public confidence in the law enforcement system. However, these 'agencies are at high risk of compromise and infiltration' and therefore, as 'law enforcement agencies play a crucial role in the fight against corruption in society, their own integrity must be beyond reproach'.[36] The Chair believes that there may be a need for a further level of oversight to improve levels of transparency and accountability in the AFP and other government agencies. Mr Bruce Hawker, writing in *The Australian*, argued:

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34 ACLEI, *Integrity in law enforcement*, http://www.aclei.gov.au/Pages/default.aspx (accessed 24 February 2015).

35 Mr Nick McKenzie and Mr Richard Baker, 'National ICAC needed to probe federal politicians, says NSW Independent Commission Against Corruption counsel Geoffrey Watson, SC', *The Age*, 5 December 2014, http://www.theage.com.au/federal-politics/political-news/national-icac-needed-to-probe-federal-politicians-says-nsw-independent-commission-against-corruption-counsel-geoffrey-watson-sc-20141204-12093d.html (accessed 24 February 2015).

36 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Integrity of Overseas Commonwealth Law Enforcement Operations*, June 2012, p. 32.

> One thing to become abundantly clear from the AWB inquiry is that there is a strong and clear case for a federal equivalent of NSW's ICAC or Queensland's CMC, with full royal commission powers. Make no mistake: a federal ICAC would have the necessary powers to get to the truth of the matter…There must be a mechanism to ensure accountability and transparency when serious allegations of impropriety arise.[37]

6.47 The Chair agrees with the reasoning of Mr Hawker. However, the Chair notes that further investigation is needed into the value of establishing a federal ICAC-type body, taking into account potential pitfalls that it may face, such as jurisdictional and legal issues that could arise between the new body and the established state anti-corruption commissions. However, in the opinion of the Chair, it is undeniable that such a federal anti-corruption body, if independent of political interference, could help to ensure that corruption and/or gross negligence does not infiltrate the Commonwealth parliament and federal government agencies.

Recommendation 4

6.48 The Chair recommends that a federal anti-corruption body be established to investigate and report on corruption and/or gross negligence within the Commonwealth Parliament and government agencies, including the Australian Federal Police.

Senator Penny Wright
Chair

Senator Christine Milne
Leader of the Australian Greens

37 Mr Bruce Hawker, 'National watchdog is needed', *The Australian*, 31 January 2006.