

Parliament of Australia

Joint committee

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[Joint Standing Committee on Treaties](#)

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Review of treaties tabled 7 December 2004 (4), 15 March and 11 May 2005

CHAPTER 2

United Nations Convention Against Corruption

Introduction

2.1 The *United Nations Convention Against Corruption* (New York, 31 October 2003) ('UNCAC') is a multilateral agreement designed to enhance international efforts to combat corruption.

2.2 UNCAC is the first binding multilateral agreement to comprehensively deal with corruption.¹ UNCAC encourages Parties to adopt anti-corruption measures, provides a standardised approach to criminalisation and ensures Parties have systems in place to facilitate law enforcement cooperation.²

Features of the Agreement

2.3 UNCAC provides for a range of measures relating to corruption prevention and criminalisation, international cooperation in combating corruption, asset recovery, training and technical assistance, and the establishment of a Conference of the Parties to the Convention.

¹ Ms Joanne Blackburn, *Transcript of Evidence*, 7 March 2005, p. 21.

² National Interest Analysis (NIA), para. 4. 6 REPORT 66: TREATIES TABLED 7 DECEMBER 2004 (4), 15 MARCH AND 11 MAY 2005

2.4 UNCAC contains both mandatory and optional provisions, leaving much of the detailed implementation to the Parties.³

Preventing corruption

2.5 With regard to preventing corruption, UNCAC establishes a number of key responsibilities, including the following provisions:

- ⊕ Parties are required to implement and maintain effective coordinated anti-corruption policies that reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability (Article 5)
- ⊕ Parties are required to ensure that recruitment and employment in the public sector are based on principles of merit, accountability and transparency, and that public sector employees are appropriately educated on issues of corruption (Articles 7 and 8)
- ⊕ Parties must ensure that the procurement and management of public finances occur in accordance with transparent and accountable processes (Article 9)
- ⊕ Parties must take measures to strengthen integrity and prevent opportunity for corruption among members of the judiciary (Article 11)
- ⊕ Parties are obliged to enhance accounting and auditing standards in the private sector and where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures (Article 12)
- ⊕ Parties are required to implement two measures to prevent money-laundering (Article 14). First, Parties are required to institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or values. Second, Parties must ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering have the ability to cooperate and exchange information at the national and international levels.⁴

³ Ms Joanne Blackburn, *Transcript of Evidence*, 7 March 2005, p. 22.

⁴ NIA, paras 10-13. UNITED NATIONS CONVENTION AGAINST CORRUPTION 7

Criminalisation

2.6 With regard to the criminalisation of corruption, UNCAC establishes a number of key responsibilities, including the following provisions:

- ⊕ Parties are required to criminalise bribery of national and foreign public officials as well as officials of public international organisations (Articles 15, 16). Parties are also required to criminalise embezzlement and **misappropriation of property by a public official** [emphasis added](Article 17)
- ⊕ Parties are encouraged to criminalise other corruption related offences, such as trading in influence and abuse of functions involving public officials or any other person (Articles 18, 19, 20)
- ⊕ Parties are encouraged to criminalise corruption related offences in the private sector (Articles 21, 22).⁵

2.7 UNCAC requires Parties to implement a range of procedural measures to assist with the criminalisation of corruption related offences.⁶

2.8 In relation to the prosecution of offences, UNCAC requires Parties, as may be necessary, to criminalise obstructions of justice, to adopt measures establishing the criminal or civil liability of legal persons for participation in UNCAC related offences, and to criminalise the participation in, preparation for, or an attempt to commit an offence under UNCAC. States are encouraged to adopt long statute of limitations periods in which to commence proceedings for offences under UNCAC (Articles 25-29).⁷

International cooperation

2.9 One of the advantages of a multilateral agreement dealing with corruption is the increased possibility for international cooperation between Parties. UNCAC contains a number of provisions to facilitate cooperation between Parties in order to more effectively prevent and prosecute corruption.

2.10 UNCAC includes provisions for extradition based on UNCAC offences. The key provision providing that all offences under UNCAC

⁵ NIA, paras 14-16.

⁶ NIA, para. 14.

⁷ NIA, paras 17-21. 8 REPORT 66: TREATIES TABLED 7 DECEMBER 2004 (4), 15 MARCH AND 11 MAY 2005

are deemed to be included as extraditable offences in any extradition treaty existing between the Parties (Article 44(4)).⁸

2.11 Under UNCAC, Parties are required to provide mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by UNCAC (Article 46).⁹

Recovery of assets

2.12 UNCAC contains a number of provisions relating to the recovery of assets obtained through corruption. These include establishing mechanisms for recovery of property directly through a Party's domestic law (Article 53), enhancing recovery and confiscation of property through international cooperation (Article 55), and special cooperation between Parties involving disclosure of information without prior request where it might assist in an investigation, prosecution or judicial proceeding (Article 56).

2.13 Under Article 57, Parties must give priority to requests from other Parties for the return of confiscated assets or restoration to legitimate owners to the extent permitted by domestic law. Where property is obtained through embezzlement, the property would be returned to the State requesting it. Where property is obtained through any other means covered by UNCAC, the property would be returned subject to proof of ownership or recognition of damage. In all other cases, priority consideration would be given to the return of confiscated property to the requesting State, to the return of such property to prior legitimate owners or to compensate victims.¹⁰

Scope of Commonwealth power

2.14 During the Committee's examination of UNCAC two issues were raised regarding the scope of the Commonwealth's jurisdiction if UNCAC were to be ratified:

- ⊕ first, to what extent does UNCAC potentially confer on the Commonwealth substantial additional jurisdiction and

⁸ NIA, para. 28-31.

⁹ NIA, paras 32-35.

¹⁰ NIA, para. 42. UNITED NATIONS CONVENTION AGAINST CORRUPTION 9

- ⊕ second, what effect does the mandatory/discretionary language of provisions within UNCAC have on that potential additional jurisdiction?

2.15 In exploring these issues, the Committee considered the potential impact of UNCAC on a number of specific possibilities. For instance, could the Commonwealth:

- ⊕ establish a national Independent Commission Against Corruption (ICAC)¹¹
- ⊕ legislate for the funding of candidates for elected office and the funding of political parties, either at a federal, state or local level¹²
- ⊕ legislate to prevent corruption in the judiciary, either at a Federal or State level?¹³

Additional jurisdiction

2.16 The Committee first considered whether UNCAC potentially confers substantial additional jurisdiction on the Commonwealth. A representative from the Attorney-General's Department advised that: Australia, under the external affairs power, would have the power to take measures that reasonably implement the obligations under that article.¹⁴

2.17 The conclusion drawn from this advice, and from the provisions of UNCAC itself, is that UNCAC potentially confers on the Commonwealth substantial additional jurisdiction. Whether or not the Commonwealth Parliament chooses to use this additional jurisdiction to implement the terms of UNCAC is a separate issue.¹⁵

11 *Transcript of Evidence*, 7 March 2005, p. 24.

12 *Transcript of Evidence*, 7 March 2005, p. 25.

13 *Transcript of Evidence*, 7 March 2005, p. 27.

14 Mr Greg Manning, *Transcript of Evidence*, 7 March 2005, p. 26.

15 The Attorney-General's Department advised the Committee that no exploration has been undertaken of the extent to which the treaty would confer additional legislative power on the Commonwealth and that it is a more usual policy process to first determine the policy objectives to be achieved and then consider what legislative power is available to implement those objectives. Attorney-General's Department, *Submission 7.1*, p. 1. 10 REPORT 66: TREATIES TABLED 7 DECEMBER 2004 (4), 15 MARCH AND 11 MAY 2005

2.18 As way of background, section 51(xxix) of the Australian Constitution enables the Australian Parliament to make laws for peace, order and good government with respect to external affairs.¹⁶

2.19 The scope of the external affairs power is considerable. The High Court has held that the Commonwealth Parliament has the legislative power to implement obligations under any treaty, regardless of the subject matter of the treaty.¹⁷ The external affairs power also extends Commonwealth jurisdiction over matters that were traditionally considered State matters.¹⁸

2.20 The scope of the external affairs power is limited by:

- ⊕ express or implied Constitutional limitations¹⁹
- ⊕ the requirement that the treaty must be genuine or bona fide
- ⊕ the requirement that to the extent that legislation relies on the external affairs power, it must be a reasonable and appropriate means of giving effect to the treaty.²⁰

2.21 The Committee received a submission from Dr Simon Evans regarding the *Melbourne Corporation* doctrine and its effect as an implied Constitutional limitation.²¹

2.22 Dr Evans suggests that ratification of UNCAC is unlikely to allow the Commonwealth to enact anti-corruption legislation that applied to official conduct by members of state parliaments, state executives and state courts because:

¹⁶ Anne Twomey, *Federal Parliament's Changing Role in Treaty Making and External Affairs*, Research Paper 15 1999-2000, Parliament of Australia Parliamentary Library, p. 23.

¹⁷ Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1999, Chapter 5, p. 76; Anne Twomey, *Federal Parliament's Changing Role in Treaty Making and External Affairs*, Research Paper 15 1999-2000, Parliament of Australia Parliamentary Library, p. 26. *Commonwealth v Tasmania* (1983) 158 CLR 1.

¹⁸ Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1999, Chapter 5, p. 76.

¹⁹ *Horta v The Commonwealth* (1994) 181 CLR, 194-5.

²⁰ *Commonwealth v Tasmania* (1983) 158 CLR 1; *Richardson v The Forestry Commission* (1988) 164 CLR 261; see also *Victoria v The Commonwealth* (1996) 187 CLR 416. Anne Twomey, *Federal Parliament's Changing Role in Treaty Making and External Affairs*, Parliament of Australia Parliamentary Library, Research Paper No. 15 1999-2000, pp. 26-27; Senate Legal and Constitutional Committee, *Trick or Treaty? Commonwealth Power to Make and Implement Treaties*, November 1999, Chapter 5, p. 76.

²¹ Dr Simon Evans, *Submission 4*, p. 1. UNITED NATIONS CONVENTION AGAINST CORRUPTION

The power to implement the Treaty under s. 51(xxix) would be limited by the *Melbourne Corporation* constitutional implication that preserves the continued existence of the states and their separately organised governments.²²

2.23 In *Melbourne Corporation v The Commonwealth*,²³ the High Court held that 's. 48 of the *Banking Act 1945* (Cth), which prevented private banks from conducting business with states and their agencies, was invalid as it was inconsistent with the fundamentally federal nature of the Constitution'.²⁴

2.24 The High Court stated in a later decision that the *Melbourne Corporation* doctrine is based on 'the constitutional conception of the Commonwealth and the States as constituent entities of the federal compact having a continuing existence reflected in a central government and separately organised State governments'.²⁵

2.25 Dr Evans suggests that the High Court is likely to strike down Commonwealth legislation that purported to define and provide for the regulation, investigation and prohibition of corrupt conduct by members of state parliament, state executives and state courts in *the discharge of their functions as state officials* based on the development of the *Melbourne Doctrine*.²⁶ In Dr Evans' view UNCAC is therefore unlikely to have such a pervasive impact on states and territories because 'it is inconsistent with the continuance of state governments "separately organised" in a federal system for the Commonwealth to attempt to discharge the function of the states to define that machinery'.²⁷

2.26 Dr Evans suggests that there are two questions concerning UNCAC and the *Melbourne Corporation* doctrine that are more difficult to answer. They are, whether the Commonwealth could validly enact anti-corruption legislation that applied to members of state parliament, state executives and state courts first, for *non-official* conduct and second, in their dealings with the Commonwealth government or exercise of Commonwealth functions.²⁸

22 Dr Simon Evans, *Submission 4*, pp. 1 and 3.

23 *Melbourne Corporation v The Commonwealth* (1947) 74 CLR 31.

24 Dr Simon Evans, *Submission 4*, p. 1.

25 *Queensland Electricity Commission v The Commonwealth* (1985) 159 CLR 192 at 218. Cited in Dr Simon Evans, *Submission 4*, p. 2.

26 Original emphasis. Dr Simon Evans, *Submission 4*, p. 2.

27 Dr Simon Evans, *Submission 4*, p. 3.

28 Dr Simon Evans, *Submission 4*, p. 3. 12 REPORT 66: TREATIES TABLED 7 DECEMBER 2004 (4), 15 MARCH AND 11 MAY 2005

2.27 Dr Evans notes in conclusion that much depends on the precise form of the legislation and the facts presented to the Court. Where implementing legislation is drafted in a sufficiently general way, and where it did not extend to high level state officials, it is possible that the High Court would consider it compatible with the federal nature of the Constitution.²⁹

Effect of mandatory/discretionary provisions

2.28 The second issue raised by the Committee during its examination of UNCAC was whether the nature of the obligation under UNCAC, that is, whether a provision is mandatory, discretionary or optional, changes the extent of the Commonwealth's power to legislate for it.

2.29 UNCAC contains a number of mandatory, discretionary and optional provisions which provide different levels of obligation for Parties. For example:

- ⊕ Article 12 states that 'each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector' and is an instance of a mandatory provision.
- ⊕ Article 6 states that 'each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption' and is an instance of a discretionary provision.
- ⊕ Article 7(3) states that 'each State Party shall also consider taking appropriate legislative and administrative measures ... to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties' and is an instance of an optional provision.³⁰

2.30 It is likely that the Commonwealth could still legislate to implement discretionary as well as mandatory obligations through the external affairs power. The Attorney-General's Department advised the Committee that the extent of the Commonwealth's power to legislate to give effect to treaty obligations will involve a consideration of the exact nature of the obligations contained in the treaty.³¹ They further advised that:

²⁹ Dr Simon Evans, *Submission 4*, p. 3.

³⁰ Emphasis added for each Article.

³¹ Attorney-General's Department, *Submission 7.1*, p. 1. UNITED NATIONS CONVENTION AGAINST CORRUPTION 13

For legislation that implements a treaty to be a valid exercise of the external affairs power, the legislation must be appropriate and adapted to fulfilling the obligations in the treaty. Depending on the exact language used, discretionary treaty language may form the basis of legislation that is a valid exercise of the external affairs power.³²

Summary

2.31 The Committee considers that section 51(xxix) ‘the external affairs power’ of the Constitution is not always an ideal basis from which to legislate, particularly where the treaty has the potential to significantly impact on the states and territories. The Committee recognises that there are instances when the external affairs power has been used in conflict with the will of the States and Territories, such as in the *Tasmanian Dams Case*³³ and the *Human Rights (Sexual Conduct) Bill 1994 (Cth)*,³⁴ and the Committee also recognises that the potential exists for this to occur again in the future. The Committee also notes that a framework of negotiation and consultation with the States and Territories, including bodies such as the Standing Committee on Treaties, has been established to more effectively involve states and territories in the treaty making process.³⁵

2.32 Moreover, the Committee notes that the issues addressed here could potentially be issues with every treaty that the Commonwealth enters into. However, while the Commonwealth continues to enter into treaties using the external affairs power of the Constitution, the Committee expects that a practical and reasonable approach will be taken when meeting its obligations under that treaty.

³² Attorney-General’s Department, *Submission 7.1*, p. 1.

³³ In *Tasmania v Commonwealth* (1983) 158 CLR 1, the Commonwealth enacted the *World Heritage Properties Conservation Act 1983* using the external affairs power and the *World Heritage (Western Tasmania Wilderness) Regulations* which, among other things, prohibited the construction of a dam on the Franklin River in Tasmania without the consent of the Commonwealth Minister.

³⁴ In 1994, the Commonwealth Parliament enacted the *Human Rights (Sexual Conduct) Bill 1994 (Cth)* as a response to Tasmanian laws that criminalised sexual acts “against the order of nature”, in public and in private. The Commonwealth Act did not specifically override the Tasmanian law but rather entrenched the right to sexual privacy through reference to Article 17 of the International Covenant on Civil and Political Rights.

³⁵ The Standing Committee on Treaties consists of senior Commonwealth and State and Territory officers who meet to identify and negotiate treaties that might impact on States and Territories. It was established as part of the 1996 package of reforms to the treaty making process. 14 REPORT 66: TREATIES TABLED 7 DECEMBER 2004 (4), 15 MARCH AND 11 MAY 2005

Recommendation 1

That the Attorney-General advise the Committee in writing of the Australian Government's intention to meet Australia's obligations under the *United Nations Convention Against Corruption* only through the means specified in the National Interest Analysis, particularly as stated in paragraphs 50, 51 and 52.

Recommendation 2

That the Attorney-General advise the Committee in writing that the Australian Government has no intention of using the external affairs power and the *United Nations Convention against Corruption* to pass legislation which has not been foreshadowed in the National Interest Analysis.