



Australian Government
Attorney-General's Department

September 2015

Cross-agency submission to Senate Standing Committee on Economics

Inquiry into Foreign Bribery

ATTACHMENTS

Attachment A – Australia Phase 1 evaluation report (1999) – page 3

Attachment B – Australia Phase 2 evaluation report (2006) – page 28

Attachment C – Australia’s report-back to the OECD Working Group following Phase 2 evaluation report (2008) – page 90

Attachment D – Australia Phase 3 evaluation report (2012) – page 197

Attachment E – Australia’s report back to the OECD Working Group following Phase 3 evaluation report (December 2014, published March 2015) – page 270

Attachment F – Summary of the status of the outstanding recommendations – page 323

Attachment G – *Prosecution Policy of the Commonwealth* – page 333

Attachment H – Austrade ‘Use of Agents’ paper – page 360

(all page numbers are of the pdf document)

Attachment A – Australia Phase 1 evaluation report (1999)

AUSTRALIA

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Australia signed the Convention on December 7, 1998, and deposited the instrument of ratification on October 18, 1999. Legislation to implement the Convention was passed by the Australian Parliament and received the Royal Assent on June 17, 1999. It came into effect on December 18, 1999.

Convention as a Whole

Australia chose to implement the Convention through amendments to the Criminal Code Act 1995.¹ The amendments include a codification of the offence of bribing a foreign public official in section 70.2, all the relevant definitions including one of “foreign public official” in section 70.1, and section 70.5, which provides for the territorial and nationality requirements of the offence.

Other existing laws, including the Proceeds of Crime Act 1987, the Mutual Assistance in Criminal Matters Act 1987, the Extradition Act 1988 and the Corporations Law contain provisions relevant to the other obligations under the Convention.

Where someone seeks to influence a foreign public official in a State of Australia, the person may be prosecuted under a State secret commissions offence, which is a corruption offence that applies to the making of payments for the purpose of influencing anyone (private or public sector). Section 70.6 of the Criminal Code clarifies that an offence may be prosecuted under State legislation, provided that the relevant law is not excluded or limited by the Commonwealth legislation. However, the Australian authorities anticipate that the majority of prosecutions for the bribery of foreign public officials will be instituted under the Criminal Code.

1. ARTICLE 1. THE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

The offence of bribing a foreign public official is set out in section 70.2 of the amendments to the Criminal Code Act as follows:

(1) A person is guilty of an offence if:

(a) the person:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is not legitimately due to the other person; and

¹ The Australian Constitution provides the Federal government with criminal law power incidental to specific powers it has under the Constitution. One of the specific powers is the external affairs power, which provides the basis for the federal government to legislate to implement the Convention.

(c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:

- (i) obtain or retain business; or*
- (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).*

Penalty: Imprisonment for 10 years.

Section 70.3 provides a defence where the conduct is not prohibited under the law of the foreign public official's country (see discussion under 1.1.4 on "any undue pecuniary or other advantage"), and section 70.4 provides a defence for "facilitation payments" (see discussion under 1.1.9 on "in order to obtain or retain business or other improper advantage"). In addition, Part 2.3 of Chapter 2 of the Criminal Code contains general defences, including mental impairment, intoxication, mistake or ignorance of fact and duress. Chapter 2 of the Criminal Code is new and has not yet been applied to the domestic offences. However, similar defences exist under the common law. The Australian authorities provide that most of the defences are not relevant to the foreign bribery offence, but some, including mistake of fact and duress could be relevant in certain circumstances.

The defence of duress applies where a person carries out conduct constituting an offence under the reasonable belief that²:

1. a threat has been made that will be carried out unless an offence is committed (i.e. unless a bribe is paid);
2. there is no reasonable way that the threat can be rendered ineffective; and
3. the conduct is a reasonable response to the threat.

The defence of duress is not available if the threat is made on or behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out the conduct of the kind actually carried out.³ The Australian authorities provide as an example of where the defence would apply the case where the briber threatens to destroy a ship or its cargo, or to harm employees of the person being bribed unless he/she makes a payment. They provide that the defence would not apply where it can be shown that the defendant was going to bribe the official in any case. Although the defence of duress has not yet been applied to domestic bribery cases, it is a concept that has existed in the common law for a long time.

1.1 The Elements of the Offence

1.1.1 any person

Subsection 70.2 (1) of the Criminal Code applies to "a person". The Australian authorities provide that pursuant to paragraph 22(1)(a) of the Acts Interpretation Act 1901, "person" includes a body corporate as well as an individual, and pursuant to paragraph 22(1)(aa), an individual is a natural person.

² Subsection 10.2 (2) of the Criminal Code.

³ Subsection 10.2(3) of the Criminal Code.

1.1.2 intentionally

Under paragraph 70.2(1)(c) an offence is committed where the person providing a benefit, etc. did so with the “intention of influencing a foreign public official...in the exercise” of his/her duties in order to “obtain or retain business”, etc. Section 5.2 of Chapter 2 of the Criminal Code provides that a person has “intention” with respect to conduct if he/she means to engage in that conduct. A person has intention with respect to a circumstance if he/she believes it exists or will exist or with respect to a result if he/she means to bring it about or is aware that it will occur in the ordinary course of events.

1.1.3 to offer, promise or give

Section 70.2 applies where a person “provides a benefit”⁴, “causes a benefit to be provided”⁵, “offers to provide...a benefit”⁶, “promises to provide a benefit”⁷, “causes an offer of the provision of a benefit”⁸ or “causes...a promise of the provision of a benefit”⁹. As the term “provide” corresponds to “give”, all of the elements in the Convention in this respect are covered.

1.1.4 any undue pecuniary or other advantage

Subsection 70.2(1) pertains to the providing, etc. of a “benefit” that is “not legitimately due”¹⁰. Under section 70.1 of the definitions, “benefit includes any advantage and is not limited to property”. In the explanatory memorandum on the amendments to the Criminal Code, it is stated that “benefit” contemplates a “pecuniary or non-pecuniary benefit”.¹¹

The prosecution bears the burden of proving that a benefit is “not legitimately due to a person in a particular situation”. Subsection 70.2 (2) requires that in proving this element of the offence, the following be disregarded:

- a) *the fact that the benefit may be customary, or perceived to be customary, in the situation;*
- b) *the value of the benefit;*
- c) *any official tolerance of the benefit.*

Subparagraphs (a) and (c) codify Commentary 7 on the Convention, and subparagraph (b) provides that there is no *de minimis* rule in this regard. The Australian authorities explain that these concepts are not used in the domestic bribery legislation and, therefore, there is no judicial guidance on their interpretation.

⁴ Subparagraph 70.2(1)(a)(i)

⁵ Subparagraph 70.2(1)(a)(ii)

⁶ Subparagraph 70.2(1)(a)(iii)

⁷ Ibid.

⁸ Subparagraph 70.2(1)(a)(iv)

⁹ Ibid.

¹⁰ Paragraph 70.2(1)(b).

¹¹ Explanatory Memorandum (1999) circulated by authority to the Minister of Justice (Senator, the Honourable Amanda Vanstone) on Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999, paragraph 24, page 15.

Defence where Conduct is Lawful in Foreign Public Official's Country

Subsection 70.3 (1) provides a table, which essentially clarifies that in relation to all the categories of foreign public officials, an offence is not committed if the advantage is not prohibited under the law of the foreign public official's country. A note below the table clarifies that the defendant bears the evidential burden of proving the defence. In the case of a foreign public official in the service of an international organisation, the relevant law is the law of the "place" where the "headquarters of the organisation is located". The Australian authorities comment that the choice of the relevant law in the latter case is intended to prevent misuse of the defence by ensuring that persons cannot deliberately locate themselves in a particular jurisdiction in order to avoid liability.¹²

Subsections 70.3 (2) and (3) appear to clarify that where the offer, etc. is made to an intermediary who is acting or pretending to act on behalf of a foreign public official, an offence is not committed if the advantage is not prohibited under the law of the foreign public official's country on behalf of whom the intermediary acts or pretends to act¹³.

The Australian authorities note that Commentary 8 on the Convention states that an offence is not committed where "the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law". They do not interpret this to mean that there must be an express permission for the conduct to be lawful. It is their interpretation that the conduct does not constitute an offence as long as it is not prohibited under the law of the foreign public official's country.

1.1.5 whether directly or through intermediaries

Subparagraph 70.2(1)(a)(ii) applies where a person "causes" a benefit to be provided, and subparagraph 70.2(1)(a)(iv) applies where a person "causes" an offer or a promise of the provision of a benefit to be made. It seems clear that the term "causes" addresses the situation where a person causes a benefit to be provided, offered or promised through an intermediary.

1.1.6 to a foreign public official

The definition of "foreign public official" and all the complementary definitions, such as "foreign country" and "public enterprise" are contained in section 70.1 of the amendments.

The definition of "foreign country" is very broad, and unlike the definition in Article 1.4(b) of the Convention, is not restricted to "government" entities. It includes a territory outside Australia "where a foreign country is to any extent responsible for the international relations of the territory" or "that is to some extent self-governing, but that is not recognised as an independent sovereign state by Australia".

The first part of the definition of "foreign public official" in Article 1.4(a) of the Convention (i.e. "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected") is covered by paragraphs (f) and (k) of the definition in the Criminal Code amendment. Although these paragraphs do not expressly apply whether the person in question has been "appointed or elected", it would appear that this is the intent. By including the reference to a "part of the foreign country" it seems that these definitions apply when the person in question holds the type of office described for "all levels and subdivisions" of the foreign country, as is required by the Convention.

¹² Ibid, paragraph 35, page20.

¹³ Again, it appears where the foreign public official is in the service of an international organisation, the relevant law is the "place" where the "headquarters" of the international organisation is located.

The second part of the definition of “foreign public official” in Article 1.4(a) of the Convention (i.e. “any person exercising a public function for a foreign country, including for a public agency or public enterprise”) is covered by various paragraphs in the definition in section 70.1 of the Criminal Code amendments, including (a), (b), (c), (d) and (e). The Australian definition is structured a little differently than the definition in the Convention, in that it does not define a “foreign public official” in terms of performing a “public function”. Instead, under the Criminal Code amendments, the definition is tied to the tasks performed by the various individuals. The result, however, is the same, and it does not appear that the Australian definition overlooks any person that would be covered by the definition in the Convention. In fact, the Australian definition clarifies that persons under contract are covered, as well as persons performing the duties of their tasks under a law of a foreign country or pursuant to the custom or convention of a foreign country. The definition of “foreign government body” under section 70.1 includes “an authority of the government of a foreign country” or “a part of the government of a foreign country”, thus covering “public agencies” as required by the Convention. It further clarifies that “foreign government body” includes “a foreign local government body or foreign regional government body”, and “a foreign public enterprise”.

“Foreign public enterprise” is broadly defined in section 70.1 of the Criminal Code. Consistent with Commentary 14 on the Convention, *de facto* control of a foreign government or governments over an enterprise is sufficient for it to be considered a “public enterprise”. The definition of “control” under section 70.1, which includes control through “trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights”, covers “indirect” control as required by Commentary 14. Furthermore, section 70.1 clarifies that the definition of “public enterprise” applies to an enterprise receiving special legal rights, benefits or privileges, etc. due to its relationship with the government of the foreign country (or of part of the foreign country).

The definition of “foreign public official” in section 70.1 of the Criminal Code amendments in relation to “public international organisations” covers every person contemplated by the corresponding part of the definition in the Convention.

1.1.7 for that official or for a third party

The offence of bribing a foreign public official under subsection 70.2(1) of the Criminal Code amendments applies to the case where a third party receives a benefit. Paragraph 70.2(1)(a) requires that the benefit be provided, etc. “to another person” and paragraph 70.2(1)(c) states that the foreign public official “may be the other person” to whom the benefit was not legitimately due. Paragraph 26 of the explanatory memorandum¹⁴ states that “another person” could be “the foreign public official or a third person, for example, the partner of the official”.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

Subsection 70.2(1) applies where a benefit is provided, etc. with the intention of influencing a foreign public official “in the exercise of the official’s duties as a foreign public official”. The term “duty” is defined under section 70.1 as “any authority, duty, function or power that”:

- (a) *is conferred on the official; or*
- (b) *that the official holds himself or herself out as having.*

¹⁴. Supra, 11.

Together, the two parts of the definition fulfil the requirement under Article 1.4(c) of the Convention that “any use of the public official’s position” is covered, “whether or not within the official’s authorised competence”. The Australian authorities explain that because “duty” is defined broadly and includes “function”, subsection 70.2(1) covers acts and omissions in the exercise of a public official’s duties, as required by the Convention.

1.1.9 in order to obtain or retain business or other improper advantage

The foreign bribery offence applies to the provision of benefits, etc. in order to “obtain or retain business”, pursuant to subparagraph 70.2(1)(c)(i), or in order to “obtain or retain a business advantage”¹⁵ that is not legitimately due to the recipient, or intended recipient of the business advantage (who may be the first-mentioned person), pursuant to subparagraph 70.2(1)(c)(ii). Only the obtaining or retaining of a “business advantage” is qualified by the requirement that the advantage not be legitimately due. In paragraph 28 of the explanatory memorandum to the Criminal Code amendments¹⁶, it is stated that the focus in subparagraph (c)(i) is “on benefits significant enough to influence trade and its scope is such that on its own it would not include smaller ‘facilitation’ benefits”. Thus, the second branch was added in relation to a “business advantage” under subparagraph (c)(ii), which is much “less specific” than the first branch and in the absence of the defence under section 70.4 (discussed below) would be “more likely to catch smaller ‘facilitation’ payments”.¹⁷

Consistent with Commentary 7 on the Convention, subsection 70.2(3) provides that in proving that “a business advantage is not legitimately due to the recipient” the following must be disregarded:

- (a) *the fact that the business advantage may be customary, or perceived to be customary, in the situation;*
- (b) *any official tolerance of the business advantage.*

Moreover, in the explanatory memorandum the Australian authorities indicate that subparagraph 70.2(1)(c)(ii) is intended, consistent with Commentary 5 on the Convention, to cover the situation where a benefit is provided, etc. in order to obtain or retain a business advantage to which the person was clearly not entitled, such as an operating permit for a factory that does not meet the required standards.¹⁸ They provide further that the courts will look for an absence of any legal entitlement to the payment, which would be the case, for instance, where the person is not owed the money as a debt. There is no case law on this element because this concept is not used in the domestic bribery legislation.

Defence for Facilitation Payments

Section 70.4 of the Criminal Code amendments provides a defence to the offence under section 70.2 in relation to “facilitation payments”, which must be raised and argued by the defendant. It states that a person is not guilty of the foreign bribery offence where:

- (a) *the person’s conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine governmental action of a minor nature; and*

¹⁵ “Business advantage” is defined in 70.1 of the Criminal Codes amendments as “an advantage in the conduct of business”.

¹⁶ See page 16, *supra*, 11.

¹⁷ Paragraph 29, page 17, *supra* 11.

¹⁸ *Ibid*, paragraph 30, page 17.

(b) *as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3).*

Moreover, pursuant to paragraph 70.4(1)(c), for the defence to apply the record must be retained at all relevant times, or lost or destroyed for reasons beyond the person's control, or the prosecution must be instituted more than 7 years after the conduct occurred. Subsection 70.4(3) particularises the required contents of these records. The Australian authorities state that the purpose of the record requirement is to ensure that the defence is only available where a person fully discloses the nature of the payment in a record, clearly showing that the payment was a "genuine facilitation payment to secure or expedite non-discretionary routine government action of a minor nature".¹⁹

"Routine government action" is defined under subsection 70.4(2) as an action of a foreign public official that "is ordinarily and commonly performed by the official" and includes the following:

1. granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in part of a foreign country;
2. processing government papers such as a visa or work permit;
3. providing police protection or mail collection or delivery;
4. scheduling inspections associated with contract performance or related to the transit of goods;
- and
5. any other action of a similar nature.

Paragraphs 70.4(2)(c) and (d) clarify that "routine government action" does not involve a decision about (or encouraging a decision about) whether to award new business or continue business with a particular party, or the terms of a new or existing business.

Although section 70.4 is not expressly restricted to situations where the value of the benefit given to the foreign public official is minor, the Australian authorities explain that the defence is only available where the benefit is of a "minor nature". They explain further that this approach is preferable to particularising a specific value because it enables the court to take into account all the circumstances of the payment, and avoids the inevitable distortions that would result from identifying a specific amount (e.g. due to differing exchange rates and the impact of different sized payments in different countries).

In addition, the Australian authorities state that although some of the "routine governmental actions" listed under subsection 70.4(2) involve a certain degree of discretion (e.g. processing a work permit), these actions are not a matter of absolute discretion.

1.1.10 in the conduct of international business

The offence of bribing a foreign public official under subsection 70.2(1) applies in relation to the obtaining or retaining of "business" or a "business advantage", and is not qualified by the term "international".

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official".

The Australian authorities provide that aiding, abetting, counselling and procuring the commission of an offence is treated as the commission of an offence under subsection 11.1(1) of the Criminal Code. The

¹⁹ Paragraph 51, page 24-25, *supra*, 11.

terms “counselling” and “procuring” would appear to encompass incitement and authorisation. It is assumed that subsection 11.1(1) is a general provision that applies to all offences under the Criminal Code.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

The Australian authorities state that an attempt to “commit the bribery of a foreign public official” is an offence pursuant to subsection 11.1(1) of Part 2.4 (Chapter 2) of the Criminal Code, and is punished as if the offence had been committed.

In addition, a conspiracy to commit the offence of bribery of a foreign public official is an offence pursuant to subsection 11.5(1) of Part 2.4 (Chapter 2) of the Criminal Code, and is punished as if the offence had been committed.

The ancillary provisions under Part 2.4 of Chapter 2 of the Criminal Code apply to all the alternative elements of the offence of bribing a foreign public official under section 70.2 (i.e. offering, promising, causing to provide, causing to offer and causing to promise).

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

2.1.1 Legal Entities

Pursuant to subsection 12.1 (1) of Part 2.5 (Chapter 2) of the Criminal Code, the Code applies to bodies corporate in the same way as it applies to individuals with the modifications required in Part 2.5 on corporate criminal responsibility, as well as with such other modifications as are necessitated by the fact of imposing criminal liability on a body corporate rather than an individual.

The Australian authorities explain that the term “body corporate” is commonly used in Australian statutes but is rarely defined. It is defined in Butterworths Australian Legal Dictionary²⁰ as “an artificial legal entity having separate legal personality” including “bodies created by common law (such as a corporation sole or corporation aggregate), by statute (such as the Australian Securities Commission) and by registration pursuant to statute (such as a company, building society, credit union, trade union or unincorporated union)”. Although there has not been much case law produced on this issue, the Australian authorities are certain that the term covers all companies including those that are state-owned or state-controlled.

²⁰ Ed. Dr. Peter E Nygh and Peter Butt (1977).

2.1.2 Standard of Liability

Pursuant to section 12.2 of the Criminal Code, where an employee, agent or officer of a body corporate commits “a physical element” of an offence while acting within the actual or apparent scope of his/her employment or authority, the “physical element” shall also be attributed to the body corporate. Subsection 12.3(1) provides further that if intention, knowledge or recklessness is required in relation to the “physical element” of an offence, it shall be attributed to a body corporate that “expressly, tacitly or impliedly authorised or permitted the commission of the offence”. The Australian authorities confirm that all the ways of committing the offence of bribing a foreign public official under section 70.2 of the Criminal Code amendments (e.g. providing, offering to provide or promising to provide a benefit) would be considered physical elements. Section 4.1 of the Criminal Code provides that a physical element of an offence may be conduct (an act, an omission to perform an act or a state of affairs), a circumstance in which conduct occurs or a result of conduct.

The ways in which it may be established that the body corporate authorised or permitted the commission of an offence may include proof of one of the following:

1. The body corporate’s “board of directors” intentionally, knowingly or recklessly carried out the conduct in question or expressly, tacitly or impliedly authorised or permitted the commission of the offence.²¹ Pursuant to subsection 12.3(6) of the Criminal Code, the “board of directors” is defined as the body (regardless of its name) exercising the executive authority of the body corporate. The Australian authorities add that, although there is no case law on the point, it would be sufficient for one member of the board of directors to carry out the conduct in question. Since a member of a board of directors would be considered a “high managerial agent”, a case of this nature would be covered under the next category.

2. A “high managerial agent” of the body corporate intentionally, knowingly or recklessly carried out the conduct in question or expressly, tacitly or impliedly authorised or permitted the commission of the offence.²² Pursuant to subsection 12.3(6) of the Criminal Code, a “high managerial agent” is defined as an employee, agent or officer of the body corporate with such duties and responsibilities that it is fair to assume that his/her conduct represents the policy of the body corporate.

If the body corporate proves that it exercised “due diligence” to prevent the conduct, authorisation or permission in question, this provision would not apply.²³

3. A “corporate culture” existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision;²⁴ or the body corporate failed to create and maintain a “corporate culture” that required compliance with the relevant provision.²⁵ Although there is no case law on this provision, the Australian authorities are confident that the term “relevant provision” would be interpreted as a reference to the relevant offence.

Pursuant to 12.3(6) of the Criminal Code, “corporate culture” is defined as an attitude, policy, rule or course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.

²¹ Paragraph 12.3(2)(a) of the Criminal Code.

²² Paragraph 12.3(2)(b) of the Criminal Code.

²³ Subsection 12.3(3) of the Criminal Code.

²⁴ Paragraph 12.3(2)(c) of the Criminal Code.

²⁵ Paragraph 12.3(2)(d) of the Criminal Code.

In determining whether the provisions on “corporate culture” apply, the factors that may be considered include the following:

- (a) Whether a “high managerial agent” had previously authorised the commission of the same or a similar offence.²⁶
- (b) Whether the employee, agent or officer who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a “high managerial agent” of the body corporate would have authorised or permitted the commission of the offence.²⁷

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of a “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

The current penalty for the offence of bribing a domestic public official is a maximum of 2 years imprisonment and/or a fine of \$13, 200²⁸, where the offender is a natural person, and a fine of \$66,000 where the offender is a “body corporate”.

The penalty prescribed under the Criminal Code amendments for the offence of bribing a foreign public official is a maximum of 10 years imprisonment. Natural persons are also liable to a fine of \$66,000, in addition to imprisonment or in lieu thereof,. A “body corporate” is liable to a fine of \$330,000.²⁹

The Australian authorities state that the penalties for the foreign bribery offence are in accordance with the penalties applied in relation to other offences. They state that the fine should not be considered alone, but together with imprisonment of the relevant directors and the recording of a criminal conviction, which will disqualify many individuals and bodies corporate from numerous areas of business activity.

Section 16A provides guidelines that the court must consider in determining the appropriate sentence in a particular case. These include consideration of the personal circumstances of any victim of the offence; the injury loss or damage resulting from the offence; and the degree to which the person has shown contrition for the offence.

²⁶ Paragraph 12.3(4)(a) of the Criminal Code.

²⁷ Paragraph 12.3(4)(b) of the Criminal Code.

²⁸ On 9 November 1999, 1.63 Australian dollars were valued at 1 U.S. dollar.

²⁹ Subsection 4B(2) of the Crimes Act 1914 provides that where the penalty prescribed for an offence is a term of imprisonment, the court may impose a fine in addition to or in lieu of imprisonment. The subsection provides a formula for calculating the fine for an individual and a body corporate.

3.3 Penalties and Mutual Legal Assistance

Pursuant to the Mutual Legal Assistance in Criminal Matters Act 1987, Australia is able to request and provide mutual legal assistance for “serious criminal offences”, which are those for which the maximum term of imprisonment is not less than 12 months.

3.4 Penalties and Extradition

The Australian authorities explain that pursuant to the Extradition Act 1988, an extraditable offence is one for which the maximum term of imprisonment is not less than 12 months.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

The Proceeds of Crime Act 1987 applies where a conviction has been obtained for an offence that carries a penalty of 12 months or more of imprisonment and, thus, applies to the offence of bribing a foreign public official.

Pursuant to section 19 of the Act, a court has the discretion to order that “tainted property” be forfeited. “Tainted property” is defined in section 4 as “property used in, or in connection with, the commission of the offence”, or “proceeds of the offence”. “Proceeds” is defined in section 4 as “any property that is derived or realised, directly or indirectly, by any person from the commission of (an) offence”. The Australian authorities state that pursuant to these provisions, the bribe payment and the proceeds of bribing a foreign public official can be forfeited. They state further that the language in section 4 clarifies that any kind of property that has been acquired with the proceeds can be ordered forfeited by the court.

Pursuant to section 9A of the Act, property may be forfeited from a third party where the court finds that it is under the effective control of the offender. The third party can resist a forfeiture order by establishing that he/she was not involved in the offence, acquired the property for sufficient consideration and had no reason to suspect that it had been derived from an offence.³⁰

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

Paragraph 70.5(1) establishes jurisdiction over a person who commits the foreign bribery offence wholly or partly in Australia or wholly or partly on board an Australian aircraft or ship.

4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad, it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

³⁰ Section 21 of the Proceeds of Crime Act 1987.

Subparagraph 70.5(1)(b)(i) establishes jurisdiction over an Australian citizen who commits the offence of bribing a foreign public official wholly outside of Australia and paragraph 70.5(b)(ii) establishes jurisdiction over a body corporate incorporated under the laws of Australia who commits the foreign bribery offence wholly outside Australia. The Australian authorities explain that subparagraph 70.5(1)(b)(i) also covers natural persons who are residents. The Australian authorities indicate that jurisdiction was extended beyond the traditional territorial jurisdictional principle pursuant to the recommendation of the Federal Parliamentary Joint Standing Committee on Treaties³¹. The Committee was of the opinion that jurisdiction was central to ensuring the effectiveness of the foreign bribery offence. It concluded that since foreign bribery is in essence international criminal activity likely to take place wholly outside Australia, the objectives and intent of the Convention would not be met without broadening the jurisdiction over the offence.³²

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Australia's bilateral treaties on mutual legal assistance and extradition commonly provide for consultation in the case of conflicting claims of jurisdiction, but they do not provide for detailed procedures. Consultations would be carried out through the normal diplomatic channels, and where appropriate, through channels established for extradition and mutual legal assistance in criminal matters.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

A review of jurisdiction as it relates to the foreign bribery offence was made by the Federal Parliamentary Joint Standing Committee (see discussion under 4.2 on "Nationality Jurisdiction").

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be "subject to the applicable rules and principles of each Party". It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and Principles Regarding Investigations and Prosecutions

Investigations are normally initiated by the Australian Federal Police and are carried out in accordance with the procedures set out in Parts 1AA, 1C and 1D of the Crimes Act 1914. Where it is determined that there is sufficient evidence to prosecute, the established procedure is to transfer the file to the Commonwealth Director of Public Prosecutions (DPP). In turn, the DPP determines whether a prosecution should be initiated and upon what charge or charges. In certain cases, it is deemed necessary or appropriate for the Australian Federal Police to initiate a prosecution by way of arrest and charge without

³¹ The Federal Parliamentary Joint Standing Committee on Treaties is a bipartisan committee.

³² Paragraph 54, page 26, *supra*, 11.

prior consultation with the DPP. In these cases the DPP determines whether the prosecution should proceed and whether the charge or charges laid by the police should be changed.

All decisions to initiate or terminate a prosecution must be made in accordance with the guidelines in paragraphs 2.8 to 2.13 of a document entitled the “Prosecution Policy of the Commonwealth”, pursuant to which the two principal considerations are as follows:

1. Whether the evidence is sufficient to justify the initiation or continuation of a prosecution. The strength of the case must be evaluated to determine whether there is a reasonable prospect of securing a conviction.
2. Whether a prosecution is required in the public interest. The factors to be considered in making this determination vary from case to case, but generally the public interest is given less consideration in relation to more serious offences.

Section 2.10 of the Prosecution Policy Statement provides a list of the guidelines that may be considered in determining whether the public interest requires a prosecution, which includes:

1. any mitigating or aggravating circumstances;
2. the effect on public order and moral;
3. whether the alleged offence is of considerable public concern;
4. any entitlement of the Commonwealth or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken; and
5. the attitude of the victim of the alleged offence to a prosecution.

There is no clear entitlement for victims (e.g. competitors) to challenge a prosecutor’s decision not to prosecute an alleged offence. Pursuant to the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) a decision taken under an Act may be sought to be reviewed. Therefore, it may be possible to request a review of a decision taken by a prosecutor to refuse to give consent to the institution of a prosecution pursuant to the Director of Public Prosecutions Act 1983 or section 70.5(2) of the Criminal Code. However, the Australian authorities explain that it is not clear whether a person or body who was adversely affected by the conduct of the prospective defendant would be a “person aggrieved” for the purpose of the ADJR Act by a decision not to prosecute the latter. They further comment that while the exercise of discretion to prosecute has not been open to review by the courts under the common law, some recent decisions of the courts in the United Kingdom indicate that such decisions can be reviewed in exceptional circumstances. The Australian authorities state that it remains to be seen whether the Australian courts will follow this new trend.

5.2 Considerations such as National Economic Interest

The Australian authorities state that the factors listed in Article 5 of the Convention do not have any bearing on the determination by the Commonwealth Director of Public Prosecutions of whether a prosecution is required in the public interest.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Under Australian law, there is no limitation period with respect to the prosecution of a natural person or a body corporate for the offence of bribing a foreign public official.³³

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

The Australian authorities indicate that the foreign bribery offence as well as the domestic bribery offence is a predicate offence for the application of the money laundering provisions in the Proceeds of Crime Act 1987. A conviction for the predicate offence is not necessary to trigger the relevant provisions of the money laundering legislation. Pursuant to subsection 81(3) of the Act, the money laundering offence is defined as follows:

A person shall be taken to engage in money laundering if, and only if:

(a) the person engages, directly or indirectly, in a transaction that involves money, or other property, that is proceeds of crime; or

(b) the person receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that is proceeds of crime;

and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.³⁴

Under subsection 4(1) “proceeds of crime” is defined as:

(a) the proceeds of an indictable offence³⁵; or

(b) any property that is derived or realised, directly or indirectly, by any person from acts or omissions that:

(i) occurred outside Australia; and

(ii) would, if they had occurred in Australia, have constituted an indictable offence or a State indictable offence

³³ Section 15B of the Crimes Act 1914 (Commonwealth).

³⁴ This provision was referred to in: G. Moens, ‘Bank Confidentiality and Governmental Control of Exchange Operations and of Their Unlawful Effects—Australia’, P. Bernasconi (ed.) *Money Laundering and Banking Secrecy*, 31-48 (1996 Kluwer Law International).

³⁵ The Australian authorities indicate that the offence of bribing a foreign public official is an indictable offence.

Thus it would appear that the proceeds of bribing a foreign or domestic public official, but not the bribe, are subject to the money laundering offence. It would also appear that it does not matter where the bribery occurred with respect to the domestic bribery offence or the foreign bribery offence, as long as the conduct in question would have constituted an offence in Australia had it occurred in Australia. However, the Australian authorities state that the ambit of the money laundering offence is restricted by the limitations on jurisdiction over the offence in Australia. Therefore, for instance, it does not extend to conduct wholly outside Australia where the briber is a body corporate that is not incorporated under the laws of Australia.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2/8.3 Accounting and Auditing Requirements/Companies Subject to Requirements/Penalties

Financial Records

Pursuant to section 298 of the Corporations Law, all companies (including those that are not required by the Corporations Law to prepare annual financial statements), registered management investment schemes and disclosing entities are required to keep written “financial records” that:

- (a) correctly record and explain their transactions and financial position and performance; and
- (b) would enable true and fair financial statements to be prepared and audited.

“Financial records” are defined in section 9 of the Corporations Law as including invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers and documents of prime entry.

The Australian authorities explain that the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents would be contrary to the requirements under section 298 of the Corporations Law, because they would not correctly record and explain transactions and would not enable true and fair financial statements to be prepared and audited.

Failure to comply with section 298 is a criminal offence and upon conviction a company is punishable by a fine up to \$12,500.

The Australian authorities state that the Federal Parliamentary Joint Standing Committee on Treaties recommended that an examination be undertaken of the benefits and practicalities of introducing a requirement that payments of bribes be disclosed in business accounts.³⁶ This recommendation is addressed by subsection 70.4(3) of the Criminal Code amendments, by requiring that a record of facilitation payments be kept.

³⁶ At the time that the review was prepared, the details of the examination had not yet been released, but it appeared likely that the Government would give serious consideration to the recommendations of the Joint Standing Committee.

Financial Report for a Financial Year

Pursuant to section 296 of the Corporations Law, the financial report for the financial year must comply with the Australian Accounting Standards, which include requirements in relation to the disclosure of contingent liabilities.

Entities that are required to prepare a financial report for the financial year are:

- disclosing entities (mainly listed corporations and registered managed investments schemes) that have listed securities or have issued shares and other securities as a result of the circulation of a prospectus;
- public companies that are not listed and large proprietary companies (i.e. companies that meet at least two of the following criteria: 1. gross operating revenue of \$10 million or more; 2. gross assets of \$5 million or more; and 3. 50 or more employees); and
- small proprietary companies that are controlled by a foreign company or are subject to a shareholder request to prepare financial statements.

The Australian Accounting Standards have the force of law for the purposes of the Corporations Law³⁷. Most apply to various aspects of financial statement preparation, although some are industry specific as in the case of financial institutions and insurance providers. Most standards pertain to the methodology of accounting for particular items and the requirements on disclosure in financial statements. Where a director of a company, registered scheme or disclosing entity fails to take all reasonable steps to comply with or secure compliance with the requirements in relation to financial records (Part 2M.2) or financial reporting (Part 2M.3)³⁸, he/she is liable to a civil penalty which may, depending on the circumstances, involve an order prohibiting a person from managing a corporation or imposing a penalty not exceeding \$200,000.

Auditing Requirements

The Australian authorities indicate that companies, registered schemes and disclosing entities are responsible for developing internal controls according to accounting standards, and that auditors' reports review the effectiveness of such controls. They also indicate that, pursuant to section 310 of the Corporations Law, these same entities must provide the Australian Securities and Investment Commission (ASIC) with an external audit report. It also appears that the auditor is required to prepare a report for the members of the board of directors stating whether he/she is satisfied that the financial report is in accordance with the law. Moreover, the auditor is required to notify the ASIC in writing if he/she:

- has reasonable grounds to suspect that a contravention of the Corporations Law has occurred; and
- believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors.

Where a person fails to carry out the duties of an auditor satisfactorily, the ASIC may refer the matter to the Companies Auditors and Liquidators Disciplinary Board. The Board may cancel or suspend the auditor's registration if a complaint is proven. An auditor may also be liable for civil damages where the performance of his/her audit functions causes a loss to other parties.

³⁷ The Australian Accounting Standards Board (AASB) has issued about 40 such standards.

³⁸ See section 344 of the Corporations Law.

In order to ensure the independence of external auditors, a person³⁹ (who must be a registered company auditor) cannot accept an appointment as the auditor of a company if:

- the person, or a body corporate in which the person is a substantial shareholder, owes more than \$5,000 to the company, to a related body corporate or to an entity that the company controls; or
- the person is an officer of the company, or a partner, employer or employee of an officer of the company.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. Pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

Australia states that it can provide mutual legal assistance in respect of criminal matters for the offence of bribing a foreign public official pursuant to the Mutual Assistance in Criminal Matters Act 1987, and treaties and arrangements made with other countries pursuant to that Act. The Australian authorities explain that mutual legal assistance can be provided to any country irrespective of the existence of a treaty or arrangement, but assistance would normally not be provided to a country that does not provide an undertaking of reciprocity.

Subsection 8(1) of the Mutual Assistance in Criminal Matters Act 1987 sets out various grounds for which the Attorney-General shall refuse to provide mutual legal assistance. For instance, assistance shall be refused if the request relates to an offence of a political character or the granting of the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory. Pursuant to subsection 8(2), the Attorney-General has discretion to refuse to provide assistance where for instance, dual criminality is not satisfied, the statute of limitations has lapsed or the provision of assistance could prejudice an investigation or proceeding in relation to a criminal matter in Australia. The Australian authorities state that the Attorney-General is never obliged to provide mutual legal assistance, but his/her discretion is more restricted under some bilateral treaties.

Pursuant to section 74 of the Act, the following types of assistance are available:

- the taking of evidence and production of documents or other articles;
- search and seizure;
- arrangements for persons (including prisoners) to give evidence or assist in investigations (and associated custody or persons in transit);
- the tracing, restraint and confiscation of proceeds of crime (including enforcement of foreign confiscation orders); and

³⁹ Similar requirements apply to the appointment of a firm (i.e. partnership) as auditor of a company.

- access to compulsorily acquired financial intelligence (“financial transaction reports information”).

Additionally, bilateral treaties on mutual assistance in criminal matters normally provide for a range of non-compulsory measures including the taking of unsworn voluntary witness statements, service of criminal process (without giving effect to foreign penalties), provision of official and publicly available documents and any other type of assistance that is not inconsistent with Australian law.

In appropriate circumstances, mutual legal assistance may be given in relation to a legal person.

9.1.2 Non-Criminal Matters

Pursuant to the Mutual Assistance in Business Regulation Act 1992, the Attorney-General may authorise Commonwealth business regulatory agencies to obtain evidence, information and documents at the request of a foreign business regulatory agency and forward it to that agency for purposes relating to the administration or enforcement of a foreign business law. The Australian authorities indicate that this legislation would enable Australia to provide assistance in relation to some non-criminal proceedings against legal persons.

9.2 Dual Criminality

Pursuant to paragraphs 8(2)(a) and (b) of the Mutual Assistance in Criminal Matters Act 1987, dual criminality is generally a discretionary ground upon which Australia can refuse to provide mutual legal assistance. However, the Australian authorities state that they shall not rely on this ground where requests are received for assistance in relation to alleged offences of bribing foreign public officials.

9.3 Bank Secrecy

In Australia, the relationship between a banker and his/her customer is protected by a duty of confidentiality.⁴⁰ Since this is a common law duty, it may be overridden by legislation.⁴¹ This duty has been overridden to some extent by the Financial Transaction Reports Act 1988, which requires “cash dealers”⁴² to provide information about customers’ transactions to the Australian Transaction Reports and Analysis Centre⁴³ (AUSTRAC) in the following circumstances:⁴⁴

1. Pursuant to section 7 of the Act, “significant cash transactions” within Australia must be reported. A “significant cash transaction” involves the transfer of currency worth not less than \$10,000 in the coin or paper money of Australia or of a foreign country.

⁴⁰ Tournier v. National Provincial and Union Bank of England, [1924] 1 KB 461.

⁴¹ G. Moens, *supra*, 34, page 33.

⁴² “Cash dealers” are defined in section 3 of the Act as a “financial institution”, “insurer or insurer intermediary” “securities dealer”, “futures broker”, “trustee or manager of a unit trust”, “person who carries on a business of operating a gambling house or casino”, etc.

⁴³ AUSTRAC is the reporting authority established pursuant to the Act for the purpose of assisting the Australian Taxation Office and Federal and State law enforcement agencies in uncovering tax evasion and criminal activity.

⁴⁴ G. Moens, *supra*, 34, page 40 and pages 42-44.

2. Pursuant to section 17B of the Act, instructions regarding the international telegraphic transfer of funds to and from Australia must be reported where the “cash dealer” is acting for a person who is not a bank or the cash dealer is not a bank.

3. Pursuant to section 15 of the Act, it is an offence to transfer Australian or foreign currency worth \$5,000 or more into or out of Australia without making a report. Financial institutions including banks, building societies and credit unions are exempted from this reporting requirement. The penalty for contravening these provisions is a fine of not more than \$5,000 or imprisonment for 2 years or both in relation to natural persons, and a fine of not more than \$20,000 in relation to bodies corporate.

4. Pursuant to subsection 16(1) of the Act, a “cash dealer” must report transactions where there are reasonable grounds to suspect that the information might assist the investigation of tax evasion or another offence under Commonwealth law.

Pursuant to section 27 of the Act, the information collected by AUSTRAC may be released to the Attorney-General in order to be able to respond to a request by a foreign country to which the Mutual Legal Assistance in Criminal Matters Act applies.⁴⁵ In addition, pursuant to section 37 of the Mutual Legal Assistance in Criminal Matters Act, Australia can provide access to information about bank records even if the information has not been reported to AUSTRAC. A search warrant or production order can be obtained in respect of an offence punishable by a maximum of at least one-year of imprisonment where criminal proceedings or an investigation has been initiated in the requesting country. Where bribery of a foreign public official constitutes a “foreign organised fraud offence” as defined in the Act, it would also be possible to obtain an account monitoring order to identify subsequent transactions for a period of up to 3 months. Moreover, there is scope for obtaining bank records under the general search and seizure powers under Part III of the Act.

10. ARTICLE 10. EXTRADITION

10.1 Extradition for Bribery of a Foreign Public Official

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them.

Pursuant to the Extradition Act 1988, Australia may provide extradition to an “extradition country”, which is defined under paragraph 5(a) of the Act as “any country (other than New Zealand⁴⁶) that is declared by the regulations to be an extradition country”. The Australian authorities provide that as a matter of policy, a country is normally declared an “extradition country” where:

- (a) Australia has a bilateral extradition treaty with the country;
- (b) the country and Australia are both parties to a multilateral treaty that includes extradition provisions; or
- (c) there is a bilateral arrangement or understanding with the country, with less than treaty status, that guarantees reciprocity.

Pursuant to the Extradition Act 1988, the offence of bribing a foreign public official is an extraditable offence if the offence is punishable by not less than 12 months of imprisonment in the requesting country. However, before a person can be extradited he/she must first be found eligible for extradition by a

⁴⁵ G. Moens, *supra*, 34, page 45.

⁴⁶ Under Part III of the Extradition Act 1988, extradition to New Zealand is not subject to the normal restriction on extradition between independent States, therefore extradition for an offence under the Convention would automatically be available.

magistrate.⁴⁷ A person cannot be found eligible for extradition if the magistrate conducting the hearing is satisfied that there are substantial grounds for believing that there is an “extradition objection” in relation to the offence. In summary, these objections are that the extradition offence is political or military in nature, the alleged offender may be placed in double jeopardy or may be prejudiced at his/her trial or punished, etc. by reason of race, nationality or political opinions.⁴⁸ Pursuant to section 22, the Attorney-General shall not order the extradition of a person unless he/she is satisfied that no extradition objection applies and that the person will not be subjected to torture or suffer the death penalty. The Attorney-General has overriding discretion, pursuant to paragraph 22 (3)(f) of the Act, to refuse extradition unless he/she “considers that the person should be surrendered in relation to the offence”.

The Australian authorities indicate that where a bilateral extradition treaty is applicable, additional mandatory or discretionary grounds for refusing extradition may apply. The Attorney-General’s residual discretion is normally not provided for under a bilateral treaty.

10.2 Legal Basis for Extradition

Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

The Australian authorities provide that Australia does not require a treaty to provide extradition, and therefore strictly speaking the requirements under Article 10.2 of the Convention are not applicable. However, when Australia considers it would be bound in international law to extradite under a treaty, it gives effect to the obligation by making regulations under the Extradition Act to give effect to the obligation. For this reason regulations have been made under the Extradition Act [Extradition (Bribery of Foreign Public Officials) Regulations 1999] to provide lawful authority, subject to the grounds for refusal (see above under 10.1) and the conditions applicable under any bilateral extradition treaty with a country that is a Party to the Convention, for Australia to surrender to a Party to the Convention a person who is sought for extradition in relation to the offence of bribing a foreign public official. The Australian authorities state that in this generalised sense it can be said that the Convention is regarded as a legal basis for extradition for the offence of bribery of a foreign public official.

10.3/10.4 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Australia indicates that Australian nationals can be extradited for the offence of bribery of a foreign public official on the same basis as other persons. Although bilateral treaties usually provide discretion to refuse the extradition of nationals, it is rarely relied on.

Where extradition is refused on grounds of nationality, section 45 of the Extradition Act provides a mechanism for initiating criminal proceedings in Australia in relation to conduct that occurred outside of Australia that would have constituted an offence if it had occurred in Australia. The Attorney-General has discretion to institute proceedings under this provision. The Australian authorities provide that no one has ever been tried for an offence pursuant to this section, and believe that this in part reflects that Australia does not normally refuse extradition on grounds of nationality. They concede that it may also partly reflect

⁴⁷ Section 19 of the Extradition Act 1988.

⁴⁸ Section 7 of the Extradition Act 1988.

that it is practically difficult in a common law system to try a person for an offence committed outside the normal territorial jurisdiction of the court.

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The Australian authorities provide that dual criminality is a condition for extradition, but that it would be met where the offence for which extradition is requested is within the scope of Article 1 of the Convention and it carries a minimum term of 12 months of imprisonment in the requesting country.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

The Attorney-General's Department (Canberra) has been designated as the channel of communication in respect of the matters listed in Article 11.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

At the time that the review was prepared, bribes paid to foreign public officials by Australian resident persons or businesses in producing assessable income or in carrying on a business for the purpose of producing assessable income were tax deductible. Similarly, bribes paid to foreign public officials by non-resident persons or businesses in producing Australian source assessable income or in carrying on a business for the purpose of producing Australian source assessable income were tax deductible.

A bill denying the deductibility of bribes paid to foreign public officials has been adopted by the House of Representatives and is currently before the Senate. It is anticipated that, subject to passage by the Parliament, the Bill will come into force early in 2000.⁴⁹

The Bill expressly denies the deductibility of bribes given to foreign public officials and does not require a criminal conviction in order to deny deductibility.

The Bill provides that a payment does not constitute a bribe to a foreign public official where no person would have been guilty of an offence against the law of the foreign public official's country, if the benefit had been provided, and all the related acts had been done, in that country. The Australian authorities state that this means that a deduction will not be disallowable if the provision of a benefit was lawful in the foreign public official's country.

The Bill also contains an exception for facilitation payments, which are payments incurred for the sole or dominant purpose of securing or expediting the performance of a routine government action of a minor nature. In order to be able to avail oneself of this exception, a taxpayer would have to substantiate the claim with the record that is required to be made of the facilitation payment under paragraph 70.4(1)(c) of the Criminal Code amendments. Subsection 25-52(4) of the Bill provides as an example of a facilitation

⁴⁹ The Bill will apply to 1999-2000 and later years of income.

payment the case where, upon arriving in a foreign country, a person is informed that his/her visa is invalid and a fee must be paid to a foreign public official for the sole purpose of expediting the issue of a new visa.

EVALUATION OF AUSTRALIA

General Remarks

The Working Group on Bribery thanked the Australian authorities for their co-operation and transparency in providing very thorough responses. The Group noted that while Australia took some time to sign the Convention, due to its local processes, it was able to ratify it and adopt the implementing legislation in less than one year after signature.

In particular, the Group welcomed the fact that Australia felt it appropriate to introduce a specific and detailed act (the Criminal Code Amendment Bribery of Foreign Officials Act 1999) to deal comprehensively with this question.

The Working Group considered that the Australian legislation conforms to the standards set by the Convention.

Specific Issues

1. The offence of bribery of foreign public officials

The Group had some queries in relation to two defences provided for in the Australian legislation.

1.1 Interpretation of paragraph 8 of the Commentary to the Convention

Section 70.3(1) provides a table according to which an offence is not committed if the advantage is not prohibited under the law of the foreign public official's country. This is a consequence of Australia's interpretation of paragraph 8 of the Commentary to the Convention.

Paragraph 8 of the Commentary states that an offence is not committed « if the advantage was permitted or required by the written law or regulation of the foreign public official's country ; including case law ».

It is the Australian view that this paragraph shall be interpreted to mean that the conduct does not constitute an offence as long as it is not prohibited under the law of the foreign public official's country. However another interpretation, taking into account the « autonomous » definition of bribery as well as the language employed in paragraph 8, is that this paragraph deals merely with the case in which the advantage has been expressly permitted or required by the law of that foreign country. According to such an interpretation, the advantage covered by paragraph 8 of the Commentary is « due ». In that context, the mere fact that the bribed person would not have been guilty of an offence under the legislation of the foreign country would not constitute a defence.

It is therefore the Group's opinion that this issue warrants further discussion as part of the first stock-take at the end of Phase 1.

1.2 Defence for facilitation payments

The Group raised two points in relation to this defence. The first one is the fact that Australia decided not to outline a specific money value in order to better define the « small » nature of such facilitation payments. Australia indicated that while this would have provided more certainty, it proved to be very difficult to agree on a specific amount.

The Group further noted that some of the items mentioned as « routine government action» defined under subsection 70.4(2) of the Australian legislation entail a certain discretion (e.g. processing of a work permit). Australia argued that while it was correct to say that there is some discretion in such instances, it is not a matter of absolute discretion.

2. Sanctions

The Group took note of the comments of the Australian authorities according to which, given the maximum term of imprisonment provided for in such legislation (10 years), it is very unlikely that a natural person bribing a foreign public official would not be imprisoned.

With regard to the level of monetary fines for legal persons, the Australian authorities indicated that such level was comparable to that of other criminal offences at federal level. They further noted that a conviction for a bribery offence would disqualify the company from a number of business activities (e.g. casinos, broadcasting).

The Group felt that these issues could appropriately be revisited in Phase 2 of the evaluation process.

Attachment B – Australia Phase 2 evaluation report (2006)



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

AUSTRALIA: PHASE 2

**REPORT ON THE APPLICATION OF THE CONVENTION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS
AND THE 1997 RECOMMENDATION ON COMBATING
BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	4
INTRODUCTION	5
1. On-Site Visit	5
2. General Observations.....	6
a. Governance	6
b. Legal System.....	7
c. Economy	8
d. On-Going Investigations and Evaluation.....	9
A. EFFECTIVENESS OF AUSTRALIA’S MEASURES FOR PREVENTING, DETECTING AND INVESTIGATING THE BRIBERY OF FOREIGN PUBLIC OFFICIALS	11
1. Awareness and Prevention.....	11
a. Government awareness and training.....	11
b. Raising awareness in the private sector and civil society	13
2. Systems for Detecting, Investigating and Reporting Bribery of Foreign Public Officials.....	16
a. Detection and investigation by the Australian Federal Police (AFP)	16
b. Proposed Australian Commission for Law Enforcement Integrity.....	26
c. Treatment of Bribe Payments by the Australian Taxation Office (ATO).....	27
d. Detection and reporting by other public bodies	31
e. Detection through money laundering reporting systems	37
f. Detection through accounting and auditing requirements	40
g. Detection within companies.....	43
B. EFFECTIVENESS OF AUSTRALIA’S MEASURES FOR PROSECUTING AND SANCTIONING THE BRIBERY OF FOREIGN PUBLIC OFFICIALS	44
1. Elements of the Offence of Bribing a Foreign Public Official	44
a. Results and necessity of payment	44
b. Omissions of the foreign public official	44
c. Defences.....	44
2. Liability of Legal Persons for the Offence.....	47
a. Effectiveness in Practice	47
b. Sanctions for Legal Persons.....	49
3. Sanctions in General	50
a. Treatment of Foreign Bribery as Summary versus Indictable Offence	50
b. Monetary Sanctions and Imprisonment for Natural Persons	50
c. Administrative Sanctions	52
4. Prosecutorial Discretion.....	54
5. International Co-operation	54
a. Mutual legal assistance	54
b. Extradition.....	55
C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP	57

1. Recommendations.....	57
Recommendations for Ensuring Effective Prevention, Detection and Investigation of Foreign Bribery	57
Recommendations for Ensuring Effective Prosecution and Sanction of Foreign Bribery and related Offences.....	58
2. Follow-Up by the Working Group.....	59
APPENDIX – LIST OF ACRONYMS.....	61

EXECUTIVE SUMMARY

1. The Phase 2 Report on Australia by the Working Group on Bribery evaluates and makes recommendations on Australia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The Australian authorities demonstrated a strong commitment to combating foreign bribery. Although no cases have been prosecuted, the Australian Federal Police has opened three investigations (one which has been terminated) and is currently conducting two investigations. Meetings held with the Australian authorities, including police, prosecutors and officials from the Attorney-General's Department, were highly constructive.

2. In 2001, Australia established a progressive framework for corporate criminal liability (i.e. the criminal liability of bodies with legal personality). Despite the broad scope of this liability, which includes in its application offences linked to "corporate culture", it has not yet been applied to corruption-related offences. The Working Group therefore identified this as an area requiring follow-up once there has been sufficient practice. Additionally, it was recommended that Australia increase the maximum corporate fine of AUD 330 000 (about EUR 209 000/USD 252 000) for foreign bribery, in view of the size and importance of many Australian companies as well as MNEs with headquarters in Australia. The defence of facilitation payments was also identified for further monitoring because of concerns such as the practical effectiveness of the record-keeping requirement and the prohibition against facilitation payments under some State criminal codes. The Australian authorities agreed with these recommendations.

3. The Working Group recommended improved measures for the referral of information about foreign bribery cases to the AFP from other Commonwealth agencies and State and Territorial police, and for ensuring that the process for notifying the Minister for Justice and Customs of foreign bribery cases in politically sensitive matters does not potentially result in delays in the referral of cases to the AFP. The Working Group welcomed improvements announced by the Australian Taxation Office (ATO) to more effectively prevent and detect bribe payments to foreign public officials and ensure that the tax deduction for facilitation payments is not misused.

4. The Report also discusses elements of the Australian system that should positively impact on the international fight against foreign bribery, including Australia's commitment to support good governance in its partner countries. In addition, two of the three foreign bribery investigations were referred through the AFP International Liaison Network, which facilitates the investigation of transnational crime involving Australian interests by placing liaison officers in key centres around the world.

5. The Report, which provides the findings of experts from Japan and New Zealand, was adopted by the OECD Working Group. Within one year of the Group's approval of the Report, Australia will make a follow-up report on its implementation of the recommendations, with a further written report within two years. The Report is based on the laws, regulations and other materials supplied by Australia, and information obtained by the evaluation team during its five-day on-site visit to Canberra and Sydney in June 2005, during which the team met with representatives of several Australian Commonwealth agencies, State agencies, the private sector, civil society and the media.

INTRODUCTION

1. On-Site Visit

6. From 6 to 10 June 2005, Australia underwent the Phase 2¹ on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group). The purpose of the on-site visit, which was conducted pursuant to the procedure for the Phase 2 self and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation), was to study the structures in place in Australia to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Australia's compliance in practice with the Revised Recommendation.

7. The OECD team was composed of lead examiners from Japan² and New Zealand³, as well as representatives of the OECD Secretariat⁴.

8. During the on-site visit, meetings were held with officials from the following Commonwealth bodies: the Department of Foreign Affairs and Trade, Attorney-General's Department, Commonwealth Director of Public Prosecutions, Australian Federal Police, Australian Crime Commission, Australian Taxation Office, Australian Public Service Commission, Department of the Treasury, Department of Finance and Administration, Australian Agency for International Development (AusAID), Export Finance and Insurance Corporation, Australian National Audit Office, Department of Immigration and Multicultural and Indigenous Affairs, Australian Customs Service, Australian Securities and Investments Commission, Australian Prudential Regulation Authority, Australian Trade Commission (AUSTRADE), Invest Australia, Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian Institute of Criminology, and the Commonwealth Ombudsman's Office. At the State level, the following government bodies were represented: the New South Wales (NSW) Director of Public Prosecutions, NSW Ministry for Police, and NSW Police Fraud Squad.

¹ The Phase 1 examination of Australia took place in December 1999. The purpose of the Phase 1 examination is to assess whether a Party's laws for implementing the Convention and the Revised Recommendation comply with the standards there under.

² In alphabetical order, Japan was represented by: Makoto Izakura, Assistant Director, OECD Division, Ministry of Foreign Affairs; Toshihiro Kawaide, Associate Professor, Faculty of Law, Tokyo University; Takeshi Nishino, Deputy Director, Research Division, Tax Bureau, Ministry of Finance; and Yasuhiro Tanabe, Senior Attorney for International Affairs, Ministry for Justice.

³ In alphabetical order, New Zealand was represented by: Alex Conte, Senior Law Lecturer, New Zealand Law Foundation International Research Fellow, University of Canterbury, Christchurch; James Mullineux, Senior Prosecutor, Serious Fraud Office; and Mike Spelman, National Advisor Transfer Pricing, Inland Revenue Department.

⁴ The OECD Secretariat was represented by: Christine Uriarte, Principal Administrator, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs (DAF); and France Chain, Administrator, Anti-Corruption Division, DAF.

9. At the on-site visit civil society was represented by: Transparency International-Australia, the Corruption Prevention Network, Whistleblowers Australia, two members of the media, and academics from the University of Adelaide Law School, the Australian National University and Monash University. The private sector was represented by: the International Bank and Securities Association of Australia, Australian Bankers Association, Investment and Financial Services Association, Australian Chamber of Commerce and Industry, Certified Practicing Accountants Australia, Institute of Chartered Accountants Australia, Ernst and Young, Pricewaterhouse Coopers, KPMG and Deloitte. The following companies participated: ADI, BHP Billiton, Telstra, and Tenix. The Australian legal profession was represented by two practicing lawyers with experience in anti-corruption matters, the New South Wales Law Society, and the Law Council of Australia. The judiciary was represented by the Australian Institute of Judicial Administration and National Judicial College of Australia.

10. In preparation for the on-site visit, the Australian authorities provided the Working Group with responses to the Phase 2 Questionnaire and responses to a supplementary questionnaire, which contained specific questions about the implementation of the Convention and Revised Recommendation in Australia. The Australian authorities also submitted relevant legislation and regulations, case law, statistical information and various government and non-government publications. The OECD team reviewed these materials and also performed extensive independent research to obtain non-government viewpoints.

11. The on-site visit involved meetings for three days in Canberra, where the principal focus was on the implementation of the Convention and Revised Recommendation from a Commonwealth government perspective. Two days were then spent in Sydney, where the focus of the meetings was on the detection of the offence of bribing a foreign public official by State authorities, the possible overlap between State and Territory bribery offences and the Commonwealth foreign bribery offence, as well as the perspective of civil society and the private sector on the fight against foreign bribery in Australia.

12. The Australian authorities made impressive efforts to ensure the smooth running of the on-site visit through the preparation of a comprehensive agenda for the visit, and by making substantial efforts to provide access to all requested participants. Leading up to and following the on-site visit, the Australian authorities responded to all requests for information and documentation. The examination team appreciates the high level of cooperation of the Australian authorities at all stages of the Phase 2 process, and notes that the cooperative spirit was conducive to constructive discussions concerning best practices and potential problem areas identified by the lead examiners regarding Australia's implementation of the Convention and Revised Recommendation.

2. General Observations

a. Governance

13. Australia is a federal state, with a three-tier system of government—Commonwealth, state and territory, and local. It is administratively divided into six states and two mainland territories.⁵ Each state and mainland territory has its own legislature.

14. Pursuant to the Commonwealth of Australia Constitution, the Commonwealth Parliament has the power to legislate on certain matters, including trade and commerce with other countries and among the states; taxation; foreign corporations and financial corporations formed within the Commonwealth. The State Parliaments have the power to legislate in respect of any matter, including education, transport, law

⁵ Australian Capital Territory (Canberra), New South Wales (Sydney), Northern Territory (Darwin), Queensland (Brisbane), South Australia (Adelaide), Tasmania (Hobart), Victoria (Melbourne) and Western Australia (Perth).

enforcement, health services and agriculture. In addition, the States and Territories are primarily responsible for the development of the criminal law and criminal trial procedure.⁶ Under section 109 of the Commonwealth Constitution, “when a law of a State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”. Legislation implementing provisions of an international convention or treaty can be regarded as falling within the Commonwealth external affairs power.⁷ It is thus pursuant to the external affairs power that the Commonwealth Parliament established the offence of bribing a foreign public official under the Commonwealth Criminal Code in order to implement the Convention.

15. As is normal in any federal system of government, tensions sometimes occur between the Commonwealth and State governments. The examination team has not seen evidence of tensions between the Commonwealth and state governments concerning the responsibility for implementing Commonwealth criminal offences, including the offence of a bribing a foreign public official under the Commonwealth Criminal Code.

16. Australia has strong and secure democratic institutions and a tradition of working closely with civil society on law reform—a robust consultation process was employed before introducing the amendments to the Commonwealth Criminal Code for the purpose of implementing the Convention. In addition, Australia has provided important leadership in the region in recent years by cooperating with Pacific Islands and other countries to “help improve law and order, democratic processes and public sector accountability and transparency”.⁸ For instance, Australia leads the Regional Assistance Mission to Solomon Islands to improve law enforcement and governance and assist in economic reform,⁹ Australia administers the Enhanced Cooperation Program in Papua New Guinea to assist PNG with such governance issues as financial reporting, budget management, corruption and law enforcement, and provides development assistance to the Republic of Nauru on matters including economic governance and financial reform. Australia also plays a leading role in the Pacific Regional Policing Initiative, which seeks to improve policing in Forum Island Countries¹⁰ with the overall goal of improving regional security and national economic, social and political stability¹¹.

b. Legal System

17. Under the Australian legal system, the Commonwealth Parliament as well as State Parliaments and the legislative assemblies of the Northern Territory, the Australian Capital Territory and Norfolk Island, may pass legislation. Due to the application of section 109 of the Commonwealth of Australia Constitution Act, State laws that overlap with a Commonwealth law operate concurrently to the extent that the State law is not inconsistent with the Commonwealth law.¹² However, with respect to the offence of

⁶ See section 51 of the Commonwealth of Australia Constitution Act (<http://scaleplus.law.gov.au/html/pasteact/1/641/0/PA000700/htm>); and “World Factbook of Criminal Justice Systems: Australia [Biles, D (1993)].

⁷ “In Defence of the Use of Public International Law by Australian Courts” (Monk, S., Australian Yearbook of International Law, vol.22, August 2002, p.210).

⁸ Statement of the Honourable Mrs. Christine Gallus MP, Parliamentary Secretary to the Minister for Foreign Affairs and Trade, to the Commission on Human Rights, High Level Segment, United Nations, Geneva, 16 March 2004 (<http://www.australia.ch/stmnt10.htm>).

⁹ Ibid.

¹⁰ The Forum Island Countries are: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

¹¹ Program Profile of the Pacific Regional Policing Initiative (http://www.prpi.sagrc.com/pri_top.html).

¹² See paragraphs 9 regarding section 109 of the Commonwealth Constitution.

bribing a foreign public official, section 70.6 of the Commonwealth Criminal Code states that the Division of the Commonwealth Criminal Code regarding the offence of bribing a foreign public official “is not intended to exclude or limit the operation of any other law of the Commonwealth, or any law of a State or Territory”.

18. Generally, under Australian law treaties and conventions to which Australia is a party, except for those terminating a state of war, are not directly and automatically incorporated into Australian law, in the absence of implementing legislation. Nevertheless, pursuant to the Acts Interpretation Act 1901 (Commonwealth), treaties and conventions that are implemented by a Commonwealth law may be used by the courts in the interpretation of those laws.¹³ The Australian common law, originally developed from the English common law, is based on *stare decisis* or the doctrine of precedent. Pursuant to this doctrine, lower courts are bound to follow the decisions of higher courts. The High Court of Australia is the final court of appeal in all matters, regardless if the appeal originates from a federal or state/territory court. Australian state and territory courts have original jurisdiction in all matters arising under state/territory laws, as well as Commonwealth laws where federal jurisdiction has been conferred on them by the Commonwealth Parliament. Most criminal offences established under Commonwealth law, including the offence of bribing a foreign public official, are adjudicated by state or territory courts exercising federal jurisdiction.¹⁴

c. Economy

19. Australia’s economic indicators have been positive for a number of years, ranking 4th in overall competitiveness in 2004, with 13 years of uninterrupted economic growth. The forecasted economic growth is 3.8 per cent for 2005 and 3.6 per cent for 2006, which represents a more rapid expansion than forecasted for most other OECD economies. In addition, Australia is ranked the 2nd most cost competitive country for business operations in the industrialised world.¹⁵ Australia’s strong economic indicators along with its highly competitive location have attracted significant foreign direct investment (FDI). According to AT Kearney’s FDI Confidence Index 2004, Australia ranks 7th as a preferred investment destination and 2nd in the Asia-Pacific region, following China.¹⁶

20. The Australian Government, through its inward investment agency – Invest Australia – has embarked on a vigorous campaign to further attract foreign investment in Australia, in particular for MNEs seeking headquarters to do business in the Asia-Pacific region. Australia has actively pursued bilateral relationships in the region by, for instance, concluding free trade agreements with Thailand and Singapore, and currently negotiating a free trade agreement with China – the first western country to do so.

21. Australia’s economy has evolved from the traditional agricultural and resource sectors to a predominantly services-based economy, with services now amounting to almost 80 per cent of economic activity.¹⁷ In 2002, Australia’s major exports partners were Japan (18.5 per cent), United States (9.6 per cent), South Korea (8.3 per cent), China (7 per cent), New Zealand (6.6 per cent), United Kingdom (4.7 per cent), Singapore (4.1 per cent), Chinese Taipei (4 per cent), Hong Kong (3 per cent) and Indonesia (2.6 per

¹³ Australia International Treaty Making Information Kit (Executive Director of the Treaties Secretariat International Organisations and Legal Division, Department of Foreign Affairs and Trade: <http://bar.austlii.edu.au/au/other/dfat/infokit.html>).

¹⁴ Australia’s Legal System (Attorney General’s Department: <http://www.ag.gov.au/www/agdHome>).

¹⁵ For instance, property prices are highly competitive, remuneration levels for management staff are lower than in many other industrialised countries, and the overall tax burden as a share of GDP is significantly lower than the OECD average.

¹⁶ Ibid, footnote 14

¹⁷ Ibid.

cent).¹⁸ The major types of exported goods included coal, crude petroleum, gold, iron ore, aluminium and aluminium ores, wheat, meat, wool, motor vehicles, dairy products, refined petroleum, natural gas, wine, aircraft and parts, and pharmaceuticals.¹⁹

22. Recent export trends include an increase in exports in goods and services to ASEAN countries by 5.7 per cent from 1998-2003, with the most significant increase to Thailand, Vietnam and Indonesia.²⁰ From 1991 to 2001, the value of Australia's exports to ASEAN increased by 116 per cent, reaching AUD 15 922 million in 2001-2002.²¹ In 2003, merchandise exports to India increased by 34 per cent (AUD 2.3 billion).²² Emerging markets for Australian exports also include Saudi Arabia, the United Arab Emirates, Kuwait, Bahrain, Oman, Qatar, South Africa and Iraq.²³

23. In 2002, the total goods imported amounted to USD 69.3 billion, 15th amongst 30 OECD countries, representing 16.9 per cent of GDP.²⁴ In 2003, Australia's major import partners were the United States (16 per cent), Japan (12.5 per cent), China (11 per cent), Germany (6.1 per cent) and the United Kingdom (4.2 per cent).²⁵ The major types of imported goods included motor vehicle parts, refined petroleum, motor vehicles for transporting goods, non-monetary gold, telecommunications equipment, pharmaceuticals, aircraft and parts, computers, crude petroleum and passenger motor vehicles.²⁶

24. From 1997 to 2001, the top destination countries for outflows of foreign direct investment (FDI) from Australia were the United States (AUD 3 828 million), New Zealand (AUD 889 million), ASEAN (AUD 723 million, including Singapore at AUD 382 million and Indonesia at AUD 141 million), Asian countries²⁷, excluding Singapore and Japan (AUD 542 million) and Japan (AUD 249 million).²⁸ From 1997 to 2001, the top source countries for inflows of FDI in Australia were the United Kingdom (AUD 1 951 million), United States (AUD 1 859 million) Netherlands (AUD 987 million), Germany (AUD 499 million), France (AUD 433 million) and Japan (AUD 403 million).²⁹

d. On-Going Investigations and Evaluation

25. To date no company or individual has been charged with the bribery of a foreign public official under section 70.2 of the Commonwealth Criminal Code. On the first day of the on-site visit (6 June 2005), the Australian Federal Police (AFP) confirmed two ongoing investigations concerning the bribery of foreign public officials. Due to confidentiality requirements, including the need to protect witnesses, the Australian authorities were only at liberty to disclose certain non-identifying information. They assured the

¹⁸ Trade data on DFAT STARS data base [Australian Bureau of Statistics—Cited in Australia's Foreign and Trade Policy White Paper, DFAT (2003), p. 143].

¹⁹ Ibid at p. 147.

²⁰ Annual Report 2003-2004 (DFAT, 2004, p. 44).

²¹ Australia's Export Markets: 1991-92 to 2000-01 (Australian Bureau of Statistics, June 2001).

²² Australia—Trading with the World (DFAT, 2003).

²³ Ibid, footnote 23.

²⁴ Ibid, footnote 18, at pp. 252-253.

²⁵ The World Fact Book (U.S. CIA, 27 January 2005).

²⁶ Composition of Trade—Australia 2003 (DFAT, Market Information and Analysis Section, May 2004).

²⁷ China, Hong Kong, Chinese Taipei, India, Indonesia, Malaysia, Philippines, and Thailand.

²⁸ International Direct Investment Yearbook 1991-2002—2003 Edition [OECD (2004)]

²⁹ Ibid.

lead examiners that if prior to the finalisation of the Phase 2 Report the investigations were to lead to charges and publicly available documents, such information would be provided forthwith to the examination team. The Australian authorities have kept the examination team up-to-date on changes in the status of these investigations as well as the commencement and status of a new investigation.

26. The AFP indicated that the two original investigations were not linked. The first allegation was received by the AFP on 8 November 2004 and the second on 17 February 2005. Both allegations were referred directly through the AFP international liaison network³⁰ in which overseas inquiries were made by an AFP liaison officer located in the foreign country and evaluated in Australia by an investigative team. In the Phase 2 responses, the Australian authorities state that one of these investigations was triggered by a complaint from an employee.

27. On 6 June 2005, a representative of the AFP told the examination team that it looked unlikely that one of the investigations would disclose any foreign bribery offences. He also confirmed that the AFP had consulted the Commonwealth Director of Public Prosecution (CDPP) for limited advice about one of the investigations and that the Attorney-General's Department (AGD) had not been consulted in either of the investigations. On 24 June 2005, following the on-site visit, the Australian authorities informed the examination team that one investigation had been finalised without the identification of an offence of bribing a foreign public official. They further advised that information about this allegation had been forwarded to the foreign authority. The AFP determined, following the interview of a number of witnesses, that the complaint related to "unethical business activities" and not the offence of bribing a foreign public official. On 24 June 2005 and 14 September 2005, the Australian authorities confirmed that the other original investigation was still on-going.

28. On the last day of the on-site visit (10 June 2005), the AGD announced to the examination team that a third investigation had been opened since the first day of the on-site visit, but that the AGD had not yet had an opportunity to obtain specifics from the AFP. On 24 June 2005, following the on-site visit, the Australian authorities confirmed that a referral had been received by the AFP concerning certain allegations. The allegations were being evaluated in accordance with the AFP assessment process, and had not yet been accepted for investigation by the AFP. Then on 14 September 2005, the Australian authorities confirmed that this allegation had been accepted for investigation.

29. Following the on-site visit, the AFP advised that in the original continuing investigation, the need for search warrants has not been identified. With respect to the two investigations that were ongoing as of 14 September 2005, mutual legal assistance has not been deemed necessary.

³⁰ The AFP international liaison network is discussed under A.3.a.(v) ("Special measures of the AFP for facilitating foreign bribery investigations").

A. EFFECTIVENESS OF AUSTRALIA’S MEASURES FOR PREVENTING, DETECTING AND INVESTIGATING THE BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Awareness and Prevention

a. Government awareness and training

30. Australia has undertaken a number of important awareness raising activities on the foreign bribery offence targeted at Australian government agencies in charge of enforcing the foreign bribery legislation, and those dealing with Australian enterprises operating abroad. As a result, officials of the Australian government and agencies interviewed at the on-site visit had good general awareness that bribery of foreign public officials constitutes an offence under Australian law.

31. The Australian authorities have conducted training and information sessions for Commonwealth law enforcement authorities, notably for liaison and non-liaison officers of the Australian Federal Police (AFP) posted abroad,³¹ on the operation of the foreign bribery offence, and how it should be reported. Where prosecutors are concerned, members of the Commonwealth Director of Public Prosecutions Office (CDPP) undergo continual criminal education sessions on newly implemented Criminal Code provisions and legislation. They also maintain an extensive intranet database of material, including on the foreign bribery offence. However, given that no foreign bribery cases have reached the prosecutorial stage to date, prosecutors interviewed at the on-site visit based their knowledge on their extensive experience prosecuting similar offences, including fraud and Commonwealth domestic bribery cases. State law enforcement authorities interviewed at the on-site visit appeared to have good knowledge of the entry into force of the foreign bribery offence, and, consequently, to be sufficiently trained to detect any such offence, even where it occurred in conjunction with related State offences (see also part A.3.a.(iv) “Reports of foreign bribery from State and Territorial law enforcement authorities” on the treatment of overlapping criminal offences.).

32. In the Australian Government, the Attorney-General’s Department (AGD) has been one of the main bodies to disseminate information on the Convention and its implementation in Australian law in the public administration. This has notably taken the form of a webpage on the AGD’s website with detailed information on the Convention, the foreign bribery offence and relevant links.³² Several Commonwealth agencies, such as the AFP, the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Australian Customs Service, the Department of Foreign Affairs and Trade (DFAT), the Australian Export Finance and Insurance Corporation (EFIC), the Australia Agency for International Development (AusAID), and the Australian Public Service Commission have included a link to this page on their own websites.

33. The AGD has also published a pamphlet—“Bribery of Foreign Public Officials is a Crime”³³--on the bribery of foreign public officials and its legal consequences in Australia for both individuals and companies. This pamphlet has been distributed to a wide number of officers in law enforcement agencies (such as the CDPP and the AFP) and other Commonwealth agencies in regular contact with the business community (EFIC, the Australian Trade Commission, the Taxation Office, DFAT, etc.), as well as to

³¹ See discussion on the AFP International Liaison Network under A.3.a.(v) (“Special measures of the AFP for facilitating foreign bribery investigations”).

³² See www.ag.gov.au/foreignbribery.

³³ See: <http://www.ag.gov.au/foreign> bribery.

Australia's top 100 companies, and private companies and industry bodies involved in international business. A guidance document on the bribery of foreign public officials is also available on the AGD foreign bribery website. At the time of the on-site visit, the lead examiners identified four areas where the pamphlet and guidance document could be clarified³⁴. However, since then the AGD amended the pamphlet to clarify these areas, and considers the re-launching of the pamphlet under a new design as an important awareness-raising activity. The AGD is also reviewing the guidance document to address these issues.

34. DFAT issued in December 1999 an Administrative Circular³⁵ advising all its staff of the effect of the extraterritorial reach of the new foreign bribery offence. The Circular focuses essentially on the risks for DFAT officers to become involved in a possible violation of the foreign bribery offence, through ancillary offences of complicity, incitement and conspiracy. A large part of the Circular is devoted to the acceptability and definition of facilitation payments, and the necessity to record these where they are made by overseas posts. The Circular does not address the issue of advice and support which could usefully be provided by DFAT staff to Australian companies likely to be in contact with overseas posts, nor does it encourage DFAT officials to report instances of foreign bribery that they may come across in the course of their functions (see also part A.3.d.(i) below on reporting by DFAT officials). However, the Australian authorities report that a recent cable and DFAT news article encourage DFAT staff to report instances of foreign bribery to the AFP.

35. Staff of other agencies closely involved with Australian companies have also been informed of the entry into force of the foreign bribery offence. Australia's Export Credit Agency, EFIC, has carried out awareness raising activities among its staff to alert employees to the criminalisation of foreign bribery under Australian law. This has notably resulted in a new corporate responsibility policy within EFIC, and a modification of its internal code of conduct, which now includes an undertaking to "not participate in corrupt practices, including bribing foreign officials..." Failure to follow the code's provisions may result in disciplinary action and, in the most extreme cases, dismissal (see also part b(i) below on actions by EFIC to raise awareness of Australian companies, and part 3.d.(ii) on detection and reporting by EFIC officials). Similarly, the "Guidance on Ethics and Probity in Government Procurement", which provides general guidance and practical advice to officials of Australian public procurement agencies, has been modified to specify that the bribery of a foreign public official is an offence under the Criminal Code and carries a maximum penalty of ten years imprisonment.

36. Finally, the Australian authorities established a working group to develop an anti-corruption campaign. The working group has focussed on raising awareness of the Commonwealth's anti-fraud and anti-corruption policies among staff of all member agencies, and ensuring that staff are aware of the mechanisms for reporting suspicious activities or behaviours to their internal affairs units. With respect to anti-corruption training, the working group has also prompted considerable information sharing among its members and is developing a best practices guide. The working group is considering the development of a mechanism to further promote awareness of the foreign bribery offence.

³⁴ These areas were the following: (a) the definition of foreign public officials does not include employees of foreign state-owned or state-controlled companies; (b) the description of the offence does not include the case where the bribe is made through an intermediary, or for the benefit of a third party; (c) the description of the offence is limited to acts of Australian nationals and companies, and does not cover foreign bribery committed by non-Australian individuals and companies in Australia; and (d) the defence for "facilitation payments" is described as "rarely (if ever) available" (The problem raised by this statement is discussed further under part B.1.c.(ii)).

³⁵ Since the issuance of this Circular, regular reminders have been posted to DFAT staff through diplomatic cables sent out on a regular basis, as well as in "DFAT News", DFAT's internal newsletter.

Commentary

The lead examiners welcome initiatives by Australia to raise awareness of staff in Australian institutions and agencies, notably those involved in law enforcement or with Australian companies operating abroad. The lead examiners encourage Australia to proceed diligently with its plans to develop, through a working group, a mechanism to further promote awareness of the foreign bribery offence.

b. Raising awareness in the private sector and civil society

37. Awareness raising activities regarding the foreign bribery offence targeted at Australian companies have been undertaken by both the public and private sectors, as well as within a number of large Australian corporations. Discussions at the on-site visit with representatives of government agencies, the Australian Chamber of Commerce and Industry, and Australian companies indicated an overall high level of awareness of the foreign bribery offence on the part of large companies, but very little knowledge within small and medium size enterprises (SMEs).

(i) Government initiatives

38. A number of government agencies, such as the AGD, the Australian Customs Service³⁶ and the Department of the Treasury have participated in briefings to industry groups on the foreign bribery offence. The above-mentioned AGD document on foreign bribery ("Bribery of Foreign Public Officials is a Crime") has also been distributed to several industry organisations in Australia, notably by such agencies as the AFP, ATO, Austrade, and AGD. As a follow-up to this distribution, the AGD conducted an "OECD Foreign Bribery Public Awareness Campaign Follow-Up Survey" among the top 100 Australian companies to enquire on actions taken within these corporations to raise awareness. As of 5 August 2005, responses had been received from 35 out of 100 organisations surveyed, and were still being returned to the AGD. Preliminary figures indicated that 77 per cent of companies had distributed the AGD pamphlet, 32 per cent had published an article in their internal newsletter on foreign bribery, 13 per cent had published an article on foreign bribery in an external newsletter, 45 per cent had provided training on foreign bribery to staff and/or members, and 13 per cent had participated in foreign bribery related seminars. Furthermore, 71 per cent of the respondents confirmed that they have a code of conduct in place, 26 per cent were aware of the existence of a mechanism to examine whether a particular transaction would constitute a foreign bribery offence, 48 per cent confirmed that their company or industry has a process in place for reporting allegations of foreign bribery internally or externally, and 52 per cent had protections for whistleblowers in place.

39. The Department of the Treasury, through its National Contact Point, maintains relations with the business community and NGOs to discuss issues included in the OECD Guidelines for Multinational Enterprises. In this respect, the issue of foreign bribery was addressed in May 2003 in consultations with the business community, in the lead-up to the June 2003 OECD Corporate Responsibility Roundtable on "Enhancing the Role of Business in the Fight against Corruption". A roundtable, with participation of a number of Australia's largest corporations and NGOs, was further organised in November 2004 on the OECD Guidelines and the Convention, with presentations by AGD officers on the foreign bribery offence.

40. AUSTRAC has also drawn the AGD pamphlet "Bribery of Foreign Public Officials is a Crime" and webpage on the foreign bribery offence to the attention of cash dealers. An Information Circular on the

³⁶ In addition, the Winter 2005 issue of the Australian Customs Service's "Manifest" magazine provided the definition of the foreign bribery offence in the Criminal Code, and referred readers to the AGD foreign bribery website.

Bribery of Foreign Public Officials has been issued to cash dealers detailing the definition of bribery, the criminalisation of foreign bribery under Australian law, and the legal consequences in terms of imprisonment and monetary sanctions for natural and legal persons. It stresses the need for cash dealers to take the foreign bribery issue into account when considering whether to make suspicious transaction reports. It also encourages all members of the public who suspect the commission of a foreign bribery offence to report it to the AFP. Moreover, further guidance on the offence will be provided in the next AUSTRAC newsletter, and AUSTRAC will be providing a link to the revised AGD pamphlet on foreign bribery on its website.

41. EFIC, Australia's export credit agency, participates in the OECD's Working Party on Export Credits and Credit Guarantees and is party to the Action Statement on Bribery of December 2000.³⁷ In this respect, Australian companies applying for official export credit support receive information from EFIC on the legal consequences of paying bribes to foreign public officials in international business transactions. Applicants are further required to certify that they have not engaged and will not engage in bribery of foreign public officials in relation to the contract for which support is sought.³⁸ (See also part 3.d.(ii) below on detection and reporting by EFIC.)

(ii) *Private sector initiatives*

42. The Australian Chamber of Commerce and Industry (ACCI) is the largest and most representative business association in Australia, with a member network of over 350 000 businesses represented through Chambers of Commerce in each State and Territory, and a nationwide network of industry associations. The ACCI represents the interests of business at the national level as well as internationally, notably through its membership in the OECD's Business and Industry Advisory Committee (BIAC). The ACCI representatives present at the on-site visit indicated that ACCI constituents are largely SMEs, and that there was very little awareness among them of the foreign bribery offence. In their view, Australian SMEs would rarely propose bribes in the context of doing business internationally; however, they would respond to solicitations for facilitation payments. The ACCI did not believe that SMEs were aware of the need to record facilitation payments (Such records are necessary to avail oneself of the defence of facilitation payments under section 70.4—see discussion under part B.1.c.(ii)). Efforts to remedy this lack of awareness and stress the risks of involvement in foreign bribery have been taken by the ACCI, which has distributed information on the foreign bribery offence and its consequences, notably targeting Australian SMEs present in geographically corruption-prone markets such as Africa, Indonesia, or China.

³⁷ See answers to "Export Credits and Bribery: Review of Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits - Situation as of 21 January 2005" [TD/ECG(2005)4].

³⁸ General text appearing in the application form will be along the following lines:
 "The Applicant declares that to the best of his or her knowledge nobody acting on the Applicant's behalf or acting with the Applicant's consent or authority (including any of the Applicant's employees, agents or sub-contractors) has engaged or will engage in corrupt activity in relation to a Relevant Matter. The Applicant understands that for the purposes of this declaration: "Relevant Matter" means this Application or a transaction, contract, arrangement, event or thing contemplated by or referred to in this Application; By making this Application, the Applicant acknowledges that it understands that the occurrence of corrupt activity in relation to a Relevant Matter may have serious consequences, including (without limitation):
 (a) evidence of corrupt activity being referred to the appropriate national authorities, such as the Australian Federal Police; or
 (b) the imposition of fines, penalties or sentences for imprisonment; or
 (c) the termination of a Relevant Matter, the acceleration of payments or the cancellation of insurance, as the case may be."

43. With respect to corporate responsibility, several Australian bodies have taken steps to encourage the establishment by Australian companies of internal control mechanisms covering the issue of corruption, particularly through corporate codes of conduct or other such ethical guidelines. The Australian Stock Exchange (ASX) has developed guidelines to help listed entities develop internal corporate governance regimes in the form of “Principles of Good Corporate Governance and Best Practice Recommendations”. The document includes 28 best practice recommendations, under 10 main principles, as well as an explanatory commentary and guidance. Under ASX Rules, listed entities are required to include in their annual report a statement disclosing the extent to which they have followed the 28 recommendations. Companies may choose not to follow certain recommendations, but must give reasons for not following them.

44. Recommendation 10.1, for instance, recommends that a code of conduct be established to “guide compliance with legal and other obligations to legitimate stakeholders; corresponding commentary and guidance does not suggest any specific reference to the prohibition of foreign bribery, but refers to a more general statement on “prohibitions on the offering and acceptance of bribes, inducements and commissions”. The Australian Prudential Regulation Authority (APRA), the prudential regulator of the Australian financial services industry, has also developed Operational Risk Practice Notes for supervisory staff. While these do not specifically cover bribery of foreign public officials, the APRA expects that regulated entities would identify and assess their sources of fraud risk, including bribery, in their fraud control systems (such as codes of conduct or other fraud and corruption control plans), although this does not imply any authority on the part of APRA to sanction entities that choose not to follow this guidance.

45. As in most OECD countries, an increasing number of Australian companies have adopted corporate codes of conduct or other ethical principles. Partial responses received to date by the AGD to its OECD Foreign Bribery Public Awareness Campaign Follow-Up Survey indicate that approximately 71 per cent of Australia’s top 100 companies have a code of conduct in place. These codes cover a range of ethical issues, from social to environmental accountability, as well as business conduct. A review of several codes showed that coverage of bribery in general and foreign bribery more specifically varies between corporations. There will normally be at least a general statement prohibiting the acceptance or offer of bribes. Certain codes refer specifically to the foreign bribery offence and/or the Criminal Code provisions. One code of a major Australian company from the extractive industry devotes an entire chapter to “Financial Inducements”, insisting on their prohibition in the conduct of international business. This same code stresses the importance that this company policy be clearly communicated to and accepted by agents and other third parties. Several codes, on the other hand, do not specify the scope of application of the code, either geographically or as regards agents and contractors. Moreover, certain code provisions demonstrate a misunderstanding of what constitutes an illicit payment. One code examined, for example, states that bribe payments are monetary payments or payments in kind made in order to induce foreign public officials to improperly grant permits or services. The Australian authorities and business organisations should thus continue to make clear, in their awareness raising activities, that the foreign bribery offence also covers payments made to a foreign public official in order for that official to carry out his/her regular functions, even where the company making the payment is in fact entitled to the permit or is the best qualified bidder. (This issue is further explored under B.1.c.(ii) on facilitation payments.)

Commentary

The lead examiners encourage the Australian authorities, in the context of private-sector awareness-raising activities, to continue to make efforts to provide complete information about the offence of bribing a foreign public official, in particular concerning: (a) what constitutes a bribe; (b) which categories of persons should be considered foreign public officials; and (c) the defences, including the distinction between bribery and facilitation payments, as well as the record-keeping requirement for the purpose of the defence of facilitation payments.

The lead examiners also recommend that special attention be given to targeting SMEs in awareness-raising activities, which diplomatic and trade missions in foreign countries could play a role in providing.

2. Systems for Detecting, Investigating and Reporting Bribery of Foreign Public Officials

a. Detection and investigation by the Australian Federal Police (AFP)

(i) Generally

46. The AFP is the primary law enforcement body responsible for investigating offences against Commonwealth law, including the offence of bribing a foreign public official under section 70.2 of the Commonwealth Criminal Code.³⁹ The AFP has several special areas of focus, including anti-terrorism, the investigation of transnational and multi-jurisdictional crime, drug trafficking, organised people smuggling, money laundering, the enforcement of child sex tourism legislation and witness protection. The AFP provides police services for the Australian Capital Territory (ACT) and the Jervis Bay Territory, and external territories such as Norfolk Island and Christmas Island. In addition, the AFP is Australia's international law enforcement and policing representative.

47. In the Phase 2 responses, the Australian authorities explain that investigations into referrals of allegations of bribery or corruption are undertaken within the Economic and Special Operations function.⁴⁰ The Australian authorities further explain that the Economic and Special Operations function is responsible for coordination, reporting and strategic direction with respect to the crime types under its mandate. Investigations of corruption and bribery offences are performed by AFP investigators located in AFP offices across Australia with the assistance, where necessary, of the International Liaison Officer Network (discussed under A.3.a.(v) "Special measures of the AFP for facilitating foreign bribery investigations").

48. Australia does not have a specialised office for the investigation (or prosecution) of the offence of bribing a foreign public official. The AGD explained that this is consistent with the Commonwealth Government's "whole of government" approach to Commonwealth law enforcement and the prosecution of Commonwealth criminal offences. While the AFP and CDPP have primary responsibility for the investigation and prosecution of foreign bribery, they are assisted by other Commonwealth bodies under the "whole of government" approach. While the lead examiners feel that there may be some disadvantages to this approach, the Australian authorities point out that one of the advantages is that the "whole system is looking at foreign bribery". In addition, due to the expansive geographical area of Australia, it would be very costly to establish an office specialised in corruption in the regional areas of each of the States and Territories. As well, it would be inconsistent with Australia's approach to combating most other forms of crime (Although note that Australia has established the Australian Crime Commission (ACC), a specialised law enforcement agency for the purpose of investigating serious and organised criminal activity—See further discussion on the ACC below under "Memoranda of Understanding between the AFP and certain Commonwealth Agencies").

49. The AFP operates independently of the CDPP and the courts. However, the AGD confirms that the AFP regularly requests legal advice from the CDPP in particular in respect of complex investigations,

³⁹ The AFP is established under the Australian Federal Police Act 1979 (Cth). The Act provides for the appointment of a Commissioner of Police, who is responsible for the general administration and control of the AFP. For further information on the AFP see: www.afp.gov.au.

⁴⁰ In July 2004, the AFP established a new organisational structure, focussing on six key national functions. The other five national functions are 1. border and international network; 2. intelligence; 3. international deployment; 4. counter terrorism; and 5. protection.

including whether it is appropriate to proceed with a particular investigation. The AGD confirms that in one of the original two investigations concerning the bribery of foreign public officials (i.e. the two ongoing investigations at the commencement of the on-site visit), the AFP consulted the CDPP for advice.

(ii) *AFP Case Categorisation and Prioritisation Model (CCPM)*

50. According to the Phase 2 responses, implementation of the OECD Convention is considered a matter of “high priority” by the Commonwealth Government. This statement was echoed at the on-site visit by the Attorney-General’s Department (AGD) and the Australian Federal Police (AFP). The Australian authorities explain that because the bribery of foreign public officials is considered “high priority” and is categorised as an “essential” priority and of “high” impact under the Case Categorisations Prioritisation Model (CCPM) of the AFP (the categorisation of foreign bribery in the CCPM is discussed below), cost will not be an impediment to investigating such a case.⁴¹

51. The AFP’s Case Categorisation and Prioritisation Model (CCPM)⁴² assesses the impact of a matter as either “very high”, “high”, “medium” or “low” for the purpose of determining the priority of incidents for investigation services. On its face, the CCPM does not seem to place the bribery of foreign public officials in the “very high impact” or “high impact” categories.

52. The Australian authorities explain that the offence of bribing a foreign public official is not considered an economic crime, but rather is characterised as a sub-category of “corruption”, which means that like all offences that fall within this sub-category, it is considered an “essential priority” or “high impact”. They also explain that due to this characterisation, every allegation of foreign bribery referred to the AFP is evaluated independent of the value of an alleged bribe or attempted bribe. However, since the publicly available CCPM does not contain this specific information about foreign bribery, it appears that it must be contained in an internal working document version of the CCPM. Since the lead examiners have not been able to view this document, they cannot comment on the clarity of the information concerning the priority of foreign bribery cases. In addition, the lead examiners consider that information regarding the priority of foreign bribery cases should be in the public domain, in order to ensure an adequate level of awareness of its importance among other government agencies as well as the public at large. The Australian authorities have undertaken to amend as soon as possible the publicly available document for the purpose of clarifying that the offences of domestic and foreign bribery are to be considered “high impact”.

Commentary

The lead examiners recommend that, consistent with the Australian Government’s intention that implementation of the Convention is given “high priority”, the Australian authorities carry through as soon as possible with the amendment of the publicly available explanatory document on the Case Categorisation Prioritisation Model (CCPM) to state that the offence of bribing a foreign public official is a “high impact” offence.

(iii) *Triggering event for investigations*

53. At the on-site visit, the AFP advised the examination team that investigations were generally opened on the basis of formal referrals, but that in respect of limited, high priority matters, not including

⁴¹ Commonwealth agencies are funded by appropriations in accordance with requirements under the Commonwealth of Australia Constitution.

⁴² The AFP CCPM is available on the AFP external website: www.afp.gov.au. The AFP CCPM are intended to provide the public and government departments with information about how the AFP evaluates referrals.

the bribery of foreign public officials, it took a more proactive intelligence-gathering role. The AFP further stated that it did not initiate investigations of foreign bribery on the basis of media reports, regardless of their level of credibility, nor on the basis of other information that came to its attention other than through formal channels (e.g. the making of a complaint directly to the AFP). The AFP stated that it felt that media reports were not consistently reliable, and therefore would not respond to them. The lead examiners questioned whether it would not be prudent to at least undertake an evaluation where the report was made by a credible source, but the representative of the AFP stated that this is not the policy. During the on-site visit, a media report (by what was acknowledged by the AGD to be a credible investigative journalism program) was aired on Australian television in which several allegations were made about an Australian company's operations in a foreign country, including allegations of the bribery of officials in the foreign country. The AFP stated that it would not open a preliminary investigation based on this media report unless a formal referral of the allegations was made to it.

54. Following the on-site visit, the Australian authorities advised that investigations into the offence of bribing a foreign public official may be triggered by any of the following circumstances: (a) a formal referral of allegations to the AFP; (b) pro-active intelligence gathering by the AFP; (c) identification of the foreign bribery offence during the investigation of another criminal offence; or (d) proactive investigation of persons or organisations where foreign bribery is suspected. Following the on-site visit, the Australian authorities also stated that there are circumstances where the AFP will review media reports of allegations of serious criminal activity, including the bribery of foreign public officials, where such reports are combined with independent supporting information. The Australian authorities explained that this position also reflects the opinion of the AFP. The lead examiners welcome the new information, and believe that it would be prudent to follow-up whether in practice the AFP depends on formal referrals of foreign bribery allegations.

55. The lead examiners were also concerned about the position of the AFP at the on-site visit that it would only open foreign bribery investigations on the basis of formal allegations, because this would have meant that other important sources of information could have been overlooked. For instance, a complaint filed in a foreign court (dated March 2004) alleged that in 2002 an Australian public official acted as an intermediary in the transfer of bribe payments from a company of country "A" to public officials in country "B". The official was named in the publicly available document.⁴³ The proceedings were subsequently dismissed by the court earlier this year. The AFP did not undertake a preliminary investigation regarding the alleged conduct of the Australian official before or after the dismissal of the complaint. The Australian authorities point out that it would be inefficient to expect the AFP to undertake investigations in these circumstances, but the lead examiners believe that it would have been prudent for the AFP to have commenced at least an evaluation prior to the withdrawal of the complaint regarding the Australian official. The lead examiners also question reliance on another country's dismissal of the case, considering that Australia might have access to further substantiating evidence within its own jurisdiction.

56. Requests for mutual legal assistance (MLA) from foreign countries investigating the bribery of foreign public officials can also be sources of important information for the AFP where the requests relate to alleged foreign bribery involving Australian nationals and companies. The AGD explained that such requests would only trigger investigations in Australia if they provided "clear evidence" of "substantial allegations" of foreign bribery involving Australian nationals or companies.

Commentary

The lead examiners recommend that the AFP undertakes evaluations where appropriate of the veracity of allegations of the bribery of foreign public officials involving Australian

⁴³

A second complaint did not contain allegations of bribery against an Australian official.

nationals and companies contained in (i) media reports from credible sources, (ii) publicly available court documents filed in foreign countries, and (iii) requests to Australia from foreign countries for mutual legal assistance.

(iv) *Reports of foreign bribery to the AFP from other Commonwealth agencies*

57. Certain Commonwealth agencies, including those that have a law enforcement and or regulatory function and those transacting with exporting companies, might become aware of the bribery of foreign public officials due to the nature of their responsibilities. These agencies include: the Australian Crime Commission (ACC), Australian Agency for International Development (AusAID), Australian Prudential Regulatory Authority (APRA), Australian Securities and Investments Commission (ASIC), Australian Customs Service (Customs), Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian Taxation Office (ATO), Commonwealth Director of Public Prosecutions (CDPP), Export Finance and Insurance Corporation (EFIC), and Department of Foreign Affairs and Trade (DFAT). In light of the reliance of the AFP on formal referrals of allegations, the role of other Commonwealth agencies in detecting and reporting foreign bribery to the AFP is extremely important.

Serious or Complex Matters

58. The AFP has issued a document for agencies considering referring matters to the AFP⁴⁴. It advises them to read the Commonwealth Fraud Control Guidelines⁴⁵ and to refer matters to the AFP Operations Monitoring Centres, Local Operations Monitoring Centres or the Client Service Team. The document explains that in order to ensure that resources are directed to the highest priority activities, all referrals are assessed using the AFP's Case Categorisation and Prioritisation Model (discussed under A.1. "Overall Priority given to Bribery of Foreign Public Officials"), and provides a link to the Model.

59. The Commonwealth Fraud Control Guidelines aim to minimise "fraud against the Commonwealth" and ensure that, "where it does occur, it is rapidly detected, effectively investigated, appropriately prosecuted and that losses are minimised". The Guidelines broadly define "fraud against the Commonwealth" as "dishonestly obtaining a benefit by deception or other means", and list several unlawful activities covered by the definition, including: (a) theft of Commonwealth property; (b) providing false or misleading information to the Commonwealth; (c) unlawful use of Commonwealth computers, vehicles, telephones and other property or services; and (d) bribery, corruption or abuse of office. Paragraph 4.19 of the Guidelines states that "agencies must refer all instances of potential serious or complex fraud offences to the AFP" except in the following circumstances: (a) the agency satisfies the AFP and the CDPP that it has the capacity, appropriate skills and resources to investigate criminal matters, including the gathering of evidence; or (b) the matter involves multi-jurisdictional organised crime being considered by the National Crime Authority (now the Australian Crime Commission).

60. Paragraph 4.20 of the Commonwealth Fraud Guidelines lists factors that indicate when a matter "is serious or complex and should be referred to the AFP". These factors essentially apply where Commonwealth interests are harmed, including where there is "significant or potentially significant monetary or property loss to the Commonwealth"; "harm to the economy, resources, assets, environment

⁴⁴ Referring Matters to the AFP (Last modified: 17 June 2005. See: www.afp.gov.au/afp/page/GovCorporate/referring.htm)

⁴⁵ The Commonwealth Fraud Control Guidelines: 2002 were issued by the Minister for Justice and Customs as Fraud Control Guidelines under Regulation 19 of the Financial Management and Accountability Regulations 1997. The Minister for Justice and Customs is responsible for coordinating Commonwealth fraud control policy. The AGD advises the Minister for Justice and Customs on fraud control, including the implementation of the Guidelines.

or well-being of Australia”; or “a serious breach of trust by a Commonwealth employee or contractor of a Commonwealth agency”. The list also includes “bribery, corruption or attempted bribery or corruption of a Commonwealth employee or a contractor to a Commonwealth agency”. The list does not contain a factor that specifically applies to the bribery of a foreign public official. Thus foreign bribery does not constitute a serious or complex matter to be referred to the AFP, unless it is committed by a Commonwealth official and constitutes a serious breach of trust by him or her, results in significant monetary damage to the Commonwealth, or harms Commonwealth interests. Following the on-site visit, the Australian authorities stated that because the Commonwealth Fraud Guidelines focus on offences that cause harm to Commonwealth interests, they are unsuitable for the inclusion of the foreign bribery offence. However, they will amend the document to refer to the foreign bribery offence as an awareness raising measure, and include a cross-reference to another document that requires the reporting of foreign bribery cases to the AFP.

61. One incident may illustrate the need for guidelines directing that all information about the bribery of foreign public officials be forwarded to the AFP. In 2001 the Australian Securities and Investments Commission (ASIC)⁴⁶ received several complaints about an Australian company, including one that alleged it had been winning overseas contracts through the bribery of foreign public officials. ASIC reviewed the books and records of the company, and concluded that there was no evidence supporting the complaints. The ASIC member who attended the on-site visit had no knowledge of any informal communication with the AFP concerning the complaint of foreign bribery.

62. Pursuant to section 13 of the ASIC Act, “ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation” where it has reason to suspect that there may have been committed (a) a contravention of the corporations legislation; or (b) a contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that (i) concerns the management or affairs of a body corporate or managed investment scheme, or (ii) involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products. The Australian authorities indicate that the complaints received by ASIC discussed in the previous paragraph met ASIC’s criteria and thus assessment of the complaint was within ASIC’s functional responsibilities and area of expertise. Nevertheless, the lead examiners believe that given that the AFP is the primary law enforcement body responsible for the investigation of foreign bribery, it may have had further information about the case in question that could have corroborated the information of ASIC. Moreover, pursuant to section 13 of the ASIC Act, the ASIC’s powers of investigation⁴⁷ appear narrower in scope than those of the AFP, which is charged with enforcing Commonwealth criminal law and protecting Commonwealth and national interests from crime in Australia and abroad.⁴⁸ Thus it appears that the AFP is procedurally a more appropriate body for assessing whether particular information concerning foreign bribery should be pursued. In addition, as practice in the foreign bribery field develops, it will have more expertise in assessing allegations. The Australian authorities believe that in practice the ASIC would refer cases of foreign bribery to the AFP.

⁴⁶ The ASIC is an independent Commonwealth government body. It regulates financial markets, securities, futures and corporations, and is responsible for consumer protection in superannuation, insurance, deposit taking and credit. It reports to the Commonwealth Parliament, the Treasurer and the Parliamentary Secretary to the Treasurer. The ASIC receives approximately 10 000 complaints each year. In 2004 it received 13 complaints of bribery, including one concerning foreign bribery.

⁴⁷ ASIC enforces and regulates company and financial services laws to protect consumers, investors and creditors (<http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC=at=a=glance?opendocument>).

⁴⁸ See: <http://www.afp.gov.au/afp/page/AboutAFP/RoleFunctions.htm>.

Notification of Politically Sensitive Matters to Minister for Justice and Customs

63. The AFP has issued National Guidelines for Referring Politically Sensitive Matters to the AFP.⁴⁹ These Guidelines, as well as the Commonwealth Fraud Control Guidelines, state that criminal matters of a politically sensitive nature requiring the assistance of the AFP are to be raised with the Minister for Justice and Customs in the first instance, rather than being referred directly to the AFP.⁵⁰ The Minister for Justice and Customs refers the matter to the AFP. This is to enable the Government to be informed as early as possible of “politically contentious matters that may require AFP investigation”, and to “ensure that a coherent, consistent approach is taken from both a law enforcement and a Government perspective”. The Fraud Control Guidelines state that the power to decide on whether to investigate a particular allegation remains with the AFP.

64. During the on-site visit, the Commonwealth agencies with which the examination team met were aware of the obligation to “raise” politically sensitive criminal matters directly with the Minister for Justice and Customs in the first instance. They also confirmed that they would report directly to the Minister for Justice and Customs information about the bribery of foreign public officials that raises politically sensitive issues, such as the national economic interest or any potential effects upon relations with another State. The AGD and AFP stated that the Minister for Justice and Customs simply passes the information to the AFP and does not filter cases. The representative of the AFP has never seen advice from the Minister for Justice attached to a referral. The Australian authorities explain that measures for ensuring that the Minister acts upon notifications include Senate reviews to enable a notification to be addressed outside of this process, and the expectation on the part of the referring authority to receive a response from the AFP. The AGD further indicates that the delay between the notification to the Minister for Justice and Customs and the referral from the Minister to the AFP is normally not longer than 28 days, and sometimes it takes only a matter of hours. Ministerial involvement in these matters increases their priority level. Pursuant to the Guidelines for Referring Politically Sensitive Matters to the AFP, the Minister for Justice and Customs is to be briefed on the outcome of any investigation referred to the AFP through this process.

65. The lead examiners appreciate the reasons for informing the Minister for Justice and Customs without delay of criminal matters that are politically sensitive. However, they question why the notification of the Minister for Justice and Customs should not be made simultaneously with a referral to the AFP, at least to minimise the appearance of a potential for political interference. The Australian authorities point out that in essence simultaneous notification of the Minister and referral to the AFP may lead to a dual reporting process. They also emphasised that this system has worked well in practice, and it has never created a perception of political interference.

Commentary

The lead examiners welcome Australia’s undertaking to clarify that all cases of the bribery of foreign public officials are to be referred to the AFP by Commonwealth agencies, not just those where the bribery is committed by a Commonwealth official and causes harm to the

⁴⁹ See: www.afp.gov.au/afp/page/GovCorporate/sensitive.htm.

⁵⁰ The National Guidelines for referring Politically Sensitive Matters to the AFP state that “where assistance from the AFP is to be sought in relation to criminal activity likely to have politically sensitive implications, the Department, Agency or Minister should raise this request with the Minister for Justice in the first instance”. The Commonwealth Fraud Control Guidelines (2002) state that “all matters of a politically sensitive nature, not limited to fraud, requiring the assistance of the AFP are raised with the Minister responsible for the AFP by the relevant Minister or Department in the first instance, rather than being referred directly by them to the AFP”.

interests of the Commonwealth or a serious breach of trust by the Commonwealth official, and encourage Australia to do this as soon as possible.

The lead examiners also recommend that the process under the National Guidelines for Referring Politically Sensitive Matters to the AFP for notifying the Minister for Justice and Customs in the first instance of all criminal activity with a politically sensitive nature, rather than directly to the AFP, be revised in respect of the bribery of foreign public officials, in order that referrals to the AFP are not potentially delayed by notifications to the Minister.

Memoranda of Understanding between the AFP and certain Commonwealth Agencies

66. To ensure effective cooperation and coordination between the AFP and other Commonwealth departments and agencies with a law enforcement or regulatory function, the AFP has entered into Memoranda of Understanding with certain agencies, including the Australian Customs Service (ACS), the Australian Taxation Office (ATO), Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian Securities and Investments Commission (ASIC), Commonwealth Director of Public Prosecutions (CDPP), and Department of Immigration and Multiculturalism and Indigenous Affairs. Although the MOUs with these agencies are classified “Security-in-Confidence”, the examination team was provided with the MOU between the AFP and the Australian Customs Service (ACS) on a confidential basis. The MOU between the AFP and ACS is consistent with MOUs between the AFP and other Commonwealth law enforcement and regulatory agencies. Meetings with representatives of these agencies at the on-site visit indicated that the MOUs have generally facilitated a high level of collaboration with the AFP in areas of mutual responsibility. Given that these Commonwealth agencies may discover allegations of the bribery of foreign public officials due to their respective areas of responsibility, the lead examiners consider that the relevant MOUs are critical for ensuring that such information is effectively shared with the AFP.

67. Two agencies with the potential to detect the bribery of foreign public officials, with which the AFP has not entered into a Memorandum of Understanding, are the Australian Prudential Regulatory Authority (APRA) and the Australian Crime Commission (ACC). The APRA⁵¹ oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies and most members of the superannuation industry. In the responses to the Phase 2 Questionnaire, Australia indicates that the APRA “may be able to take action against officials of a regulated entity accused of bribing foreign public officials” by, for example, disqualifying a person from acting as an officer on the ground that he or she is “not fit and proper” for carrying out the duties of his or her office. If suspicions arise that a regulatory entity or an officer or employee thereof has been involved in the bribery of a foreign public official, the APRA is not required by law or directives to communicate this information to the AFP. However, the APRA indicates that, although it has never detected foreign bribery, it would refer such information to the AFP⁵² and, where possible, apply the disqualification process to any officer or employee of a regulated entity who has been involved in foreign bribery.

⁵¹ The APRA is a Commonwealth agency funded by levies imposed on its members. The levies are not paid directly to the APRA.

⁵² Pursuant to the “fitness and propriety test”, information about criminal conduct is to be reported to the most appropriate agency, which is the AFP in respect of the bribery of foreign public officials.

68. The ACC⁵³, which was established in January 2003, undertakes investigations approved by the ACC Board into serious and organised criminal activity, including money laundering and tax fraud in specific circumstances. Although the ACC does not have direct responsibility for the investigation of foreign bribery cases, its investigations, which employ extensive coercive powers⁵⁴, sometimes reveal issues of corruption. The ACC indicates that it works in cooperation with law enforcement agencies at the State and Commonwealth levels, and has the authority to disseminate evidence that it uncovers to other agencies. The Australian authorities indicate that at this stage the AFP does not consider it necessary to establish a formal MOU with the ACC because the AFP and ACC share premises in most locations, are jointly involved in a number of permanent task forces, have a number of agreements concerning investigations, and the AFP Commissioner is Chairman of the ACC Board. To date the ACC has not uncovered indications of the bribery of foreign public officials, but it indicates that in such a case the information would be disseminated.

Commentary

The lead examiners recommend that, given the potential for the APRA to uncover suspicions of foreign bribery committed by officers of member entities that it regulates, the AFP enter into a formalised agreement, such as the MOUs already in place between the AFP and other Commonwealth agencies with regulatory or law enforcement functions, concerning areas of overlapping jurisdiction.

(v) *Reports of foreign bribery to the AFP from State and Territorial law enforcement authorities*

69. Pursuant to section 51 of the Commonwealth Constitution, the Commonwealth Government has the power to legislate on “external affairs”. Pursuant to this power, the Commonwealth implemented the Convention into Australian law by enacting the offence of bribing a foreign public official in Division 70 of the Commonwealth Criminal Code Act. Under the Commonwealth Constitution, the States have the power to make laws on any matter, including matters for which the Commonwealth is conferred legislative power under section 51 of the Commonwealth Constitution. The States and Territories have the power to establish laws on criminal offences and procedure. They have implemented their powers in this respect by promulgating legislation that establishes criminal offences, and establishing State and Territory police forces⁵⁵ for the purpose of enforcing these offences. With respect to the offence of bribing a foreign public official under the Commonwealth Criminal Code, section 70.6 states that “this Division (i.e. regarding the offence of bribing a foreign public official) is not intended to exclude or limit the operation of another law of the Commonwealth or any law of a State or Territory”. The Australian authorities underline that section 70.6 supports and is consistent with section 109 of the Commonwealth Constitution, which states that “when a law of a State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”.

70. Australia acknowledges the potential for overlapping criminal offences, and points out that there is nothing unusual or problematic about this in a federal system. Indeed, several State criminal codes

⁵³ The ACC was established to meet the threats posed by nationally significant crime. It aims to reduce the incidence and impact of serious and organised criminal activity. It brings together the following three agencies: the Australian Bureau of Criminal Intelligence, National Crime Authority and Office of Strategic Crime Assessments. The ACC has its headquarters in Canberra and offices in Sydney, Melbourne, Brisbane, Adelaide and Perth. (See: www.crimecommission.gov.au)

⁵⁴ Pursuant to the ACC Act, the ACC has special coercive powers for its intelligence operations and investigations. Police agencies do not hold these powers, which are necessary in circumstances where traditional law enforcement methods are not adequate for combating sophisticated criminal activity.

⁵⁵ The states and territories are served by eight police forces: one in each state and in the Northern Territory.

establish general bribery offences that are sufficiently broad to encompass the bribery of a foreign public official in addition to the bribery of a State public official and, in some cases, bribery in the private sector. For instance, section 249B(2) of the New South Wales Crimes Act 1900 establishes the offence of corruptly giving or offering to give to any “agent” any benefit as an inducement or reward for doing or not doing something, or showing favour or disfavour to any person, in relation to the affairs or business of the agent’s principal. Section 530 of the Western Australia Criminal Code also establishes an offence of corruptly giving or offering any valuable consideration to “any agent”. Paragraph 87(1)(b) of the Queensland Criminal Code establishes the offence of corruptly giving, conferring, procuring, promising or offering any property or benefit to “any person” on account of any act or omission on the part of the person so employed or holding such office. Section 83 of the Tasmanian Criminal Code Act also establishes an offence in these terms.

71. Australia explains that despite the potential for overlap between the federal foreign bribery offence and general bribery offences at the State and Territorial levels, the State and Territorial law enforcement authorities “will be happy to turn over foreign bribery cases to the AFP”. At the on-site visit, the AFP and AGD emphasised that there is a very high degree of cooperation between the State law enforcement authorities and the AFP. State authorities engage in joint investigations with the AFP where appropriate, and State police services have access to the AFP data-base. In addition, the AFP does not envisage the investigation of the bribery of foreign public officials at the State level, especially given the complexity of these matters and the frequent need to make overseas inquiries.

72. The New South Wales (NSW) Fraud Squad advised the examination team that the referral to the AFP of minor Commonwealth offences is made through written correspondence and serious offences through written correspondence and/or in face-to-face meetings. However, it is not automatic that Commonwealth offences are investigated by the AFP because they may be combined with State-based offences—in such cases the AFP and NSW Fraud Squad confer on which is the appropriate police department. A formal process, such as a MOU, for the referral of foreign bribery cases to the AFP has not been established between the AFP and the NSW Fraud Squad, and the AFP has not indicated that a formal process in this respect has been entered into between the AFP and any other State or police department or Northern Territory Police. The Australian authorities indicate that, although there is no requirement for a MOU between state law enforcement bodies and the AFP for the referral of Commonwealth offences by the state agencies to the AFP, inclusion of such guidance may be considered in the development of MOUs between these authorities in the future.

73. The lead examiners are concerned for two reasons about the impact of the overlap between State-level bribery offences and the Commonwealth foreign bribery offence on the enforcement of the Commonwealth offence. First, the bribery of foreign public officials may not be treated as a priority matter at the State level. For instance, the NSW Fraud Squad does not designate corruption as a priority matter for investigation in its case prioritisation model—unless it involves corruption in the Australian public sector—due to the low impact that it has on the victim. It is therefore not clear whether the treatment of corruption by the NSW prioritisation model might result in the non-referral of foreign bribery cases by the NSW Fraud Squad to the AFP. It is also not known whether other States treat corruption similarly in their prioritisation models. Second, the general bribery offences under the State criminal codes do not carry as heavy a sanction as the offence of bribing a foreign public official under the Commonwealth Criminal Code: generally 7 years of imprisonment under the State laws as opposed to 10 years under the Commonwealth law.

74. In addition, there is further potential for overlapping enforcement between the AFP and anti-corruption bodies with investigative powers that have been established in certain States. In particular, several State agencies have the authority to investigate corruption-related offences involving State public officials or specifically the police, including the New South Wales Independent Commission against

Corruption (NSWICAC), New South Wales Police Integrity Commission, Office of Police Integrity (Victoria), Crime and Misconduct Commission (Queensland), and Corruption and Crime Commission (Western Australia). Thus there is a potential for these State-level agencies to detect the bribery of foreign public officials committed by State public officials.

75. The NSWICAC declined to participate in the on-site visit on the ground that “its functions and roles do not cover investigations of the Commonwealth offence of foreign bribery”. Upon receiving this response from the NSWICAC, the examination team informed the Australian authorities that this might reflect an absence of awareness on the part of the NSWICAC that it has the mandate to investigate allegations of foreign bribery perpetrated by NSW public officials. During the on-site visit, the NSW Police indicated that following investigation the NSWICAC will report indications of the bribery of foreign public officials committed by NSW public officials to the NSW Director of Public Prosecution (DPP). The NSW DPP will then look at the matter afresh and if the offence predominantly involves the bribery of a foreign public official, it will refer the case to the CDPP. It is assumed that similar anti-corruption agencies in the other States will treat the bribery of foreign public officials committed by their State public officials in the same manner. The lead examiners are satisfied that cases of foreign bribery involving NSW public officials reported to the NSW DPP by the NSWICAC will in turn normally be reported to the CDPP, but believe that there is a chance that due to differences in investigation and prosecution priorities at the State level, some cases might be filtered out that should be prosecuted. For instance, fraud control guidelines at the State level might put an emphasis on enforcement actions against bribery offences that affect State interests (e.g. the bribery of State officials, or bribery that results in a financial cost to the State). In addition, it is more appropriate that foreign bribery cases be investigated by the AFP.

Commentary

The lead examiners recommend that Australia consider establishing measures, such as MOUs, to ensure the continued referral of cases involving the bribery of foreign public officials by State and Territorial police and anti-corruption bodies to the AFP even where the State or Territorial law establishes a bribery offence that is sufficiently broad to cover the specific act of bribing a foreign public official.

(vi) *Special measures of the AFP for facilitating foreign bribery investigations*

AFP International Liaison Network

76. The AFP International Liaison Network is an effective system for facilitating the investigation of transnational crime affecting Australia and the activities of Australian criminals overseas. The Network is composed of 63 liaison members in 30 federal liaison offices deployed in 25 key centres around the world.⁵⁶ The liaison officers play an important role in gathering criminal intelligence in these key centres to combat transnational organised crime and provide assistance where needed to the ACC, ASIC, State police services, ASD and AUSTRAC. Liaison officers work closely with the host country’s law enforcement agencies to develop and facilitate the exchange of criminal intelligence for all crimes by carrying out functions, including the following: (a) establishing a relationship of confidence with the law enforcement authorities in the host country and other countries in the region; (b) initiating inquiries with local law enforcement authorities on behalf of the AFP, State police and other Australian law enforcement agencies; (c) coordinating and providing advice to host countries on joint investigations; (d) assisting with

⁵⁶ The key centres include: Bangkok, Beijing, Buenos Aires, Hanoi, Hong Kong, Islamabad, Jakarta, Kuala Lumpur, London, Los Angeles, Lyon, Manila, Nicosia, Port Moresby, Rome, Singapore and Washington.

the extradition of persons wanted in Australia or the host country; and (e) facilitating visits by law enforcement officials to and from the host country.⁵⁷

77. The AFP International Liaison Network has proved to be an invaluable tool for the investigation of the bribery of foreign public officials. Out of three cases that have been referred to the AFP to date, two were referred directly through this mechanism.

National Witness Protection Program

78. The AFP Case Categorisation and Prioritisation Model states that in performing its functions, the AFP is expected to give “special emphasis” to “providing protective security services to high office holders and physical establishments and entities of specific interest to the Commonwealth, witnesses and special events”. For the purpose of ensuring the security of witnesses, the National Witness Protection Program (NWPP), which is administered by the AFP, was established under the Witness Protection Act 1994. Pursuant thereto, the AFP may place in the NWPP persons who have, for example, (a) given or agreed to give evidence in criminal proceedings in the Commonwealth or a State or Territory, or (b) made a statement to the AFP or an approved authority in relation to an offence against a law of the Commonwealth or of a State or Territory. Entry into the NWPP is also available for persons in need of protection because of their relationship to a witness. In addition, foreign nationals or residents may be placed in the NWPP at the request of foreign law enforcement authorities where certain conditions are satisfied.⁵⁸ The Witness Protection Act 1994 provides procedures governing the placement in and removal of witnesses from the NWPP, including the signing of a memorandum of understanding (MOU) by the witness, creating new identities and restoring former identities. It also provides the Commonwealth Ombudsman with the authority to review decisions of the AFP to not accept applicants for entry into the NWPP. The Commonwealth Ombudsman and the AFP work together to ensure that applicants not accepted in the NWPP are aware of their rights to complain to the Ombudsman.⁵⁹

79. The lead examiners consider the National Witness Protection Program as an essential mechanism for the effective investigation by the AFP of the bribery of foreign public officials. Due to the tight security concerning the use of the NWPP, the AFP is not able to provide details concerning the use of the NWPP in bribery investigations. However, the Australian Government indicates that the NWPP has been used effectively in a number of cases to protect whistleblowers.

b. Proposed Australian Commission for Law Enforcement Integrity

80. In May 2005, the Minister for Justice and Customs announced that the 2005-2006 budget includes AUD 9.5 million over four years to establish the Australian Commission for Law Enforcement Integrity (ACLEI). A draft Bill for the establishment of the new Commission was due to be introduced into the federal Parliament in May or June 2005, although the AGD advised the examination team at the on-site visit that the Bill was still in its conceptual state and had not yet been drafted. The introduction of the Bill was delayed due to unrelated issues, and is now expected to be introduced in 2006. The Australian authorities indicate that the proposal is for an independent federal body responsible for the investigation of corruption in the AFP and the Australian Crime Commission (ACC). The ACLEI should therefore have

⁵⁷ See discussion about the AFP International Liaison Network in: International Links the Backbone in the Fight against Crime at: www.afp.gov.au/afp/raw/Publications/Platypus/June99/internat.htm.

⁵⁸ Foreign witnesses are only approved for inclusion in the NWPP where they have an entry visa, the foreign law enforcement authority enters into an arrangement for the costs of the protection, and final approval for acceptance into the program is given by the Minister for Justice.

⁵⁹ Complaint Handling: Australian Federal Police (Commonwealth Ombudsman—see: www.comb.gov.au/publications_information/Annual_Reports/AR2000-01/AFP.html).

jurisdiction to investigate the bribery of foreign public officials committed by members of the AFP and ACC, as well as cases where they corruptly fail to investigate a foreign bribery case.

c. Treatment of Bribe Payments by the Australian Taxation Office (ATO)

81. At the time of the Phase 1 examination in 1999, bribes paid to foreign and domestic public officials by Australian resident persons or businesses in producing assessable income or in carrying on a business for the purpose of producing assessable income were tax deductible. Similarly, bribes paid to foreign and domestic public officials by non-resident persons or businesses in producing Australian source assessable income or in carrying on a business for the purpose of producing Australian source assessable income were tax deductible. According to the Australian Tax Office (ATO), before the 2000 amendment to the Income Tax Assessment Act (ITA), bribes to foreign public officials in certain cases (as well as bribes to domestic public officials) were tax deductible pursuant to the general principle under section 8-1 of the ITA that permits the deduction from assessable income of any loss or outgoing that is incurred in gaining or producing assessable income or is necessarily incurred in gaining or producing assessable income.

82. The Explanatory Memorandum to the Bill amending the ITA contains the following statement concerning the rationale for the amendment:

“It is a longstanding principle that Australia’s tax law allows deductions for expenditures incurred in deriving assessable income, irrespective of whether the expenditure relates to legal or illegal activities. Although disallowing bribes paid to foreign public officials would be an exception to this principle, it can be justified on the grounds that it will enable Australia to implement the OECD recommendation and align itself with the majority of OECD countries.”

83. The Department of the Treasury indicates that the introduction of the amendment in 1999 does not appear to have been met with any strong objection from the business community. Submissions were not made by any members of the business community to the Senate Economics Legislation Committee concerning the part of the Bill dealing with the non-tax deductibility of bribe payments.

84. In the Phase 2 responses the Australian authorities state that “the ATO’s current view is that the payment of foreign bribes is not a significant occurrence in Australia. Accordingly the claiming of tax deductions for such payments has not been identified as a risk worthy of specific targeting in the ATO’s Compliance Program 2004-2005⁶⁰.” This position was repeated at the on-site visit, and the ATO explained that its conclusion was not reached through risk analysis, but because the ATO considers that industries and businesses in Australia are already highly regulated by other regulatory regimes. However, the lead examiners are not entirely reassured by this statement, in part because there is no formal requirement for auditors to specifically look for instances of foreign bribery or report indications of foreign bribery to the law enforcement authorities. In addition, they are only obligated to report suspicions of foreign bribery to the ASIC if the contravention of the Corporations Act is “significant” or inadequately redressed (see discussion under A.3.f (iii) “Responsibility of the accounting and auditing profession”). However, the ATO indicates that in practice such information would be disseminated to the AFP.

(i) Non-deductibility of bribe payments

85. Section 26-52 of the ITA prohibits the deduction of a “loss or outgoing” incurred that is a “bribe to a foreign public official”. (Similarly section 26-53 prohibits the deduction of bribes to domestic public

⁶⁰ The Compliance Program has been published annually for three years (see: www.ato.gov.au). The publication describes the risks under the system of self-assessment and how the ATO manages these risks by balancing its resources and structuring itself accordingly to ensure that people meet their obligations.

officials.) To a large extent the description of what constitutes a bribe to a foreign public official under the ITA follows the same formulation as the offence of bribing a foreign public official in the Commonwealth Criminal Code. Under the ITA, in the following two situations payments to foreign public officials are not considered bribes and thus a deduction is available: (a) where the conduct in question is lawful in the foreign public official's country, and (b) for facilitation payments. The first exception is consistent with the defence under section 70.3 of the Criminal Code. However, there are some differences between the exception under the ITA for facilitation payments and the defence for facilitation payments under section 70.4 of the Criminal Code.

86. Pursuant to subsection 70.4(1) of the Commonwealth Criminal Code, the following three factors, for which the defendant bears the evidential burden, must be present in order to satisfy the defence of facilitation payments: (a) the value of the benefit must be of a minor nature, (b) the conduct in question must be for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature, and (c) as soon as practicable after the conduct occurs, the person must make a record of the conduct that complies with section 70.4(3) of the Criminal Code regarding the content of the record. However, under the ITA, the exception for facilitation payments applies where only the second factor applies. The ATO believes that the definition of "routine government action" under subsection 26-52(4) of the Income Tax Act, which is identical to the definition under subsection 70.4(2) of the Criminal Code, is sufficient support to restrict facilitation payments to those of a minor nature. It is the position of the ATO that due to the definition of "routine government actions" of a minor nature, as specified under the Income Tax Act, it is not possible that a payment in order to obtain such an action could be anything but "minor".

87. The ITA does not expressly require the keeping of a record in compliance with section 70.4(3) of the Criminal Code to be eligible for a tax deduction for a facilitation payment. However, the ATO is of the view that the normal record-keeping requirement under section 262A of the Income Tax Assessment Act 1936 (ITA) is satisfactory for this purpose. Pursuant to the ITA, a person carrying on a business is required to keep records that explain all transactions and other acts engaged in by the person that are relevant for any purpose of the Act. The records to be kept include any documents relevant for ascertaining income and expenditure as well as documents that contain particulars of any elections, estimates, etc., made by the person under the Act. The ATO believes that the minimum information required by ATO staff to understand the essential features of transactions relating to income and expenditure is the date, amount and character of the transactions. In some circumstances a tax officer will need further information, such as the purpose of the transactions and the relationships between the parties to the transactions. In addition, the ATO submits that pursuant to a Taxation Ruling and a Practice Statement of the ATO, the general record-keeping requirements for obtaining a tax deduction cover in essence all the requirements under section 70.4(3) of the Criminal Code, except the necessity of obtaining the signature of the foreign public official. The lead examiners believe that in order to obtain a tax deduction for facilitation payments, all the requirements for the defence under the Criminal Code should be satisfied, including the record-keeping requirement, which is specific to the circumstances of such a payment, including the identity of the foreign public official concerned (including his/her signature or some other means of verifying his/her identity) and the particulars of the routine government action. In addition, pursuant to the Criminal Code, a person availing himself/herself of the facilitation payment defence must have made the record as soon as practicable after the conduct occurred.

88. The lead examiners consider that the potential to claim payments other than those of a minor nature as facilitation payments for the purpose of claiming an expense for tax purposes as well as the absence under the ITA of a record-keeping requirement in accordance with the Criminal Code may provide scope for abuse. The lead examiners are also concerned that the inconsistency between the Criminal Code and the ITA will further contribute to confusion on the part of the private sector as to the operation of the

defence of facilitation payments (see also the discussion on the defence of facilitation payments under part B.1.c.(ii).).

89. The lead examiners also consider that both exceptions are highly technical, and believe that it would be very difficult for a tax auditor to effectively apply them without interpretive guidelines or advice from a legal expert. The ATO confirms that interpretive guidelines have not been issued on the application of either exception but that, at least with respect to the exception regarding the law of the foreign public official's country, tax auditors would need to obtain an internal technical interpretation.

(ii) *Detection and reporting of bribe payments to foreign public officials*

Detection

90. The lead examiners consider that, especially given the longstanding principle (which was only recently departed from in respect of bribe payments) in Australia to allow deductions for expenditures incurred in deriving assessable income, irrespective of whether they relate to legal or illegal activities, tax auditors need specific instructions to ensure that they are aware of and know how to identify payments to foreign public officials. However, specific direction has not been provided to tax auditors on the identification of bribe payments, including identification of the categories of allowable expenses under which bribe payments might be concealed (e.g. deductions for gifts or contributions, entertainment industry expenses, and promoting and advertising expenses). The ATO indicated that projects in this respect have not been undertaken because of its determination that in Australia there is a low risk of claiming tax deductions for bribe payments to foreign public officials. However, following the on-site visit, the ATO informed the lead examiners that it is in the process of drafting audit guidelines on the identification of bribe payments to foreign public officials. The ATO advises that the guidelines will be based on the OECD Bribery Awareness Handbook.

91. It is anticipated that the focus in the ATO's Bribery Awareness Handbook will be on developing countries as a risk factor for bribe payments to foreign public officials, but the ATO representatives realise that other indicators may also be important. In addition, the ATO recognises that there is scope for improving the section of the tax return for Australian businesses regarding "overseas transaction information" (Schedule "A") in order to more effectively identify payments that might be bribes to foreign public officials.

Reporting

92. Pursuant to section 3E of the Taxation Administration Act 1953, the Commissioner of Taxation has a discretionary power to disclose information acquired by the Commissioner under the provisions of the tax legislation to an authorised law enforcement agency officer, or to an authorised Royal Commission officer, if the Commissioner is satisfied that the information is relevant to: (a) establishing whether a "serious offence" has been, or is being, committed⁶¹ (Note that in the Act "serious offence" means an "indictable offence" as defined in section 4F of the Commonwealth Crimes Act, and therefore includes the foreign bribery offence.⁶²); or (b) the making, or proposed or possible making, of a proceeds of crime order. For the purpose of giving effect to this power of disclosure, the ATO has issued Internal

⁶¹ The Australian authorities underline that information provided pursuant to section 3E of the Taxation Administration Act 1953 can be used for investigative purposes but not as evidence in a court for non-tax prosecutions (except in respect of proceedings for the purpose of making proceeds of crime orders).

⁶² This is the case regardless if the offence could be tried summarily in certain circumstances, including where both the prosecution and defendant agree.

Guidelines.⁶³ These Guidelines clarify that the information to be disclosed to a law enforcement agency does not have to provide conclusive evidence of a serious offence—it only has to be “relevant”. They also clarify that the Commissioner has the authority to disclose such information in response to a request by an authorised law enforcement agency or upon his or her own initiative. The Guidelines place the responsibility for disclosures with the Serious Non Compliance Business Line (SNC), of which there are offices in seven major centres, including the National Office of the ATO. The ATO indicates that the size of a bribe payment to a foreign public official would not be relevant to determining whether to make a referral to the AFP.

93. With respect to self initiated disclosures, the Internal Guidelines state that tax auditors “should” contact a SNC Audit Team Leader, who will make an assessment of the value of the information and whether a self initiated disclosure should be made to a Law Enforcement Agency or Royal Commission. In the absence of a clear direction to make disclosures concerning serious offences, the lead examiners are of the view that foreign bribery cases worthy of investigation might be filtered out by tax auditors without further consultation.

94. During the 2004-05 financial year, the ATO received 680 requests for information from law enforcement agencies and had begun the year with 130 requests already on hand. Of these 820 requests, 693 were processed and information was disclosed for all 693 requests. These requests pertained to the affairs of 4 113 individuals and corporate entities. The vast majority of the requests concerned offences under the Crimes Act (235), Criminal Code (156) and Drugs Misuse and Trafficking Act (224). The ATO has also advised that during the same period, it made three self-initiated disclosures to law enforcement agencies. The lead examiners note that the ATO has an excellent record concerning disclosures upon requests from law enforcement agencies.

95. The lead examiners believe that disclosure of the bribery of foreign public officials would be promoted by a specific requirement in the Internal Guidelines for tax auditors to report such information to the SNC. In the absence of such a requirement, discretion is applied at two levels—first by the tax auditors and then by the SNC. Combined with other factors, including (a) the absence of specific targeting of foreign bribery in the ATO’s Compliance Program, (b) the absence of specific guidance and training on how to detect the foreign bribery payments, and (c) the potential for abuse created by the availability of tax deductions where the conduct in question is lawful in the foreign public official’s country, and for facilitation payments, the lead examiners believe that it may be difficult for the ATO to effectively detect and report the bribery of foreign public officials. Following the on-site visit, the ATO undertook to clarify in the Guidelines that indications of foreign bribery are required to be reported to the SNC.

Commentary

The lead examiners recommend that the ATO:

- (a) consider revising its Compliance Program to specifically include bribe payments to foreign public officials in their risk profile;***
- (b) issue the bribery awareness audit guidelines that it is currently drafting as soon as possible on: (i) the identification of bribe payments to foreign public officials, including identification of the categories of allowable expenses under which bribe payments might be concealed, and (ii) how to determine whether a particular payment to a foreign public official comes under one of the defences (i.e. defence for conduct that is lawful in the foreign public official’s country, and defence for facilitation payments);***

⁶³ The full title of the Internal Guidelines is: Internal Guidelines for the Processing of Disclosures in Terms of Section 3E of the Taxation Administration Act 1953.

(c) within the bribery awareness audit guidelines currently being drafted, include a requirement that tax auditors report all information regarding the bribery of foreign public officials to the Serious Non Compliance Business Line (SNC).

In addition, the lead examiners recommend follow-up of the application of the deduction for a facilitation payment.

d. Detection and reporting by other public bodies

96. Although Commonwealth public officials are bound by a code of conduct that requires them to not engage in criminal conduct and encourages them to report breaches of the code of conduct perpetrated by members of the public service, there are no specific provisions in Australian law obliging Commonwealth public officials to report offences involving members of the general public of which they become aware in the course of performing their duties. The Australian authorities point out, however, the Public Service Act⁶⁴ and related instruments provide obligations that are consistent with reporting such offences. For instance, The Australian Public Service (APS) Code of Conduct requires an APS employee to “behave honestly and with integrity in the course of APS employment” as well as behave at all times “in a way that upholds the APS Values and the integrity and good reputation of the APS”. The Australian authorities feel that these obligations are broad enough to obligate a member of the Australian Public Service to report to the AFP indications of foreign bribery committed by a company involved in a contractual relationship (or applying to enter into such a relationship) with the Australian government.

97. Other than awareness-raising measures undertaken by DFAT to encourage officials to report suspected breaches of the foreign bribery offence, in the form of a DFAT cable and DFAT news article, there does not appear to have been any awareness raising measures to encourage public officials outside of DFAT to report foreign bribery instances encountered in the course of their work. This could constitute a weakness of the Australian detection system, given that a number of public officials serving in Commonwealth public bodies or agencies are in contact with Australian companies operating abroad and are well-situated to discover instances of bribery of foreign public officials in the course of their work.

98. This apparent weakness of the Australian public service detection system raises further concern given the low level of whistleblower protection in the public sector. Section 16 of the Public Services Act 1999 protects Commonwealth public servants from victimisation and discrimination where they report breaches of the Code by an employee or employees to an authorised person within an Australian Public Service agency. The Australian authorities specify, in their Phase 2 responses, that such breaches would include failure to comply with Australian law when acting in the course of Australian public service employment. However, section 16 only provides protection where reporting is made to the Australian Public Service (APS) Commissioner, the Merit Protection Commissioner, or the Agency Head of the person making the disclosure (or to persons authorised by the fore-mentioned authorities). There are no specific provisions protecting whistleblowers where disclosures are made to law enforcement authorities.

99. The Australian authorities explain that victimisation of, or discrimination against, an APS employee by another APS employee for having reported suspected illegal activity to a law enforcement authority would be a breach of the APS Code of Conduct, and could result in disciplinary action under the APS Act. They also point out that although a recent evaluation conducted by the APS Commission into agency management of suspected breaches of the Code of Conduct found some confusion among employees about how the APS whistleblower scheme operates, a recent survey disclosed general

⁶⁴ Paragraph 10(1)(d) of the Public Service Act states that the APS “has the highest ethical standards”.

satisfaction with the protections.⁶⁵ Between 69 and 77 per cent of APS employees had a high or moderate level of confidence that they would not be victimised or harassed as a consequence of making a report that they suspected that another employee had seriously breached the Code of Conduct. In any case, there has been some criticism of the Commonwealth public sector whistle-blowing protections. For instance, they were considered weak in a Transparency International Report of 2004. In addition, the Parliamentary Committee on Finance and Public Administration observed that the whistleblower scheme was deficient, notably in that⁶⁶: (a) it applies only to half of the federal public sector; (b) it does not cover disclosures by members of the public; and (c) reports can only be received by a limited number of authorities, the APS Commissioner having no power to take remedial action.⁶⁷ Although the Australian authorities have indicated that whistleblower protection provisions applicable to private sector employees would also protect Australian officials, it appears that this legislation is rather weak as well (see discussions on whistle-blowing in the private sector under part g. below). Following the on-site visit, the Australian authorities indicated that the issue of whistle-blower protection is the subject of on-going review by the Australian government.

(i) *The Department of Foreign Affairs and Trade*

100. To the knowledge of the lead examiners, the only Commonwealth agency to have expressly imposed a reporting obligation on its employees is DFAT. Its Overseas Code of Conduct for Australian officials serving overseas includes an obligation and guidance to report breaches of the Code, and misconducts of a criminal nature. This obligation is however quite limited in that it applies only to overseas officials.⁶⁸ Furthermore, reports of alleged breaches of the Code are to be made to the Head of Mission, and, possibly, to the First Assistant Secretary, Corporate Management Division, or the Conduct and Ethics Unit. There is no provision for reporting directly to law enforcement authorities, and reference is made to section 16 of the Public Services Act 1999 as regards protection from disciplinary action, which would not apply for disclosure to law enforcement authorities. Finally, the reporting obligation covers only apparent or alleged breaches of the Code. The Australian authorities contend that breaches of Australian law, including legislation on foreign bribery, would constitute a breach of the Code and would thus have to be reported. However, according to the Overseas Code of Conduct, an APS employee who becomes aware of “serious criminal misconduct by another Australian who is not an APS employee” is only encouraged to report the matter to the Head of Mission. Thus, staff of diplomatic missions who discover instances of bribery of foreign public officials would only be obliged to report alleged breaches of Australian law committed by APS colleagues; reporting of similar misconduct by Australian individuals or corporations is only encouraged but not required.

101. The Australian authorities indicate that DFAT employees not covered by the Overseas Code of Conduct are covered by the Public Service Act and the APS Code of Conduct, which, while not specifically requiring breaches of the criminal law to be reported to the law enforcement authorities, leaves

⁶⁵ The survey was conducted for the purposes of the Public Services Commissioner’s State of the Service Report 2003-04.

⁶⁶ National Integrity Systems, Transparency International Country Study Report (Australia 2004, at p. 25) (http://www.transparency.org/activities/nat_integ_systems/dnld/australia.pdf).

⁶⁷ The Australian authorities explain that although the APS Commissioner can not take remedial action, if he/she inquires into a report and finds that an investigation is warranted under the agency’s procedures for determining if a breach has occurred, a recommendations is made to that effect to the Head of the agency concerned so that the Agency Head can take remedial action.

⁶⁸ See sections 1.1 and 1.4 of the DFAT Code of Conduct for Overseas Service (http://www.dfat.gov.au/dept/code_of_conduct200598.html).

it open for officials to report such allegations to the AFP. In addition, the Australian authorities state that DFAT employees have been encouraged in a DFAT news article to report such breaches in this manner.

102. While DFAT has regularly kept its overseas staff aware of the criminalisation of foreign bribery under Australian law, to the knowledge of the lead examiners, overseas officials have not been encouraged to liaise with Australian companies present in foreign markets, provide advice where they face corruption situations, and encourage them to report to diplomatic missions any instances of foreign bribery they are faced with (whether bribes are being paid by less scrupulous competitors or where they are being solicited). Further efforts in this regard could usefully be undertaken in order to facilitate the detection and reporting of foreign bribery offences.

(ii) *Detection and reporting by EFIC*

103. Australia's Export Finance and Insurance Corporation (EFIC) provides a range of financing options to assist Australian companies exporting and investing overseas, through export finance and insurance products. EFIC also provides specific help to Australian SMEs and can help secure working capital from financial institutions through the Export Working Capital Guarantee facility or provide the bonding often required for export contracts. As such, EFIC is very much in contact with Australian companies operating on foreign markets, and could potentially play a useful role in detecting and reporting foreign bribery offences.

104. Agents' commissions are included in the export contract eligible for EFIC support, and EFIC exercises a control in order to support only commissions that are at a level deemed reasonable. EFIC representatives present at the on-site visit indicated that all agents' commissions are evaluated in terms of commercial reasonableness. Generally, commissions of up to five per cent are acceptable, whereas amounts between five and ten per cent would trigger various checks to ensure that the level of work provided by the agent is proportionate to the fees paid. Commissions exceeding ten per cent receive even greater scrutiny, and could only be supported after a due diligence process involving EFIC's Managing Director. Thus, verification of agents' commissions could potentially uncover attempts to pay bribes to foreign public officials through intermediaries. The Working Group noted that the relationship between the level of agents' commissions and the triggering of increased scrutiny by export credit agencies is a horizontal issue.

105. As EFIC staff are not considered public servants, they are not subject to the APS rules, including the APS Code of Conduct. On the other hand, EFIC has in place a Fraud Control Program, which places an explicit obligation on EFIC employees to report cases of fraud to management as soon as they are detected.⁶⁹ Under the Program, fraud is broadly defined as "any intentionally dishonest or deceitful act that occasions actual or potential loss to EFIC, its clients or key stakeholders, of property, money, information or reputation. Fraudulent behaviour also includes breaches of public trust, bias and misuse of information." Examples of fraud risks are given in the Program, with a reference to bribery that concerns only instances where EFIC employees may be offered a bribe. Thus, it does not appear from the Fraud Control Program that suspicions of foreign bribery would similarly amount to fraud and be subject to a reporting obligation. However, an obligation to report foreign bribery to management may arise indirectly. EFIC indicates that the provision of a false or misleading statement or document in a material particular to EFIC in an application to enter into a contract of insurance or indemnity, etc., amounts to an offence under section 88 of the EFIC Act 1991, triggering the reporting obligation under the Fraud Control Program. Since applicants are invited to provide an undertaking/declaration in an application form that neither they nor anyone acting on their behalf have been engaged or will engage in bribery in the transaction, it would appear that a false statement in this regard would be subject to a reporting obligation. EFIC representatives

⁶⁹ Section 8.1.1 of the EFIC Fraud Control Program.

further explained that it would be within their internal policy to inform investigative authorities of suspicions of bribery, both before and after decisions are made to provide export credit support. While, at the time of the on-site visit, EFIC had not had any experience of suspicions or evidence of foreign bribery in EFIC supported contracts, EFIC representatives indicated they have had previous experience of uncovering fraud by clients, and that such instances had been referred to the AFP. Additionally, EFIC may withhold or withdraw support for a contract where it suspects or has evidence of foreign bribery (see also part B.3.c.on administrative sanctions).

(iii) *Detection and Reporting by ASIC*

106. Following the on-site visit, the Australian authorities indicated that the Australian Securities and Investments Commission (ASIC) intends to provide an internal direction to ensure that staff responsible for receiving, assessing and referring complaints (i.e. ASIC's National Assessment and Action) refer all complaints received relating to foreign bribery to the AFP. The lead examiners consider this a positive development, but consider that it is also important to issue an internal direction to all ASIC staff directing them to report all suspicions of foreign bribery to the Director of National Assessment and Action.

Commentary

The lead examiners recommend that Australia consider taking appropriate measures to ensure that members of the Australian Public Service who come into contact with companies involved in international business understand that the Australian Public Service (APS) Code of Conduct requires Commonwealth officials, bodies and agencies to report to the AFP credible evidence of foreign bribery offences that they uncover in the course of performing their duties, and take steps to encourage and facilitate their reporting. They also recommend that the Australian authorities consider strengthening reporting provisions, such as those already included in the DFAT Overseas Code or EFIC internal rules.

Furthermore, the lead examiners recommend that Australia consider reviewing Commonwealth whistle-blower provisions in the context of the ongoing review on this subject to ensure effective whistleblower protection measures for Commonwealth officials and staff employed by Commonwealth agencies who report suspicions of foreign bribery, in order to encourage them to report such instances without fear of retaliatory action.

(iv) *Detection and reporting by AusAID*

107. Australia is a significant provider of Official Development Assistance (ODA), a significant share (approximately 70 per cent) of which is allocated to the Asia-Pacific Region. In 2003 the total net ODA was USD 1 200 million⁷⁰ and in 2004-5 Australia will provide approximately AUD 2.1 billion in ODA (approximately .28 per cent of GDP). The majority of ODA—approximately 80 per cent—is provided in the form of bilateral aid. In 2002-3 the top recipients of ODA were Papua New Guinea (USD 195 million)⁷¹, Indonesia (USD 79 million), Solomon Islands (USD 44 million)⁷², Vietnam (USD 38 million), Timor-

⁷⁰ OECD (2005), Development Co-operation Report 2004, Volume 6, No. 1, p. 77.

⁷¹ In Papua New Guinea (PNG) AusAID administers the Enhanced Cooperation Program, which aims to strengthen the ability of PNG to tackle corruption, manage its finances, maintain law and order and improve border security through the placement of Australian officials and police in operational and advisory positions in key PNG agencies.

⁷² In the Solomon Islands, Australia administers the Regional Assistance Mission to Solomon Islands (RAMSI) with its regional neighbours. RAMSI focuses on enforcing the law and stabilising the budget,

Leste (USD 33 million) and the Philippines (USD 32 million). Substantial aid was also provided to China (USD 29 million), Cambodia (USD 8 million), Iraq (USD 21 million) and Bangladesh (USD 17 million). The majority of Australia's ODA is administered through the Australian Agency for International Development (AusAID), with 20 per cent administered through government agencies other than AusAID in 2004-5.⁷³ In 2004-5 AusAID managed more than 1 500 contracts with a total contract value of about AUD 2.3 billion. The contracts ranged from short term consultancies to multi-million dollar construction and institutional strengthening projects, and involved relationships with a number of stakeholders.⁷⁴

108. More recently, Australia's commitment to improving the conditions in the Asia-Pacific Region was further demonstrated with its promise in January 2005 of USD 1 billion over five years to the Australia-Indonesia Partnership for Reconstruction and Development (AIPRD), an agency to be administered by the governments of Australia and Indonesia, in response to the Tsunami disaster in the Indian Ocean. The package, which is the largest single aid package in Australia's history, will consist of AUD 500 million in grants and AUD 500 million in concessional loans over 40 years with no interest and no repayments of principal over the first 10 years.⁷⁵ The AIPRD announced in March 2005 that companies from Australia, Indonesia, and New Zealand will be eligible to compete for projects under the AIPRD grant and loan programs.

109. Australian ODA is traditionally "tied", which means that normally only businesses from Australia (and New Zealand) are eligible to tender for AusAID overseas implementation services contracts.⁷⁶ In 2004, in response to growing criticisms about the negative effect of tied aid on competitiveness, Australia introduced a policy of untying part of its ODA.⁷⁷ Moreover, in order to enhance competition in AusAID funded contracts, a Procurement Related Complaints Handling Process was recently established in order to enable AusAID to receive complaints regarding its procurement exercise.⁷⁸

110. The largest budgetary component of Australia's ODA is used to support good governance in Australia's partner countries, with 33 per cent of ODA funds earmarked for this purpose in 2004-5. The Australian authorities indicate that much of this expenditure will be used to assist Australia's partner countries directly and indirectly in effectively combating corruption.

Measures for Preventing and Detecting Foreign Bribery in Bilateral Aid-Funded Procurement Contracts

111. AusAID has established a number of measures for detecting and preventing inappropriate conduct in relation to its activities, such as the bribery of foreign public officials. For instance, Australian Managing Contractors⁷⁹ and NGOs are required to provide regular activity reports advising of risk

with particular attention to tackling corruption through activities to improve local accountability institutions, strengthen government expenditure and revenue management processes, and build the capacity of the criminal justice system to effectively handle corruption cases.

⁷³ OECD (2005), DAC Peer Review: Australia.

⁷⁴ Ibid, p. 73.

⁷⁵ Note that Australia's pre-Tsunami assistance in Indonesia was AUD 160 million, in the form of 100 per cent grant financing and primarily provided through projects managed by Australian contractors selected using the Commonwealth Procurement Guidelines.

⁷⁶ See: www.aisaid.gov.au/business/contracting/eligibility.cfm.

⁷⁷ Ibid, footnote 84.

⁷⁸ See: www.aisaid.gov.au/latestnews/pdfs/procurement.pdf.

⁷⁹ An Australian Managing Contractor (AMC) is typically a large Australian company, partnership or consortium contracted to deliver an aid project.

assessments and risk ratings and measures to manage such issues. AusAID also employs a program of compliance audits, which includes a component for identifying risk areas where fraudulent use of Commonwealth funds could or has occurred. Moreover, pursuant to the Procurement related Complaints Handling Process, suppliers are entitled to lodge a complaint about the procurement process. Suppliers may seek external review through the Commonwealth Ombudsman where they are not satisfied with the outcome of the complaints process.

112. The standard bilateral aid-funded procurement contract with AusAID is the main tool of AusAID for preventing and detecting the bribery of foreign public officials. It includes the following provisions, which are relevant in this respect:

1. an anti-corruption clause warranting that the Contractor shall not engage in an illegal or corrupt practice as an inducement or reward in relation to the execution of the contract;⁸⁰ (violation of this warranty is grounds for immediate termination of the contract by notice from AusAID); and
2. a clause warranting that the Contractor must use best endeavours to ensure that all sub-contractors comply with relevant laws and policies in Australia and the partner country, including Division 70 of the Commonwealth Criminal Code on the bribery of foreign public officials.

113. The lead examiners believe that there is some scope for fine-tuning the relevant clauses in the AusAID standard procurement contract to increase their effectiveness in preventing and detecting the bribery of foreign public officials. A specific prohibition from bribing foreign public officials in the anti-corruption clause would increase awareness of the offence among contracting parties, and in light of the express reference to foreign bribery in the clause regarding the activities of sub-contractors, would remove any ambiguity. Moreover, in the absence of a requirement that contracts with subcontractors include a prohibition against foreign bribery, “best endeavours” to ensure that subcontractors ensure that any second-level subcontractors comply with the foreign bribery offence are not likely to be perceived as forceful by subcontractors.

Reporting the Bribery of Foreign Public Officials

114. At the on-site visit, representatives of AusAID stated that if AusAID receives information that a contractor bribed a foreign public official in relation to an ODA contract, they do not know whether an audit would be performed and are not sure if a report would be made to the AFP. Nevertheless the situation would be considered serious if it were suspected that a managing contractor was involved. They also stated that AusAID’s Fraud Control Policy establishes an obligation to report fraudulent activities, which includes the bribery of Commonwealth officials but not foreign public officials.

115. Following the on-site visit, AusAID representatives stated that AusAID does indeed have in place a policy for responding to indications of the bribery of foreign public officials in ODA contracts, which are set out in AusAID’s Fraud Control Policy, Fraud Control Circular and Fraud Control Brochure. A review of AusAID’s Fraud Control Policy indicates that “fraud” includes “bribery, corruption or abuse of office”, and “requires that all cases of suspected or detected fraud must be reported immediately to the Director of

⁸⁰

The full text of the anti-corruption clause in this respect is: “The Contractor warrants that the Contractor shall not make or cause to be made, nor shall the Contractor receive or seek to receive, any offer, gift or payment, consideration or benefit of any kind, which would or could be construed as an illegal or corrupt practice, either directly or indirectly to any party, as an inducement or reward in relation to the execution of this Contract”.

Performance Review and Audit”. It further states that “AusAID considers the prosecution of offenders for fraud cases including minor instances of fraud where appropriate”. AusAID also drew attention to AusAID’s Contracts Charter and Standard Contract Conditions. The former states that “cases of fraud, corruption or criminal actions are automatically transferred to the appropriate authorities where court action may then follow”, and the latter that “the Contractor and its subcontractors must not engage in any fraudulent activity”. Nevertheless, in light of the statements of the representatives of AusAID at the on-site visit, the lead examiners are concerned that it may not be clear to AusAID personnel that fraud includes the bribery of foreign public officials. They are also concerned that there is no clear direction regarding the reporting of fraud to the law enforcement authorities, and that two AusAID documents contain different reporting directions.

Commentary

The lead examiners recommend that the standard contract with AusAID be amended to clarify that the Contractor shall not engage in the bribery of foreign public officials in relation to the execution of the contract, and that contracts with subcontractors contain a similar prohibition.

The lead examiners further recommend that AusAID take steps to ensure that its staff is aware of the policy for responding to indications of the bribery of foreign public officials in relation to ODA contracts, including the reporting of such indications to the Australian Federal Police.

e. Detection through money laundering reporting systems

(i) The money laundering offences

116. Division 400 of the Criminal Code 1995 establishes the offence of laundering the proceeds of crime, as well as the offence of possession of criminal property that constitutes the proceeds of crime. (These offences are hereafter referred to the offences of money laundering.) Under section 400.1, “proceeds of crime” are defined as “any money or other property that is derived or realised, directly or indirectly, by any person from the commission of an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).” It is quite clear that the advantage obtained by bribing a foreign public official—having been “derived” from the commission of the foreign bribery offence—constitutes the “proceeds of crime”. On the other hand, the advantage provided to the foreign public official (i.e. the bribe payment) does not appear to fit the notion of “proceeds of crime” in respect of the offence of bribing a foreign public official. Under Australian law, the prosecution does not need to prove the predicate offence (sections 400.11 and 400.13), but only that the money or property is the proceeds of crime.

117. Sections 400.3 to 400.8 cover the offences of money laundering, with distinctions depending on the value of the money or property concerned [ranging from over AUD 1 million (approximately EUR 630 000 or USD 760 000) or more to “any value”]⁸¹. Under these sections, a person is guilty of an offence if he/she deals with money or other property, either with the knowledge or belief that such money or property is the proceeds of crime; or reckless or negligent about the fact that the money or property is the proceeds of crime. Thus, the offence covers not only persons who had knowledge of the criminal nature of the money or property, but also persons who may or should have known. The CDPP indicated that it prosecuted one offence of money laundering where the defendant was negligent as to whether the proceeds were derived from the commission of an offence. The defendant was charged with negligently dealing with the proceeds of crime contrary to subsection 400.8(3) of the Criminal Code, and sentenced to eight months

⁸¹ The conversion of Australian Dollars (AUD) into Euros (EUR) and U.S. Dollars (USD) is based on the exchange rate on 26 July 2005, on which AUD 1=EUR 0.63=USD 0.76.

periodic detention. Under Australian law, the prosecution will not need to prove the predicate offence (sections 400.11 and 400.13), but only that the money or property is the proceeds of crime.

118. Pursuant to sections 400.3 to 400.8, it is an offence against the money laundering provisions for a person to possess or deal with money or other property where “the person intends that the money or property will become an instrument of crime”. Thus, a person in Australia who possesses money with the intent to use it to bribe a foreign official in a way that violates Australian law, also commits an offence of money laundering under Australian law. In this respect, the money laundering regime in Australia is far reaching since it sanctions money laundering that takes place before the commission of the predicate offence. Thus, although there have been no cases to date, an individual or company guilty of attempted bribery of a foreign public official could also, depending on the facts, be sanctioned under the money laundering regime for possessing or dealing with an intended bribe payment.

119. Sanctions vary depending on the value of the money or property which constitutes the proceeds of the crime.⁸² They range from 25 years imprisonment and 1500 penalty units [AUD 165 000 (approximately EUR 105 000 or USD 126 000)]⁸³ for a person who knowingly deals with money or property that constitute the proceeds (or instrument) of crime in excess of AUD 1 million, to only 10 penalty units (AUD 1 100) where the person was negligent in dealing with proceeds of crime of “any value” less than AUD 1 000. The Australian authorities confirmed that there have been no prosecutions of money laundering offences involving the proceeds of bribing a foreign public official. Statistical information shows that from 1 July 2000 to 25 May 2005, 51 charges of money laundering were dealt with under the Proceeds of Crime Act (POCA) and the money laundering offences in Division 400 of the Criminal Code (noting that the money laundering offences under the Criminal Code came into effect in January 2003). From 1 January 2000 to 7 March 2005 under the POCA, 28 defendants were convicted, two acquitted and the proceedings were discontinued for ten. Of those convicted, 19 received a sentence involving imprisonment ranging from greater than two years to up to or including five years (Three were released forthwith on recognizance.). The majority (13) of the sentences were imprisonment for up to or including two years. During the same period under the money laundering offences in the Criminal Code there were 5 convictions. Of those convicted, four received a sentence involving imprisonment of up to or including two years (Two were released forthwith on recognizance.).

(ii) *Reporting money laundering offences*

120. AUSTRAC, the Australian Transaction Reports and Analysis Centre, is Australia’s anti-money laundering regulator and specialist financial intelligence unit. As such, it is responsible for ensuring the collection, analysis and dissemination of financial intelligence to designated Commonwealth, State and Territory law enforcement, revenue, national security and social justice agencies.⁸⁴ As part of this role,

⁸² The offences are categorised based on the value of the money or property involved: Section 400.3 covers dealing in proceeds of crime worth AUD 1 million or more; section 400.4 covers dealing in proceeds of crime worth AUD 100 000 or more; section 400.5 covers dealing in proceeds of crime worth AUD 50 000 or more; section 400.6 covers dealing in proceeds of crime worth AUD 10 000 or more; section 400.7 covers dealing in proceeds of crime worth AUD 1 000 or more; and section 400.8 covers dealing in proceeds of any value.

⁸³ Under section 4AA of the Crimes Act 1914, one penalty unit means AUD 110. As provided under section 4B(3), where a legal person is convicted, the fine may be up to five times the maximum fine that could be imposed by the court on an individual convicted of the same offence.

⁸⁴ AUSTRAC’s current domestic partner agencies are: Australian Crime Commission, Australian Customs Service, AFP, ASIC, ATO, Australian Security Intelligence Organisation, Centrelink, Corruption and Crime Commission of Western Australia, Crime and Misconduct Commission (Qld), Child Support Agency Australia, Independent Commission Against Corruption, New South Wales Crime Commission, New South Wales Police, Northern Territory Police, Police Integrity Commission (NSW), Queensland

AUSTRAC allows partner agencies (such as the ATO, the ACC or the AFP) on-line access to the AUSTRAC database of financial transaction reports information to assist them in their actions against money laundering, terrorist financing and other major crimes, in addition to assisting the administration and enforcement of taxation laws. AUSTRAC provides on-site training and analytical assistance to those agencies to assist their efforts in combating these activities. AUSTRAC also provides training to foreign financial intelligence units, and is currently assisting ten South East Asian nations and seven Pacific Island nations.⁸⁵

121. The Financial Transaction Reports Act 1988 (FTR) requires cash dealers to report to AUSTRAC significant cash transactions of AUD10 000 (EUR 6 300 or USD 7 600) or more or the foreign currency equivalent (Division 1 of the FTR);⁸⁶ suspicious transactions (Division 2); and international funds transfer instructions (Division 3). The FTR also requires cash dealers to verify the identity of persons who are signatories to accounts, and prohibits accounts being opened or operated in a false name. Cash dealers, as defined in section 3 of the FTR, include banks, building societies and credit unions referred to as ‘financial institutions’; financial corporations; insurance companies and insurance intermediaries; securities dealers and futures brokers; cash carriers; managers and trustees of unit trusts; firms that deal in travellers cheques, money orders and the like; persons who collect, hold, exchange or remit currency on behalf of other persons; currency and bullion dealers; and casinos and gambling houses.

122. Section 16 of the FTR details the circumstances under which cash dealers are required to make suspicious transaction reports (STRs), and outlines in particular the need to report suspect transactions that may be linked to evasion of taxation law and financing of terrorism. AUSTRAC produces guidelines to assist cash dealers and their staff in identifying and reporting suspect transactions. Mirroring the FTR, these guidelines focus largely on transactions connected with tax evasion or drug trafficking, and not with foreign bribery offences. AUSTRAC has however issued a Circular on the Bribery of Foreign Public Officials that provides general information on the criminalisation of foreign bribery under Australian law, but does not provide specific guidelines on detecting money laundering offences potentially linked to predicate foreign bribery offences (see part 2.b(i) above on government initiatives to raise awareness in the private sector).

123. AUSTRAC representatives present at the on-site visit indicated that they receive approximately 11 million reports a year, with a large majority concerning international funds transfers, approximately 11 500 of which concern suspicious transactions. To date, AUSTRAC has not received any STRs relating to the bribing of a foreign official. AUSTRAC further indicated that it did not keep track of how many of these STRs result in prosecutions by the law enforcement authorities. However, a reporting procedure is in place whereby law enforcement agencies provide feedback to AUSTRAC on a quarterly basis on enforcement actions taken with respect to STRs. AUSTRAC similarly provides feedback regarding STRs to cash dealers, notably to the Provider Advisory Group, created in 1989 and including the largest representation of cash dealers, but also in regular newsletters and in the AUSTRAC Annual Report.

124. Sanctions are provided under Part V of the FTR for failure by cash dealers to provide information in accordance with the FTR. Under section 30, provision of incomplete information may be sanctioned by

Police Service, South Australia Police, State Revenue Agencies (ACT, NSW, NT, QLD, SA, TAS, VIC, WA), Tasmania Police, Victoria Police Service, and Western Australia Police Service.

⁸⁵ The assistance to South East Asian nations consists of in-country mentoring, attachments to AUSTRAC, IT advice, training programs and assistance with typologies development. In the Pacific, AUSTRAC is assisting with IT systems development

⁸⁶ Solicitors who enter cash transactions for clients are also subject to reporting obligations of significant cash transactions (section 15A). There are also requirements for the public to report cash transfers into and out of Australia of AUD 10 000 or more or the foreign currency equivalent (section 15).

up to ten penalty units for an individual (AUD 1 100) or 50 penalty units for a body corporate (AUD 5 500). Refusal or failure to provide information (section 28) is punished with a maximum of two years imprisonment and/or a fine of maximum 120 penalty units for an individual (AUD 13 200) or 660 penalty units for a body corporate (AUD 66 000). Under section 29, provision of false or misleading information may be sanctioned by imprisonment for up to five years or/and 300 penalty units for an individual (AUD 33 000) or 1 500 penalty units for a body corporate (AUD 165 000). Statistical information shows that from 1 July 2000 to 25 May 2005, 802 charges were brought for violations of the FTR. From 1 January 2000 to 7 March 2005, 672 defendants were convicted, 11 acquitted, and proceedings were discontinued for ten. Of those convicted, 99 received a sentence involving imprisonment, with 77 receiving a sentence including imprisonment for a period of up to or including two years, 21 for more than two years up to or including five years, and one for more than five years (28 were released forthwith on recognisance.) In addition, 234 of those convicted received bonds and 37 received a community service order. Representatives of the AGD interviewed at the on-site visit indicated that most prosecutions and sanctions had been imposed for failure to report transfers of currency into or out of Australia pursuant to section 15 of the FTR. Overall, the penalties imposed appear relatively modest to the examining team. The Australian authorities indicated that they may be complemented by confiscation measures.

125. There are plans to further reform Australia's anti money laundering regime. Australia's implementation of the revised 40 Recommendations of the Financial Action Task Force will be the occasion to review and update Australia's anti money laundering legislation. Preliminary work undertaken by the Australian authorities, in cooperation with cash dealers, indicates that key principles at the core of the new legislation will include new customer due diligence obligations, further reporting and record-keeping obligations, and the setting up of a single money laundering regulator. The process to reform legislation is underway, and a first round of consultations has already taken place with each of the affected industry sectors. Information posted on the AGD's website in November 2004 indicates that "a draft exposure Bill will form the basis of the second round of industry consultation". At the time of the on-site visit, there was no fixed schedule for the issuance and discussion of this draft legislation.

Commentary

The lead examiners encourage Australia to continue to compile statistical information on the application of the offence of money laundering, including the level of sanctions and confiscation of proceeds of crime. They also encourage the Australian authorities to pursue efforts to draw the attention of cash dealers to the foreign bribery offence as a predicate offence to money laundering, and provide them with guidance on identifying suspicious transactions that may be linked to foreign bribery offences.

f. Detection through accounting and auditing requirements

(i) The false accounting offence

126. Bribe payments made to foreign public officials in the context of international business transactions can also be detected through analysis of books and records violations by accountants and auditors. Under Australian law, section 286 of the Corporations Act 2001 requires all companies to keep "written financial records that: (a) correctly record and explain its transactions and financial position and performance; and (b) would enable true and fair financial statements to be prepared and audited (...)" Financial records are defined under section 9 to include invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers, documents of prime entry, and working papers and other documents needed to explain the methods by which financial statements are made up and adjustments to be made in preparing financial statements.

127. According to the Australian authorities in Phase 1, the establishment of off-the-book accounts, the making of off-the-book or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents, prohibited under Article 8 of the Convention, would be contrary to the requirements under section 286 of the Corporations Act, because they would not correctly record and explain transactions and would not enable true and fair financial statements to be prepared and audited. The maximum penalty for a violation of section 286 is six months of imprisonment. CDPP representatives at the on-site visit indicated that there had not been any prosecutions conducted by the DPP under section 286 since the DPP took over the responsibility for the prosecution of Corporations Act offences in 1991. Rather, false accounting offences have been prosecuted under section 1307 of the Corporations Act 2001, which focuses on the falsification of books by officers, employees or members (or former officers, employees or members) of a company. The maximum penalty for a violation of section 1307 is two years of imprisonment.

128. Between 1991 and 2005, 18 prosecutions have been conducted by the DPP under section 1307(1) of the Corporations Act. Of these, six were dealt with summarily and nine on indictment, and where sentences were handed down, these ranged from fines of AUD 500 to AUD 3 000, and imprisonment sentences of six to 12 months. At the time of the on-site visit, three cases were still pending before the courts. In their Phase 2 responses, the Australian authorities indicate that there had been no cases concerning false accounting offences related to foreign bribery. The CDPP further indicates that it has not identified any false accounting case relating to a domestic bribery offence. Given that financial and economic crime, including the payment of bribes, is often likely to result in related accounting offences, the lead examiners are concerned about the level of enforcement in this regard.

(ii) *Accounting and auditing requirements*

129. Under section 292 of the Corporations Act, disclosing entities (i.e. mainly listed companies and registered managed investment schemes), public companies and large proprietary companies must prepare financial reports for each financial year. A small proprietary company is only required to produce annual financial reports if: (a) shareholders with at least 5 per cent of the votes or the Australian Securities and Investment Commission (ASIC) require it; or (b) it is controlled by a foreign company.⁸⁷ Section 45A defines “small proprietary companies” as those satisfying at least two of the following criteria: (a) consolidated gross operating revenue under AUD 10 million; (b) value of the consolidated gross assets under AUD 5 million; and (c) less than 50 employees.⁸⁸ Financial reports must comply with accounting standards set by the Australian Accounting Standards Board (AASB),⁸⁹ although compliance with these accounting standards is not always necessary for “small proprietary companies”. It should be noted that, as of 15 July 2004, the AASB has made Australian accounting standards fully equivalent to the International Accounting Standards Board (IASB) Standards.

130. As concerns auditing obligations, under section 301, companies subject to financial reporting obligations must have their annual financial report audited.⁹⁰ Division 3, Part 2M.3 of the Corporations Act 2001 specifies the modalities that audits and auditors’ reports must follow, in accordance with auditing standards set by the Australian Auditing and Assurance Standards Board (AUASB). At its 8 April 2005 meeting, Australia’s Financial Reporting Council set a Strategic Direction for the AUASB, including reliance, as appropriate, on International Standards on Auditing (ISAs) developed by the International

⁸⁷ Sections 292(2), 293 and 294 of the Corporations Act 2001.

⁸⁸ All these figures concern the company, as well as the entities it controls (if any).

⁸⁹ Sections 296, 304 and 334 of the Corporations Act 2001.

⁹⁰ With the exception of small proprietary companies which only need to have the financial report audited if the report has been requested by the ASIC, or if the shareholders have specifically requested it.

Auditing and Assurance Standards Board. Representatives from accounting firms interviewed at the on-site visit stated that most ISAs do not go beyond provisions in the Corporations Act 2001, which is already 90 per cent compliant with ISAs. The objective of the Strategic Direction will be to make Australian auditing standards 100 per cent compliant, but the Australian legislation will retain additional requirements beyond those required by the ISAs.

(iii) *Responsibility of the accounting and auditing profession*

131. Division 3, Part 2M.4 of the Corporations Act 2001 provides for auditor independence measures, including mandatory rotation of auditors, “cooling-off” periods before renewed engagement, etc. Under section 311 of the Corporations Act 2001, individual auditors as well as auditing companies are obliged to report to ASIC contraventions to the Corporations Act that they become aware of in the course of conducting an audit. An auditor contravenes section 311 of the Corporations Act if he/she fails to report to the ASIC contraventions of the Corporations Act that are significant or have not been adequately redressed. In the view of ASIC representatives interviewed at the on-site visit, this would not place a requirement on auditors to report potential foreign bribery offences, and auditors would only be obliged to report suspicions of foreign bribery if the bribe payments made the accounts “materially” inexact. According to representatives of the Institute of Chartered Accountants in Australia (ICAA), any amount below five per cent of the total of the specific expense account audited would not “generally” be considered “material”, while any amount over ten per cent would definitely be considered material. Amounts between five and ten per cent constitute a “grey area”, where the materiality would have to be determined by the auditor based on other relevant information. ASIC indicated that, since 2001, it had received 267 reports under section 311, most of these concerning failures to lodge reports in due time.

132. Auditors interviewed at the on-site visit indicated that Australian auditing standards only place an onus on auditors to question fraud incidences detected in the course of an audit. Thus there is no responsibility on the auditor to look specifically for instances of foreign bribery. Auditors further pointed out that they are strongly opposed to such an obligation as well as an obligation to report indications of foreign bribery to law enforcement authorities. Furthermore, because their first and foremost responsibility is to the shareholders of the company being audited, they consider that any suspicion of fraud should be reported to the company itself. Auditors of certain auditing firms are also encouraged to refer such suspicions to their legal office.

Commentary

The lead examiners welcome the important efforts by the Australian authorities to establish rigorous accounting and auditing standards and to adhere generally to the relevant international standards relating to accounting and auditing. However, the lead examiners are concerned about the low number of prosecutions for false accounting under either section 286 or section 1307 of the Corporations Act as well as the low sanctions for those prosecutions under section 1307 that ended in convictions, and thus recommend follow-up by the Working Group with regard to the application in practice of Article 8 of the Convention.

The lead examiners recommend that Australia should require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies. In addition, the lead examiners recommend that Australia should consider requiring the auditor to report indications of a possible illegal act to the competent authorities.

g. Detection within companies

133. The Australian authorities indicate in the Phase 2 responses that one of the two investigations that were ongoing at the outset of the Phase 2 on-site visit was triggered by a complaint received from an employee. Australia further indicates that ASIC has received 13 complaints concerning alleged breaches of the Corporations Act. Part 9.4AAA of the Corporations Act provides protections for officers and employees, etc., of a company who disclose information indicating that the company has or may have contravened a provision of the Corporations Act. Disclosures qualifying for protection are those made to the ASIC, the company's auditor, director, senior manager or a person authorised by the company to receive such disclosures. In addition, the discloser must provide his/her name and have reasonable grounds to suspect the breach of the Corporation Act. Where an individual makes a disclosure in accordance with the Act, he/she is protected from civil or criminal liability for the disclosure, enforcement of a contractual or other remedy. In addition, the court may order reinstatement of his/her contract of employment where it was terminated due to the disclosure. The lead examiners recognise the importance of these protections in general, but feel that they provide limited protection to employees who disclose indications of foreign bribery, in particular to individuals and bodies not listed as qualifying for protection under the Act.

134. Moreover, two NGOs (the Australian Chapter of Transparency International and Whistleblowers Australia), consider that whistle-blowing arrangements do not provide adequate protections. According to Whistleblowers Australia, at the State level, five statutes are in place, with little conformity between them, and with an emphasis on compensation for victimisation rather than also preventing victimisation in the first place. Commonwealth legislation such as the Corporations Act or the Workplace Relations Act provides protection to certain categories of employees, but only in respect of contraventions of the Act in question. Additionally, anonymity of the person making the disclosure is generally not assured (in fact, under the Corporations Act, disclosure is only protected if the whistleblower gives his/her name), and whistle-blowing directly to law enforcement authorities is not protected. Consequently, NGO representatives feel there is little incentive to blow the whistle, and that, on the contrary, employees would fear retaliation in the workplace, as well as being seen as troublemakers on the job market.

135. Large Australian companies have recognised the need to provide for whistleblower protection, and sometimes even encourage the reporting of misconduct to appropriate bodies. As of 5 August 2005, the partial responses received by the AGD to its OECD Foreign Bribery Public Awareness Campaign Follow-Up Survey appear to indicate that approximately 52 per cent of Australia's top 100 companies have whistleblower protection in place. Indeed, a majority of the corporate codes of conduct reviewed by the examining team provide encouragement to report or discuss suspected misconduct with nominated entities, and about half of the codes specifically provide whistleblower protection measures such as the possibility to raise issues anonymously, the use of specifically dedicated hotlines (some of these external to the company), and an undertaking that employees raising concerns in good faith will not be subject to retribution or disciplinary action. Most corporations with whistleblowing procedures in place have a specific ethical body in charge of investigating reports made; in fewer cases, a senior officer within the company is in charge of handling the follow-up of reports. Representatives of companies present at the on-site visit stressed that at least half of all reports resulted in some sort of action on the part of the company, including reporting to law enforcement authorities, although most of the reports concerned the handling of human resources and not the conduct of business.

Commentary

Given the key role that whistleblowers could play in detecting foreign bribery offences, the lead examiners recommend that Australia consider introducing stronger whistleblower protection measures for private sector employees who report suspicions of foreign bribery, in order to encourage them to report such instances without fear of retaliatory action.

B. EFFECTIVENESS OF AUSTRALIA'S MEASURES FOR PROSECUTING AND SANCTIONING THE BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Elements of the Offence of Bribing a Foreign Public Official

136. Australia's provisions on the offence of bribing a foreign public official, contained in sections 70.2-70.6 of the Commonwealth Criminal Code, are detailed and comprehensive. The Australian legislature has made a commendable effort in drafting the offence in terms that are accessible to the general public, by using plain language. The offence provides a glossary of definitions, including "foreign public enterprise" and "benefit". In addition, section 70.5 provides rules on the establishment of territorial and nationality jurisdiction over conduct constituting the offence. Nevertheless, the lead examiners have identified certain elements of the offence, as well as the defences to the offence, as areas requiring attention.

a. Results and necessity of payment

137. Pursuant to section 70.2(1)(b) of the Commonwealth Criminal Code, one of the elements of the offence of bribing a foreign public official is that the benefit provided "is not legitimately due to the other person". Section 70.2(2) clarifies that in determining whether a benefit "is not legitimately due" the following shall be disregarded: (a) whether the benefit is customary or perceived as customary; (b) the value of the business advantage; and (c) any official tolerance of the advantage. Section 70.2(2) largely codifies Commentary 7 on the Convention, except that it does not prohibit consideration of: (a) the "results" of the conduct; and (b) the "alleged necessity of the payment". The lead examiners also note that the offence of bribing a domestic public official under section 141.1 of the Commonwealth Criminal Code does not import the requirement that the benefit must not be legitimately due to the other person. The AGD doubts that the factors in Commentary 7 that are not reproduced in section 70.2(2) would be taken into account in prosecuting the foreign bribery offence.

b. Omissions of the foreign public official

138. Neither the offence of bribing a foreign public official under section 70.2 nor the definition of "duty" in section 70.1 expressly refers to omissions in the performance of a foreign public official's duties. However, the Australian authorities explain that indeed bribes for the purpose of obtaining omissions by a foreign public official are covered, and provided the decision in *R. v. Stuart Harold Tange* (1993, Supreme Court of Queensland Court of Appeal) as supporting authority. In *Tange* the defendant allegedly bribed a detective sergeant with AUD 5 000 to take no action against him or deal with drug charges summarily rather than on indictment. The judgement of the Full Court of the Queensland Supreme Court of Appeal in *Tange* holds that provision of a benefit to obtain an omission can amount to a bribe. In light of this decision, the lead examiners are satisfied that section 70.2 covers bribes for the purpose of obtaining omissions.

c. Defences

(i) Conduct Lawful in the Foreign Public Official's Country

139. Section 70.3 provides a defence where the conduct of the foreign public official that is sought by the briber is lawful in the foreign public official's country. A detailed table is contained in section 70.3 for the purpose of clarifying how it is determined in specific situations which country's law is determinative. In general terms, the person is not guilty of the foreign bribery offence, which is established under section 70.2, where "the person would not have been guilty of an offence against a law in force" (emphasis added)

in the place where the central administration is located for which the official performs his/her duties. This defence exceeds the limits in Commentary 8 on the Convention for the following reasons, and thus might, in the opinion of the lead examiners, be an obstacle to the effective implementation of the Convention.

140. Commentary 8 on the Convention states that it is not an offence “if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law” (emphasis added). It has been widely accepted in the Working Group on Bribery in International Business Transactions that Commentary 8 only provides an exception to the offence where the law of the foreign public official’s country states that the advantage in question is permitted or required. However, the Australian exception applies even where pursuant to the law of the foreign public official’s country the person would not be guilty of an offence. Thus in effect section 70.3 provides a rule of dual criminality, which applies even where the act of bribing a foreign public official takes place in Australia.

141. The Australian authorities do not believe that a matter such as an expired statute of limitations in the foreign public official’s country could be a consideration because the table in section 70.3 expressly provides that the defendant “would not” have been guilty of an offence against a law in force in the foreign public official’s country. The Australian authorities believe that because this is a past tense expression that requires consideration of the law at the time the offence was committed, prosecution of the foreign bribery offence would not be restricted by foreign statutes of limitation. The AGD views section 70.3 as a valid interpretation by Australia of Commentary 8. The CDPP views section 70.3 as virtually synonymous with Commentary 8, and believes that a literal interpretation of Commentary 8 is unworkable. Nevertheless, the Australian authorities agree that the test set out under this defence may, in some circumstances, operate more broadly than is contemplated by Commentary 8 (e.g. where the conduct in questions is prohibited in the foreign country by a mechanism that falls short of creating an offence), and has undertaken to amend this defence.

(ii) *Facilitation Payments*

142. Section 70.4 provides a defence for “facilitation payments” that is largely modelled after a defence under the United States Foreign Corrupt Practices Act.⁹¹ So far the Australian courts have not had an opportunity to interpret this defence. In addition, interpretive guidelines on the application of this defence have not been issued by the Commonwealth government. Unlike the United-States, the Commonwealth government does not provide a service whereby individuals and companies may request an opinion concerning prospective payments to foreign public officials.

143. Nevertheless, in certain respects the defence for facilitations payments under the Commonwealth law sets more precise limitations than the one under the Foreign Corrupt Practices Act,⁹² as follows: (a) the value of the benefit must be of a “minor nature”; (b) the routine government action of the foreign public official must be of a “minor nature”; and (c) a record of the payment must have been kept in accordance with section 70.4(3)⁹³. In addition, pursuant to section 70.4(1)(d)(ii) and (iii), the defence for facilitation

⁹¹ For instance, an inclusive list of what constitutes a “routine government action” of a foreign public official is provided, and covers actions such as “granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country”; “processing government papers such as a visa or work permit”, and “providing police protection or mail collection or delivery”.

⁹² In one respect the defence under the Australian law is broader than the one under the U.S. law—the U.S. law is restricted in application to “payments” whereas the Australian law covers “benefits”.

⁹³ According to section 70.4(3), for the record to be considered valid, it must set out: (a) the value of the benefit concerned; (b) the date on which the conduct occurred, (c) the identity of the foreign public official or, if the foreign public official is not the other person mentioned in section 70.2(1)(a), the identity of the

payments also applies where a record of the conduct was made in accordance with 70.4(3) but was lost or destroyed because of actions beyond the person's control, or no record has been kept and the prosecution of the offence is instituted more than 7 years after the conduct occurred. Australia explains that these limitations on the application of the defence were included by the legislature as a compromise. Two bills were submitted to the Senate—one including the defence for facilitation payments and one without the defence. Due to pressure from Australian industry to have the same defence as is contained in the United States law, the defence was included in the final law, but with the record-keeping requirement and other limitations to minimise the potential for a loophole caused by the defence.

144. A publication (pamphlet) of the AGD entitled “Bribery of Foreign Public Officials is a Crime”⁹⁴ states that the “the [facilitation payments] defence is rarely (if ever) available in circumstances where the payment was made to facilitate making a decision to award business to a company”. This language implies that, contrary to the Convention and section 70.4 of the Commonwealth Criminal Code, there may be cases where a “routine government action” consists of a decision in relation to the awarding of business. Following the on-site visit, this document was amended, and the AGD will also amend a similar guidance document available on its website.

145. In addition, one major Australian resource company includes a description of what constitutes a facilitation payment in its code of conduct that demonstrates how difficult it is for companies to differentiate between facilitation payments and bribes under the Commonwealth Criminal Code. The code of conduct in question states that it is not always a simple matter to make this differentiation, and emphasises the need to address facilitation payments on a case-by-case basis in consultation with a manager. Although the code of conduct of this company has painstakingly attempted to describe for its employees what constitutes a facilitation payment, it still contains one key piece of misleading information—it states that bribes, unlike facilitation payments, are intended to induce people to act illegally or dishonestly and thus corrupt decision-making. However, the Convention also covers cases where the act or omission of the foreign public official which is sought is legal or honest—for instance pursuant to Commentary 4 on the Convention “it is an offence to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company for which could properly have been awarded the business”.

146. Further difficulties arise regarding the necessity to keep a record of the facilitation payment in accordance with section 70.4(3). For instance, neither the Australian Bankers Association nor the Australian Defence Industries was aware of the record-keeping requirement. The representative of the Australian Chamber of Commerce and Industry believes that it is unlikely that a company will keep a record of a facilitation payment given that the existence of such a record is likely to be perceived as “an admission of guilt”. In addition, for the purpose of obtaining a tax deduction for a facilitation payment, the Australian Taxation Office (ATO) requires the keeping of a record of a more general nature as opposed to one in accordance with section 70.4(3) (See also discussion under A.3.c.(i) on “Non-deductibility of bribe payments”). The Australian authorities point out that where the records are not sufficient to satisfy a judge that the facilitation payments defence is established, and in the absence of any other defence, the offence will be proved.

147. Moreover, the examination team was informed by representatives of the Australian legal profession that nearly all acts amounting to facilitation payments under the Commonwealth Criminal Code are prohibited under most State criminal codes, and, thus, what amounts to a defence under the Commonwealth Criminal Code is prohibited under State law. Since the State laws have an extraterritorial

other person; (d) particulars of the routine government action; and (e) the person's signature or some other means of verifying the person's identity.

⁹⁴

See www.ag.gov.au/foreignbribery.

reach, the conflict does not just exist in respect of offences that take place in Australia. The conflict in this regard between the Commonwealth and State law was not apparently considered when the Bill implementing the Convention was drafted, and the prosecutors who participated in the on-site visit did not appear to be aware of the conflict. Although the AGD does not believe that the conflict represents a problem in practice, the lead examiners remain concerned that at the very least Australian companies will have a disincentive to maintain records of facilitation payments in accordance with section 70.4(3), with the result that the defence might be misused in order to avoid liability at the State level.

Commentary

The lead examiners recommend that the Australian authorities take appropriate measures to clarify and ensure that the offence of bribing a foreign public official covers cases regardless of the results of the conduct or the alleged necessity of the payment.

The lead examiners are of the view that the defence for conduct that is “lawful” in the foreign public official’s country under section 70.3 of the Commonwealth Criminal Code, appears to exceed the limits in Commentary 8 on the Convention. They therefore recommend that Australia carry out its undertaking to amend this defence to ensure consistency with the scope contemplated under Commentary 8 as soon as possible.

In addition, the lead examiners recommend that the Australian authorities carry out the undertaking as soon as possible to revise the existing guidance document on the foreign bribery offence, which is publicly available on the AGD website, to clarify the details of the defence of facilitation payments, as well as follow-up the application of the defence, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements.

2. Liability of Legal Persons for the Offence

a. Effectiveness in Practice

(i) Legal Provisions

148. Section 12 of the Commonwealth Criminal Code on corporate criminal liability came into full operation in late 2001. It establishes an organisational model for the liability of legal persons, representing a major shift in the Australian legal system. Section 12 is ambitious and progressive, with many elements that are not contained in the criminal legal systems of most other countries, in particular liability based on a corporate culture conducive to the criminal conduct in question. The lead examiners regard section 12 as a commendable development, and well-suited to prosecutions for foreign bribery.

149. In summary, “bodies corporate” are liable for offences committed by “an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority” where the body corporate “expressly, tacitly, or impliedly authorised or permitted the commission of the offence”. Authorisation or permission by the body corporate may be established in ways including the following:

1. The board of directors intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorised or permitted it to occur;
2. A high managerial agent intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorised or permitted it to occur;

3. A corporate culture existed that directed, encouraged, tolerated or led to the offence; or
4. The body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

150. Section 12 is generally detailed enough to enable companies to know with adequate precision what conduct is prohibited. Section 12.3(3) clarifies that, if a high managerial agent is directly or indirectly involved in the conduct, no offence is committed where the body corporate proves that it “exercised due diligence to prevent the conduct, or the authorisation or permission”. Section 12.3(4) provides factors relevant to determining whether the corporate culture was responsible for the offence. The only area in which section 12 is not sufficiently detailed concerns the term “bodies corporate”, which is not defined in the Code. Nonetheless, according to the Australian authorities the term is commonly used in Australian statutes and is broadly interpreted.⁹⁵ The Australian authorities have not provided supporting case law for its opinion as, to date, there has been no judicial consideration of the meaning of this term under the Commonwealth Criminal Code.

(ii) *Enforcement*

151. To date, the application of section 12 of the Commonwealth Criminal Code has been essentially limited to regulatory offences such as offences resulting in environmental damage, and no legal person has been prosecuted for domestic bribery. The CDPP states that in 2004 it prosecuted 52 cases involving regulatory offences, such as environment and health and safety offences, committed by corporate bodies. The Australian authorities do not consider there to be any obstacles to prosecuting legal persons for the bribery of foreign public officials.

152. The Australian authorities note that since 2001 there has not been adequate time for the development of a body of case law on the liability of legal persons for bribery offences, and adds that the Australian legal system does not generate a large number of bribery cases. The CDPP explains that it has not had any domestic or foreign bribery charges against legal persons referred to it. In addition, the CDPP has not so far prosecuted a legal person where nationality jurisdiction was established. At the State level, the New South Wales Director of Public Prosecution (NSW DPP) has not prosecuted a legal person for bribery, but points out that there has been an increased tendency since 1990 to seek corporate criminal liability. The representative of the NSW DPP who participated in the on-site visit has personally been involved in the prosecution of a company for customs fraud⁹⁶ as well as several other cases.

153. From the perspective of the legal profession, there has not been much enforcement activity regarding the criminal liability of legal persons, except for environmental, health and safety offences. Two representatives of the legal profession who participated in the on-site visit explained that it has been difficult to interest corporations in compliance programs. In addition, they have not seen a demand for developing specialised legal expertise in the field of foreign bribery. Both the legal profession and Attorney-General’s Department acknowledge that the level of interest is unlikely to increase until prosecutions of the foreign bribery offence occur. On the other hand, a representative of the banking and securities sector reports that the Australia Securities and Investments Commission (ASIC) has been very active in prosecuting directors under the Commonwealth Corporations Act. This may partly explain why representatives of a major telecommunications company and the defence industry have observed that, in the last 10 to 15 years, Australian corporations have been increasingly focusing on corporate governance.

⁹⁵ In Phase 1 the Australian authorities stated that they were certain that “bodies corporate” covers all companies including those that are state-owned or state-controlled.

⁹⁶ In the customs fraud case the two principals of the company were also prosecuted.

Commentary

The lead examiners recommend following-up the application of the criminal liability of legal persons to the bribery of domestic and foreign public officials once there has been adequate time for the development of case law and practice in this regard.

b. Sanctions for Legal Persons

154. Pursuant to the formula for calculating fines in sections 4B(2) and 4B(3) of the Commonwealth Crimes Act, a “body corporate” is liable to a fine of AUD 330 000 (EUR 209 000 or USD 251 900) for the offence of bribing a foreign public official under section 70.2 of the Commonwealth Criminal Code.⁹⁷ In Phase 1 the Working Group on Bribery in International Business Transactions recommended that the level of sanctions for legal person be followed-up in Phase 2. However, given that neither the offence of bribing a foreign public official nor of bribing a domestic official has to date been enforced against a legal person, it is not possible to assess the effectiveness of the fine available for legal persons. In any case, the lead examiners consider that it is highly questionable whether the available maximum fine can be sufficiently “effective, proportionate and dissuasive” given the size and importance of many Australian companies as well as MNEs with headquarters in Australia. Moreover, the Australian authorities have not pointed to any examples where confiscation of the proceeds of bribery has been imposed on a legal person pursuant to the Commonwealth Proceeds of Crime Act (POCA).

155. The AGD indicates that the level of monetary sanctions for legal persons committing the offence of bribing a foreign public official may be an issue that needs to be examined. The Australian authorities inform that significant reforms have been recently enacted in respect of competition and trade practices legislation⁹⁸. The Australian Government has also announced that it will shortly enact legislation providing that the maximum pecuniary penalty for corporations convicted of cartel conduct will be the greater of AUD 10 million (EUR 6.3 million, USD 7.6 million) or three times the gain from the contravention or, where the gain cannot be readily ascertained, ten per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any). Following the on-site visit, the Australian authorities agreed that the current maximum fine for the foreign bribery offence is inadequate, and announced that the Australian government has commenced a review of all criminal penalties, including the fines for legal persons. The review is expected to take approximately 12 months.

Commentary

The lead examiners recommend that Australia increase the fine for legal persons for the offence of bribing a foreign public official to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia.

⁹⁷ Pursuant to section 4B(3) of the Crimes Act, “the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence”. (Natural persons are liable to a maximum pecuniary penalty of AUD 66 000 for the offence of bribing a foreign public official under the Commonwealth Criminal Code.)

⁹⁸ See: (i) Review of the Competition Provisions and the Trade Practices Act (Dawson Report) (January 2003, Commonwealth of Australia; www.dcita.gov.au/cca); and (ii) Criminal Penalties for Serious Cartel Behaviour (Announcement No. 004, Treasurer of the Commonwealth of Australia, www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp?pf=1).

3. Sanctions in General

a. *Treatment of Foreign Bribery as Summary versus Indictable Offence*

156. Pursuant to the Commonwealth Crimes Act 1914, the offence of bribing a foreign public official under section 70.2 of the Commonwealth Criminal Code may be prosecuted summarily or on indictment.⁹⁹ With respect to natural persons, if proceeded with summarily, the offence is punishable by a maximum penalty of two years imprisonment and/or a fine of AUD 13 200 (approximately EUR 6 500 or USD 7 800) (i.e. 120 penalty units multiplied by AUD 110), as opposed to ten years of imprisonment and/or a maximum fine penalty of AUD 66 000 (approximately EUR 41 700 or USD 50 400) where proceeded with as an indictable offence. With respect to a corporation, the maximum penalty for a foreign bribery offence that is tried summarily would be a fine of 600 penalty units or AUD 66 000. According to the CDPP, it is “highly unlikely” that a foreign bribery offence involving a corporation would be dealt with summarily. One reason would be the low penalty level applicable. According to the CDPP, decisions on whether to prosecute summarily or on indictment would be made in accordance with the Prosecution Policy of the Commonwealth, which provides the criteria governing the mode of prosecution.¹⁰⁰ The decision to try the offence of bribing a foreign public official on a summary basis must be concurred in by the defendant and the CDPP.

b. *Monetary Sanctions and Imprisonment for Natural Persons*

157. In light of the absence at this stage of convictions for bribing a foreign public official under the Commonwealth Criminal Code, it is necessary to review the sentences for similar offences to assist in predicting the level of sanctions for foreign bribery. In this respect, Australia has provided statistical information on the sanctions imposed for fraud, which carries the same maximum term of imprisonment and fine sanction as for foreign bribery under the Commonwealth Criminal Code. The Australian authorities indicate that from 1 July 2003 to 30 June 2004 the courts imposed terms of imprisonment for fraud 1713 times. The vast majority of the terms were for less than 12 months (1266) and the longest term imposed was for less than six years. Periodic detention was imposed 83 times, home detention 73 times and suspended sentences 1067 times. Information about the fine sanctions imposed has not been provided.

158. The sanctions for the bribery of a Commonwealth public official under section 141.1(1) are the same as for foreign bribery, and providing a corrupting benefit to a Commonwealth public official under subsection 142.1(1) is punishable by a maximum of five years of imprisonment.¹⁰¹ Prior to the introduction of sections 141.1 and 142.1 of the Criminal Code, domestic bribery was prosecuted under section 73 of the Crimes Act 1914. Section 73 was repealed upon the coming into force of the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (which inserted Divisions 141 and 142 into the Criminal Code). For the period of 1984 to 2005, there were 60 cases where convictions for Commonwealth domestic bribery offences were obtained. In 46 of these cases, the prosecutions were under section 73 of the Crimes Act and in some of these 46 cases more than one conviction was recorded. The remaining 14 cases were prosecuted under Divisions 141 and 142 of the Criminal Code. During this period there were four acquittals for Commonwealth domestic bribery charges. Out of the 60 convictions, 32 were dealt with

⁹⁹ Depending on a number of factors, an indictable offence could be tried by a judge and jury.

¹⁰⁰ The criteria governing the selection of the mode of trial is set out in the Prosecution Policy of the Commonwealth (paragraphs 5.9-5.11)

¹⁰¹ The offence of bribing a Commonwealth public official under section 141.1(1) of the Commonwealth Criminal Code requires the intention of influencing the public official; whereas the offence of giving a corrupting benefit to a Commonwealth public official under section 142.1(1) requires the expectation that the benefit “would tend to influence” the public official.

on indictment and 27 by summary conviction. The prosecutions resulted in 33 terms of imprisonment,¹⁰² eight sentences of community service under section 20AB of the Crimes Act, 14 good behaviour bonds under sub-section 20(1)(a) of the Crimes Act, three good behaviour bonds under section 19B of the Crimes Act and nine fines¹⁰³. Neither a fine nor a confiscation order under the Proceeds of Crime Act (POCA) was ordered in any of the active corruption cases prosecuted under Divisions 141 or 142.¹⁰⁴ Statistics regarding offences prosecuted under the previous article 73 do not differentiate between active and passive bribery.

159. The examining team notes that the terms of imprisonment imposed in the domestic bribery cases are much lower than the available maximum penalty of imprisonment for those offences. However, they recognise that in most of these cases the bribes involved relatively low amounts (In one case the bribe was AUD 82 300, and in three cases the judge was satisfied that the bribe amount was between AUD 2 500 and 10 000 paid in AUD 50 and 100 amounts), or the amount of the bribe could not be ascertained. The Australian authorities point out that the penalties imposed by the courts do not necessarily reflect the penalties that CDPP officers have submitted to the courts as appropriate.

160. The lead examiners question whether the CDPP routinely requests monetary sanctions upon conviction for domestic bribery offences where it is appropriate, and are concerned that, since the sanctions for the bribery of foreign public officials are likely to be influenced by those for domestic bribery, this might also occur for foreign bribery. The AGD believes that POCA is wide enough to enable the confiscation of the proceeds of bribing a foreign public official if it can be shown that the contract would not have been obtained without bribing, but adds that this has not yet been tested.¹⁰⁵

Commentary

The lead examiners recommend that the Working Group follow-up the practice regarding the choice of proceeding with foreign bribery offences as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive.

With respect to the sanctions for natural persons convicted of foreign bribery, the lead examiners recommend follow-up to determine whether monetary sanctions, including fine penalties and confiscation, are imposed where appropriate.

¹⁰² The longest term of imprisonment was 39 months (two times), the shortest seven days, and the average was approximately 18.5 months. In 14 cases an early release was ordered, in seven cases release forthwith was ordered, and in eight cases periodic or weekend detention was ordered.

¹⁰³ The fines ranged from AUD 500 to AUD 5 000, with an average of approximately AUD 2 066.

¹⁰⁴ A pecuniary penalty order under POCA was made in respect of one passive bribery case prosecuted under Division 141 (i.e. AUD 115 000).

¹⁰⁵ Pursuant to POCA, which provides a comprehensive scheme for the restraining and forfeiture of property derived from the commission of offences as well as property used to commit offences, five processes are available: (a) restraining orders prohibiting the disposal of property, (b) civil based forfeiture orders, (c) forfeiture on conviction of an indictable or serious offence, (d) pecuniary penalty orders requiring the payment of amounts based on benefits derived from committing offences upon conviction of an indictable or serious offence or in certain circumstances upon the commission of a serious offence, and (e) literary proceeds orders requiring payment of amounts based on literary proceeds relating to offences. "Literary proceeds" are any benefit that a person derives from the commercial exploitation of, for example, the person's notoriety resulting, directly or indirectly, from the person committing an indictable offence or a foreign indictable offence.

c. Administrative Sanctions

(i) Disqualification from Managing Corporations, etc.

161. Under section 206B of the Corporations Act 2001, a natural person is disqualified from managing corporations if convicted on indictment of an offence that “concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation” or “concerns an act that has the capacity to affect significantly the corporation’s financial standing”. Thus, in the special circumstances outlined in section 206B, a conviction for bribing a foreign public official could result in such a disqualification for a period of five years from the conviction or release from prison, which ever is the later. Moreover, pursuant to section 915B the ASIC may suspend or cancel an Australian financial services licence held by a natural person if the person is “convicted of serious fraud”, and pursuant to section 920A the ASIC may make a banning order against a person (i.e. from participating in the industry) if “the person is convicted of fraud”.

(ii) Disqualification from Contracting with the Government

162. There are no formal rules for disqualifying companies or individuals from contracting with the government where they have been convicted of the bribery of foreign public officials. Given that the monetary sanction for legal persons is quite low, such alternative or complementary administrative penalties may be useful and may act as a deterrent.

163. Since the courts do not have the authority to impose additional administrative sanctions such as disqualification from contracting with the Commonwealth government, it is important to review whether key government contracting agencies, such as the Department of Finance and Administration, Export Credit and Insurance Corporation (EFIC) and Australian Agency for International Development (AusAID), have special rules in their contracting processes for companies and individuals convicted of foreign bribery.

164. Officials responsible for public procurement in the Department of Finance and Administration, EFIC and AusAID confirmed that they do not maintain blacklists of firms convicted of criminal offences, including foreign bribery or any other corruption or fraud-related offences.

Department of Finance and Administration —Public Procurement

165. With regard to public procurement, conviction of a company for a foreign bribery offence would not automatically disqualify it from applying for a publicly funded contract. However, the Department of Finance and Administration indicates that if a company were convicted of an offence relating to the foreign bribery provisions, this would be sufficient ground for an agency to consider refusing to award a public procurement contract to that company. Section 44 of the Financial Management and Accountability Act (FMA Act) places a primary obligation on Chief Executive Officers of agencies to ensure proper (efficient, effective and ethical) use of Commonwealth resources. Issues such as the misuse of public money are addressed in the Fraud Control Guidelines, which are issued under the FMA Act. The Australian authorities also point to the general guidance in the Commonwealth Procurement Guidelines, which recommend the ethical use of resources when awarding contracts.¹⁰⁶ These provisions focus on the ethical behaviour to be adopted on the part of officials involved in handling and awarding public tenders. They do not refer to any necessity to take into account the ethical behaviour of companies applying in these tendering processes. In any case, public procurement agencies would retain the flexibility to not deal with a

¹⁰⁶ See part 6 of the Commonwealth Procurement Guidelines – January 2005 on Efficient, Effective and Ethical Use of Resources.

company based on ethical issues. In their view, where there is a conviction or clear factual evidence of a foreign bribery case concerning a company applying for a public tender, this could potentially constitute a reason to refuse a public procurement contract. There have not however been any practical cases to date.

Export Finance and Insurance Corporation (EFIC)

166. As indicated in its responses to the OECD's Working Party on Export Credits and Credit Guarantees' Survey,¹⁰⁷ EFIC may also withhold or withdraw support for a contract where there is evidence, or even a suspicion, of bribery. Although they do not maintain a blacklist, EFIC representatives indicated that they do check the World Bank List of Debarred Firms, and that any application for official export credit support from one of the organisations listed therein would trigger particular scrutiny on the part of EFIC. There is however no formal requirement that support must automatically be refused or withdrawn where there has been a conviction for foreign bribery, whether in an Australian or a foreign jurisdiction. EFIC retains discretion to accept or refuse support, and each request is examined on a case-by-case basis. To date, the EFIC has not had any practical experience dealing with applicants or contractors convicted of foreign bribery.

Australian Agency for International Development (AusAID)

167. The Australian Agency for International Development (AusAID) has the discretion to not enter into a bilateral aid-funded procurement contract with any applicant. The decision on who to contract with is made on a case-by-case basis, and AusAID does not have a policy regarding the treatment of applicants who have been convicted of the bribery of foreign public officials. Although AusAID does not maintain its own blacklist to assist in making its contracting decisions, it has access to the World Bank and Asian Development Bank blacklists. AusAID routinely consults these blacklists when considering applicants.

168. A similar discretion exists in relation to the authority of AusAID to terminate a bilateral aid-funded procurement contract where the contractor has engaged in a "corrupt practice". Clause 35.4 of the Standard Contract Conditions states that "any such practice shall be grounds for immediate termination" of the contract upon notice from AusAID. AusAID has not established a policy for terminating its contracts where the contractors have been convicted of the bribery of a foreign public official. In addition, AusAID has not established a procedure for obtaining information about such convictions concerning its contracting partners.

Commentary

The lead examiners recommend that Australia consider introducing formal rules on the imposition of additional civil or administrative sanctions upon legal persons and individuals convicted of the bribery of foreign public officials, so that public subsidies, licences, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied as a sanction for foreign bribery in appropriate cases.

In addition, the lead examiners recommend that public agencies that provide contracting opportunities, such as the public procurement agencies, EFIC and AusAID, consider establishing a policy for denying access to such opportunities to individuals and companies convicted of the offence of bribing a foreign public official in appropriate cases, as well as

¹⁰⁷

See answers to: Export Credits and Bribery: Review of Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits - Situation as of 21 January 2005 [TD/ECG(2005)4].

including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after the contract has been entered.

4. Prosecutorial Discretion

169. The Commonwealth Director of Public Prosecutions (CDPP) is responsible for prosecuting offences against the Commonwealth law, including the offence of bribing a foreign public official under the Commonwealth Criminal Code, and for recovering the proceeds of crime under the Proceeds of Crime Act (POCA). All decisions regarding the prosecution process are made in accordance with the Guidelines on the Prosecution Policy of the Commonwealth, which is a publicly available document that has been tabled in Parliament.

170. Item 2.13 of the Guidelines on the Prosecution Policy of the Commonwealth lists the considerations that must “clearly” not influence a decision whether or not to prosecute. These prohibited considerations include “the possible political advantage or disadvantage to the Government or any political group or party”¹⁰⁸ While none of the prohibited considerations under Article 5 of the Convention (i.e. “considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural and legal persons involved”) are expressly included, Australia believes that item 2.13 is broad enough to encompass them.

171. Moreover, the CDPP does not believe that factors such as the national economic interest would be taken into account in making a decision whether or not to prosecute a foreign bribery case, and no opinion was provided during the on-site visit to contradict this position. However, under the Australian legal system there is very little scope to address a decision of a prosecutor to not prosecute a foreign bribery case for any reason except internally within the CDPP. Australia does not provide a formal review process for decisions to not prosecute offences, although the CDPP indicates that it would possible to go to the Deputy DPP, and advises that decisions not to prosecute are reviewed by senior officers of the CDPP as a matter of practice. The CDPP advises that prosecutorial decision-making is exempt from the Judicial Review Act, which establishes a procedure for the review of the legality of federal administrative decisions in Australia.

Commentary

The lead examiners recommend that Australia take appropriate steps to clarify that item 2.13 of the Guidelines on the Prosecution Policy of the Commonwealth prohibits consideration of the factors listed in Article 5 of the Convention in deciding whether or not to prosecute offences of bribing a foreign public official.

5. International Co-operation

a. Mutual legal assistance

172. Pursuant to sections 9 and 11 of the Mutual Assistance in Criminal Matters Act 1987, requests for international assistance in a criminal matter must be sent to the Attorney-General, who determines whether the conditions for providing such assistance have been met. Section 8 of the Act prescribes the grounds for automatic or discretionary refusal of assistance. Mutual legal assistance (MLA) requests must

¹⁰⁸

Other prohibited grounds include: (a) “the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender”, (b) “personal feelings concerning the alleged offender or victim”, and (c) “the possible effect of the decision upon the personal or professional circumstances of those responsible for the prosecution decision”.

be refused, for instance, in situations where the alleged crime is a political offence, where the death penalty may be imposed and there are no special circumstances, or where the granting of the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory. The Attorney-General retains discretionary power to refuse MLA “if it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted”.¹⁰⁹ Statistics indicate that only three MLA requests were refused between 1999 and 2004. One of the requests refused concerned a case where, under Australian rules, a testimony could not be required from the witness on a compulsory basis, since the matter was only under preliminary investigation in the requesting country; the other two concerned non criminal matters and discussions with the requesting countries resulted in withdrawal of the request in both cases.

173. With respect to requests for mutual legal assistance concerning legal persons, Australia is only able to provide MLA for criminal matters. AGD representatives indicated that the concept could be interpreted broadly to a certain extent, where the conduct in question constitutes a criminal offence. However, where the country making the request only provides for purely non-criminal penalties in respect of legal persons, Australia may not be able to provide MLA. There may be a possibility to grant assistance to some extent in such cases under the Mutual Assistance in Business Regulation Act 1992. Pursuant to this Act the Attorney-General may authorise Commonwealth business regulatory agencies to gather information for purposes of answering MLA requests from a foreign business regulatory agency and to forward it to that agency for purposes relating to the administration or enforcement of a foreign business law. However, this would not enable Australia to provide MLA in relation to non-criminal proceedings where the request is made by law enforcement authorities. Furthermore, MLA can only be provided in response to requests made in respect of laws that regulate or relate to the regulation of businesses or persons engaged in business.¹¹⁰

174. The Australian authorities indicate that they have not received any requests for MLA concerning foreign bribery offences. At the time of the on-site visit they also stated that no request for MLA had been made by Australia to foreign countries in either of the two ongoing investigations (of which one has subsequently been terminated) or the evaluation (which has since become an investigation) concerning allegations of the bribery of foreign public officials made to the AFP.

b. Extradition

175. Pursuant to the Extradition Act 1988, Australia may provide extradition to any “extradition country”¹¹¹ for extraditable offences, in respect of any person, including Australian nationals. The Extradition (Bribery of Foreign Public Officials) Regulations 1999 declare all parties to the Convention to be “extradition countries”. Extraditable offences are those that meet the dual criminality condition, which would be satisfied where the conduct comprises a criminal offence in both the requesting and requested country, the offence is within the scope of Article 1 of the Anti-Bribery Convention and carries a minimum term of imprisonment of at least 12 months in the requesting country. Australian magistrates decide whether there are legal grounds for providing extradition following an extradition hearing (i.e. whether a person is extraditable). As in most countries, the Attorney-General retains overall discretionary power to

¹⁰⁹ Section 8(2)(g) of the Mutual Assistance in Criminal Matters Act 1987.

¹¹⁰ Sections 3 and 6 of the Mutual Assistance in Business Regulation Act 1992.

¹¹¹ The Extradition Act regulates extradition from Australia to “extradition countries”, which are defined therein. It also regulates extradition from Australia to New Zealand, and extradition to Australia from “other countries”.

provide or deny surrender for any reason.¹¹² At the time of the on-site visit, no extradition requests had been received or sent out in respect of foreign bribery offences.

Commentary

The lead examiners recommend follow-up of whether in practice Australia's capacity to provide mutual legal assistance in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence. The lead examiners note that this is a horizontal issue affecting many Parties.

¹¹² Section 12(3) of the Extradition Act 1988.

C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Australia, the Working Group (i) makes the following recommendations to Australia, and (ii) will follow-up certain issues when there has been sufficient practice.

1. Recommendations

Recommendations for Ensuring Effective Prevention, Detection and Investigation of Foreign Bribery

176. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by: (i) further promoting awareness within the Commonwealth public service, (ii) continuing efforts to raise the awareness of the private sector, including the distinction between bribery and facilitation payments and the record-keeping requirement for the defence of facilitation payments, (iii) paying special attention to raising the awareness of SMEs through, for instance, Australian diplomatic and trade missions in foreign countries, and (iv) raising the awareness of cash dealers of the foreign bribery offence as a predicate offence for the offence of money laundering, and providing them with guidance on identifying suspicious transactions.

177. Concerning the detection and investigation of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (a) it is clarified in the publicly available explanatory document on the Case Categorisations Prioritisation Model (CCPM), that implementation of the Convention is to be given “high priority”;
- (b) the AFP undertakes evaluations where appropriate of the veracity of allegations of foreign bribery involving Australian nationals and companies contained in (i) media reports from credible sources, (ii) publicly available court documents filed in foreign countries, and (iii) requests to Australia from foreign countries for mutual legal assistance;
- (c) Australia clarify that all cases of foreign bribery be referred to the AFP by Commonwealth agencies;
- (d) the process be revised under the National Guidelines for Referring Politically Sensitive Matters to the AFP so that referrals of politically sensitive cases of foreign bribery to the AFP are not potentially delayed by notification to the Minister of Justice and Customs, and
- (e) the AFP take the following steps to ensure the effective transmission of information to it about foreign bribery cases: (i) enter into a formalized agreement with the Australian Prudential Regulation Authority (APRA) concerning areas of overlapping jurisdiction respecting foreign bribery, and (ii) consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territorial police and anti-corruption bodies to the AFP even where a State or Territorial law establishes a bribery offence broad enough to cover foreign bribery. (Convention, Art. 5; Commentary 27; Revised Recommendation I, II)

178. Concerning the prevention and detection of foreign bribery through measures for disallowing the tax deductibility of bribe payments to foreign public officials, the Working Group recommends that the Australian Taxation Office (ATO):

(a) consider revising its Compliance Program to specifically include bribe payments to foreign public officials in their risk profile; and

(b) issue as soon as possible the bribery awareness audit guidelines that it is currently drafting on identifying bribe payments to foreign public officials and determining whether a particular payment meets one of the defences, and include within the bribery awareness audit guidelines a requirement that tax auditors report all information regarding foreign bribery to the Serious Non Compliance Business Line (SNC). (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

179. Concerning other measures for preventing and detecting foreign bribery, the Working Group recommends that Australia:

(a) should require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies, and consider requiring external auditors to report indications of a possible illegal act to the competent authorities; (Revised Recommendation V.B.iii, iv)

(b) consider taking appropriate measures to ensure that members of the Australian Public Service who come into contact with companies involved in international business understand that the Australian Public Service Code of Conduct requires Commonwealth officials to report to the AFP credible evidence of foreign bribery offences that they uncover in the course of performing their duties, encourage and facilitate such reporting, and consider strengthening reporting provisions, such as those included in the Department of Foreign Affairs and Trade (DFAT) Overseas Code and Export Finance and Insurance Corporation (EFIC) internal rules; (Revised Recommendation I)

(c) ensure that AusAID staff are aware of the policy for responding to indications of foreign bribery in relation to ODA contacts, including the reporting of such indications to the AFP, amend the standard contract with AusAID to clarify that the Contractor shall not engage in foreign bribery in relation to the execution of the contract, and ensure that contracts with subcontractors contain a similar prohibition; (Revised Recommendation I, VI. iii) and

(d) consider reviewing the Commonwealth whistleblower provisions in the context of the on-going review on this subject to ensure effective whistleblower protections for Commonwealth officials and staff of Commonwealth agencies who report suspicions of foreign bribery, and consider introducing stronger whistleblower protections for private sector employees who report suspicions of foreign bribery. (Revised Recommendation I)

Recommendations for Ensuring Effective Prosecution and Sanction of Foreign Bribery and related Offences

180. Concerning the implementation of the offence of bribing a foreign public official under the Commonwealth Criminal Code, the Working Group recommends that Australia:

(a) clarify that the foreign bribery offence applies regardless of the results of the conduct or the alleged necessity of the payment; (Convention, Art. 1; Commentary 7)

(b) carry out its undertaking to amend as soon as possible the defence for conduct that is “lawful” in the foreign public official’s country to ensure consistency with Commentary 8 on the Convention; (Convention, Art. 1; Commentary 8) and

(c) carry out the undertaking to revise the existing publicly available guidance document on the foreign bribery offence as soon as possible to clarify the defence of facilitation payments. (Convention, Art. 1; Commentary 9)

181. Concerning the sanctions for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:

(a) increase the fine for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia; (Convention, Art. 3.1)

(b) with respect to companies that have been convicted of foreign bribery (i) consider introducing formal rules on the imposition of civil or administrative sanctions upon legal persons and individuals convicted of foreign bribery, so that public subsidies, licenses, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied or terminated, including through the provisions of the relevant contracts, as a sanction for foreign bribery in appropriate cases, and include provisions for the termination of such contracts in appropriate cases; and (ii) consider establishing a policy for denying access to contracting opportunities with public agencies, such as the public procurement agencies, EFIC and AusAID, as well as including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after entering the contract; (Convention, Art. 3.4; Revised Recommendation II.v, VI ii) and

(c) continue compiling statistics on the offence of money laundering, including the level of sanctions and the confiscation of proceeds of crime. (Convention, Art. 7)

182. Concerning the discretion to prosecute the offence of bribing a foreign public official, the Working Group recommends that Australia clarify that the Guidelines on the Prosecution Policy of the Commonwealth prohibits consideration of the factors listed in Article 5 of the Convention. (Convention, Art. 5)

2. Follow-Up by the Working Group

183. The Working Group will follow-up the following issues once there has been sufficient practice:

(a) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code; (Convention, Art. 1; Commentary 9)

(b) the application of the tax deduction for facilitation payments; ((1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

(c) application of the criminal liability of legal persons for the bribery of foreign public officials; (Convention, Art. 2)

(d) the choice of proceeding with foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive, as well as the sanctions imposed on natural persons for foreign

bribery, to determine whether monetary sanctions, including fine penalties and confiscation, are imposed where appropriate; (Convention, Art. 3.1, 5)

(e) whether in practice Australia's capacity to provide mutual legal assistance in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence (The Working Group notes that this is a horizontal issue affecting many Parties.); and (Convention, Art. 9.1)

(f) the use of false accounting offences under the Corporations Act, including the level of sanctions. (Convention, Art. 8.1, 8.2)

APPENDIX – LIST OF ACRONYMS

AASB	Accounting and Auditing Standards Board
ACC	Australian Crime Commission
ACCI	Australian Chamber of Commerce and Industry
ACLEI	Australian Commission for Law Enforcement Integrity
ACT	Australian Capital Territory
AFP	Australian Federal Police
AGD	Attorney-General's Department
AIPRD	Australia-Indonesia Partnership for Reconstruction and Development
APRA	Australian Prudential Regulatory Authority
APSC	Australian Public Service Commission
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
ATO	Australian Taxation Office
AUASB	Australian Auditing and Assurance Standards Board
AusAID	Australian Agency for International Development
AUSTRAC	Australian Transaction Reports and Analysis Centre
Austrade	Australian Trade Commission
CCPM	Case Categorisation Prioritisation Model
CDPP	Commonwealth Director of Public Prosecution
DFAT	Department of Foreign Affairs and Trade
EFIC	Export Finance and Insurance Corporation
FTR	Financial Transaction Reports Act 1988
HOCOLEA	Heads of Commonwealth Operational Law Enforcement Agencies
IASB	International Accounting Standards Board
ICAC	Independent Commission against Corruption
ICAA	Institute of Chartered Accountants in Australia
ISAs	International Standards on Auditing
ITA	Income Tax Assessment Act
MLA	Mutual legal assistance
MNE	Multinational enterprise
MOU	Memorandum of Understanding
NAO	Australian National Audit Office
NGO	Non governmental organisation
NSW	New South Wales
NWPP	National Witness Protection Program
ODA	Official Development Assistance
PNG	Papua New Guinea
POCA	Commonwealth Proceeds of Crime Act
SME	Small and medium size enterprise
SNC	Serious Non Compliance Business Line
STR	Suspicious transaction report

**Attachment C – Australia’s report-back to the Working Group
following Phase 2 evaluation report (2008)**



Directorate for Financial and Enterprise Affairs

AUSTRALIA: PHASE 2

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS

APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 29 August 2008.

TABLE OF CONTENTS

SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY	3
WRITTEN FOLLOW-UP TO PHASE 2 REPORT	6
SUPPLEMENTARY INFORMATION	28
ATTACHMENTS	36
Attachment A. Cole Inquiry Findings.....	36
Attachment B. ASIC media release regarding charges against former AWB directors	38
Attachment C. Fact sheet three, Foreign Bribery Information and Awareness pack.....	40
Attachment D. Summary of Australian Tax Office Compliance Program 2006-07	42
Attachment E. AusAID standard contractual terms.....	43
Attachment F. Australia’s Approach to Fighting Corruption	44
Attachment G. Chapter 15, APS Values and Code of Conduct in Practice	51
Attachment H. International Trade Integrity Act 2007	54
Attachment I. Customs Act 1901 [<i>hyperlink</i>].....	69
Attachment J. Extracts – Income Tax Assessment Act 1997.....	70
Attachment K. Extracts – Criminal Code Act 1995.....	72
Attachment L. Charter of the United Nations Act 1945 [<i>hyperlink</i>]	78
Attachment M. Foreign bribery brochure	79
Attachment N. Fact Sheet 4, Foreign Bribery Information and Awareness Pack.....	81
Attachment O. ATO advice on facilitation payments.....	83
Attachment P. CDPP direction to prosecutors	89
Attachment Q. AWB media release	90
Attachment R. ATO Guidelines for tax auditors	91

SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) *Summary of Findings*

1. In June 2008, Australia presented its written follow-up report, outlining its responses to the Recommendations adopted by the Working Group on Bribery at the time of Australia's Phase 2 Examination in 2005. The Working Group welcomed the information provided by the Australian authorities in the course of this exercise and recognised Australia's significant efforts to implement the Recommendations made by the Working Group. The Working Group deems that Australia has fully implemented 12 out of the 22 Recommendations made during the Phase 2 examination, while 10 Recommendations have either been partially implemented or not implemented.

2. Although no foreign bribery cases have yet been brought before the Australian Courts, increased awareness of the foreign bribery offence, as well as significant changes to the legislative provisions governing foreign bribery will contribute to providing a more effective framework for the investigation and prosecution of such cases. Indeed, as of June 2008, Australia reported that the Australian Federal Police are conducting investigations into six foreign bribery cases.

3. Australia has taken a number of initiatives to raise awareness and improve training on the foreign bribery offence. In particular, Australia has developed a very comprehensive Foreign Bribery Information and Awareness Pack, which has been broadly distributed within the public administration as well as the private sector. Training has been provided to Australian officials departing on overseas missions. Information is also available on a number of high profile and regularly visited government websites. The Working Group welcomes the initiatives taken by Australia to improve awareness of the foreign bribery offence in the public and private sector, but regrets that only limited information relating to foreign bribery is available on the website of the Australian trade promotion agencies, such as AusTrade, which represent a key resource through which the private sector, including SMEs, can obtain information. Furthermore, this information is difficult to access. The Working Group also expects Australia to provide additional information regarding awareness raising activities provided by AUSTRAC.

4. With regard to the Working Group Recommendations to improve the reporting and detection of foreign bribery, Australia has taken important steps to improve reporting of suspected foreign bribery within the Australian civil service. The Australian Taxation Office (ATO) has published Guidelines for Tax Auditors which include an obligation to report suspected foreign bribery to their Serious Non-Compliance business line, and from there to the Australian Federal Police (AFP). The Australian Public Service Code of Conduct has been amended to include an obligation to report suspected foreign bribery instances to their superior and subsequently to the AFP. The Code is applicable to all agents in Commonwealth agencies, including staff in AusAid, Australia's official development aid agency. As of June 2008, Guideline 4.20 of the Commonwealth Fraud Control Guidelines does not however clearly reflect this reporting obligation where foreign bribery is concerned, and only refers to "bribery, corruption or attempted bribery or corruption of a Commonwealth employee or contractor to a Commonwealth agency". Consequently, the Working Group welcomed and encouraged Australia's expressed intent to clarify this in the Commonwealth Fraud Control Guidelines at the earliest opportunity.

5. Regarding steps taken to improve reporting more broadly, including in the private sector,

Australia reported that it was currently considering possible reforms to legislation protecting whistleblowers. As concerns specific reporting obligations applicable to external auditors of companies, Australia did not report any specific action to require auditors to report to management indications of possible acts of bribery. Nor did Australia address the issue of reporting of such suspected bribery to the law enforcement authorities, although it should be noted that this is a horizontal issue for many Parties to the Convention.

6. In the specific area of the non tax deductibility of bribes and its effective application, the ATO has included bribe payments to foreign public officials on the risk profile included in the Compliance Programme 2006-2007.¹ Furthermore, as noted above, the ATO has developed Guidelines to Tax Auditors, which provide a summary of legislative provisions in place and assistance to tax auditors in understanding and dealing with bribery. These Guidelines rely largely on information contained in the OECD Bribery Awareness Handbook for Tax Examiners.

7. Australia has also taken important steps as regards the effective investigation of foreign bribery. The AFP has amended its Case Categorisation Prioritisation Model to include in the “high” category “corruption by a public official (including within Australia and bribery of a foreign official in other countries)”. The Working Group appreciates this modification and welcomes Australia’s expressed intent to further clarify the wording to ensure that all types of foreign bribery are considered a high priority, regardless of whether it is committed by a public official. Although the written answers to the follow-up report were not explicit in this respect, the Working Group welcomed explanations provided orally by the AFP before the Working Group that they are willing to undertake evaluations on suspected foreign bribery instances based on credible media reports, publicly available documents from foreign courts or mutual legal assistance requests. A significant measure taken by Australia to allow efficient investigations into foreign bribery cases is amending the National Guidelines for Referring Politically Sensitive Matters and the Commonwealth Fraud Control Guidelines to allow matters to be reported simultaneously to the AFP and to the Minister for Justice (rather than subsequently, as was previously the case).² One area where it was felt that further progress could be achieved concerns cooperation with other law enforcement agencies, and clarifying that the AFP is the competent authority for dealing with foreign bribery. The Working Group acknowledges steps taken in the form of letters to the heads of other federal, state and territorial authorities and discussion of the matter in the context of the HOCOLEA (Heads of Commonwealth Operation Law Enforcement Agencies) forum. Nevertheless, the Working Group considers that this is not fully in line with the Phase 2 Recommendation to enter into formalised agreements with other law enforcement agencies, and encourages Australia to adopt additional measures to ensure that information concerning the need to refer foreign bribery cases to the AFP is available at all levels within the different law enforcement agencies.

8. As concerns effective prosecution, in September 2006, the Commonwealth Director of Public Prosecutions (CDPP) issued a formal Direction which clarifies that decisions to prosecute for foreign bribery should not be influenced by considerations of economic interest, the potential effect upon the relations with another State, or the identity of the natural or legal persons involved. Prosecutors are

¹ As noted in the Phase 2 Report, the Compliance Programme describes the existing risks under the system of self-assessment, and how the ATO manages these risks by balancing its resources and structuring itself accordingly to ensure that taxpayers meet their obligations

² The written answers provided by Australia in its follow-up report (attached hereafter) in advance of the June 2008 Working Group meetings only indicate that consideration was being given to modifying the language. However, by June 2008, Australia had made the necessary changes to effectively amend the National Guidelines for Referring Politically Sensitive Matters and the Commonwealth Fraud Control Guidelines, available on-line at

http://www.ag.gov.au/www/agd/agd.nsf/Page/Fraudcontrol_CommonwealthFraudControlGuidelines-May2002

required to comply with such formal Directions issued by the CDPP.

9. Australia has amended its foreign bribery offence, through legislative changes made under the International Trade Integrity Act 2007, such that section 70.2(2)(a) of the Criminal Code Act 1995 (Cth) now provides that any perception that a benefit is customary, necessary or required is to be disregarded when assessing a possible offence. The Act also amended the Criminal Code to ensure the offence applies regardless of the results of the alleged conduct, and to ensure the defense under section 70.3 to a charge of bribing a foreign public official is only available where the advantage given or offered to a foreign public official is expressly permitted or required by written law, consistent with Commentary 8 on the Convention. While Australia has revised its publicly available guidance documentation on the foreign bribery offence to make more explicit mention of small facilitation payments, it was noted that definitions of small facilitation payments remain problematic. First, the language of the “Fact Sheet” and ATO guidance focuses on government actions “of a minor nature”, rather than payments of a minor value. Furthermore, the examples given in these documents include those which may not, depending upon the circumstances, be considered small facilitation payments (such as “granting a permit, license or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country”).

10. As for sanctions, it was noted that Australia is undertaking a broader review of Commonwealth criminal penalties and that this review will assess existing penalty-setting mechanisms, and that there is likely to be an increase in almost all penalties. While the Working Group was encouraged by this news, it expressed its disappointment in the lack of actual progress in increasing the fine available for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive. The Working Group was also disappointed to learn that, although Australia had considered the introduction of civil or administrative sanctions upon legal persons, and the exclusion from public procurement opportunities for contractors convicted of foreign bribery offences, it had decided not to change its law or policy in this regard. The Working Group was grateful, however, for Australia’s continued compilation of statistics on the offence of money laundering, and for its undertaking to compile these statistics in a way which identifies the predicate offence for such convictions.

b) Conclusions

11. Based on the findings of the Working Group on Bribery with respect to Australia’s implementation of its Phase 2 Recommendations, the Working Group concluded that Australia has fully implemented Recommendations 1(a), 2(c), 2(d), 3(a), 3(b), 4(b), 4(c), 4(d), 5(a), 5(b), 6(c), and 7; that Australia has partially implemented Recommendations 1(b), 1(c), 2(a), 2(b), 2(e), 4(a), 5(c), and 6(b); that Recommendation 1(d) has not (yet) been implemented; and that Recommendation 6(a) has not been implemented.

12. The Working Group invited Australia to report orally, within one year after the written follow-up examination, i.e. by June 2009, on the implementation of the Recommendations that the Group considers to be not yet fully implemented. In particular, the Working Group expressed its expectation to hear of progress by Australia concerning Recommendations 1(d) and 6(a), and follow-up issue 8(c).

WRITTEN FOLLOW-UP TO PHASE 2 REPORT

Name of country: Australia

Date of approval of Phase 2 Report: January 2006

Date of information: February 2008

Part I. Recommendations for Action

Text of recommendation:

1. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by:

- (a) further promoting awareness within the Commonwealth public service;

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government is continuing its awareness raising campaign within the Commonwealth public sector.

This campaign includes Government-wide distribution of publications about the foreign bribery offence (including to missions of the Department of Foreign Affairs and Trade and the Australian Trade Commission (Austrade)), inclusion of information about the offence on Government websites, and training and information sessions to brief Australian Government officials about the offence, including pre-departure training for officials undertaking overseas postings or travel. The Department of Foreign Affairs and Trade presents pre-departure training on foreign bribery, detailing the offence and obligation to report any instances of foreign bribery for posted officers. This program has been developed over the last two years and, since August 2007, all posted officers receive this training.

A Foreign Bribery Information and Awareness Pack was distributed widely throughout the public sector in 2007. Copies of the pack have been provided to the head of every Commonwealth Department, to every Commonwealth Senator and Member of Parliament and to Government agencies such as the Australian Transaction Reports and Analysis Centre (AUSTRAC), Austrade and the Australian Agency for International Development (AusAID). The information pack contains a number of fact sheets with information on the foreign bribery offence and attendant obligations, the distinction between a bribe

and a facilitation payment, as well as a PowerPoint presentation, brochures and posters for training purposes.

This pack is actively publicised in training and information sessions and is also available on the internet. The pack will be reviewed and updated as necessary.

In July 2006 the Australian Public Service Commissioner (the Commissioner) reviewed and amended the material in chapters 10 and 14 of the *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and Agency heads* (the Guide), which provide guidance on gifts and benefits and aspects of working overseas. These chapters now explicitly refer to foreign bribery and the obligation for Australian Public Service (APS) employees to report any instances of bribery that they observe in the course of their employment, particularly when working overseas. The Guide strongly reinforces the requirement under the Public Service Act 1999 that APS employees observe the highest standards of ethical behaviours. It makes it clear that, whether in Australia or overseas, APS employees should report suspected breaches of the APS Code of Conduct in accordance with agency guidelines. It also emphasises that where an APS employee becomes aware of criminal misconduct, such as bribery, by another Australian who is not an APS employee, the employee should report that to management and to the AFP. The Commissioner wrote to agency heads in July 2006, drawing their attention to the revised material.

The updated Guide can be accessed at www.apsc.gov.au/values/conductguidelines.htm.

Text of recommendation:

1. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by:

- (b)** continuing efforts to raise the awareness of the private sector, including the distinction between bribery and facilitation payments and the record-keeping requirement for the defence of facilitation payments;

Actions taken as of the date of the follow-up report to implement this recommendation:

The Commonwealth Attorney-General's Department has contacted a range of private organisations and individuals to raise awareness of the foreign bribery offence, including:

- Ministerial letters to the CEOs of Australia's top 100 public companies informing them of the foreign bribery offence and requesting their assistance in raising awareness about the offence,
- Ministerial letters to the former Minister for Local Government, Territories and Roads and the Chief Minister of Norfolk Island seeking their assistance in distributing the foreign bribery awareness pack to the residents of Australia's external territories, the Cocos (Keeling) Islands, Christmas Islands and Norfolk Island,

- Departmental letters to key industry representative groups advising of the foreign bribery offence and enclosing copies of the Foreign Bribery Information and Awareness pack.

The Foreign Bribery Information and Awareness pack has been distributed widely throughout the private sector, with packs sent to 40 peak industry bodies (such as the Australasian Institute of Mining and Metallurgy and the International Banks & Securities Association of Australia), the CEOs of Australia's top 100 companies and Australia's top 14 accounting firms, Law Societies in each State and Territory, the Group of 100 (Inc), more than 800 individual enterprises and Transparency International Australia. The Department of Foreign Affairs and Trade has also publicised the Information and Awareness Pack and the offence of foreign bribery at meetings with industry representatives in all Australian State and Territory capitals. The Pack details the difference between bribes and facilitation payments and the record-keeping requirements for the defence of facilitation payments.

A pamphlet providing information on the offence of foreign bribery is available at Passport Offices and further information is available at <www.smarttraveller.gov.au>. The Australian Government has also ensured that information relating to foreign bribery is available on the internet and easily accessible via links on high profile and regularly visited Government websites such as <www.ag.gov.au> and <www.australia.gov.au>.

The Australian Taxation Office (ATO) has finalised a guide which sets out ATO responsibilities in the area of bribes and facilitation payments and provides practical guidance for small, medium and large business to help minimise their level of risk in this area.

The guide, which is available online, discusses initiatives that company boards can put in place and offers suggestions to help business meet their obligations under the law, including:

- having a code of conduct across the business relating to bribes
- having a strong internal audit function and audit committee oversight, and
- acting to rectify any relevant internal control weaknesses identified and reported to the board by external auditors.

Finally, the Australian National Contact Point (ANCP) for the OECD Guidelines for Multinational Enterprises provides a one-stop contact point for all businesses subject to these Guidelines. The ANCP provides information on the Guidelines, specific information on bribery, and links to useful documents including risk awareness tools for weak governance zones. The Department of Foreign Affairs and Trade has actively publicised the OECD Guidelines and the ANCP at meetings in Australia's national, State and Territory capitals.

Text of recommendation:

1. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by:

- (c) paying special attention to raising the awareness of SMEs through, for instance, Australian diplomatic and trade missions in foreign countries, and

Actions taken as of the date of the follow-up report to implement this recommendation:

The Attorney-General's Department has sent letters to approximately 800 small and medium enterprises enclosing the Foreign Bribery Information and Awareness Pack. The Pack has also been provided to peak industry bodies representing small and medium enterprises, including the Council of Small Business Organisations of Australia, the Small Enterprise Association of Australia and New Zealand, and Tourism Australia.

The Pack has also been provided to Austrade for distribution through the Austrade network around the world. The Department of Foreign Affairs and Trade is conducting seminars for Australian expatriate business communities in key regional centres which include content relating to bribery of foreign public officials.

Text of recommendation:

1. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by:

13. (d) raising the awareness of cash dealers of the foreign bribery offence as a predicate offence for the offence of money laundering, and providing them with guidance on identifying suspicious transactions.

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government has been involved in an ongoing campaign to raise the awareness of cash dealers of the foreign bribery offence since 2004, including AUSTRAC Information Circular No. 42, 'Bribery of Foreign Public Officials', highlighted in Australia's Phase 2 Report. The Information Circular is maintained on the AUSTRAC website to provide guidance on foreign bribery issues.

AUSTRAC is continuing to educate cash dealers around the country about the new Financial Transaction Report (FTR) legislation (the *FTR Amendment Act 2006*), the *Anti-Money Laundering / Counter Terrorism Financing Act 2006 (AML/CTF Act)* and the related *AML/CTF Transitional Provisions and Consequential Amendments Act 2006*.

As part of this education / awareness raising process, AUSTRAC officials continue to educate cash dealers, where relevant, in relation to:

- the AUSTRAC Information Circular No. 42 'Bribery of Foreign Public Officials',
- AGD Fact Sheet 5 – 'Identification of suspicious transactions, notification requirements', which is included in the Foreign Bribery Awareness Information Pack,
- the Attorney-General's Department website,

- the Australian Government's pamphlet on Foreign Bribery, and foreign bribery-related typologies.

Text of recommendation:

14. **2.** Concerning the **detection and investigation** of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (a) it is clarified in the publicly available explanatory document on the Case Categorisations Prioritisation Model (CCPM), that implementation of the Convention is to be given “high priority”;

Actions taken as of the date of the follow-up report to implement this recommendation:

The AFP has amended the CCPM to include corruption as a ‘high impact’ issue and obligations under international treaties as an ‘essential priority’ issue. This places corruption in a higher rating category than the previous model and foreign bribery is specifically referred to under the category of ‘corruption’. The AFP’s public CCPM document can be found on the AFP website at www.afp.gov.au/services/operational_priorities.html.

Text of recommendation:

15. **2.** Concerning the **detection and investigation** of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (b) the AFP undertakes evaluations where appropriate of the veracity of allegations of foreign bribery involving Australian nationals and companies contained in (i) media reports from credible sources, (ii) publicly available court documents filed in foreign countries, and (iii) requests to Australia from foreign countries for mutual legal assistance;

Actions taken as of the date of the follow-up report to implement this recommendation:

The AFP will evaluate allegations of foreign bribery, including those disclosed by media reports and publicly available court documents filed in foreign countries, where they contain sufficient sources and/or corroborating material of jurisdiction and offence to enable evaluation. In the case of foreign information, including court documents, the AFP would need to be made aware of their existence before an evaluation could be considered. The AFP will likewise evaluate allegations of foreign bribery by Australians disclosed in requests for mutual legal assistance.

Text of recommendation:

2. Concerning the **detection and investigation** of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (c) Australia clarify that all cases of foreign bribery be referred to the AFP by Commonwealth agencies;

Actions taken as of the date of the follow-up report to implement this recommendation:

In July 2006, chapters 10 and 14 of the *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and agency heads* (the Guide) were amended to refer to foreign bribery and clarify that APS employees should report any instances of bribery that they observe in the course of their employment, particularly when working overseas. The Guide makes it clear that, whether in Australia or overseas, APS employees should report suspected breaches of the APS Code in accordance with their respective agency's instructions on reporting breaches. Under the Commonwealth Fraud Control Guidelines all Australian Government agencies are required to maintain instructions on handling fraud matters that come to the agency's attention. As the AFP has responsibility for investigating all Commonwealth criminal offences, agency guidelines will provide for referring fraud matters to the AFP.

In June 2006, the AFP reminded members of the Heads of Commonwealth Operational Law Enforcement Agencies (HOCOLEA) forum of their responsibilities to refer all foreign bribery matters to the AFP. The foreign bribery information and awareness pack also includes a fact sheet detailing how to report suspected foreign bribery. The fact sheet clearly states that all allegations of foreign bribery are to be reported to the AFP. The information pack has been provided to all Australian Government Departments.

Text of recommendation:

2. Concerning the **detection and investigation** of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (d) the process be revised under the National Guidelines for Referring Politically Sensitive Matters to the AFP so that referrals of politically sensitive cases of foreign bribery to the AFP are not potentially delayed by notification to the Minister of Justice and Customs, and

Actions taken as of the date of the follow-up report to implement this recommendation:

The process under the National Guidelines for Referring Politically Sensitive Matters to the AFP does not

delay referral to the AFP, although the drafting of the Guidelines does not make this clear. The Australian Government is considering amendments to these Guidelines, and the Commonwealth Fraud Control Guidelines, to make it clear that referral to the AFP of politically sensitive matters may occur concurrently with advising the Minister.

The National Guidelines for Referring Politically Sensitive Matters to the AFP state:

‘A Department, Agency or Minister seeking the AFP’s assistance to investigate criminal activity likely to be politically sensitive should first raise the request with the Minister for [Home Affairs]. The purpose of this procedure is to ensure that there is a coherent, consistent approach from both a law enforcement and a Government perspective.

On completion of the investigation, the Minister for [Home Affairs] should be briefed on the outcome.

These procedures are incorporated in the Memoranda of Understanding entered into by the AFP and various Departments and Agencies.’

Commonwealth Fraud Control Guideline 4.9 provides further detail, stating:

‘All matters of a politically sensitive nature, not limited to fraud, requiring the assistance of the AFP are raised with the Minister responsible for the AFP by the relevant Minister or Department in the first instance, rather than being referred directly by them to the AFP. This enables the Government to be informed at the earliest juncture of potentially politically contentious matters that may require AFP investigation. Under present arrangements, the Minister for [Home Affairs] is responsible for the AFP. The procedure exists only to enable the Minister for [Home Affairs] to be informed of significant matters affecting the Minister’s responsibility for the AFP. The Minister for [Home Affairs] does not have the power or function of deciding what particular allegations the AFP will investigate. The decision to seek an AFP investigation will, unless the matter affects other portfolios, remain that of the complainant agency or Minister.’

This process is for information only and does not give the Minister any power to intervene in an investigation. As such, there is no reason that referral to the AFP could not occur simultaneously to the Minister being notified. The Australian Government will clarify this procedure.

Text of recommendation:

2. Concerning the **detection and investigation** of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (e) the AFP take the following steps to ensure the effective transmission of information to it about foreign bribery cases: (i) enter into a formalized agreement with the Australian Prudential Regulation Authority (APRA) concerning areas of overlapping jurisdiction respecting foreign bribery, and (ii) consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territorial police and anti-corruption bodies to the AFP even where a State or Territorial law establishes a bribery offence broad enough to cover foreign bribery. (Convention, Art. 5; Commentary 27;

Revised Recommendation I, II).

(i) enter into a formalized agreement with the Australian Prudential Regulation Authority (APRA) concerning areas of overlapping jurisdiction respecting foreign bribery

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government has carefully considered this recommendation and concludes that a documented relationship between the AFP and APRA is not necessary beyond that established by the Commonwealth Fraud Control Guidelines, the *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and agency heads* (the Guide) and current practice.

APRA, and all other Australian Government agencies, are subject to the Commonwealth Fraud Control Guidelines (the Guidelines). The Guidelines require all agencies to maintain fraud control policies detailing how the agency will deal with reports of fraud, that is, conduct indicating a dishonestly obtained benefit. These internal guidelines will direct matters to the AFP as the agency responsible for investigating Commonwealth criminal offences. APRA will refer to the AFP all foreign bribery matters that come to its attention.

APRA is a member of HOCOLEA and that forum endorsed the process of referring foreign bribery matters to the AFP at the June 2006 meeting.

In light of the efforts of the AFP to raise awareness of its role in investigating foreign bribery matters and APRA's internal guidelines and commitment to refer all such matters to the AFP, Australia considers these arrangements are sufficient for dealing appropriately with allegations of foreign bribery that come to the attention of APRA.

(ii) consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territory police and anti-corruption bodies to the AFP even where a State or Territory law establishes a bribery offence broad enough to cover foreign bribery

Actions taken as of the date of the follow-up report to implement this recommendation:

The AFP has provided advice to all Commonwealth, State and Territory law enforcement bodies about its role in investigating the Commonwealth offence of foreign bribery and sought their support in referring such matters to the AFP. The matter has also been raised at the HOCOLEA forum, meaning that all State, Territory and Commonwealth law enforcement agencies are aware of the AFP's responsibility for investigating foreign bribery matters.

To date, no States or Territories have enacted foreign bribery offences. Australia acknowledges the concern of the examiners that, if a State does establish such a law or conclude an existing law is broad enough to cover the circumstances, State prosecutors may have different priorities to Commonwealth prosecutors. However, the Australian Government considers that, due to the nature of the offence, foreign bribery cases will most likely be raised with the AFP in the course of investigation, before decisions are made as to prosecution. This is because the need to gather evidence off shore in foreign bribery offences, if a State or Territory police agency received such an allegation, would require the State law enforcement to raise the matter with the AFP and the Minister responsible for the AFP in order to

progress mutual assistance requests.

Having carefully considered this recommendation, the Australian Government concludes the AFP's offshore role and arrangements with other law enforcement agencies are sufficient to ensure referral of foreign bribery matters to the AFP, without need for formal MOU's.

Text of recommendation:

3. Concerning the prevention and detection of foreign bribery through measures for disallowing the tax deductibility of bribe payments to foreign public officials, the Working Group recommends that the Australian Taxation Office (ATO):

- (a) consider revising its Compliance Program to specifically include bribe payments to foreign public officials in their risk profile; and

Actions taken as of the date of the follow-up report to implement this recommendation:

The revised ATO Compliance Program 2006-07 was published in August 2006 and information on the risks associated with bribes and facilitation payments was specifically included in this publication. Bribery and facilitation payment information is found within chapters relating to Large Businesses, Small to Medium Enterprises, and International tax issues. The full document is available at the following link: www.ato.gov.au/content/downloads/ARL_77362_n7769-8-2006_w.pdf.

Text of recommendation:

3. Concerning the prevention and detection of foreign bribery through measures for disallowing the tax deductibility of bribe payments to foreign public officials, the Working Group recommends that the Australian Taxation Office (ATO):

- (b) issue as soon as possible the bribery awareness audit guidelines that it is currently drafting on identifying bribe payments to foreign public officials and determining whether a particular payment meets one of the defences, and include within the bribery awareness audit guidelines a requirement that tax auditors report all information regarding foreign bribery to the Serious Non Compliance Business Line (SNC). (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials).

Actions taken as of the date of the follow-up report to implement this recommendation:

The ATO has issued the bribery awareness audit guidelines to its staff and made them accessible to staff through the ATO intranet. As recommended, the auditor guidelines contain a requirement for tax auditors to report a transaction they suspect may be a bribe, at the earliest opportunity, to the Serious

Non-Compliance business line. The guidelines also provide practical information to help auditors identify the ways in which bribe payments may be concealed and information on the legislative defences to a charge of foreign bribery.

Where the information is relevant to:

- (a) establishing whether a serious offence has been, or is being, committed; or
 - (b) the making, or possible making, of a proceeds of crime order,
- an authorised officer from within the Serious Non-Compliance business line will pass the information to the Australian Federal Police under to section 3E of the *Taxation Administration Act 1953*.

These guidelines have also been published on the ATO public website to provide guidance to the community.

The guidelines are available at <www.ato.gov.au/corporate/content.asp?doc=/content/81899.htm>.

Text of recommendation:

4. Concerning **other measures for preventing and detecting foreign bribery**, the Working Group recommends that Australia:

- (a) should require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies, and consider requiring external auditors to report indications of a possible illegal act to the competent authorities; (Revised Recommendation V.B.iii, iv).

If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Having reviewed this recommendation the Australian Government concludes the current legislative obligations, which require external auditors to report possible illegal acts to management and to the appropriate authority, are sufficient.

All disclosing entities, public companies, large proprietary companies and registered schemes are required to prepare audited financial reports and directors' reports for each financial year, under section 292 of the *Corporations Act 2001*.

Section 311 of the Corporations Act requires an auditor to report indications of possible breaches of the Act, any attempt to unduly influence someone involved in the conduct of the audit, or an attempt to otherwise interfere with the proper conduct of the audit to management of the audited company and to the Australian Securities and Investment Commission (ASIC). ASIC has the power to prosecute any breach of the Act and may refer to the Australian Federal Police any indications of criminal offences that do not fall within its mandate.

The Corporations Act contains principled offence provisions that are intended to prevent corporate misconduct generally, rather than specific offences such as bribery or money laundering. Conduct that may constitute a breach of the Corporations Act and also relate to foreign bribery includes failure to act in good faith and for proper purposes, making false or misleading statements or giving false information in relation to the affairs of the company, falsifying company books, or failing to abide by record keeping requirements. The Australian Government considers it is within the expertise of auditors to ascertain this type of conduct, whereas potential criminal offences such as foreign bribery require consideration of matters that fall outside an auditor's expertise.

The Australian Government considers the existing measures allow for an appropriate obligation on auditors and ensures they report to the law enforcement agency with the appropriate business expertise.

Text of recommendation:

4. Concerning **other measures for preventing and detecting foreign bribery**, the Working Group recommends that Australia:

- (b)** consider taking appropriate measures to ensure that members of the Australian Public Service who come into contact with companies involved in international business understand that the Australian Public Service Code of Conduct requires Commonwealth officials to report to the AFP credible evidence of foreign bribery offences that they uncover in the course of performing their duties, encourage and facilitate such reporting, and consider strengthening reporting provisions, such as those included in the Department of Foreign Affairs and Trade (DFAT) Overseas Code and Export Finance and Insurance Corporation (EFIC) internal rules; (Revised Recommendation I).

Actions taken as of the date of the follow-up report to implement this recommendation:

The amended *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and agency heads* (the Guide) and the Foreign Bribery Information and Awareness Pack have been circulated to Government agencies and Departments and included in training for APS employees. These documents specifically highlight the obligation and procedures for APS employees to report instances of foreign bribery uncovered in the course of their duties.

The Australian Public Service Commissioner wrote to Agency Heads in July 2006 drawing their attention to the revised Guide, which has also been posted on the Commissioner's website.

Having considered the reporting provisions within Commonwealth and agency-specific guidelines, the Australian Government considers the existing guidelines provide a sufficiently strong reporting regime. The Guide has been amended to specifically highlight officers' obligations to report foreign bribery. In addition to this, all Commonwealth agencies are required to maintain internal guidelines on how to deal with indications of fraud, that is, any indication a person has dishonestly obtained a benefit, through deception or otherwise. Internal guidelines will direct agencies to report indications of criminal conduct to the AFP, as the law enforcement agency with responsibility for investigating all offences against

Commonwealth law.

Text of recommendation:

4. Concerning **other measures for preventing and detecting foreign bribery**, the Working Group recommends that Australia:

- (c) ensure that AusAID staff are aware of the policy for responding to indications of foreign bribery in relation to ODA contacts, including the reporting of such indications to the AFP, amend the standard contract with AusAID to clarify that the Contractor shall not engage in foreign bribery in relation to the execution of the contract, and ensure that contracts with subcontractors contain a similar prohibition; (Revised Recommendation I, VI. iii) and

Actions taken as of the date of the follow-up report to implement this recommendation:

AusAID has included in training courses for all staff the policy guidelines for dealing with suspected bribery, in relation to ODA contracts or otherwise witnessed in the course of duty. AusAID staff have also benefited from the broader awareness raising measures outlined previously, including the Foreign Bribery Information and Awareness Pack and pre-departure training conducted by the Department of Foreign Affairs and Trade.

The Australian Government amended the AusAID standard contractual documentation, which now explicitly prohibits contractors from engaging in foreign bribery. The standard contract also obliges contractors to ensure that contractor personnel, including subcontractors, do not engage in foreign bribery and to include equivalent anti-bribery provisions in sub-contracts.

Text of recommendation:

4. Concerning **other measures for preventing and detecting foreign bribery**, the Working Group recommends that Australia:

- (d) consider reviewing the Commonwealth whistleblower provisions in the context of the on-going review on this subject to ensure effective whistleblower protections for Commonwealth officials and staff of Commonwealth agencies who report suspicions of foreign bribery, and consider introducing stronger whistleblower protections for private sector employees who report suspicions of foreign bribery. (Revised Recommendation I).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government is committed to protections for whistleblowers and to appropriately protecting public interest disclosures within the Commonwealth Government sector. The Government

favours public interest disclosures where they would not jeopardise law enforcement, national intelligence or security, military operations or diplomatic relations. The Government is currently exploring options for progressing appropriate reforms.

Griffith University is leading an evaluation of legislative regimes for whistleblower protection across Australia, particularly those serving the Queensland, New South Wales, Western Australia and Commonwealth Governments. The Project is known as 'Whistling While They Work': Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations and a draft report was released for comment in October 2007. A final report is due to be published in mid-2008 and this report will inform Australia's further consideration of the recommendation and Commonwealth whistleblower provisions.

In the meantime, Australia has included information about whistleblower protection in the Foreign Bribery Information and Awareness Pack and amended the *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and agency heads* to clarify the requirement for employees to report any instances of bribery that they observe in the course of their employment, particularly when working overseas.

Legislative protection for corporate sector whistleblowers is provided under Part 9.44 of the *Corporations Act 2001*. There is a standard for whistleblower protection schemes in both public and private sector entities, set in Australian Standard 8004-2003 *Whistleblower Protection Programs for Entities* (AS 8004-2003). AS 8004-2003 sets a standard for the structural, operational and maintenance elements that a whistleblower protection program entity must meet. The standard is voluntary for private sector entities but APS agencies are required by the *Public Service Act 1999* to have procedures in place to investigate reports and provide protection to APS employees making whistleblowing reports.

Text of recommendation:

5. Concerning the **implementation of the offence of bribing a foreign public official** under the Commonwealth Criminal Code, the Working Group recommends that Australia:

- (a) clarify that the foreign bribery offence applies regardless of the results of the conduct or the alleged necessity of the payment; (Convention, Art. 1; Commentary 7).

Actions taken as of the date of the follow-up report to implement this recommendation:

On 24 September 2007, the *International Trade Integrity Act 2007* received Royal Assent. The Act amended paragraph 70.2(2)(a) of the *Criminal Code Act 1995* (Cth) to provide that any perception that a benefit is customary, necessary or required is to be disregarded when assessing a possible offence. The Act also amended the Criminal Code to ensure the offence applies regardless of the results of the alleged conduct.

Text of recommendation:

5. Concerning the **implementation of the offence of bribing a foreign public official** under the Commonwealth Criminal Code, the Working Group recommends that Australia:

- (b) carry out its undertaking to amend as soon as possible the defence for conduct that is “lawful” in the foreign public official’s country to ensure consistency with Commentary 8 on the Convention; (Convention, Art. 1; Commentary 8) and

Actions taken as of the date of the follow-up report to implement this recommendation:

On 24 September 2007, the *International Trade Integrity Act 2007* received Royal Assent. The Act amended the *Criminal Code Act 1995* (Cth) to ensure the defence under section 70.3 to a charge of bribing a foreign public official is only available where the advantage given or offered to a foreign public official is expressly permitted or required by written law, consistent with Commentary 8 on the Convention.

Text of recommendation:

5. Concerning the **implementation of the offence of bribing a foreign public official** under the Commonwealth Criminal Code, the Working Group recommends that Australia:

- (c) carry out the undertaking to revise the existing publicly available guidance document on the foreign bribery offence as soon as possible to clarify the defence of facilitation payments. (Convention, Art. 1; Commentary 9).

Actions taken as of the date of the follow-up report to implement this recommendation:

The publicly available information was amended to clarify the defence of facilitation payments in 2006 and has since been updated to account for the amendments contained in the *International Trade Integrity Act 2007*.

Text of recommendation:

6. Concerning the **sanctions** for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:

- (a) increase the fine for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia; (Convention, Art. 3.1).

Actions taken as of the date of the follow-up report to implement this recommendation:

Australia is considering the recommendation to increase penalties for these offences as part of a broader review of Commonwealth criminal penalties that is currently underway. The outcome of the review will inform Australia's response to this recommendation.

The Terms of Reference for the review are available on the Attorney-General's Department website <www.ag.gov.au>. The review will assess existing penalty-setting mechanisms, assess the appropriateness of Commonwealth criminal penalties in light of comparable penalties in other jurisdictions, and gauge community expectations about penalising criminal offences.

The *International Trade Integrity Act 2007* increased penalties in the *Charter of the United Nations Act 1945* and the *Customs Act 1901* for offences of contravening United Nations sanctions, importing or exporting restricted goods without permission, or for providing false information in relation to UN sanctions or restricted goods. Offences for contravening UN sanctions or importing/exporting without permission attract a penalty of \$275,000 for an individual and \$1.1 million for a body corporate, or three times the value of the offending transaction, whichever is the greatest. Offences for providing false or misleading information attract a penalty for an individual of up to ten years imprisonment, and/or a fine of up to \$275,000, or a fine of up to \$1.375 million for a body corporate.

Text of recommendation:

6. Concerning the sanctions for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:

- (b) with respect to companies that have been convicted of foreign bribery (i) consider introducing formal rules on the imposition of civil or administrative sanctions upon legal persons and individuals convicted of foreign bribery, so that public subsidies, licenses, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied or terminated, including through the provisions of the relevant contracts, as a sanction for foreign bribery in appropriate cases, and include provisions for the termination of such contracts in appropriate cases; and (ii) consider establishing a policy for denying access to contracting opportunities with public agencies, such as the public procurement agencies, EFIC and AusAID, as well as including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after entering the contract; (Convention, Art. 3.4; Revised Recommendation II.v, VI ii) and

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government has made a strong commitment to improved accountability and transparency in public administration.

The financial framework underpins the appropriation, expenditure and use of money and resources. It is an important feature of an accountable and transparent public sector and informs the daily work of

Australian Government agencies, office holders and their employees.

The *Financial Management and Accountability Act 1997* (FMA Act) and Regulations encompass Australian Government Department and Agencies and the *Commonwealth Authorities and Companies Act 1997* encompasses Australian Government Authorities and Companies.

Before a commitment to spend public money may be lawfully entered into, the Regulations require that persons approving funding must be satisfied, after making appropriate and reasonable inquiries, that the proposed expenditure is in accordance with the policies of the Commonwealth and will make efficient, effective use of the public money. These requirements apply to Ministers as well as to officials.

Appropriate due diligence inquiries and consideration of an organisation's governance arrangements are a fundamental part of approval and procurement processes. The Regulations also enable agencies to include termination provisions in contract or grants procedures.

The Government does not think it appropriate to specify particular offences as grounds for termination as this might have the effect of unintentionally excluding other offences or circumstances which might appropriately lead to termination.

The Australian Government's procurement framework allows for an application or contract to be excluded on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirements or obligation under a contract, and this may include conviction for a criminal offence as grounds for exclusion.

Text of recommendation:

6. Concerning the sanctions for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:

- (c) continue compiling statistics on the offence of money laundering, including the level of sanctions and the confiscation of proceeds of crime. (Convention, Art. 7).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government continues to compile statistics on the offence of money laundering, including the level of sanctions and the confiscation of the proceeds of crime. The Attorney-General's Department maintains statistics on proceeds of crime confiscated and the Commonwealth Director of Public Prosecutions maintains statistics on the number of money laundering matters and the outcomes of these cases.

Text of recommendation:

7. Concerning the discretion to prosecute the offence of bribing a foreign public official, the Working Group recommends that Australia clarify that the Guidelines on the Prosecution Policy of the

Commonwealth prohibits consideration of the factors listed in Article 5 of the Convention. (Convention, Art. 5).

Actions taken as of the date of the follow-up report to implement this recommendation:

On 11 September 2006, the CDPP issued a direction to all prosecutors instructing them that when deciding whether to prosecute a person for bribing a foreign public official under Division 70 of the Criminal Code, the prosecutor should not be influenced by:

- considerations of national economic interest
- the potential effect upon relations with another State, or
- the identity of the natural or legal persons involved.

This is a formal direction issued by the CDPP. Prosecutors are required to comply with the direction.

Part II. Issues for Follow-up by the Working Group

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:
- (a) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code; (Convention, Art. 1; Commentary 9).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The facilitation payment defence has not been used in response to a foreign bribery prosecution as there have been no foreign bribery prosecutions.

Australia will monitor application of the defence and compliance with record-keeping requirements as it arises in practice.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:
- (b) the application of the tax deduction for facilitation payments; ((1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The ATO has improved its compliance strategy to meet the risk posed by instances of suspected bribery and will monitor the application of the tax deduction for facilitation payments as it arises in practice. Deductibility of facilitation payments will be checked in reviews and audits of companies with trade or relationships in jurisdictions or activities where there is a significant risk of corruption. These jurisdictions will be identified with the Transparency International Corruption Perception Index. Questionnaires on bribery and facilitation payments have also been developed and used during reviews with Australia's top 100 companies and adapted for use in other market segments of the ATO. The Tax Office guidelines for understanding and dealing with the bribery of Australian and foreign public officials

have been published on the ATO website. Guidelines have also been developed to provide practical guidance for businesses to help minimise their level of risk in the area of bribes and facilitation payments.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:

- (c) application of the criminal liability of legal persons for the bribery of foreign public officials; (Convention, Art. 2).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

As yet, no legal person has been found criminally liable for the offence of foreign bribery as there have been no foreign bribery prosecutions. Investigations into possible foreign bribery are underway in several cases and Australia will monitor the issue as it arises in practice.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:

- (d) the choice of proceeding with foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive, as well as the sanctions imposed on natural persons for foreign bribery, to determine whether monetary sanctions, including fine penalties and confiscation, are imposed where appropriate; (Convention, Art. 3.1, 5).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

To date, there have been no prosecutions, therefore it has not been necessary to determine whether to proceed summarily or upon indictment.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:

- (e) whether in practice Australia's capacity to provide mutual legal assistance in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence (The Working Group notes that this is a horizontal issue affecting many Parties.); and (Convention, Art. 9.1) .

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Australia has not received a mutual legal assistance request from a Party that has established non-criminal liability of legal persons for the foreign bribery offence.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:

- (f) the use of false accounting offences under the Corporations Act, including the level of sanctions. (Convention, Art. 8.1, 8.2).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The Corporations Act creates an obligation for companies to keep financial records and introduces offences for failing to abide by record-keeping requirements (s286 & s344(2)). However, matters relating to false accounting have been conducted under the broader offences established by the following sections:

- Section 1307 - falsification of books, which provides that it is an offence for an officer/former officer to, amongst other things, falsify any books relating to affairs of the company
- Section 1308 - false or misleading documents, which provides that it is an offence for a person to make or authorise a false or misleading statement in a document required for the purposes of the Corporations Act, and
- Section 1309 - false information, which provides that knowingly providing false information in certain circumstances is an offence.

Since January 2006, the Australian Securities and Investments Commission (ASIC) has taken the following number of enforcement actions in relation to these offences:

- Section 1307: two matters have been finalised, resulting in one conviction and one acquittal;
- Section 1308: one matter has been finalised, resulting in a conviction, with another two matters currently before the court; and

- Section 1309: two matters have been finalised, resulting in convictions.

It must be noted these sections have much broader application than false accounting or foreign bribery and the conduct in these cases does not relate directly to foreign bribery.

SUPPLEMENTARY INFORMATION

Preliminary Comments

Summary AWB

As the Working Group on Bribery (WGB) is aware from reports by Australian officials at Tour de Table discussions, the AWB case has been the subject of both a Royal Commission and investigations by a Task Force comprising officers of the Australian Federal Police, the Australian Securities and Investment Commission and the Victoria Police. Royal Commissions are commissions of inquiry with the power to compel the production of evidence and to summon witnesses to give evidence. Royal Commissions are major inquiries which are quite rare and involve a comprehensive investigation into a matter. The summary of the findings of the Cole Inquiry, comprising pages lxxxi and lxxxii of Volume 1 of the Report, are **Attachment A**.

Australia has also responded legislatively following the Cole Inquiry with the *International Trade Integrity Act 2007* (ITI Act).

The ITI Act made the following changes:

- Applicants for licences to import or export under United Nations sanctions are required to provide information to the Government (with criminal penalties for giving false or misleading information).
- A new offence has been created for breaching UN sanctions.
- Government agencies have the power to obtain evidence about suspected evasion of sanctions, so these suspected evasions can be referred to law enforcement agencies.
- Laws regarding the bribery of foreign officials have been strengthened.
- Tax laws are now consistent with foreign bribery laws.

The ITI Act also included specific foreign bribery and tax amendments which:

- tightened the Foreign Bribery offence in the *Criminal Code Act 1995* (Criminal Code) to clarify that the defence in section 70.3 applies only where the law of the foreign country states that the advantage in question is permitted or required; and that the offence can be made out regardless of the results of the payment or the alleged necessity of the payment, and

- amended the *Income Tax Assessment Act 1997* to align the definition of facilitation payments to the definition in the Criminal Code to allow deductibility only for minor facilitation payments.

As the WGB is also aware and has recorded in its case matrix, Commissioner Cole found the offence of foreign bribery had no application to dealings by AWB Limited with the Government of Iraq, instead suggesting a range of other offences that AWB or AWB directors might have committed. As the WGB was advised at the meeting in March 2008, legal proceedings against six former directors commenced on 19 December 2007 and investigations into additional charges continue. Please find attached the relevant media release (**Attachment B**).

Questions

1. **Rec. 1(a) - Please Comment on whether and how the AWB case has been used to raise awareness of the public and private sectors in Australia about the risks of foreign bribery.**

The Australian Government has not relied on any one case in its efforts to raise awareness of foreign bribery, referring instead to the offence and the consequences of bribery for Australia's trade and reputation. Further, as stated in the Cole Inquiry Report, the AWB case did not constitute bribery under Australian laws so this case is not well suited to the Government's campaign to raise awareness of the foreign bribery offence.

However, the Government publicly commented on the serious and detrimental effects of this case on Australia's trade and reputation. It is also accurate to say that media attention to the AWB case, the subsequent and highly publicised Inquiry, investigations and legal proceedings have raised awareness throughout Australia of the risks of unethical business conduct.

2. **Rec 2(b) - that the AFP undertakes evaluations where appropriate of the veracity of allegations contained in (i) media reports; (ii) publicly available court documents; and (iii) MLA requests: Please provide supporting information, such as policy directives, information about relevant training initiatives, etc. regarding AFP's use of media reports, publicly available court documents and MLA requests in investigations.**

The process of evaluating referrals is core to the business of the AFP across all types of crime investigated. All relevant material is sought for this purpose including material supplied by a complainant, material already held by the AFP, publicly available documents and media reports.

The AFP has an extensive training regime for its own officers and for other law enforcement agencies in Australia and the region. It is not practical to attach the AFP's complete internal and external training programs to this document, nor would this add value to assurances the AFP appropriately utilises information when investigating foreign bribery matters, but further information on AFP training resources may be found on the AFP website at http://www.afp.gov.au/about/AFP_resources.html.

3. **Rec 2(c) - It is stated that an information pack has been provided to all Australian Government Departments with a fact sheet stated that all allegations of foreign bribery are to be reported to the AFP. It would be useful to provide (i) the relevant excerpts of the information pack; and (ii) information about how the pack is distributed within each Australian Government Department.**

- i) Fact sheet three of the foreign bribery pack is **Attachment C**. Please note, fact sheet three is being amended to update information. The following http address on page two will be deleted:

<[http://www.afp.gov.au/business/reporting_crime/reporting_national_crime/refs from other gov agencies](http://www.afp.gov.au/business/reporting_crime/reporting_national_crime/refs_from_other_gov_agencies)>.

The following http address will appear in its place:

<[http://www.afp.gov.au/national/reporting_national_crime/refs from other gov agencies.html](http://www.afp.gov.au/national/reporting_national_crime/refs_from_other_gov_agencies.html)>

This amendment had not been published on the internet at the time of writing.

- ii) As stated in Australia's Phase 2 written response, the information pack has been provided to every Commonwealth Department. In addition, the *Guide to APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and Agency heads* has been amended to refer to the offence of foreign bribery. This document is included in training for all APS employees.

Under sections 44 and 45 of the *Financial Management and Accountability Act 1997*, the CEO of each Commonwealth agency is responsible for promoting the efficient, effective and ethical use of Commonwealth resources and implementing fraud control strategies for that agency. This responsibility is also highlighted in the *Commonwealth Fraud Control Guidelines*. It is not appropriate to micro-manage the ways in which CEOs discharge this responsibility within individual agencies and enquire as to how each CEO disseminated the Foreign Bribery Information and Awareness Pack.

4. Rec 2(d) - It is stated that the Australian Government is considering amendments to the National Guidelines to make it clear that referral to the AFP of politically sensitive matters may occur concurrently with advising the Minister. This raises the following questions that should be addressed: (i) How are these amendments being considered? (ii) Who is considering these amendments? (iii) What is the timeline for making a decision on this issue? (iv) Why would concurrent reporting be discretionary (i.e. "may occur concurrently") rather than mandatory for all politically sensitive matters? (v) If concurrent reporting is not mandatory for all cases, when would such reporting be required?

- i) Australia is not considering whether to amend the National Guidelines but is considering the wording of amendments to make it clear that notice to the Minister occurs concurrently with referral to the AFP.
- ii) The decision has been made to amend the Guidelines to clarify concurrent reporting. All that remains is to settle the wording of the new policy, which will occur over the coming months.
- iii) The language of the written response is not intended to reflect the language of the amendment to the National Guidelines. Australia will clarify on the face of the National Guidelines that the practice of notifying the Minister of politically sensitive matters occurs concurrently with referring matters to the AFP. Australia will notify the working group of the wording of the amended policy in due course.

iv) See above.

5. **Rec 2(e) - i) It is stated that the AFP has provided advice to all Commonwealth, State and Territory law enforcement bodies about its role in investigating the foreign bribery offence under the Commonwealth Penal Code. How has the AFP transmitted this advice to State and Territorial police and anti-corruption bodies? Excerpts from relevant documents should be provided as well as any other information such as training seminars. (ii) The response to this issue states that no States or Territories have enacted foreign bribery offences. However, the Working Group has noted that some States/Territories have offences of bribing that are broad enough to cover the bribery of foreign public officials (e.g. bribery of any “agent”). Therefore, the issue still remains about what concrete steps have been taken by the Commonwealth Government to ensure that where a foreign bribery case is covered by an offence at the State/Territorial level and Commonwealth level it is referred to the AFP. For instance, why doesn’t Australia put such an instruction in the Commonwealth Fraud Guidelines?**

- i) The AFP Deputy Commissioner of Police wrote to the Deputy Commissioners of all appropriate authorities within Australia. He outlined in the letter the AFP interest in allegations of bribing foreign officials and in the referral of these matters to the AFP. He also outlined the AFP’s interest in joint investigations to be undertaken where a State interest also exists.

It is worth noting that an MoU does not have the force of law and provides only a written statement of intent to cooperate. As such, an MoU would have no greater force than an agreement reached through exchanging letters as has been undertaken.

The actual details of communications between agencies and the content of training sessions are matters for the agencies involved and do not add value to assurances from the Australian Government that adequate policy and mechanisms are in place.

- ii) The concrete steps taken to ensure foreign bribery cases are referred to the AFP are stated on pages nine and ten of the written response. Australia has raised this issue with Commonwealth, State and Territory law enforcement agencies and requested their assistance referring cases to the AFP. The nature of the offence will also require any investigation of foreign bribery to be brought to the attention of the AFP, the Commonwealth Director of Public Prosecutions and the Attorney-Generals’ Department in the course of obtaining offshore evidence.

As regards the Commonwealth Fraud Control Guidelines, there would appear to be little value including instructions for State and Territory agencies in Commonwealth guidelines that do not apply to those States and Territories.

6. **Rec 3(a) - The response simply refers to the link to the Compliance Programme. A summary of the relevant parts of the document should be provided.**

A summary of the relevant parts of the Compliance Program 2006-07 is included as **Attachment D**.

7. **Rec 4(c) - Please provide copies of the relevant provisions from the amended AusAID standard contractual documentation.**

A copy of the revised anti-corruption provisions is **Attachment E**.

8. **Rec 4(d) - Please provide the information on whistleblower protections in the *Foreign Bribery Information and Awareness Pack* and the relevant provisions in the *APS Values and Code of Conduct in Practice***

Whistleblower protection is discussed on page 2 of the information paper on Australia's Approach to Fighting Corruption and is **Attachment F**. Chapter 15 of the Guide is **Attachment G**.

9. **Rec 5(a) - i) Please provide a copy of the International Trade Integrity Act 2007 ii) Please explain whether the AWB case was not investigated and prosecuted because the Australian authorities considered that the payments made in the OFFP were "lawful" in Iraq. Please also comment on what the Cole Inquiry says in this respect.**

- i) International Trade Integrity Act 2007 is **Attachment H**. Please note, the International Trade Integrity Act 2007 is an amending Act and does not stand alone. Please find attached a copy of the amended sections of the Customs Act 1901, Income Tax Assessment Act 1997, and the Criminal Code Act 1995 and a copy of the revised Charter of the United Nations Act 1945 (**Attachments I, J, K and L** respectively).
- ii) The WGB has been kept informed of the Royal Commission into the AWB matter, the subsequent investigation by the AFP, Victoria Police and the Australian Securities and Investment Commission and the legal proceedings that have commenced. The OECD case matrix accurately records Commissioner Cole's findings that there is no reasonable basis for concluding that a foreign bribery offence may have been committed, as AWB would not have been guilty of an offence under Iraqi law.

10. **Rec 5(c) - i) Please provide a copy of the amended guidance document, which clarifies the defence of facilitation payments ii) Please discuss the issue of facilitation payments in relation to the AWB case and the findings of the Cole Inquiry.**

- i) The brochure titled Bribing a Foreign Public Official is a Crime is **Attachment M**. It has been amended to remove reference to facilitation payments to avoid the potential confusion anticipated in the Phase 2 Report. Information on facilitation payments is now available in fact sheet four of the foreign bribery pack (**Attachment N**) and on the Australian Taxation Office (ATO) website (**Attachment O**). Please note fact sheet four is being amended to clarify that references to facilitation payments are references to payments of minor value. These amendments had not been published on the internet at the time of writing.
- ii) Commissioner Cole made no findings on the tax treatment of AWB payments. Commissioner Cole also found the foreign bribery offence had no application to the AWB case. The Cole Inquiry did not make any findings on facilitation payments.

11. **Rec 6(c) - Please provide these statistics for the two years since the Phase 2 examination.**

The total value of assets confiscated under Commonwealth proceeds of crime legislation in 2005-06 was \$18,420,566 and \$19,147,112 in 2006-07.

12. **Rec 7 - Please provide a copy of the direction in the CDPP instructing prosecutors on what factors shall not influence their discretion.**

This direction is publicly available on the CDPP website. A copy is included as **Attachment P**.

13. Follow-Up Issue 8(a) - i) Please comment on the allegations in the press that AWB claimed tax deductions for almost \$300 million in kickbacks paid to the Iraqi Government in the OFFP as facilitation payments, and comment on the Cole Inquiry's findings on this issue. (ii) Please comment on whether the AWB case was not investigated and prosecuted because the Australian authorities considered that the payments made in the OFFP were "facilitation payments" in accordance with the Commonwealth Penal Code (iii) Please comment on whether these facilitation payments were taken in accordance with the record-keeping requirements in section 70.4(3) of the Commonwealth Penal Code.

- i) Australia is aware of media allegations that AWB claimed tax deductions for payments made to Iraq between 1999 and 2003. Various media reports allege deductions ranging from \$70 million to \$300 million. Commissioner Cole made no findings about the tax treatment of AWB payments. Under section 16 of the *Income Tax Assessment Act 1936*, the ATO is unable to comment on the affairs of individual taxpayers. However, a copy of the media release by AWB on 20 December 2006 is included as **Attachment Q**.
- ii) The AWB case was extensively investigated by Commissioner Cole. A Task Force has been established to investigate civil and criminal offences. As reported at the Tour de Table in March 2008, legal proceedings against six former directors of AWB commenced on 19 December 2007.
- iii) Commissioner Cole concluded the offence of foreign bribery had no application to the AWB case. The issues of the application of the defence of facilitation payments and compliance with the accompanying record keeping requirements did not arise.

14. Follow-Up issue 8(b)

- i) **Please comment on whether the Australian Taxation Office accepted AWB's claim for tax deductions for \$300 million in kickbacks paid to the Iraqi Government in the OFFP.**

Under section 16 of the *Income Tax Assessment Act 1936*, the ATO is unable to comment on the affairs of individual taxpayers.

- ii) **Please explain whether the ATO considers such kickbacks as facilitation payments.**

Australia cannot give a broad policy answer in relation to a specific case. Australia will assess any claims for tax deductions in accordance with Australian law.

- iii) **Please comment on whether ATO considered whether the kickbacks were documented in accordance with the record-keeping requirements in 70.4(3) of the Commonwealth Penal Code.**

Under section 16 of the *Income Tax Assessment Act 1936*, the ATO is unable to comment on the affairs of individual taxpayers. All taxpayers are required to maintain sufficient records to justify any taxation claim.

- iv) Please comment on whether the Australian Taxation Office reported to the AFP suspicions of bribery due to AWB's claim for tax deductions for kickbacks paid to the Iraqi Government in the OFFP.**

Under section 16 of the *Income Tax Assessment Act 1936*, the ATO is unable to comment on the affairs of individual taxpayers. Commissioner Cole found the payments to the Iraqi Government could not constitute foreign bribery under Australian laws.

- v) Please explain whether the ATO has amended or plans to amend its policy on facilitation payments since AWB's claim for deductions for kickbacks.**

The *International Trade Integrity Act 2007* amended subsection 26-52(4) of the *Income Tax Assessment Act 1997* to the effect that a benefit to an official is not a bribe if 'the value of the benefit is of minor nature' and it is given for the purpose of securing a routine government action of a minor nature. Previously, the Act did not refer to the value of a benefit.

- vi) Regarding the announcement in October 2006 that the ATO issued guidelines for tax auditors on facilitation payments, can these guidelines be shared with the WGB? If not, please summarise them.**

These guidelines are publicly available on the ATO website. A copy is included as **Attachment R**.

- vii) Regarding the report in October 2006 that "for the first time" companies will be required to reveal in their tax returns whether they paid facilitation payments to foreign public officials, how is this question phrased. Have any companies taken a deduction for facilitation payments since inserting this item in tax returns? Have any of these companies been reported to the AFP for suspicions of foreign bribery?**

Australia understands these comments were made in an article 'AWB fallout: Tax Office cracks down on kickbacks', *Australian Financial Review* 4 October 2006. Rather than require identification of facilitation payments in tax returns, the ATO has improved its compliance strategy to meet the risk posed by instances of suspected bribery. The ATO considers that compliance will be better achieved through audit and review processes and regular meetings with large companies rather than a label on the company tax return. As yet there have been no companies reported to the AFP for suspicions of foreign bribery.

- viii) Please explain whether the Australian Government is considering amendments to the availability of tax deductions for facilitation payments since the AWB case.**

The Australian Government is strongly committed to combating corruption in international business transactions. To this end, the Australian Government has introduced tax legislation consistent with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Australian laws, as amended by the *International Trade Integrity Act 2007*, allow deductions for legitimate facilitation payments.

This is consistent with the commentary on Article 1 of the OECD Convention that states 'small' facilitation payments are not an offence. Tax legislation primarily serves economic objectives but supports the goals of the Criminal Code by denying deductions for the illegal activity of

bribery of foreign public officials. Tax legislation is not an appropriate instrument for discouraging 'facilitation' payments which are lawful under the terms of the Convention.

- ix) What was the content of the proposed amendment to the Income Tax Act to eliminate tax deductions for facilitation payments submitted to Parliament in March 2006? Why was the proposed amendment voted down? Did the Government inform Parliament that the WGB was concerned about the availability of this deduction? If so, what was Parliament's reaction?**

The content of the amendment to the *Income Tax Assessment Act 1997* proposed by the then opposition Labour party in March 2006 was as follows:

50A Subsection 26-52(4)

Repeal the subsection, substitute

(4) An amount is not a bribe to a foreign public official if

- (a) it is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature, and
- (b) the value of the benefit was of a minor nature, and
- (c) as soon as practicable after the loss or outgoing was incurred, the person made a record of the loss or outgoing and the record complies with subsection 70.4(3) of the Criminal Code Act 1995.

A similar amendment was passed by the *International Trade Integrity Act 2007*, introducing the requirement that the value of a payment be 'of minor nature' in order to be a deductible facilitation payment. The Government did not inform the Parliament that the WGB was concerned about the availability of a tax deduction for facilitation payments, which are lawful under both Australian law and the Convention.

- x) Given that the Cole Inquiry did not have the technical and resource capacity to look at the tax treatment of payments made by the AWB to Iraq, has this issue been picked up in some other government forum?**

No comment can be provided on the specific treatment of AWB's payments. The implications and recommendations for tax policy of the Cole Inquiry were considered by the Treasury and the Australian Government. The Australian Government's legislative response to the Cole Inquiry was implemented by the *International Trade Integrity Act 2007*.

ATTACHMENTS

Attachment A. Cole Inquiry Findings

Findings

The Letters Patent require that I inquire into and report on whether any decision, action, conduct, payment or writing of AWB Limited, Alkaloids of Australia Pty Limited, Rhine Ruhr Pty Limited, BHP Limited or The Tigris Petroleum Corporation Limited or persons associated with them *might* have constituted a breach of any law of the Commonwealth, a State or Territory and, if so, whether the question of commencing proceedings should be referred to the relevant Commonwealth, State or Territory agency.

I am of the view on the material before me that the following breaches of laws *might* have occurred:

- Acts, conduct and payments by AWB Limited and AWB (International) Limited *might* have constituted a breach of
 - ss. 29D, 29A and 29B of the *Crimes Act 1914*
 - ss. 135.1(7) and 136.1 of the Criminal Code
 - ss. 82 of the *Crimes Act 1958* (Vic)
 - ss. 5 of the Banking (Foreign Exchange) Regulations.
- Acts and conduct by the following persons *might* have constituted them accessories to the offences AWB Limited or AWB (International) Limited *might* have committed
 - Mr Emons
 - Mr Flugge
 - Mr Geary
 - Mr Hogan
 - Mr Ingleby
 - Mr Long
 - Mr Officer
 - Mr Rogers
 - Mr Stott
 - Mr Watson
- Acts and conduct of the following persons *might* have constituted a breach of ss. 180, 181, 182, 184 or 1309 of the *Corporations Act 2001*
 - Mr Cooper
 - Mr Emons
 - Mr Flugge
 - Mr Geary
 - Mr Hogan

- Mr Ingleby
- Mr Long
- Mr Officer
- Mr Rogers
- Mr Stott
- Mr Watson.

- Mr Davidson Kelly *might* have conspired with or aided and abetted AWB or AWB (International) in the commission of an offence against s. 82 of the *Crimes Act 1958* (Vic).

I recommend that each of these matters be referred to the appropriate authority for consideration whether proceedings should be commenced for breach of the law referred to. I recommend that there be established a joint Task Force comprising the Australian Federal Police, Victoria Police, and the Australian Securities and Investments Commission to consider possible prosecutions in consultation with the Commonwealth Director of Public Prosecutions and the Victorian Director of Public Prosecutions. Administrative responsibility for the conduct of the Task Force should reside with the Commonwealth Attorney-General.

I make no other findings of possible breaches of the laws by any company or person.

Attachment B. ASIC media release regarding charges against former AWB directors

07-332 ASIC launches civil penalty action against former officers of AWB

Wednesday 19 December 2007

ASIC has commenced civil penalty proceedings in the Supreme Court of Victoria against six former directors and officers of AWB Limited (AWB).

ASIC alleges that the defendants contravened section 180 of the Corporations Act, which requires company officers to act with care and diligence, and section 181, which requires company officers to discharge their duties in good faith and for a proper purpose.

ASIC is asking the Court for declarations that each defendant has breached the law, the imposition of pecuniary penalties (for each breach a maximum of \$200,000), and disqualification of each defendant from managing a corporation.

These actions arise out of investigations following Cole Inquiry. The structure of those investigations is as follows:

- (a) The AFP and Victoria Police are investigating criminal breaches of both Commonwealth and Victorian law (which investigations continue).
- (b) ASIC is responsible for investigations under the ASIC Act, possible civil and criminal breaches of the Corporations Act.

Investigations into civil penalty proceedings was given more priority by ASIC because of the statute of limitation periods which apply to those actions and which do not apply to possible criminal proceedings (which investigations by ASIC continue). Commissioner Cole examined 27 contracts between AWB and the Iraqi Grain Board (IGB). The Corporations Act limits the time for the commencement of civil penalty proceedings to six years. The time limit had expired for 20 of the contracts when the Cole Inquiry concluded in November 2006 and two expired in February and June 2007.

The contracts covered by ASIC's proceedings were entered into between 20 December 2001 and 11 December 2002 and involved the payment of AUD\$126.3 million in breach of UN sanctions.

The defendants in the ASIC actions are:

- Andrew Lindberg, the former Managing Director of AWB;
- Trevor Flugge, the former Chairman of AWB;
- Peter Geary, the former Group General Manager Trading of AWB;
- Paul Ingleby, the former Chief Financial Officer of AWB;
- Michael Long, the former General Manager of International Sales and Marketing for AWB (2001-2006); and
- Charles Stott, the former General Manager of International Sales and Marketing for AWB (2000-2001).

ASIC alleges that these officers breached their duties under the Corporations Act in connection with AWB's contracts with the IGB under the United Nations (UN) Oil-for-Food Program, which contained payments for purported inland transportation fees (ITF). The ITF payments were made to Alia, a Jordanian company partly owned by the Iraqi Ministry of Transport.

ASIC alleges that Messrs Long, Geary and Stott were officers of AWB who:

- knew of and implemented various AWB contracts that included the purported inland transportation fees;
 - were aware or ought to have been aware that the fees were not genuine; and
 - knew or ought to have known that the fees were, or were likely to be, contraventions of the UN sanctions upon trade with Iraq.
- ASIC alleges that Messrs Lindberg, Flugge and Ingleby:

- knew, or ought to have known, about the AWB contracts that included the purported inland transportation fees;
- had obligations to make reasonable inquiries to ensure that AWB complied with obligations under UN sanctions upon trade with Iraq;
- were aware, or ought to have been aware, that the fees were not genuine; and
- knew, or ought to have known, that the fees were, or were likely to be, contraventions of the UN sanctions.

The regulator further alleges that all defendants caused harm to AWB through their conduct. ASIC Chairman, Tony D'Aloisio said 'We have commenced these actions as we believe that the conduct of the directors and officers in these circumstances fell short of what the law requires in relation to the management and supervision of corporations'.

Background

ASIC alleges the payment of the inland transportation fees were in breach of UN Sanctions on Trade with Iraq, in particular Resolution 661, which prevented member states from making any payments that resulted in funds being made available to the Government of Iraq.

The regulator also believes Resolution 986 was breached. This resolution required funds from the UN Oil-for-Food program to be used exclusively to meet the humanitarian needs of the Iraqi population.

Attachment C. Fact sheet three, Foreign Bribery Information and Awareness pack

FOREIGN BRIBERY FACT SHEET 3

How to Report Suspected Foreign Bribery? Who should I report to?

All incidents of suspected foreign bribery should be reported to the Australian Federal Police (AFP). The AFP has offices in all Australian capital cities (over page).

The AFP is separate from State and Territory police forces. Every effort should be made to provide information directly to the AFP.

What information should I report?

All information relating to incidents of suspected foreign bribery should be communicated to the AFP, either orally or in writing.

Information you provide may supplement other information provided to the AFP and assist an investigation.

You may be asked to provide the following information, if available:

- advice as to whether the alleged criminal activity is ongoing or has ceased
- details of the suspected offender(s) – name, date of birth, location (where known)
- a chronological account of the information known about the suspected criminal activities
- if the suspect(s) is aware of the allegation
- details of witnesses
- the action being requested of the AFP
- criminal history, if known, and information relating to the circumstances where the person(s) has previously come to attention
- the significance or impact of the matter on the agency, company or individual
- value of the revenue loss or potential loss at risk, if any, to the agency, company or individual
- a summary of any enquiries already undertaken
- details regarding how the alleged criminal activity is suspected of breaching the Criminal Code Act 1995 (Cth)
- copies of any relevant documentation, and
- copies of any relevant legal advice, sought and provided, to the party contacting the AFP.
-

If information is provided over the telephone you may be asked to **provide any relevant documentation as soon as possible**, subject to availability.

What happens if my suspicions are incorrect?

There is no offence for reporting suspected criminal activity to the AFP. However, it is important that you do not make a report which is vindictive or malicious, knowing that what you are alleging is incorrect, as there are offences that may relate to reports made under these circumstances.

The AFP will not provide details of who made an allegation to the alleged offender. In the event of the matter coming before a court, the Commonwealth Director of Public Prosecutions is required to provide the full brief of evidence to the defence counsel, which will contain this information. You may be required to give evidence in court relating to your knowledge of the facts.

Commonwealth agencies – reporting suspected foreign bribery to the AFP

Information on referrals by Commonwealth agencies can be found at: www.afp.gov.au/business/reporting_crime/reporting_national_crime/refs_from_other_gov_agencies.

Commonwealth agencies should consider using the generic 'Referral to the AFP' form which can be found at: www.afp.gov.au/_data/assets/pdf_file/3904/annexure_b_afp_referral_form.pdf

Commonwealth agencies are asked to read this fact-sheet in conjunction with the Commonwealth Fraud Control Guidelines and any agency-specific information in relation to reporting suspected foreign bribery. (The Commonwealth Fraud Control Guidelines can be found at: www.ag.gov.au/www/agd/agd.nsf/Page/RWPA3AE7FADD0992544CA2571A10009A8DC).

The Public Service Act 1999 (Cth) provides protection against victimisation and discrimination for any Commonwealth Public Service employee who reports breaches.

Where do I send the referral?

Referrals should be directed to the AFP Operations Monitoring Centre (OMC) in the State or Territory where the suspected offence occurred or the offender resides.

Contact details for AFP OMCs:

[...]

Can I report these matters to the AFP overseas?

Yes – The AFP has an extensive global presence with Liaison Posts in many countries. If a report is not able to be referred to an AFP OMC, AFP liaison officers are able to receive this information. For further details on the location of AFP liaison posts, please refer to the AFP web site www.afp.gov.au.

Information can also be provided to Australian embassies in foreign countries which will then be passed on to the AFP and actioned accordingly.

Attachment D. Summary of Australian Tax Office Compliance Program 2006-07

Excerpt from Compliance Program 2006-07

Small to medium enterprises [page 28]

International tax issues

We are working to improve compliance by educating and helping small to medium enterprises understand and comply with their international tax obligations. We are also continuing to check that businesses are:

- properly declaring foreign source income
- accurately reporting international transactions by lodging appropriate schedules with their returns
- claiming only legitimate expenses relating to overseas transactions, and
- maintaining appropriate systems to detect international facilitation payments so that deductions for expenses and input tax credits are properly claimed.

Large business

Headline issues [page 34]

New and expanded priorities

In 2006–07 we are placing more emphasis on:

- checking that businesses have appropriate systems in place to detect international facilitation payments, so that deductions for expenses and input tax credits are properly claimed

Reporting correct information [page 36]

Bribes and facilitation payments

To ensure that only legitimate expenses are claimed as deductions and legitimate input tax credits are claimed, this year we are:

- reviewing significant, one-off, regular or embedded payments by Australian businesses to entities in jurisdictions where bribes or facilitation payments are said to be ‘part of doing business’
- checking that businesses with particular international trade profiles have appropriate codes of conduct and systems in place to detect bribes and international facilitation payments, and
- reviewing organisations that do not have appropriate systems in place.

International tax issues

Facilitation payments [page 58]

We are also checking that businesses have sound systems in place to detect international facilitation payments, so that deductions for expenses and input tax credits are properly claimed

Attachment E. AusAID standard contractual terms

Anti-Corruption

- 35.4 The Contractor warrants that the Contractor shall not make or cause to be made, nor shall the Contractor receive or seek to receive, any offer, gift or payment, consideration or benefit of any kind, which would or could be construed as an illegal or corrupt act, either directly or indirectly to any party, as an inducement or reward in relation to the execution of this Contract. In addition, the Contractor shall not bribe public officials and shall ensure that all Contractor Personnel comply with this provision. Any breach of this clause shall be grounds for immediate termination of this Contract under Standard Conditions **Clause** Error! Reference source not found. (Termination for Contractor Default) by notice from AusAID.

Please note that in our contract Contractor Personnel is defined as follows:

"**Contractor Personnel**" means personnel either employed by the Contractor or Associates, engaged by the Contractor or Associates on a sub-contract basis, including the Specified Personnel, or agents of the Contractor or Associates engaged in the provision of the Services.

11. SUB-CONTRACTING

The Contractor may not sub-contract the whole of the Services. The sub-contracting of parts or elements of the performance of the Services is subject to compliance with the following requirements:

- (c) the Contractor must ensure that sub-contracts include equivalent provisions regarding the Contractor's relevant obligations under this Contract. In particular sub-contractors must:
- (iii) be bound by the same obligations regarding **Clauses** Error! Reference source not found. (Accounts and Records), Error! Reference source not found. (Audits), Error! Reference source not found. (Access to Premises), Error! Reference source not found. (Privacy), and **35.4** (Anti-corruption) **below** and as required by Project Specific Conditions **Clause 3** (Accounts and Records) as the Contractor; and

Attachment F. Australia's Approach to Fighting Corruption

FOREIGN BRIBERY

AUSTRALIA'S APPROACH TO FIGHTING CORRUPTION

Introduction

The Australian Government recognises the destructive effects that corruption can have on a society. Corruption undermines democracy and the rule of law, distorts market forces and facilitates activities such as organized crime and terrorism. A culture of bribery and corruption is often linked to a lack of respect for human rights.

Australia consistently performs well on international corruption surveys. Australia is routinely placed among the top ten least corrupt countries in the world by Transparency International's Corruption Perceptions Index. We are proud of this success, but recognise that the fight against corruption is an ongoing battle, and we remain committed to the fight.

This paper outlines Australia's approach to fighting corruption, which is based on:

- Australia's anti-corruption system including combating existing problems in international anti-corruption cooperation, and
- the legal framework for asset recovery, extradition and denial of safe haven.

Australia's Anti-Corruption System

Australia has a wide-ranging anti-corruption system. We signed the United Nations Convention against Corruption (UNCAC) on 9 December 2003 and ratified it on 7 December 2005. Since then Australia has implemented the mandatory requirements, and some non-mandatory requirements, prescribed in the provisions of UNCAC. The Australian Government believes UNCAC is an important step in combating corruption.

Australia's approach to fighting corruption is based on four key elements:

- constitutional safeguards
- accountability and transparency
- criminalisation of corruption, and
- international cooperation and technical assistance.

Constitutional safeguards

Australia's constitutional democracy (based on the Westminster system) provides the checks and balances needed to guard against corruption. The separation of powers and the rule of law within that system help to safeguard Australia from corruption and provides fundamental protections for human rights. Australia has a federal system with three layers of government; Federal, State and local. This paper focuses on the federal level of government.

The Westminster system provides for responsible government. Under the Westminster system, Ministers are elected officials who are answerable to Parliament. Australian Government Ministers are constitutionally responsible for the departments of state and statutory authorities within their portfolio and are also answerable to Parliament for abuses which may occur within their areas of responsibility.

A key principle in the Australian Constitution is the separation of powers. Under the Constitution the three types of government power (legislative, executive and judicial) are divided between three separate branches of government (legislature, executive and judiciary). Legislative power is the power to make laws, Executive power is the power to administer laws and carry out the business of government through such bodies as government departments, statutory authorities and the defence force and Judicial power is the power to hear and determine disputes according to law.

Under the Australian Constitution, each of these powers is allocated to a separate branch of government. This separation of power ensures that no one body has a concentration of power. By distributing the power each branch of government acts as a check and balance on the other. This helps to prevent individuals or

groups from ignoring the will of the people and / or manipulating government for personal gain.

Another important feature of the Australian Constitution is the implied freedom of political communication. This freedom prevents the making of laws which would hinder the Press in investigating and reporting on bribery and corruption, among other things.

The democratic system also makes governments accountable to the people. At least every three years citizens have the opportunity to vote on whether they would like the current government to remain in power. The Australian Electoral Commission is the independent statutory authority responsible for conducting federal elections, any referendums on constitutional questions and for maintaining the Commonwealth electoral roll.

The rule of law underpins Australia's system of government. It is the principle that subjects every person, regardless of their rank, status or office, to the same legal and judicial processes. All people and bodies, including governments, can have the lawfulness of their actions scrutinised in a court of law and can be held accountable for any activity determined to be inconsistent with the law.

Together, these constitutional safeguards form a strong basis for preventing and addressing corruption in Australia.

Accountability and transparency

The Australian Government's approach to preventing corruption is based on the idea that no single body should be responsible for corruption. Instead, the strong constitutional foundation is enhanced by a range of bodies and government initiatives that promote accountability and transparency. This strategy addresses corruption in both the private and public sectors.

We see this distribution of responsibility as a great strength in Australia's approach to corruption because it creates a strong system of checks and balances.

Many aspects of the private sector are regulated at the federal level. Key pieces of legislation include the Corporations Act 2001, which governs the way in which corporations can operate, and the Australian Securities and Investments Commission Act 2001, which establishes the Australian Securities and Investments Commission (ASIC). ASIC is an independent government body that is specifically tasked to enforce and regulate company laws. The Australian Prudential Regulation Authority Act 1998 establishes the Australian Prudential Regulation Authority (APRA), which oversees the Australian financial services industry. The Australian Taxation Office also plays an important role in regulating the private sector.

Regulation of the public sector is shared between the Federal and State / Territory governments. Several States have independent anti-corruption commissions or police integrity bodies (New South Wales, Queensland, Victoria, South Australia and Western Australia). The Australian Government has established an independent Australian Commission for Law Enforcement Integrity that has jurisdiction over the Australian Federal Police (AFP) and the Australian Crime Commission (ACC). The AFP and the ACC investigate serious crimes and have important roles in the fight against corruption.

Australia has a comprehensive system of administrative law that allows the public to scrutinise government decisions. There are rights to seek review of administrative decisions in various pieces of legislation, including the Australian Constitution. Federal tribunals and other bodies have been established to deal with the review of administrative decisions and actions taken by government officials and the States and Territories have also established bodies to review decisions made by their government officials. Some of these bodies are specialised and deal with a limited range of decisions, while others have a more general jurisdiction. Each jurisdiction has an independent ombudsman.

The establishment of administrative review bodies is complemented by the Freedom of Information Act 1982 (FOI Act) which extends, as far as possible, the Australian community's right to access information that is in the possession of the Federal Government. The FOI Act imposes a legal duty on federal agencies to provide members of the public with access to government information, including the official documents of Ministers, unless those documents fall within defined classes of exemption. This allows the public to scrutinise government decisions and encourages government accountability and transparency.

The Australian Government has established a financial framework containing requirements about financial

governance, financial management and accountability. The management and accountability of public money is addressed through the Financial Management and Accountability Act 1997 (FMA Act). The FMA Act provides a framework for the proper management of public money and public property, including regulating the way in which public officials spend public money. The Commonwealth Authorities and Companies Act 1997 (CAC Act) regulates the Commonwealth authorities and companies who are legally and financially separate from the Commonwealth. For Commonwealth authorities, the CAC Act contains detailed rules on reporting and accountability and deals with matters such as banking, investment and the conduct of officers.

For Commonwealth companies, the CAC Act contains reporting and other requirements in addition to the requirements of the Corporations Act.

One of Australia's key strategies in the prevention of corruption is the requirement that public officials behave appropriately and are held accountable for their actions. Each State and Territory, as well as the Australian Government, has its own public service with its own code of conduct.

Australia's approach is to promote ethical conduct rather than legislate detailed rules for compliance. The Public Service Act 1999 (PS Act) establishes the Australian Public Service (APS) and sets out guidelines for its management. The PS Act, which establishes the APS Values, articulates the culture and operating ethos of the APS and provides a philosophical underpinning. Agency heads must uphold and promote the APS Values and have systems in place to ensure that employees understand and apply them. Leadership is important in articulating the role of the Values and how they complement the agency's vision and organisational goals. The PS Act also sets out the APS Code of Conduct. The Code of Conduct specifies the standard of conduct that is required of all APS employees. Agency heads and statutory office holders are also bound by it. The heads of agencies play a key role in promoting and enforcing the Code of Conduct and must put in place measures directed at ensuring employees are aware of the consequences of breaching it. If an employee does breach the Code of Conduct, they can be subject to sanctions ranging from a reprimand to reduction in salary or even dismissal. Some breaches of the Code of Conduct may also be crimes which will attract criminal penalties. The heads of agencies play a key role in promoting and enforcing the Code of Conduct. Agency heads must put in place measures directed at ensuring that employees are aware of the Code of Conduct and of the consequences of breaching it. Agency heads must establish procedures to determine when a breach has occurred. There are also whistleblower provisions in the PS Act that prohibit the victimisation of, or discrimination against, any employee who reports a suspected breach of the Code of Conduct.

The Australian Public Service Commission is the government agency responsible for the future capability and sustainability of the APS. The Public Service Commissioner's functions include:

- promoting the APS Values and Code of Conduct
- conducting inquiries, evaluations and reviews of people-management practices
- supporting and coordinating APS-wide training and career-development opportunities in the APS
- contributing to, and fostering leadership in, the APS, and
- reporting annually to Parliament on the state of the Service.

As this brief survey shows, there is a wide range of bodies and initiatives to promote accountability and transparency. This is a key element in Australia's anti-corruption strategy.

Criminalisation of corruption

Australia has a strong legislative regime criminalising corrupt behaviour. Australia also has strategies in place to ensure that these laws are understood and enforced.

Corruption offences cover a very broad range of crimes, including bribery, embezzlement, nepotism and extortion. For this reason Australia's corruption offences are not contained in any single Act of Parliament. Instead, different types of corruption are dealt with in different pieces of State / Territory and federal legislation.

At the federal level, for example:

- domestic bribery and foreign bribery offences are contained in the Criminal Code Act 1995
- dealing in proceeds of crime is an offence under the Criminal Code Act 1995
- obstruction of justice is criminalised in the Crimes Act 1914

- offences for improperly dealing with public money are covered by the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997, and
- breach of duties as a director of a company is dealt with by the Corporations Act 2001.

Responsibility for investigating corruption offences is divided between State and Territory police forces, the AFP and specialised bodies such as the ACC and ASIC.

During the period 1 July 2004 to 30 June 2005, 54 corruption matters were reported to the AFP. This figure is comparable to the previous year when 32 corruption matters were reported to the AFP.

Once an investigating body completes an investigation of a corruption offence it refers the case to the relevant Director of Public Prosecutions (DPP). The DPP then makes an independent assessment on whether to prosecute the case.

An effective criminal justice system must be responsive to changing circumstances and be receptive to strategies for improvement. Australia's experience with foreign bribery provides a good example.

Australia ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1999. In order to comply with the OECD Convention, Australia introduced a new offence into the Criminal Code Act 1995. Division 70 of the Criminal Code creates the offence of bribing a foreign public official. Any person or company who commits the offence when in Australia can be prosecuted in Australia, and any Australian citizen, resident or company incorporated in Australia who commits the offence, whether or not the offence is committed in Australia, can also be prosecuted in Australia.

In 2003, after the offence had been in place for four years, there had not been one investigation of the offence.

Australia identified this as a potential area for improvement and embarked on a campaign to:

- raise public awareness that foreign bribery is a criminal offence with significant penalties
- encourage organisations to implement policies and procedures for reporting allegations of bribery, and
- increase the level of reporting of allegations of foreign bribery.

The key messages of the public awareness campaign are that:

- bribing a foreign public official is a crime with serious consequences
- bribery damages the global economy, and
- allegations of foreign bribery should be reported to the AFP.

The campaign targets government and non-government organisations, including large companies, small- and medium-sized enterprises and professional bodies, and is disseminating information through various means, including:

- distributing a leaflet entitled 'Bribing a Foreign Public Official is a Crime'. This leaflet explains the foreign bribery offence and the penalties associated with it. It also explains the obligation on companies to create and maintain a corporate culture that requires compliance with the law, including an obligation to take reasonable steps to ensure that their employees do not commit the foreign bribery offence. The leaflet has also been distributed within government, with a particular focus on agencies that are involved in law enforcement or have links to international trade, eg the AFP, AusTrade, the DPP, Australian Customs Service, the Departments of Foreign Affairs and Trade (DFAT) and Finance and Administration and the Treasury
- publishing articles on foreign bribery in government newsletters such as the DFAT News and industry newsletters
- raising awareness amongst Australian Government employees by training officers before they are posted overseas and by alerting officers who are already posted overseas. The foreign bribery leaflet has also been forwarded to overseas posts
- promoting the Attorney-General's Department's foreign bribery web site which sets out information about the foreign bribery offence. A number of government and nongovernment organisations have posted links to this web site (eg Australian Customs Service, DFAT and AusAID), and
- conducting a survey of Australia's Top 100 public companies, peak industry bodies and professional bodies requesting information on the initiatives in place in those organisations for raising awareness of the foreign bribery offence. The responses received have been positive. The initial results of the campaign

appear to be positive also, with an increased level of awareness of the foreign bribery offence in both government and non-government sectors.

Ensuring there are comprehensive and appropriate laws against corruption, and that the laws are effectively enforced, is an ongoing challenge.

International cooperation and technical assistance

Corruption is a form of transnational crime that has no respect for, or loyalty to, nations, boundaries or sovereignty and is a critical restraint on development that affects countries throughout the Asia – Pacific region.

For these reasons, Australia recognises that corruption cannot be dealt with in isolation—a collaborative approach to developing domestic and international techniques to combat corruption is required.

Through AusAID's, 'good governance' activities, Australia is actively involved in assisting countries in the

Asia – Pacific region combat corruption. Promoting 'good governance' means promoting democratic, accountable government and effective administration. In 2005–06, AusAID directly funded approximately \$897 million of governance activities (36 per cent of Australia's total Overseas Development Assistance program).

Examples of Australia's activities in our region include:

- providing assistance to Asia – Pacific countries to combat money laundering by facilitating the implementation of international best practice in regulation and good governance
- assisting Thailand to oversee and regulate relevant activities (Ombudsman, competition regulator, financial intelligence)
- working to strengthen public expenditure management in Vanuatu, Samoa, Kiribati, Tuvalu, Solomon Islands and Papua New Guinea, and
- assisting to build the capacity of the police, ombudsman and audit offices, judiciary and prison services in Indonesia, Cambodia, East Timor, Papua New Guinea, Solomon Islands, Nauru and the Philippines.

International legal cooperation ensures that corrupt individuals will not be able to exploit international boundaries to avoid prosecution. The Mutual Assistance in Criminal Matters Act 1987, the Mutual Assistance in

Business Regulation Act 1992, the Extradition Act 1988 and the Proceeds of Crime Act 2002 enable Australia to

cooperate with other countries to prevent, investigate and prosecute offenders. Australia facilitates cooperation

through the AFP International Liaison Network, which consists of 61 officers in 31 posts in 26 countries.

Australia is working to improve its mutual assistance and extradition relationships with other countries in the Asia – Pacific region. The Pacific Legal Knowledge Program is one of the ways Australia is improving its relationships. The Program involves the presentation of a series of workshops to law and justice sector officers from 14 Pacific Island Forum countries, with a focus on both building capacity and developing regional cooperative networks.

The first international criminal justice cooperation workshop, focusing on mutual assistance, extradition and proceeds of crime, was held in Vanuatu in December 2005 and was attended by Pacific Island country officers who are responsible for processing these matters. A second, follow up workshop was held in 2006 and had a practical focus, covering some of the investigative and prosecutorial aspects of these matters.

Australia recognises that corruption is not just one country's problem and, in recognition of this, is an active participant in international initiatives, including:

- ratifying UNCAC on 7 December 2005
- ratifying the United Nations Convention against Transnational Organized Crime on 27 May 2004
- ratifying the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 18 October 1999 and participating in the Asian Development Bank OECD Anti-

Corruption Initiative for the Asia – Pacific

- participating in the Asia – Pacific Economic Cooperation Anti-Corruption and Transparency Experts Task

Force (APEC ACT), and

- participating in monitoring exercises operated by both the G8 Financial Action Task Force on Money Laundering and the Commonwealth Secretariat on anti-money laundering measures.

Australia is committed to sharing technical expertise and improving our legal cooperation relationships with other countries to strengthen the fight against corruption, both in Australia and throughout the Asia – Pacific region.

Legal framework for asset recovery, extradition and denial of safe haven

Australia has a comprehensive legal framework for asset recovery, extradition and denial of safe haven.

Asset recovery

Australia supports the prompt return of illicitly acquired assets. Chapter V of UNCAC requires States Parties to return assets obtained through corruption to the country from which they were stolen. This is the first international agreement to do so. Australia complies with the provisions of Chapter V through the Proceeds of Crime Act 2002, the Mutual Assistance in Criminal Matters Act 1987 and the Mutual Assistance in Business Regulation Act 1992.

The Proceeds of Crime Act 2002 provides a scheme to trace, restrain and confiscate the proceeds of crime against Commonwealth law. Any person (including a foreign State) can initiate civil proceedings in Australian courts (where the offence falls within Australia's jurisdiction).

The Proceeds of Crime Act 2002 establishes an 'equitable sharing program', which gives the Minister for Justice and Customs the discretion to return the proceeds of crime to a foreign State. The foreign State may then use that money to pay compensation to the victims.

The Mutual Assistance in Criminal Matters Act 1987 establishes procedures for Australia to assist foreign States to deprive persons of the proceeds of crime that are reasonably suspected of being in Australia and provides mechanisms to register and enforce foreign forfeiture orders, obtain restraining orders, and obtain production and monitoring orders.

The Act provides for conviction-based forfeiture of assets. That is, assets may only be recovered from a person convicted of an offence in the foreign State and the conviction must not be subject to further appeal. An alternative forfeiture process also exists under the Act, which does not require the person from whom the assets are recovered to have been convicted of an offence (ie civil forfeiture). However, this alternative forfeiture process only applies to requests from specified countries (currently the US, Ireland, South Africa, UK and Canada).

A foreign forfeiture order registered under the Act can be enforced as if it were a forfeiture order made under the Proceeds of Crime Act 2002.

The Mutual Assistance in Business Regulation Act 1992 establishes procedures for Commonwealth regulators, such as ASIC and APRA, to provide assistance to foreign regulators in the administration or enforcement of foreign business laws by obtaining relevant information, documents and evidence from persons in Australia and transmitting that information and evidence and copies of those documents to foreign regulators. This Act however cannot be used to obtain evidence for use in criminal proceedings (the Mutual Assistance in Criminal Matters Act 1987 must be used for this purpose).

Australia's anti-money laundering regulator and specialist financial intelligence unit, Australian Transaction Reports and Analysis Centre (AUSTRAC), assists in tracing the proceeds of crime. Banks and financial institutions have an obligation to report suspect transactions and 'significant cash transactions' to AUSTRAC, who then shares the information it collects with specified law enforcement, security and revenue agencies within Australia.

AUSTRAC, the AFP and the Australian Security Intelligence Organisation cooperate with overseas authorities to share financial intelligence (subject to appropriate safeguards as to confidentiality and use).

Extradition and denial of safe haven

The Mutual Assistance in Criminal Matters Act 1987, the Extradition Act 1988 and the Proceeds of Crime

Act 2002 all provide for international cooperation in the prevention, investigation and prosecution of offenders as required by UNCAC.

Australia has made regulations that apply the Extradition Act 1988 and Mutual Assistance in Criminal Matters Act 1987 to those countries that are a party to UNCAC. The regulations extend mutual assistance and extradition to offences contained in UNCAC.

Australia has numerous programs which cooperate internationally on law enforcement, including:

- the AFP Law Enforcement Cooperation Program, which facilitates cooperation and capacity-building activities agreed by Australia and the receiving (developing) country as priorities for both countries
- the AFP International Network of Liaison Officers (a total of 61 officers in 31 posts in 26 countries), which facilitates information-sharing and good operational working relationships between the AFP and foreign law enforcement agencies
- agency-to-agency Memoranda of Understanding (eg MOUs between the AFP and priority partner law enforcement agencies, particularly in Australia's immediate region)
- cooperation with Interpol, which enables Australia to send and receive information on various law enforcement operations and associated policy, data and analytical issues
- participating in joint investigations (eg with the Indonesian National Police after the terrorist bombings in 2002, 2004 and 2005), and
- providing technical assistance to investigations of serious crime conducted by foreign law enforcement partners.

Conclusion

There is no one solution to the problem of corruption. Domestically, Australia uses a range of strategies to prevent, detect and address corruption and believes the key elements in an effective anti corruption strategy are:

- constitutional safeguards
- accountability and transparency
- criminalisation of corruption, and
- international cooperation and technical assistance.

International cooperation is paramount in the fight against corruption.

International cooperation and technical assistance, combined with strong political will at the domestic level, will serve to further increase each country's capacity to fight corruption and win.

Attachment G. Chapter 15, APS Values and Code of Conduct in Practice

APS Values and Code of Conduct in practice

Useful references

Public Service Act 1999

APS Values

Code of Conduct

Employment policy and advice

Frequently asked questions

Section 4: Personal behaviour

Chapter 15: Whistleblowing

Relevant Values and elements of the Code of Conduct

APS Values

(d) The APS has the highest ethical standards.

APS Code of Conduct

(6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

Public Service Act provisions

Whistleblowing refers to the reporting, in the public interest, of information which alleges a breach of the APS Code of Conduct by an employee or employees within an agency. Section 16 of the PS Act provides legislative protection for whistleblowers³³ within the APS.

Regulation 2.4(1) requires Agency Heads to establish procedures to manage whistleblowing reports that must meet the minimum requirements set out in regulation 2.4(2).

The Public Service Commissioner's Direction 2.5, which relates to the APS having the highest ethical standards (s10(1)(d)), reinforces the requirement for Agency Heads to ensure that procedures are in place to manage whistleblowing disclosures. The direction also requires Agency Heads to put in place measures to ensure that APS employees are aware of the procedures and are encouraged to make appropriate disclosures.

Avenues for whistleblowing

The whistleblowing scheme is based on the expectation that most whistleblowing reports will be made and investigated within the relevant agency.

However, whistleblowers who are not satisfied with the outcome of an investigation conducted by their agency can refer the matter to the Public Service Commissioner or the Merit Protection Commissioner (regulation 2.4(2)(g)).

A disclosure made by an APS employee directly to the Public Service or the Merit Protection Commissioners would only be considered where the Commissioner agrees that the matter is so sensitive that it would be inappropriate to report it to the relevant Agency Head. For example, the employee may allege the Agency Head personally breached or was complicit in another person breaching the APS Code (regulation 2.4(2)(c)). In all other cases, a report should be made in the first instance to the Agency Head or a person nominated by the Agency Head.

³³ For the purposes of the PS Act a whistleblower is an APS employee who reports a breach (or alleged breach) of the code of Conduct to an authorised person.

Protection of whistleblowers

Section 16 of the PS Act provides that a person performing functions in or for an agency must not victimise or discriminate against an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code to an authorised person.

Because the PS Act prohibits victimisation and discrimination by persons performing functions 'in or for an Agency', contractors as well as APS employees are prohibited from taking retaliatory action against whistleblowers.

The whistleblower scheme is not designed to resolve personal grievances about employment decisions, which are the subject of other agency review processes and promotion review committees.

Although there is no specific reference to whistleblowers, the Workplace Relations Act and the OH&S (CE) Act also provide some protection.

Paragraph 170CK (2)(e) of the Workplace Relations Act states that employment cannot be terminated for: *'the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.'*

The OH&S (CE) Act includes a similar provision where an employee who complains about a workrelated health, safety or welfare matter cannot be dismissed (s. 76).

Unauthorised disclosures

Public Service Regulation 2.1 creates a duty for the purposes of section 70 of the *Crimes Act 1914*, which makes it an offence for an APS employee to publish or communicate information, obtained in the course of their duties, that they have a duty not to disclose. However, a public interest disclosure that is made in accordance with the PS Act and regulations (that is, to the relevant Agency Head, the Public Service Commissioner, the Merit Protection Commissioner or persons authorised by them) is not considered an unauthorised disclosure of information or an offence under s. 70 of the Crimes Act.

In addition, the Code (s. 13(6)) requires APS employees to maintain appropriate confidentiality about dealings with any Minister or Minister's member of staff. This is an important obligation. Because there are various processes in the APS for raising concerns, including the whistleblower scheme, there is no justification for employees to 'leak' information, which can only undermine the essential relationship of trust, particularly with Ministers and the Government.

Confidential and anonymous disclosures

Sometimes people may not wish to disclose their identity when they report a breach of the Code. An anonymous disclosure, supported by sufficient evidence to justify an investigation, should be dealt with in accordance with the agency's whistleblowing procedures.

Under the Privacy Act, a whistleblower's identity is considered 'personal information' and therefore protected. 'Personal information' can only be disclosed without the individual's consent in certain circumstances prescribed under the Privacy Act, such as to protect public revenue or enforce criminal law.

However, the person or agency to which the personal information is disclosed shall not use it for a purpose other than that for which it was provided.

The Agency Head, the Public Service Commissioner or the Merit Protection Commissioner may refer information provided by a whistleblower to another appropriate agency, such as the Australian Federal Police, the State Police, or the Commonwealth Director of Public Prosecutions, should they consider it necessary. If this occurs, it is likely that the substance of the whistleblower's complaint, and so perhaps their identity, will become public. The Agency Head, and Public Service or Merit Protection Commissioners cannot direct or control how other agencies may investigate the complaint. However, the whistleblower remains protected under s. 16 of the PS Act.

Defamation

The regulations do not protect a whistleblower from liability for defamation. Common law protection applies, as modified by state or territory legislation where applicable. At common law, the defence of qualified privilege applies to a whistleblower sued for defamation by the person who has allegedly breached the Code, as long as the statements alleged to be defamatory were made in good faith and to an authorised person.

It should be emphasised that the protection of qualified privilege is unlikely to be available if the disclosure is made to the media.

As mentioned above, a public interest disclosure that is made in accordance with the PS Act and regulations is not considered an unauthorised disclosure of information or an offence under s. 70 of the Crimes Act.

Frivolous or vexatious allegations

Agency Heads, the Public Service or Merit Commissioners or other authorised persons do not have to investigate reports that are considered frivolous or vexatious.

The Commonwealth Ombudsman

Whistleblowing provisions do not affect an APS employee's right to complain to the Commonwealth Ombudsman about actions taken or decisions made by an agency. However, the Commonwealth Ombudsman cannot investigate complaints about actions taken or decisions made by:

. politicians

. private individuals or companies

. courts or tribunals

. state or local governments government Ministers

. some government business enterprises or

. employment related matters, except in certain cases in the Australian Defence Force.

More information about the Commonwealth Ombudsman's functions can be found on the website at:

<http://www.comb.gov.au>.

Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security oversees activities of the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Defence Signals Directorate (DSD), Defence Intelligence Organisation (DIO), the Office of National Assessments (ONA) and Defence Imagery and Geospatial Organisation (DIGO). Complaints relating to illegality or impropriety by employees in these agencies may be referred to the Office of the Inspector-General.

Attachment H. International Trade Integrity Act 2007

International Trade Integrity Act 2007 No. 147, 2007

Note: An electronic version of this Act is available in ComLaw

([http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/43C34CE521706650CA25742B000F8491/\\$file/1472007.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/43C34CE521706650CA25742B000F8491/$file/1472007.pdf))

An Act to implement the Australian Government's response to recommendations made by the Inquiry into Certain Australian Companies in relation to the United Nations Oil-for-Food Programme, and for other purposes

International Trade Integrity Act 2007 No. 147, 2007

Contents

1 Short title

2 Commencement

3 Schedule(s)

Schedule 1—Enforcing UN sanctions

Charter of the United Nations Act 1945

Customs Act 1901

Schedule 2—Bribery of foreign officials

Criminal Code Act 1995

Income Tax Assessment Act 1997

International Trade Integrity Act 2007 No. 147, 2007

An Act to implement the Australian Government's response to recommendations made by the Inquiry into Certain Australian Companies in relation to the United Nations Oil-for-Food Programme, and for other purposes

[Assented to 24 September 2007]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *International Trade Integrity Act 2007*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	24 September 2007

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
2. Schedule 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	24 March 2008
3. Schedule 2	The day after this Act receives the Royal Assent.	25 September 2007

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Enforcing UN sanctions

Charter of the United Nations Act 1945

1 Section 2

Repeal the section, substitute:

2 Definitions

In this Act:

asset means:

- (a) an asset of any kind or property of any kind, whether tangible or intangible, movable or immovable, however acquired; and
- (b) a legal document or instrument in any form, including electronic or digital, evidencing title to, or interest in, such an asset or such property, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.

CEO, in relation to a Commonwealth entity, means the chief executive officer (however described) of that entity.

Charter of the United Nations means the Charter of the United Nations, done at San Francisco on 26 June 1945 [1945] ATS 1.

Note: The text of the Charter of the United Nations is set out in Australian Treaty Series 1945 No. 1. In 2007, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII Internet site (www.austlii.edu.au).

Commonwealth entity means:

- (a) an agency (within the meaning of the *Financial Management and Accountability Act 1997*); or
- (b) a Commonwealth authority (within the meaning of the *Commonwealth Authorities and Companies Act 1997*).

designated Commonwealth entity means a Commonwealth entity that is specified in an instrument under section 2A.

foreign government entity means:

- (a) the government of a foreign country or of part of a foreign country; or
- (b) an authority of the government of a foreign country; or
- (c) an authority of the government of part of a foreign country.

officer of a Commonwealth entity includes:

- (a) the CEO of the Commonwealth entity; and
- (b) an employee of the Commonwealth entity; and
- (c) any other person engaged by the Commonwealth entity, under contract or otherwise, to exercise powers, or perform duties or functions, of the Commonwealth entity.

public international organisation has the meaning given by section 70.1 of the *Criminal Code*.

State or Territory entity means:

- (a) a State or Territory; or
- (b) an authority of a State or Territory.

UN sanction enforcement law means a provision that is specified in an instrument under subsection 2B(1).

2 After section 2

Insert:

2A Meaning of *designated Commonwealth entity*

The Minister may, by legislative instrument, specify a Commonwealth entity as a **designated Commonwealth entity**.

2B Meaning of *UN sanction enforcement law*

- (1) The Minister may, by legislative instrument, specify a provision of a law of the Commonwealth as a **UN sanction enforcement law**.
- (2) The Minister may specify a provision in relation to particular circumstances.
- (3) The Minister may only specify a provision to the extent that it gives effect to a decision that:
 - (a) the Security Council has made under Chapter VII of the Charter of the United Nations; and
 - (b) Article 25 of the Charter requires Australia to carry out;in so far as that decision requires Australia to apply measures not involving the use of armed force.

Note: Articles 39 and 41 of the Charter provide for the Security Council to decide what measures not involving the use of armed force are to be taken to maintain or restore international peace and security.

- (4) A provision may be specified whether or not the provision is made for the sole purpose of giving effect to a decision of the Security Council.
- (5) A provision ceases to be a **UN sanction enforcement law** to a particular extent if:
 - (a) Article 25 of the Charter of the United Nations ceases to require Australia to carry out a decision referred to in subsection (3); and
 - (b) the provision gave effect to that decision to that extent; and
 - (c) the provision does not give effect to any other decision referred to in subsection (3) to that extent.

3 Section 6

Before “The Governor-General”, insert “(1)”.

4 Paragraph 6(a)

Omit “has made”, substitute “makes”.

5 At the end of section 6

Add:

- (2) Without limiting subsection (1), the regulations may give effect to a decision of the Security Council by any or all of the following means:
- (a) proscribing persons or entities;
 - (b) restricting or preventing uses of, dealings with, and making available, assets;
 - (c) restricting or preventing the supply, sale or transfer of goods or services;
 - (d) restricting or preventing the procurement of goods or services;
 - (e) providing for indemnities for acting in compliance or purported compliance with those regulations;
 - (f) providing for compensation for owners of assets;
 - (g) authorising the making of legislative instruments.
- (3) Despite subsection 14(2) of the *Legislative Instruments Act 2003*, regulations made for the purposes of subsection (1) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

6 At the end of Division 2 of Part 3

Add:

13A Invalidation of permission, authorisations etc.

A licence, permission, consent, approval or authorisation granted under the regulations (a **relevant authorisation**) is taken never to have been granted if information contained in, or information or a document accompanying, the application for the relevant authorisation:

- (a) is false or misleading in a material particular; or
- (b) omits any matter or thing without which the information or document is misleading in a material particular.

7 Application

Section 13A of the *Charter of the United Nations Act 1945*, as in force after the commencement of this item, applies in relation to a relevant authorisation granted in respect of an application made on or after that commencement.

8 Part 4 (heading)

Repeal the heading, substitute:

Part 4—Security Council decisions that relate to terrorism and dealings with assets

9 Section 14 (definition of *asset*)

Repeal the definition.

10 Subsection 20(1)

Omit “A person”, substitute “An individual”.

Note: The following heading to subsection 20(1) is inserted “*Offence for individuals*”.

11 Paragraphs 20(1)(a) and (b)

Omit “person”, substitute “individual”.

12 Subsection 20(1) (penalty)

Repeal the penalty.

13 At the end of subsection 20(2)

Add:

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

14 Subsection 20(3)

Omit “person”, substitute “individual”.

15 At the end of subsection 20(3)

Add:

Note: The individual bears a legal burden in relation to a matter in subsection (3) (see section 13.4 of the *Criminal Code*).

16 After subsection 20(3)

Insert:

Penalty for individuals

(3A) An offence under subsection (1) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (3B), or both.

(3B) For the purposes of subsection (3A), the amount is:

- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 2,500 penalty units; or
- (b) otherwise—2,500 penalty units.

Offence for bodies corporate

(3C) A body corporate commits an offence if:

- (a) the body corporate holds an asset; and
- (b) the body corporate:
 - (i) uses or deals with the asset; or
 - (ii) allows the asset to be used or dealt with; or
 - (iii) facilitates the use of the asset or dealing with the asset; and
- (c) the asset is a freezable asset; and
- (d) the use or dealing is not in accordance with a notice under section 22.

(3D) An offence under subsection (3C) is an offence of strict liability.

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

(3E) It is a defence if the body corporate proves that:

- (a) the use or dealing was solely for the purpose of preserving the value of the asset; or
- (b) the body corporate took reasonable precautions, and exercised due diligence, to avoid contravening subsection (3C).

Note: The body corporate bears a legal burden in relation to a matter in subsection (3E) (see section 13.4 of the *Criminal Code*).

Penalty for bodies corporate

(3F) An offence under subsection (3C) is punishable on conviction by a fine not exceeding:

- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 10,000 penalty units; or
- (b) otherwise—10,000 penalty units.

17 Subsection 20(4)

After “subsection (1)”, insert “or (3C)”.

18 Subsection 21(1)

Omit “A person”, substitute “An individual”.

Note: The following heading to subsection 21(1) is inserted “*Offence for individuals*”.

19 Paragraph 21(1)(a)

Omit “person” (first occurring), substitute “individual”.

20 Subsection 21(1) (penalty)

Repeal the penalty.

21 At the end of subsection 21(2)

Add:

Note: For ***strict liability***, see section 6.1 of the *Criminal Code*.

22 After subsection 21(2)

Insert:

Penalty for individuals

(2A) An offence under subsection (1) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (2B), or both.

(2B) For the purposes of subsection (2A), the amount is:

- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 2,500 penalty units; or
- (b) otherwise—2,500 penalty units.

Offence for bodies corporate

- (2C) A body corporate commits an offence if:
- (a) the body corporate, directly or indirectly, makes an asset available to a person or entity; and
 - (b) the person or entity to whom the asset is made available is a proscribed person or entity; and
 - (c) the making available of the asset is not in accordance with a notice under section 22.
- (2D) An offence under subsection (2C) is an offence of strict liability.
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.
- (2E) It is a defence if the body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravening subsection (2C).
Note: The body corporate bears a legal burden in relation to a matter in subsection (2E) (see section 13.4 of the *Criminal Code*).

Penalty for bodies corporate

- (2F) An offence under subsection (2C) is punishable on conviction by a fine not exceeding:
- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 10,000 penalty units; or
 - (b) otherwise—10,000 penalty units.

23 Subsection 21(3)

After “subsection (1)”, insert “or (2C)”.

24 After section 22A

Insert:

22B Invalidation of notice for false or misleading information

A notice under section 22 is taken never to have been made if information contained in, or information or a document accompanying, the application for the notice:

- (a) is false or misleading in a material particular; or
- (b) omits any matter or thing without which the information or document is misleading in a material particular.

25 Application

Section 22B of the *Charter of the United Nations Act 1945*, as in force after the commencement of this item, applies in relation to a notice made in respect of an application made on or after that commencement.

26 After Part 4

Insert:

Part 5—Offences relating to UN sanctions

27 Offence—Contravening a UN sanction enforcement law

Individuals

- (1) An individual commits an offence if:
 - (a) the individual engages in conduct; and
 - (b) the conduct contravenes a UN sanction enforcement law.
- (2) An individual commits an offence if:
 - (a) the individual engages in conduct; and
 - (b) the conduct contravenes a condition of a licence, permission, consent, authorisation or approval (however described) under a UN sanction enforcement law.

- (3) An offence under subsection (1) or (2) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (4), or both.
- (4) For the purposes of subsection (3), the amount is:
 - (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 2,500 penalty units; or
 - (b) otherwise—2,500 penalty units.

Bodies corporate

- (5) A body corporate commits an offence if:
 - (a) the body corporate engages in conduct; and
 - (b) the conduct contravenes a UN sanction enforcement law.
- (6) A body corporate commits an offence if:
 - (a) the body corporate engages in conduct; and
 - (b) the conduct contravenes a condition of a licence, permission, consent, authorisation or approval (however described) under a UN sanction enforcement law.
- (7) Subsection (5) or (6) does not apply if the body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravening that subsection.
Note: The body corporate bears a legal burden in relation to a matter in subsection (7) (see section 13.4 of the *Criminal Code*).
- (8) An offence under subsection (5) or (6) is an offence of strict liability.
Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (9) An offence under subsection (5) or (6) is punishable on conviction by a fine not exceeding:
 - (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 10,000 penalty units; or
 - (b) otherwise—10,000 penalty units.

Definitions

- (10) In this section:
engage in conduct means:
 - (a) do an act; or
 - (b) omit to perform an act.

28 Offence—False or misleading information given in connection with a UN sanction enforcement law

- (1) A person commits an offence if:
 - (a) the person gives information or a document to a Commonwealth entity; and
 - (b) the information or document is given in connection with the administration of a UN sanction enforcement law; and
 - (c) the information or document:
 - (i) is false or misleading; or
 - (ii) omits any matter or thing without which the information or document is misleading.

Penalty: Imprisonment for 10 years or 2,500 penalty units, or both.
- (2) A person (the *first person*) commits an offence if:
 - (a) the first person gives information or a document to another person; and
 - (b) the first person is reckless as to whether the other person or someone else will give the information or document to a Commonwealth entity in connection with the administration of a UN sanction enforcement law; and
 - (c) the information or document:

- (i) is false or misleading; or
- (ii) omits any matter or thing without which the information or document is misleading.

Penalty: Imprisonment for 10 years or 2,500 penalty units, or both.

- (3) Subsection (1) or (2) does not apply:
 - (a) as a result of subparagraph (1)(c)(i) or (2)(c)(i)—if the information or document is not false or misleading in a material particular; or
 - (b) as a result of subparagraph (1)(c)(ii) or (2)(c)(ii)—if the information or document did not omit any matter or thing without which the information or document is misleading in a material particular.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

Geographical application of offences

- (4) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (1) or (2).

Part 6—Information relating to UN sanctions

29 CEO of Commonwealth entity may give information or document

- (1) The CEO of a Commonwealth entity may give any information or document to the CEO of a designated Commonwealth entity for a purpose in connection with the administration of a UN sanction enforcement law.
- (2) Subsection (1) applies despite any other law of the Commonwealth, a State or a Territory.

30 Power to require information or documents to be given

- (1) The CEO of a designated Commonwealth entity may, for the purpose of determining whether a UN sanction enforcement law has been or is being complied with, give a person a written notice requiring the person to do either or both of the following:
 - (a) to give the CEO information of the kind, by the time and in any manner or form, specified in the notice;
 - (b) to give the CEO documents of the kind, by the time and in any manner, specified in the notice.
- (2) The person must comply with the notice despite any other law of the Commonwealth, a State or a Territory.
- (3) The time specified in the notice must be reasonable, having regard to all the circumstances.
- (4) The person may, before the time specified in the notice, request the CEO to extend the time by which the information or documents must be given.
- (5) The CEO may, by written notice given to the person, vary the notice under subsection (1) to specify a later time by which the information or documents must be given.
- (6) Subsection (5) does not limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* in relation to a notice under subsection (1).

Note: Subsection 33(3) of the *Acts Interpretation Act 1901* deals with revocation and variation etc. of instruments.

- (7) Subsection (1) does not apply if:
 - (a) the person is the Commonwealth or a Commonwealth entity; or
 - (b) the person:
 - (i) is, or has at any time been, an officer of a Commonwealth entity; and
 - (ii) obtained or generated the information or document in the course of carrying out his or her duties as an officer of the Commonwealth entity.

31 Information may be required to be given on oath

- (1) The CEO may require the information to be verified by, or given on, oath or affirmation.
- (2) The oath or affirmation is an oath or affirmation that the information is true.

32 Offence for failure to comply with requirement

- (1) A person commits an offence if:

- (a) the person has been given a notice under section 30; and
- (b) the person does not comply with the notice.

Penalty: Imprisonment for 12 months.

- (2) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (1).

33 Self-incrimination not an excuse

- (1) An individual is not excused from giving information or a document under section 30 on the ground that the information, or the giving of the document, might tend to incriminate the individual or otherwise expose the individual to a penalty or other liability.
- (2) However, neither the information given nor the giving of the document is admissible in evidence against the individual in any criminal proceedings, or in any proceedings that would expose the individual to a penalty, other than proceedings for an offence against:
 - (a) section 28 (false or misleading information given in connection with a UN sanction enforcement law); or
 - (b) section 32 (failure to comply with requirement to give information or document).

34 CEO may copy documents

If a person gives a document to the CEO of a designated Commonwealth entity under section 30, the CEO:

- (a) may take and keep a copy of the document; and
- (b) must return the document to the person within a reasonable time.

35 Further disclosure and use of information and documents

Disclosure and use of information etc. within entity

- (1) An officer of a designated Commonwealth entity may do any of the following for a purpose in connection with the administration of a UN sanction enforcement law or with a decision of the Security Council referred to in section 6:
 - (a) copy, make a record of or use, any information or document;
 - (b) disclose any information, or give any document, to another officer of that entity.

Disclosure outside of entity

- (2) A CEO of a designated Commonwealth entity may disclose any information or give any document to any of the following for a purpose in connection with the administration of a UN sanction enforcement law or with a decision of the Security Council referred to in section 6:
 - (a) a Minister of the Commonwealth, a State or a Territory;
 - (b) the CEO of another Commonwealth entity;
 - (c) a State or Territory entity;
 - (d) a foreign government entity;
 - (e) a public international organisation;
 - (f) a person specified in an instrument under subsection (3).
- (3) The Minister may, by legislative instrument, specify a person for the purposes of paragraph (2)(f).
- (4) Subsections (1) and (2) apply despite any other law of the Commonwealth, a State or a Territory.

36 Protection from liability

- (1) A person who, in good faith, gives, discloses, copies, makes a record of or uses information or a document under section 29, 30, 34 or 35 is not liable:
 - (a) to any proceedings for contravening any other law because of that conduct; or
 - (b) to civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.
- (2) Subsection (1) does not prevent the person from being liable to a proceeding for conduct of the person that is revealed by the information or document.

37 Retention of records and documents

- (1) A person who applies for a licence, permission, consent, authorisation or approval under a UN sanction enforcement law (a ***relevant authorisation***) must retain any records or documents relating to that application for the period of 5 years beginning on:
 - (a) if the relevant authorisation was granted—the last day on which an action to which the relevant authorisation relates was done; or
 - (b) if the relevant authorisation was not granted—the day on which the application was made.
- (2) A person who is granted a licence, permission, consent, authorisation or approval under a UN sanction enforcement law (a ***relevant authorisation***) must retain any records or documents relating to the person's compliance with any conditions to which the relevant authorisation is subject for the period of 5 years beginning on the last day on which an action to which the relevant authorisation relates was done.

Note: A person may commit an offence if the person fails to give under section 30 a record or document that is required to be retained under this section: see section 32.

38 Delegation

- (1) The CEO of a Commonwealth entity may, by written instrument, delegate all or any of his or her powers or functions under this Part to:
 - (a) an SES employee or acting SES employee of the entity; or
 - (b) an employee of the entity of equivalent rank to an SES employee.
- (2) In exercising powers or performing functions delegated under subsection (1), the delegate must comply with any directions of the CEO.

Part 7—Miscellaneous

39 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Customs Act 1901

27 Subsection 4(1)

Insert:

Charter of the United Nations means the Charter of the United Nations, done at San Francisco on 26 June 1945 [1945] ATS 1.

Note: The text of the Charter of the United Nations is set out in Australian Treaty Series 1945 No. 1. In 2007, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII Internet site (www.austlii.edu.au).

28 Subsection 4(1)

Insert:

UN-sanctioned goods means goods that are prescribed as UN-sanctioned goods under subsection 233BABAA(1).

29 At the end of Division 1 of Part IV

Add:

52 Invalidation of licence, permission etc. for false or misleading information

A licence, permission, consent or approval granted in respect of the importation of UN-sanctioned goods is taken never to have been granted if:

- (a) an application for the licence, permission, consent or approval was made in an approved form; and
- (b) information contained in, or information or a document accompanying, the form:
 - (i) was false or misleading in a material particular; or

- (ii) omitted any matter or thing without which the information or document is misleading in a material particular.

30 Application

Section 52 of the *Customs Act 1901*, as in force after the commencement of this item, applies in relation to a licence, permission, consent or approval granted in respect of an application made on or after that commencement.

31 At the end of Division 1 of Part VI

Add:

112B Invalidation of licence, permission etc. for false or misleading information

A licence, permission, consent or approval granted in respect of the exportation of UN-sanctioned goods is taken never to have been granted if:

- (a) an application for the licence, permission, consent or approval was made in an approved form; and
- (b) information contained in, or information or a document accompanying, the form:
 - (i) was false or misleading in a material particular; or
 - (ii) omitted any matter or thing without which the information or document is misleading in a material particular.

32 Application

Section 112B of the *Customs Act 1901*, as in force after the commencement of this item, applies in relation to a licence, permission, consent or approval granted in respect of an application made on or after that commencement.

33 Paragraph 210(1)(b)

Omit “or 233BAB(5) or (6)”, substitute “, 233BAB(5) or (6), 233BABAB(1) or 233BABAC(1)”.

34 After section 233BAB

Insert:

233BABAA UN-sanctioned goods

- (1) The regulations may prescribe specified goods as UN-sanctioned goods.
 - (2) Regulations made for the purposes of subsection (1) may provide that specified goods are only UN-sanctioned goods if:
 - (a) they are imported from, or exported to, a specified place; or
 - (b) the origin, or the final destination, of the goods is a specified place; or
 - (c) other specified circumstances apply in relation to the goods.
 - (3) The regulations must not prescribe goods for the purposes of subsection (1) unless:
 - (a) either:
 - (i) the importation of the goods is prohibited, either absolutely or on condition, by the *Customs (Prohibited Imports) Regulations 1956*; or
 - (ii) the exportation of the goods is prohibited, either absolutely or on condition, by the *Customs (Prohibited Exports) Regulations 1958*; and
 - (b) the regulation under which that importation or exportation is prohibited gives effect to a decision that:
 - (i) the Security Council has made under Chapter VII of the Charter of the United Nations; and
 - (ii) Article 25 of the Charter requires Australia to carry out;in so far as that decision requires Australia to apply measures not involving the use of armed force.
- Note: Articles 39 and 41 of the Charter provide for the Security Council to decide what measures not involving the use of armed force are to be taken to maintain or restore international peace and security.
- (4) For the purposes of paragraph (3)(b), a regulation may be taken to give effect to a decision:
 - (a) whether or not it is made for the sole purpose of giving effect to the decision; and
 - (b) whether or not it has any effect in addition to giving effect to the decision.

233BABAB Special offences for importation of UN-sanctioned goods

Offence for individuals

- (1) An individual commits an offence if:
 - (a) the individual intentionally imported goods; and
 - (b) the goods were UN-sanctioned goods and the individual was reckless as to that fact; and
 - (c) their importation:
 - (i) was prohibited under this Act absolutely; or
 - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.
- (2) Subject to subsection (3), absolute liability applies to paragraph (1)(c).
Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (3) For the purposes of an offence against subsection (1), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (1)(c)(ii) had not been obtained at the time of the importation.
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Penalty for individuals

- (4) An offence under subsection (1) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (5), or both.
- (5) For the purposes of subsection (4), the amount is:
 - (a) if the Court can determine the value of the goods to which the offence relates—
whichever is the greater of the following:
 - (i) 3 times the value of the goods; or
 - (ii) 2,500 penalty units;
 - (b) if the Court cannot determine the value of those goods—2,500 penalty units.

Offence for bodies corporate

- (6) A body corporate commits an offence if:
 - (a) the body corporate imported goods; and
 - (b) the goods were UN-sanctioned goods; and
 - (c) their importation:
 - (i) was prohibited under this Act absolutely; or
 - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.
- (7) Subsection (6) does not apply if the body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravening that subsection.
Note: The body corporate bears a legal burden in relation to a matter in subsection (7) (see section 13.4 of the *Criminal Code*).
- (8) Strict liability applies to paragraphs (6)(a) and (b).
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.
- (9) Subject to subsection (10), absolute liability applies to paragraph (6)(c).
Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (10) For the purposes of an offence against subsection (6), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (6)(c)(ii) had not been obtained at the time of the importation.
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Penalty for bodies corporate

- (11) An offence under subsection (6) is punishable on conviction by a fine not exceeding:
 - (a) if the Court can determine the value of the goods to which the offence relates—
whichever is the greater of the following:
 - (i) 3 times the value of the goods;
 - (ii) 10,000 penalty units; or
 - (b) if the Court cannot determine the value of those goods—10,000 penalty units.

Person not liable to other proceedings

- (12) A person convicted or acquitted of an offence against subsection (1) or (6) in respect of particular conduct is not liable to proceedings under section 233 in respect of that conduct.

233BABAC Special offences for exportation of UN-sanctioned goods

Offence for individuals

- (1) An individual commits an offence if:
- (a) the individual intentionally exported goods; and
 - (b) the goods were UN-sanctioned goods and the individual was reckless as to that fact; and
 - (c) their exportation:
 - (i) was prohibited under this Act absolutely; or
 - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the exportation, that approval had not been obtained.
- (2) Subject to subsection (3), absolute liability applies to paragraph (1)(c).
Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (3) For the purposes of an offence against subsection (1), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (1)(c)(ii) had not been obtained at the time of the exportation.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Penalty for individuals

- (4) An offence under subsection (1) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (5), or both.
- (5) For the purposes of subsection (4), the amount is:
- (a) if the Court can determine the value of the goods to which the offence relates—whichever is the greater of the following:
 - (i) 3 times the value of the goods;
 - (ii) 2,500 penalty units; or
 - (b) if the Court cannot determine the value of those goods—2,500 penalty units.

Offence for bodies corporate

- (6) A body corporate commits an offence if:
- (a) the body corporate exported goods; and
 - (b) the goods were UN-sanctioned goods; and
 - (c) their exportation:
 - (i) was prohibited under this Act absolutely; or
 - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the exportation, that approval had not been obtained.
- (7) Subsection (6) does not apply if the body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravening that subsection.
Note: The body corporate bears a legal burden in relation to a matter in subsection (7) (see section 13.4 of the *Criminal Code*).
- (8) Strict liability applies to paragraphs (6)(a) and (b).
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.
- (9) Subject to subsection (10), absolute liability applies to paragraph (6)(c).
Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (10) For the purposes of an offence against subsection (6), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (6)(c)(ii) had not been obtained at the time of the exportation.

Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Penalty for bodies corporate

- (11) An offence under subsection (6) is punishable on conviction by a fine not exceeding:
- (a) if the Court can determine the value of the goods to which the offence relates—whichever is the greater of the following:

- (i) 3 times the value of the goods;
 - (ii) 10,000 penalty units; or
 - (b) if the Court cannot determine the value of those goods—10,000 penalty units.
- Person not liable to other proceedings*
- (12) A person convicted or acquitted of an offence against subsection (1) or (6) in respect of particular conduct is not liable to proceedings under section 233 in respect of that conduct.

35 Subsection 233BAC(1)

Omit “or 233BAB(5) or (6)”, substitute “, 233BAB(5) or (6), 233BABAB(1) or (4) or 233BABAC(1) or (4)”.

36 Subsection 233BA(2)

After “section 233BAB”, insert “, 233BABAB or 233BABAC,”.

37 After section 233BA

Insert:

233C Offence for giving false or misleading information in relation to UN-sanctioned goods

Individuals

- (1) An individual commits an offence if:
 - (a) an application is made in respect of UN-sanctioned goods under:
 - (i) the *Customs (Prohibited Imports) Regulations 1956*; or
 - (ii) the *Customs (Prohibited Exports) Regulations 1958*; and
 - (b) the application is made in an approved form; and
 - (c) the individual signed the form; and
 - (d) information contained in, or information or a document accompanying, the form:
 - (i) is false or misleading; or
 - (ii) omits any matter or thing without which the information or document is misleading.

Penalty: Imprisonment for 10 years or 2,500 penalty units, or both.

Bodies corporate

- (2) A body corporate commits an offence if:
 - (a) an application is made by or on behalf of the body corporate; and
 - (b) the application is in an approved form; and
 - (c) the application is made in respect of UN-sanctioned goods under:
 - (i) the *Customs (Prohibited Imports) Regulations 1956*; or
 - (ii) the *Customs (Prohibited Exports) Regulations 1958*; and
 - (d) information contained in, or information or a document accompanying, the form:
 - (i) is false or misleading; or
 - (ii) omits any matter or thing without which the information or document is misleading.

Penalty: 12,500 penalty units.

- (3) Subsection (1) or (2) does not apply:
 - (a) as a result of subparagraph (1)(d)(i) or (2)(d)(i)—if the information or document is not false or misleading in a material particular; or
 - (b) as a result of subparagraph (1)(d)(ii) or (2)(d)(ii)—if the information or document did not omit any matter or thing without which the information or document is misleading in a material particular.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

Schedule 2—Bribery of foreign officials

Criminal Code Act 1995

1 After subsection 70.2(1) of the *Criminal Code*

Insert:

- (1A) In a prosecution for an offence under subsection (1), it is not necessary to prove that business, or a business advantage, was actually obtained or retained.

2 Paragraph 70.2(2)(a) of the *Criminal Code*

Repeal the paragraph, substitute:

- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;

3 Subsection 70.3(1) of the *Criminal Code* (table, heading to column 4)

Omit “the person would not have been guilty of an offence against...”, substitute “this written law requires or permits the provision of the benefit ...”.

4 Subsection 70.3(1) of the *Criminal Code* (table)

Before “law in” (wherever occurring), insert “written”.

Income Tax Assessment Act 1997

5 After subsection 26-52(2)

Insert:

- (2A) For the purposes of subsection (2), disregard whether business, or a business advantage, was actually obtained or retained.

6 Subsection 26-52(3)

Repeal the subsection (including the heading), substitute:

Payments that written law of foreign public official's country requires or permits

- (3) An amount is not a ***bribe to a foreign public official*** if, assuming the benefit had been provided, and all related acts had been done, in the *foreign public official's country, a written law of that country would have required or permitted the provision of the benefit.

7 Subsection 26-52(4)

Repeal the subsection (not including the heading), substitute:

- (4) An amount is not a ***bribe to a foreign public official*** if:

- (a) the value of the benefit is of a minor nature; and
(b) the amount is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature.

8 Paragraph 26-52(6)(a)

Repeal the paragraph, substitute:

- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;

9 Application

The amendments of the *Income Tax Assessment Act 1997* made by this Schedule apply to a loss or outgoing incurred on or after the commencement of this Schedule.

[Minister's second reading speech made in—
House of Representatives on 14 June 2007
Senate on 17 August 2007]

Attachment I. Customs Act 1901 *[hyperlink]*

**Customs Act 1901
Act No. 6 of 1901 as amended**

Available at

[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/61BBCD2969B4E2D2CA2574120005F8DF/\\$file/Customs01Vol1.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/61BBCD2969B4E2D2CA2574120005F8DF/$file/Customs01Vol1.pdf)

See notably Part I – Introductory and Part VI – The Exportation of Goods

Attachment J. Extracts – Income Tax Assessment Act 1997

Income Tax Assessment Act 1997

Act No. 38 of 1997 as amended

This compilation was prepared on 1 January 2008 taking into account amendments up to Act No. 184 of 2007

Volume 1 includes: Table of Contents Sections 1-1 to 36-55

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Volume 2 includes: Table of Contents Sections 40-1 to 55-10

Volume 3 includes: Table of Contents Sections 58-1 to 122-205

Volume 4 includes: Table of Contents Sections 124-1 to 152-430

Volume 5 includes: Table of Contents Sections 164-1 to 220-800

Volume 6 includes: Table of Contents Sections 240-1 to 410-5

Volume 7 includes: Table of Contents Sections 700-1 to 727-910

Volume 8 includes: Table of Contents Sections 768-100 to 995-1

Volume 9 includes: Note 1

Table of Acts

Act Notes

Table of Amendments

Notes 2–9

Table A

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

26-52 Bribes to foreign public officials

(1) You cannot deduct under this Act a loss or outgoing you incur that is a *bribe to a foreign public official.

(2) An amount is a *bribe to a foreign public official* to the extent that:

(a) you incur the amount in, or in connection with:

(i) providing a benefit to another person; or

(ii) causing a benefit to be provided to another person; or

(iii) offering to provide, or promising to provide, a benefit to another person; or

(iv) causing an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is not legitimately due to the other person (see subsection (6)); and

(c) you incur the amount with the intention of influencing a *foreign public official (who may or may not be the other person) in the exercise of the official's duties as a foreign public official in order to:

(i) obtain or retain business; or

(ii) obtain or retain an advantage in the conduct of business that is not legitimately due to you, or another person, as the recipient, or intended recipient, of the advantage in the conduct of business (see subsection (7)).

The benefit may be any advantage and is not limited to property.

(2A) For the purposes of subsection (2), disregard whether business, or a business advantage, was actually obtained or retained.

Payments that written law of foreign public official's country requires or permits

(3) An amount is not a *bribe to a foreign public official* if, assuming the benefit had been provided, and all related acts had been done, in the *foreign public official's country, a written law of that country would have required or permitted the provision of the benefit.

Facilitation payments

(4) An amount is not a ***bribe to a foreign public official*** if:

- (a) the value of the benefit is of a minor nature; and
- (b) the amount is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature.

(5) For the purposes of this section, a ***routine government action*** is an action of a *foreign public official that:

- (a) is ordinarily and commonly performed by the official; and
- (b) is covered by any of the following subparagraphs:
 - (i) granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;
 - (ii) processing government papers such as a visa or work permit;
 - (iii) providing police protection or mail collection or delivery;
 - (iv) scheduling inspections associated with contract performance or related to the transit of goods;
 - (v) providing telecommunications services, power or water;
 - (vi) loading and unloading cargo;
 - (vii) protecting perishable products, or commodities, from deterioration;
 - (viii) any other action of a similar nature; and
- (c) does not involve a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business; and
- (d) does not involve encouraging a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business.

Benefit not legitimately due

(6) In working out if a benefit is not legitimately due to another person in a particular situation, disregard the following:

- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;
- (b) the value of the benefit;
- (c) any official tolerance of the benefit.

Advantage in the conduct of business that is not legitimately due

(7) In working out if an advantage in the conduct of business is not legitimately due in a particular situation, disregard the following:

- (a) the fact that the advantage may be customary, or perceived to be customary, in the situation;
- (b) the value of the advantage;
- (c) any official tolerance of the advantage.

Duties of foreign public official

(8) The duties of a *foreign public official are any authorities, duties, functions or powers that:

- (a) are conferred on the official; or
- (b) the official holds himself or herself out as having.

Attachment K. Extracts – Criminal Code Act 1995

Criminal Code Act 1995

Act No. 12 of 1995 as amended

This compilation was prepared on 20 January 2008 taking into account amendments up to Act No. 177 of 2007

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing, Attorney-General's Department, Canberra

Division 70—Bribery of foreign public officials

70.1 Definitions

In this Division:

benefit includes any advantage and is not limited to property.

business advantage means an advantage in the conduct of business.

control, in relation to a company, body or association, includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

duty, in relation to a foreign public official, means any authority, duty, function or power that:

- (a) is conferred on the official; or
- (b) that the official holds himself or herself out as having.

foreign government body means:

- (a) the government of a foreign country or of part of a foreign country; or
- (b) an authority of the government of a foreign country; or
- (c) an authority of the government of part of a foreign country; or
- (d) a foreign local government body or foreign regional government body; or
- (e) a foreign public enterprise.

foreign public enterprise means a company or any other body or association where:

- (a) in the case of a company—one of the following applies:
 - (i) the government of a foreign country or of part of a foreign country holds more than 50% of the issued share capital of the company;
 - (ii) the government of a foreign country or of part of a foreign country holds more than 50% of the voting power in the company;
 - (iii) the government of a foreign country or of part of a foreign country is in a position to appoint more than 50% of the company's board of directors;
 - (iv) the directors (however described) of the company are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country;
 - (v) the government of a foreign country or of part of a foreign country is in a position to exercise control over the company; and
- (b) in the case of any other body or association—either of the following applies:
 - (i) the members of the executive committee (however described) of the body or association are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country;
 - (ii) the government of a foreign country or of part of a foreign country is in a position to exercise control over the body or association; and
- (c) the company, body or association:
 - (i) enjoys special legal rights or a special legal status under a law of a foreign country or of part of

a foreign country; or

(ii) enjoys special benefits or privileges under a law of a foreign country or of part of a foreign country; because of the relationship of the company, body or association with the government of the foreign country or of the part of the foreign country, as the case may be.

foreign public official means:

- (a) an employee or official of a foreign government body; or
- (b) an individual who performs work for a foreign government body under a contract; or
- (c) an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country; or
- (d) an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country; or
- (e) an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force); or
- (f) a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country; or
- (g) an employee of a public international organisation; or
- (h) an individual who performs work for a public international organization under a contract; or
- (i) an individual who holds or performs the duties of an office or position in a public international organisation; or
- (j) an individual who is otherwise in the service of a public international organisation; or
- (k) a member or officer of the legislature of a foreign country or of part of a foreign country; or
- (l) an individual who:
 - (i) is an authorised intermediary of a foreign public official covered by any of the above paragraphs; or
 - (ii) holds himself or herself out to be the authorised intermediary of a foreign public official covered by any of the above paragraphs.

public international organisation means:

- (a) an organisation:
 - (i) of which 2 or more countries, or the governments of 2 or more countries, are members; or
 - (ii) that is constituted by persons representing 2 or more countries, or representing the governments of 2 or more countries; or
- (b) an organisation established by, or a group of organisations constituted by:
 - (i) organisations of which 2 or more countries, or the governments of 2 or more countries, are members; or
 - (ii) organisations that are constituted by the representatives of 2 or more countries, or the governments of 2 or more countries; or
- (c) an organisation that is:
 - (i) an organ of, or office within, an organisation described in paragraph (a) or (b); or
 - (ii) a commission, council or other body established by an organisation so described or such an organ; or
 - (iii) a committee, or subcommittee of a committee, of an organization described in paragraph (a) or (b), or of such an organ, council or body. ***share*** includes stock.

70.2 Bribing a foreign public official

(1) A person is guilty of an offence if:

- (a) the person:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or
 - (iii) offers to provide, or promises to provide, a benefit to another person; or
 - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
- (b) the benefit is not legitimately due to the other person; and

(c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:

- (i) obtain or retain business; or
- (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Penalty: Imprisonment for 10 years.

Note 1: For defences, see sections 70.3 and 70.4.

Note 2: Section 4B of the *Crimes Act 1914* allows a court to impose a fine instead of imprisonment or in addition to imprisonment.

(1A) In a prosecution for an offence under subsection (1), it is not necessary to prove that business, or a business advantage, was actually obtained or retained.

Benefit that is not legitimately due

(2) For the purposes of this section, in working out if a benefit is **not legitimately due** to a person in a particular situation, disregard the following:

- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;
- (b) the value of the benefit;
- (c) any official tolerance of the benefit.

Business advantage that is not legitimately due

(3) For the purposes of this section, in working out if a business advantage is **not legitimately due** to a person in a particular situation, disregard the following:

- (a) the fact that the business advantage may be customary, or perceived to be customary, in the situation;
- (b) the value of the business advantage;
- (c) any official tolerance of the business advantage.

70.3 Defence—conduct lawful in foreign public official's country

(1) A person is not guilty of an offence against section 70.2 in the cases set out in the following table:

Defence of lawful conduct			
Item	In a case where the person's conduct occurred in relation to this kind of foreign public official...	and if it were assumed that the person's conduct had occurred wholly...	this written law requires or permits the provision of the benefit ...
1	an employee or official of a foreign government body	in the place where the central administration of the body is located	a written law in force in that place
2	an individual who performs work for a foreign government body under a contract	in the place where the central administration of the body is located	a written law in force in that place
3	an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be
4	an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be
5	an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force)	in the place where the central administration of the body is located	a written law in force in that place

Defence of lawful conduct			
Item	In a case where the person's conduct occurred in relation to this kind of foreign public official...	and if it were assumed that the person's conduct had occurred wholly...	this written law requires or permits the provision of the benefit ...
6	a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be
7	an employee of a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
8	an individual who performs work for a public international organisation under a contract	in the place where the headquarters of the organisation is located	a written law in force in that place
9	an individual who holds or performs the duties of a public office or position in a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
10	an individual who is otherwise in the service of a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
11	a member or officer of the legislature of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

(2) A person is not guilty of an offence against section 70.2 if:

(a) the person's conduct occurred in relation to a foreign public official covered by paragraph (l) of the definition of **foreign public official** in section 70.1

(which deals with intermediaries of foreign public officials covered by other paragraphs of that definition); and

(b) assuming that the first-mentioned person's conduct had occurred instead in relation to:

(i) the other foreign public official of whom the first-mentioned foreign public official was an authorised intermediary; or

(ii) the other foreign public official in relation to whom the first-mentioned foreign public official held himself or herself out to be an authorized intermediary; subsection (1) would have applied in relation to the first-mentioned person.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3).

(3) To avoid doubt, if:

(a) a person's conduct occurred in relation to a foreign public official covered by 2 or more paragraphs of the definition of **foreign public official** in section 70.1; and

(b) at least one of the corresponding items in subsection (1) is applicable to the conduct of the first-mentioned person; subsection (1) applies to the conduct of the first-mentioned person.

70.4 Defence—facilitation payments

(1) A person is not guilty of an offence against section 70.2 if:

- (a) the value of the benefit was of a minor nature; and
- (b) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
- (c) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3); and
- (d) any of the following subparagraphs applies:
 - (i) the person has retained that record at all relevant times;
 - (ii) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;
 - (iii) a prosecution for the offence is instituted more than 7 years after the conduct occurred.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

Routine government action

(2) For the purposes of this section, a ***routine government action*** is an action of a foreign public official that:

- (a) is ordinarily and commonly performed by the official; and
- (b) is covered by any of the following subparagraphs:
 - (i) granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;
 - (ii) processing government papers such as a visa or work permit;
 - (iii) providing police protection or mail collection or delivery;
 - (iv) scheduling inspections associated with contract performance or related to the transit of goods;
 - (v) providing telecommunications services, power or water;
 - (vi) loading and unloading cargo;
 - (vii) protecting perishable products, or commodities, from deterioration;
 - (viii) any other action of a similar nature; and
- (c) does not involve a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business; and
- (d) does not involve encouraging a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business.

Content of records

(3) A record of particular conduct engaged in by a person complies with this subsection if the record sets out:

- (a) the value of the benefit concerned; and
- (b) the date on which the conduct occurred; and
- (c) the identity of the foreign public official in relation to whom the conduct occurred; and
- (d) if that foreign public official is not the other person mentioned in paragraph 70.2(1)(a)—the identity of that other person; and
- (e) particulars of the routine government action that was sought to be expedited or secured by the conduct; and
- (f) the person's signature or some other means of verifying the person's identity.

70.5 Territorial and nationality requirements

- (1) A person does not commit an offence against section 70.2 unless:

(a) the conduct constituting the alleged offence occurs:

- (i) wholly or partly in Australia; or
- (ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(b) the conduct constituting the alleged offence occurs wholly outside Australia and:

- (i) at the time of the alleged offence, the person is an Australian citizen; or
- (ii) at the time of the alleged offence, the person is a resident of Australia; or
- (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Note: The expression *offence against section 70.2* is given an extended meaning by subsections 11.2(1) and 11.6(2).

(2) Proceedings for an offence against section 70.2 must not be commenced without the Attorney-General's written consent if:

(a) the conduct constituting the alleged offence occurs wholly outside Australia; and

(b) at the time of the alleged offence, the person alleged to have committed the offence is:

- (i) a resident of Australia; and
- (ii) not an Australian citizen.

(3) However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence against section 70.2 before the necessary consent has been given.

70.6 Saving of other laws

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

Attachment L. Charter of the United Nations Act 1945 *[hyperlink]*

Act No. 32 of 1945 as amended

Available at
[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D1AC9CB30DA619EDCA257412001254D0/\\$file/CharteroftheUnitedNations1945_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D1AC9CB30DA619EDCA257412001254D0/$file/CharteroftheUnitedNations1945_WD02.pdf)

Attachment M. Foreign bribery brochure

BRIBING A FOREIGN PUBLIC OFFICIAL IS A CRIME

It is a criminal offence to bribe a foreign public official.

The offence applies to:

- Individuals or companies, whether or not they are Australian, who bribe or attempt to bribe a foreign public official while in Australia, and
- Australian citizens, Australian residents or companies incorporated in Australia who bribe or attempt to bribe a foreign public official while overseas.

Individuals or companies that commit the offence can be prosecuted in an Australian court.

Australian law provides for up to 10 years imprisonment for persons found guilty of bribing a foreign public official. A court can also impose a fine instead of, or in addition to, imprisonment.

Proceeds of this criminal activity can also be forfeited to the Australian Government.

The high penalties for foreign bribery reflect the seriousness of the offence. Corruption shrinks the global market for Australian exports and investment. It undermines fair competition, and can have disastrous consequences for developing economies.

The law applies to both individuals and companies

Companies can be found guilty of the foreign bribery offence and can be held criminally responsible for the acts of their agents.

Companies must create and maintain a corporate culture that requires compliance with the law. They must take reasonable steps to ensure that their employees do not commit foreign bribery offences.

Companies should also ensure that they have appropriate channels for reporting suspected breaches of the law, and that people who do report breaches are protected from persecution within the company.

What is bribing a foreign public official?

The definition of 'foreign bribery' is very broad. It includes providing or offering a benefit to another person, or causing a benefit to be provided or offered to another person, where the benefit is not legitimately due.

The benefit must be intended to influence a foreign public official in the exercise of his or her official duties for the purpose of obtaining business or a business advantage.

A 'benefit' can be a non-monetary or non-tangible inducement.

It does not need to be provided or offered to the foreign public official (that is, it can be provided or offered to another person). It can also be provided or offered by an agent.

Who are foreign public officials?

The definition of 'foreign public official' is also very broad. It includes:

- employees, officials or contractors of a foreign government body
- individuals performing the duties of an appointment, office or position under a law of a foreign country
- individuals holding or performing the duties of an appointment, office or position created by custom or convention of a foreign country
- individuals in the service of a foreign government body (including service as a member of a military force or police force)
- members of the executive, judiciary, magistracy or legislature of a foreign country
- employees, contractors and individuals who perform the duties of an office or position, or are otherwise in the service of a public international organisation (such as the United Nations)
- individuals who hold themselves out to be an authorized intermediary of a foreign public official.

If you suspect that an individual or company has bribed or attempted to bribe a foreign public official, please report the matter to Crime Stoppers on 1800 333 000 or write to:

Australian Federal Police [...]

Alternatively, write to the Australian Federal Police in your capital city.

For more information, visit www.ag.gov.au/foreignbribery

Produced by the Australian Government Attorney-General's Department.

Attachment N. Fact Sheet 4, Foreign Bribery Information and Awareness Pack

FOREIGN BRIBERY – FACT SHEET 4

Taxation Implications of Foreign Bribery

Bribery of public officials in Australia or overseas is a criminal offence and is not tax deductible.

This fact sheet outlines the difference between a bribe and a facilitation payment for tax purposes, and provides guidance to taxpayers and businesses that have dealings with foreign public officials.

It is important that businesses who operate in jurisdictions where bribes or facilitation payments may occur:

- understand the relevant Australian laws, including what constitutes a bribe or facilitation payment
- have systems in place to report facilitation payments
- implement assurance processes to minimise their risk of breaking the law, and
- are aware of the Australian Taxation Office (ATO) compliance activities in this area.

The ATO is working to ensure that bribes to foreign public officials cannot be claimed as tax deductions and only legitimate facilitation payments will be allowed.

What is a bribe?

For tax purposes, a bribe is generally a benefit provided or promised to another person that is:

- not legitimately due to the other person
- provided with the intent to influence a foreign public official (who may or may not be the recipient of the benefit), and
- provided to obtain or retain business, or a business advantage, that is not legitimately due.

The benefit may be any advantage and is not limited to property.

What is a facilitation payment?

A facilitation payment is a payment to a foreign public official for the sole, or dominant, purpose of expediting or securing the performance of a routine government action of a minor nature.

A facilitation payment is not regarded as a bribe and may be tax deductible.

Examples of routine government actions of a minor nature include the following:

- granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country
- processing government papers such as a visa or work permit
- providing police protection or mail collection or delivery
- scheduling inspections associated with contract performance or related to the transit of goods
- providing telecommunications services, power or water
- loading and unloading cargo, and / or
- protecting perishable products, or commodities, from deterioration.

The above, and any action of a similar nature, must not involve a decision (or involve encouraging a decision) about whether to award new business, continue existing business with a particular person, or change the terms of new or existing business.

What should taxpayers do?

Your business or organisation should make sure any employees, representatives, agents or intermediaries who conduct business with foreign public officials understand this law. This may include:

- putting in place board-endorsed systems and processes which are tested and reviewed to assure the integrity of processes, payments and people
- implementing a code of conduct that sets out expectations for the behaviour of employees, agents and intermediaries
- monitoring the reputation and suitability of representatives, agents or intermediaries engaged to act on behalf of your business to engage with foreign public officials
- putting in place an independent, confidential and impartial reporting function for staff and others to alert senior management or Australian government authorities of possible criminal conduct, and

- ensuring that accounting systems can identify facilitation payments.

Accounting systems and working papers should be able to identify and report facilitation payments for review by internal and external auditors.

The Criminal Code Act 1995 (Cth) imposes record keeping requirements with respect to facilitation payments and compliance with them needs to be considered by companies who wish to make facilitation payments.

Accurate records should be kept for financial reporting and any review of internal controls and tax compliance processes, detailing:

- a description of the benefit secured and the circumstances which led to your company seeking the benefit—was it a routine government action?
- the date(s) the benefit was secured
- the amount(s) paid or the gift(s) given and its value
- the entity paying for the benefit
- the country in which the benefit was secured
- the method of payment
- the date the benefit was granted to your company
- the identity and position of the foreign public official or other person the payment was made to, and
- either your company's authorising officer's signature or some other means of identification.

These records should be available for audit and the accuracy of the particulars should meet the standard set by sound audit processes. Audit reports should be reviewed and, if necessary, acted on by audit committees.

What is the Australian Taxation Office doing?

The ATO is focusing on compliance in the area of bribes and facilitation payments. In the Commissioner of Taxation's Compliance Program 2006–07, the ATO undertook to ensure that only legitimate expenses are claimed as deductions (and that only legitimate input tax credits are claimed), by:

- reviewing significant, one-off, regular or embedded payments by Australian businesses to entities in jurisdictions where bribes or facilitation payments are said to be 'part of doing business'
- checking that businesses with particular international trade profiles have appropriate codes of conduct and systems in place to detect bribes and international facilitation payments, and
- reviewing organisations that do not have appropriate systems in place.

The ATO also encourages people who may have information about businesses they suspect of paying bribes to contact them directly on 1800 060 062. People who call this number will also be asked to inform the Australian Federal Police of their suspicions.

Which laws target bribery of foreign public officials?

Australia's obligations are outlined in the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and include making foreign bribery a criminal offence and ensuring bribes to foreign public officials are not tax deductible.

The Income Tax Assessment Act 1997 (Cth) also denies taxpayers a deduction for bribes to foreign public officials (sections 26 – 52) but may allow deductions for facilitation payments (subsections 26 – 52(3) – (5)).

Penalties for incorrect claims can be substantial.

Section 70.2 of the Criminal Code Act 1995 (Cth) makes it a criminal offence to bribe or attempt to bribe a foreign public official, whether in Australia or elsewhere. This means that Australian citizens and corporations can be prosecuted for actions undertaken overseas.

Penalties for bribery include imprisonment and substantial fines.

Attachment O. ATO advice on facilitation payments

Commissioner's foreword

We are committed to providing a world-class tax administration for Australian business. Our objective is to administer the tax laws fairly and efficiently for all taxpayers.

In supporting the competitiveness of Australian business we look for ways to reduce compliance costs and make compliance as easy as possible, as well as providing avenues for certainty on contentious tax issues. Our aim is to smooth the way for business prosperity while maintaining a level playing field for all businesses.

As part of our commitment to business we have developed this publication. It provides practical guidance to help businesses manage their tax obligations in the area of bribes and facilitation payments.

We suggest initiatives that company boards can put in place and offer suggestions to help businesses meet their obligations under the law. We strongly recommend that businesses:

- have a code of conduct across the business relating to bribes
- have a strong internal audit function and audit committee, and
- act to rectify any relevant internal control weaknesses identified and reported to the board by external auditors.

In preparing this document we consulted with key stakeholders, including the Business Council of Australia, the Corporate Tax Association, the Taxation Institute of Australia, Transparency International, Australian Stock Exchange and Standards Australia. I thank everyone for their valuable contribution.

This publication complements the Organisation for Economic Cooperation and Development publication, *OECD bribery awareness handbook for tax examiners*, and builds on advice from Transparency International.

The cornerstone of our work with business is boosting self regulation and enhancing governance processes that help identify risks before they eventuate.

Michael D'Ascenzo

Commissioner of Taxation

Introduction

Making payments to bribe public officials in Australia or overseas is a serious criminal offence which attracts significant

penalties for both a company and its employees. Bribes are not tax deductible.

A facilitation payment is not regarded as a bribe and may be tax deductible. This is a payment to a foreign public official to perform routine government actions of a minor nature.

The Tax Office is focusing on this area to ensure that claims for tax deductions and GST credits are legitimate, and that businesses have appropriate assurance processes in place.

Businesses that operate in jurisdictions where bribes and facilitation payments may occur may wish to consider their exposure to risk and act to:

- understand the relevant Australian laws, including the difference between a bribe and a facilitation payment
- implement assurance processes to minimise their risk of offending, and
- be aware of our compliance activities in this area.

What is the Tax Office doing?

We are focusing on bribes and facilitation payments in our compliance activities with the intention of ensuring that only legitimate expenses are claimed as deductions (and that only legitimate GST credits are claimed). We will:

- review significant, one-off, regular or embedded payments by Australian businesses to entities in jurisdictions
- where bribes and facilitation payments are known to be 'part of doing business'

- check that businesses with particular international trade profiles have appropriate codes of conduct and systems in
- place to detect bribes and confirm facilitation payments, and
- review organisations that do not have appropriate systems in place.

We will pay particular attention to all businesses that have significant trading activities in countries that are given a low rating on Transparency International's corruption perception index. In addition, as part of our senior tax officer visits to the top 100 companies twice a year, we will discuss bribes and facilitation payments and seek confirmation that the companies have assurance processes in place to minimise the risk of bribes occurring.

We have also issued guidelines for staff on the treatment of bribes and facilitation payments, *Guidelines for Tax Office auditors – understanding and dealing with bribery*.

These guidelines are modelled on the *OECD bribery awareness handbook for tax examiners*.

In identifying and dealing with deductions being claimed for bribe payments we are primarily concerned with protecting the revenue and maintaining community confidence in our administration. However, we also have an important role to play in the whole-of-government effort to combat corruption and bribery. We fulfil this role by referring information on suspected or actual bribe transactions to the Australian Federal Police for potential criminal investigation and/or prosecution.

Where warranted, and within the requirements of legislation, we will pass on information to the Australian Federal Police

pursuant to section 3E of the *Taxation Administration Act 1953*.

What laws affect bribery and facilitation payments?

In 1999 Australia became a party to the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Australian Government subsequently introduced changes to the relevant tax and criminal legislation.

Sections 26-52 and 26-53 of the *Income Tax Assessment Act 1997* (ITAA) deny taxpayers a deduction for bribes paid to foreign or domestic public officials. Deductions may be allowable for facilitation payments to foreign public officials (subsections 26-52(4)-(5)).

The Commonwealth *Criminal Code Act 1995* (Criminal Code) makes it a criminal offence to bribe a foreign public official, whether in Australia or elsewhere. This means that Australian citizens and corporations can be prosecuted for actions undertaken overseas. The penalties for bribery include up to 10 years imprisonment and substantial fines. For further information see Division 70 of the Criminal Code.

Due to the similarity of the relevant laws, a payment which is considered a bribe for the tax law is also likely to be referred for criminal investigation.

What constitutes a bribe?

For tax purposes, a **bribe** is generally a benefit provided to another person that is:

- not legitimately due to that person
- provided with the intention of influencing a public official (who may or may not be the direct recipient of the benefit)
- provided to obtain or retain a business advantage.

For example, a payment to a foreign trade official to secure or maintain foreign trade.

What constitutes a facilitation payment?

A **facilitation payment** is a payment to a foreign public official to perform a routine government action of a minor nature, such as granting a permit or licence, providing utility services, or loading or unloading cargo. The action must be ordinarily and commonly performed by the official and must not involve a decision about awarding new business or continuing existing business. Facilitation payments are defined in subsections 26-52(4)-(5).

For example, on arriving in a foreign country, a business person is informed that their visa is invalid. The business person, who is entitled to a visa, pays a fee to a foreign public official for the sole purpose of expediting the issue of a new visa.

For tax purposes, facilitation payments are not bribes and may be deductible.

What can taxpayers do to meet their obligations?

To meet your business's tax obligations, you can put assurance processes in place to ensure that your employees, agents or intermediaries who conduct business with government officials understand the law. These may be board-endorsed systems and processes that are tested and reviewed to assure the board that its processes, payments and people have integrity.

Assurance processes may include:

- implementing a code of conduct that sets out expectations for the behaviour of employees, agents and
- intermediaries, including those acting for subsidiaries and joint ventures
- ensuring internal auditors and audit committees have clear guidelines for the identification and escalation of risk
- having external auditors assess your internal controls relating to bribery for risk
- implementing an effective monitoring process to check the reputation and suitability of the agents or intermediaries
- you engage to act for your business in dealings with government officials
- implementing an independent, confidential and impartial issues reporting function for staff and others to report
- possible criminal conduct to your senior management or government authorities
- ensuring that company records can identify and substantiate facilitation payments.

We acknowledge that some businesses have already recognised and implemented the better practices needed to prevent the payment of bribes, including those outlined in Standards Australia International's standard AS 8001-2003 titled *Fraud and Corruption Control*.

The level of assurance processes you implement will vary depending on whether your business is a large listed multinational or a smaller, closely-managed business with limited international dealings.

Code of conduct

Codes of conduct are designed to influence the behaviour of directors, key executives and employees.

The existence of a code of conduct helps assure us, taxpayers and the broad community that tax deductions claimed in Australia are in accordance with our tax laws. Establishing a code of conduct can also help to minimise your tax risk by ensuring that bribes to public officials are not paid in the first place.

The ASX Corporate Governance Council recommends that companies establish and disclose a code of conduct (Recommendation 3.1 of the Council's *Principles of Good Corporate Governance and Best Practice Recommendations*

[ASX Principles]).

Proposed amendments to the ASX Principles include a list of suggestions for the content of a code of conduct, including:

Describe the company's approach to business courtesies, bribes, facilitation payments, inducements and commissions. This might include how the company regulates the giving and accepting of business courtesies and facilitation payments and prevents the offering and acceptance of bribes, inducements and commissions and the misuse of company assets and resources.

Our position is that an effective code of conduct should provide clear guidance on your business's policies and expectations regarding the behaviour of employees, agents and intermediaries in relation to bribes and facilitation payments.

A comprehensive code will:

- explain that your business does not countenance illicit payments to induce government officials to make
- favourable business decisions
- outline the law in Australia relating to bribery of foreign public officials

- offer guidance on what constitutes an acceptable facilitation payment or gift and what will be considered a bribe
- make clear that an internal audit process will follow if there are any concerns about payment that appear to be bribes.

For greater assurance, a business could implement a process for reporting any payments or gifts made to government officials to senior management and for involving senior management in situations where doubt exists.

We recommend you take steps to ensure that all staff, including those working for subsidiaries and joint ventures, and company agents and representatives are aware of the expectations contained in the code of conduct.

You may also need to check if your business needs to comply with the provisions of the (US) *Foreign Corrupt Practices Act*. You may find it useful to refer to the requirements of this legislation when considering the assurance practices you should implement in Australia.

Internal auditors and audit committees

The board of directors has an important role to play in ensuring that proper governance processes are in place to manage the risk of incurring significant penalties for both the company and its employees as a result of employees bribing public officials.

To minimise the business's tax risk, the board of directors can establish clear guidelines for its audit committee that set parameters for the identification and escalation of risk.

The audit committee's role is to monitor the scope of the internal audit and review internal audit reports and management responses.

The internal audit function plays a significant role in evaluating and monitoring the adequacy and effectiveness of internal control systems. It plays a vital role in managing risks generally, including checking that bribes are not paid. The independence of these auditors is paramount, and direct reporting by the internal audit function to the audit committee would be an important control.

External auditors

In auditing company financial reports, auditors make risk assessments by, among other things, reviewing the company's internal controls.

External auditors conduct audits in accordance with Australian Auditing Standards. Under these standards, auditors are required to identify any material weaknesses in the design or implementation of internal controls over financial reporting that come to their attention, and to report these to the company's board of directors. We expect this would include any material weaknesses in internal controls relating to bribery.

Monitoring agents and intermediaries

Your business should carefully check the reputation, qualifications and history of business practices of potential agents or intermediaries. Fees paid for the services these representatives provide should be reasonable and in line with what would

be paid locally for similar services – in particular, the level of remuneration should not provide any incentive to act improperly.

You can implement a number of processes to provide greater assurance for your business. These include:

- executing a formal agreement with agents or intermediaries that they will act in accordance with your business's
- code of conduct
- undertaking periodic contract monitoring to ensure your expectations around business conduct and performance
- are met, and
having a clear process for reporting and dealing with any improper conduct by an agent or intermediary – in

particular, provision for timely termination of the agreement if any improper conduct occurs.

Staff concerns

You can initiate processes to protect employees who wish to report possible criminal conduct to senior management. If employees have some level of comfort that they can report conduct they suspect does not comply with the law, your business has greater assurance that corrupt practices will be minimised.

Such processes need to:

- be independent and provide staff with the confidentiality they need to raise issues that affect them or the business
- have three vital functions: complaint resolution (including interventions), analysis and reporting, and education;

and

- have standards of practice that enable the process to fulfil its role with integrity.

Standards Australia International has issued AS 8004-2003 *Whistleblowing Programs for Entities*, which you may find Bribes and facilitation payments: A guide to managing your tax obligations Page 4 of 6 file://H:\OECD%20supplementary%20questions\Bribes%20and%20facilitation%20pa... 04/04/2008 useful in establishing an appropriate reporting mechanism.

Company records

Implementing record-keeping processes to give the board information that identifies the size and nature of payments made to government officials would provide additional assurance. This would be particularly true of records that identify and report facilitation payments for review by internal and external auditors.

For the purpose of income tax law, the question is whether the person has kept records in a way that complies with section 262A of the *Income Tax Assessment Act 1936*. This section requires that records be kept for all transactions and that those records are adequate to explain the transactions. (Section 382-5 of Schedule 1 to the *Taxation Administration*

Act 1953 sets out the record-keeping requirements for the claiming of GST credits.)

For facilitation payments, the Commonwealth *Criminal Code Act 1995* sets out the following record making and retention requirements (Division 70):

Failure to maintain records in this form may have important consequences if a person is prosecuted for bribing a foreign public official under the Criminal Code. The person will not be able to rely on a defence that the payments were facilitation payments, even if the defence would otherwise be available, if they have not kept the required records.

A failure to maintain records in the form required under the Criminal Code will not necessarily mean the person cannot claim a tax deduction.

These records should be available for audit and the accuracy of the particulars tested by following sound audit processes.

Audit reports should be reviewed and, if necessary, acted on by audit committees.

References

ASX Corporate Governance Council's *Principles of Good Corporate Governance and Best Practice Recommendations*

AS 8004-2003 *Whistleblowing Programs for Entities*

Compliance Program 2006-07

Criminal Code Act 1995 – Section 70.1 Definitions

Criminal Code Act 1995 – Division 70 – Bribery of foreign public officials

Criminal Code Act 1995 – Division 141 – Bribery

Criminal Code Act 1995 – Division 142 – Offences relating to bribery

Income Tax Assessment Act 1997 – Section 26–52 – Bribes to foreign public officials

Income Tax Assessment Act 1997 – Section 26-53 Bribes to public officials

Income Tax Assessment Act 1997- Division 995 Definitions

Income Tax Assessment Act 1936 – Section 262A Keeping of records

Taxation Administration Act 1953 – Section 3E Use of tax information by law enforcement agencies and eligible Royal

Commissions etc.

- a. The value of the benefit concerned; and
- b. The date on which the conduct occurred; and
- c. The identity of the foreign public official in relation to whom the conduct occurred; and
- d. If that foreign public official is not the other person mentioned in paragraph 70.2(10(a) – the identity of that other person; and
- e Particulars of the routine government action that was sought to be expedited or secured by the conduct; and
- f. The person's signature or some other means of verifying the person's identity.

Bribes and facilitation payments: A guide to managing your tax obligations Page 5 of 6

file://H:\OECD%20supplementary%20questions\Bribes%20and%20facilitation%20pa... 04/04/2008

Taxation Administration Act 1953 – Section 382-5 Keeping records of indirect tax transactions

(US) *Foreign Corrupt Practices Act*

OECD bribery awareness handbook for tax examiners

Standards Australia International's standard AS 8001-2003, *Fraud and Corruption Control*

Guidelines for Tax Officers – understanding and dealing with bribery

Transparency International's corruption perception index

Last Modified: Tuesday, 17 July 2007

Copyright

© Commonwealth of Australia

This work is copyright. You may download, display, print and reproduce this material in unaltered form only (retaining this notice) for your personal, non-commercial use or use within your organisation. Apart from any use as permitted under the *Copyright Act 1968*, all other rights are reserved.

Requests for further authorisation should be directed to the Commonwealth Copyright Administration, Copyright Law Branch, Attorney-General's Department, Robert Garran Offices, National Circuit, BARTON ACT 2600 or posted at <http://www.ag.gov.au/cca>.

Bribes and facilitation payments: A guide to managing your tax obligations Page 6 of 6

file://H:\OECD%20supplementary%20questions\Bribes%20and%20facilitation%20pa... 04/04/2008

Attachment P. CDDP direction to prosecutors

Note on prosecutions for the bribery of foreign public officials under Division 70 of the Criminal Code

At paragraph 2.13 the Prosecution Policy of the Commonwealth states that a decision whether or not to prosecute must clearly not be influenced by:

- a. the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- b. personal feelings concerning the alleged offender or the victim;
- c. possible political advantage or disadvantage to the Government or any political group or party;
- or
- d. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

The Director of Public Prosecutions has issued the following to prosecutors to clarify this in relation to prosecutions for foreign bribery.

Assessing matters involving allegations of foreign bribery contrary to section 70.2 of the Criminal Code

When deciding whether to prosecute a person for bribing a foreign public official under Division 70 of the Criminal Code, the prosecutor should not be influenced by:

- considerations of national economic interest;
- the potential effect upon relations with another State; or
- the identity of the natural or legal persons involved.

This is because the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which Australia implemented in 1999, provides at Article 5 that:

“Article 5 – Enforcement Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”

Attachment Q. AWB media release

ATO finalises AWB tax audit (20/12/2006)

AWB has received written confirmation today from the Australian Taxation Office (ATO) stating that the ATO has finalised the AWB Group business audit for the years ended 30 September 2000 to 2004 inclusive in relation to payments under the Oil-for-Food programme.Â The ATO accepts that for the reasons set out in the Cole Inquiry report payments made by AWB under the United Nations Oil-for-Food programme do not constitute bribes to foreign public officials for the purposes of the Income Tax Assessment Act 1997.

Media contact: Peter McBride, 03 9209 2174 or 0417 662 451

Attachment R. ATO Guidelines for tax auditors

Guidelines for Tax Office auditors – understanding and dealing with bribery

At the November 2006 Senate Estimates hearings the Commissioner undertook to make our *Guidelines for Tax Office auditors - understanding and dealing with bribery* available on the Tax Office website.

These guidelines were developed for our auditors and are intended to:

- set out the key aspects of the law in this area
- provide some practical ways to identify and deal with concealment of bribes
- provide advice on record-keeping and audit techniques where bribery is suspected
- give guidance on how to refer cases where bribery is suspected, and
- provide direction on how to obtain information from our treaty partners.

These guidelines draw heavily from the Organisation for Economic Cooperation and Development publication *OECD bribery awareness handbook for tax examiners*.

We consulted with key stakeholders before finalising these guidelines and their feedback has been included.

Input from key stakeholders and the community is important in developing working documents which complement effective administration of the law and enhance our compliance work in this important area.

Constructive suggestions from interested parties can be sent to snccommunications@ato.gov.au.

In consultation with key external stakeholders we have prepared *Bribes and facilitation payments: A guide to managing your tax obligations* to help businesses manage their tax obligations in this important area.

Proposed legislative changes relating to foreign bribery and tax deductions have been introduced to the Australian Parliament. Please go to the Attorney-General's Department website for further information.

If you have any information on tax issues relating to possible bribes to Australian and foreign public officials please contact the Tax Office on:

Phone: **1800 060 062**, 8.00am to 6.00pm, Monday to Friday, excluding national public holidays

Fax: **1800 804 544**

Post: Tax Evasion

Locked Bag 6050

Dandenong Vic 3175

Web: Information is available at www.ato.gov.au/reportevasion

Tax Office Guidelines for Understanding and Dealing with the Bribery of Australian and Foreign Public Officials

Purpose

These guidelines, which draw heavily on the OECD Bribery Awareness Handbook for Tax Examiners, are designed to provide tax officers with:

- increased awareness of the legislative provisions disallowing a deduction for a loss or outgoing that is a bribe to
- an Australian or foreign public official
- practical ways to identify how a taxpayer may be concealing bribe transactions to an Australian or foreign public
- official
- advice on record keeping and audit techniques where bribery is suspected
- guidance for the referral of information to the Serious Non-Compliance business line where it is suspected that
- bribe payments may or have been made, and
- information on how to obtain information from our tax treaty partners.

If tax officers hold any doubts on interpretation in relation to the application of these guidelines advice

should be sought from the Tax Counsel Network.

Background

The Australian government, as a signatory to the Organisation for Economic Cooperation and Development (OECD) convention on combating bribery of foreign public officials in international business transactions (the convention), is committed to a whole of government approach to addressing the incidence of bribes to foreign public officials in business transactions. The convention also allows for the OECD to review the implementation of the convention by signatory countries.

Phase 1 of the OECD review occurred in 1999 and amongst other outcomes, resulted in the enactment of section 26–52 ‘Bribes to foreign public officials’ of the *Income Tax Assessment Act 1997* (ITAA 1997). Section 26–53 ‘Bribes to public officials’ of the ITAA 1997 was also enacted via government initiative at a similar time. These provisions specifically disallow deductions for any loss or outgoing determined to be a bribe to a public official and became effective from the 1999/2000 income year.

Phase 2 of the OECD review was completed in January 2006. Included in the Phase 2 report was a recommendation that the Tax Office prepare these guidelines to assist tax officers in identifying non-deductible amounts that have been claimed for bribes to foreign public officials by:

better understanding how they can be concealed

- identifying bribe payments to foreign public officials
- highlighting the legislative provisions denying deductibility for bribe payments, and
- including a requirement that tax officers report all information (intelligence, suspicions or actual) of bribery of foreign public officials to the Serious Non-Compliance (SNC) business line.

Although the convention is only concerned with combating bribery of foreign public officials, these guidelines also have application to bribes made to Australian public officials.

Legislative provisions

The relevant legislative provisions in respect of bribes are sections 26–52 (bribes to foreign public officials) and 26–53 (bribes to public officials) of the ITAA 1997.

Section 26–52 of the *Income Tax Assessment Act 1997* – Bribes to foreign public officials

Section 26–52 of the ITAA 1997 specifically denies deductibility to a taxpayer for a loss or outgoing that is determined to be a bribe to a foreign public official. The full text of section 26–52 ITAA 1997 is as follows:

26-52(1) You cannot deduct under this Act a loss or outgoing you incur that is a *bribe to a foreign public official.

26-52(2) An amount is a ***bribe to a foreign public official*** to the extent that:

(a) you incur the amount in, or in connection with:

- (i) providing a benefit to another person; or
- (ii) causing a benefit to be provided to another person; or
- (iii) offering to provide, or promising to provide, a benefit to another person; or
- (iv) causing an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is not legitimately due to the other person (see subsection (6)); and

(c) you incur the amount with the intention of influencing a *foreign public official (who may or may not be the other

person) in the exercise of the official's duties as a foreign public official in order to:

- (i) obtain or retain business; or
- (ii) obtain or retain an advantage in the conduct of business that is not legitimately due to you, or another person, as the recipient, or intended recipient, of the advantage in the conduct of business (see subsection (7)).

The benefit may be any advantage and is not limited to property.

26-52(2A) For the purposes of subsection (2), disregard whether business, or a business advantage, was actually obtained or retained.

Payments that written law of foreign public official's country requires or permits

26-52(3) An amount is not a *bribe to a foreign public official* if, assuming the benefit had been provided, and all related acts had been done, in the *foreign public official's country, a written law of that country would have required or permitted the provision of the benefit.

Facilitation payments

26-52(4) An amount is not a *bribe to a foreign public official* if:

- (a) the value of the benefit is of a minor nature; and
- (b) the amount is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature.

26-52(5) For the purposes of this section, a *routine government action* is an action of a *foreign public official that:

- (a) is ordinarily and commonly performed by the official; and
- (b) is covered by any of the following subparagraphs:
 - (i) granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;
 - (ii) processing government papers such as a visa or work permit;
 - (iii) providing police protection or mail collection or delivery;
 - (iv) scheduling inspections associated with contract performance or related to the transit of goods;
 - (v) providing telecommunications services, power or water;
 - (vi) loading and unloading cargo;
 - (vii) protecting perishable products, or commodities, from deterioration;
 - (viii) any other action of a similar nature; and
- (c) does not involve a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business; and
- (d) does not involve encouraging a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business.

Benefit not legitimately due

26-52(6) In working out if a benefit is not legitimately due to another person in a particular situation, disregard the following:

- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;
- (b) the value of the benefit;
- (c) any official tolerance of the benefit.

Advantage in the conduct of business that is not legitimately due

26-52(7) In working out if an advantage in the conduct of business is not legitimately due in a particular situation, disregard the following:

- (a) the fact that the advantage may be customary, or perceived to be customary, in the situation;
- (b) the value of the advantage;
- (c) any official tolerance of the advantage.

Duties of foreign public official

26-52(8) The duties of a *foreign public official are any authorities, duties, functions or powers that:

- (a) are conferred on the official; or
- (b) the official holds himself or herself out as having.

Definitions:

Division 995 of the ITAA 1997 adopts the definition of foreign public official under section 70.1 of the Criminal Code 1995. The full text of the definition of foreign public official in section 70.1 of the Criminal Code 1995 is as follows:

foreign public official means:

- (a) an employee or official of a foreign government body; or
- (b) an individual who performs work for a foreign government body under a contract; or
- (c) an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country; or
- (d) an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country; or
- (e) an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force); or
- (f) a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country; or
- (g) an employee of a public international organisation; or
- (h) an individual who performs work for a public international organisation under a contract; or
- (i) an individual who holds or performs the duties of an office or position in a public international organisation; or (j) an individual who is otherwise in the service of a public international organisation; or
- (k) a member or officer of the legislature of a foreign country or of part of a foreign country; or
- (l) an individual who:
 - (i) is an authorised intermediary of a foreign public official covered by any of the above paragraphs; or
 - (ii) holds himself or herself out to be the authorised intermediary of a foreign public official covered by any of the above paragraphs.

Note: A foreign public official can only be a natural person. However, the benefit may be provided to another natural person, another entity or a government body with the intention of influencing that foreign public official. If tax officers hold any doubts on interpretation in relation to the application of these guidelines advice should be sought from the Tax Counsel Network.

Record keeping requirements

Tax officers should expect that taxpayers would have appropriate records. Taxpayers require these records for corporate governance purposes including tax risk management. External and internal auditors also have expectations that entities will keep appropriate records.

For tax purposes, section 262A of the *Income Tax Assessment Act 1936 (ITAA 1936)* requires that records are kept for all transactions and that those records are adequate to explain the transactions.

For facilitation payments, the Criminal Code 1995 in Division 70 also sets out particular record making and retention obligations in certain circumstances for records to set out:

- (a) The value of the benefit concerned; and
- (b) The date on which the conduct occurred; and
- (c) The identity of the foreign public official in relation to whom the conduct occurred; and
- (d) If that foreign public official is not the other person mentioned in paragraph 70.2(1)(a) – the identity of that other person; and
- (e) Particulars of the routine government action that was sought to be expedited or secured by the conduct; and
- (f) The person's signature or some other means of verifying the person's identity.

Failure to maintain records in that form may have important consequences if a person is prosecuted for an offence of bribing a foreign public official under the Criminal Code. The person will not be able to rely on a defence that the payments, even if the defence would otherwise be available, if the person has not kept the required records. However, a failure to maintain records in the form required under the Criminal Code will not necessarily mean the person cannot claim a tax deduction. For the purpose of taxation law, the

question is whether the person has kept records in a way that complies with section 262A.

Links:

- *Income Tax Assessment Act 1997* – Section 26–52 – Bribes to foreign public officials
- *Income Tax Assessment Act 1936* – Section 262A Keeping of records
- *Income Tax Assessment Act 1997*- Definitions Division 995
- *Criminal Code Act 1995* – section 70.1 Definitions
- *Criminal Code Act 1995* – Division 70

Section 26–53 of the *Income Tax Assessment Act 1997* – Bribes to public officials

Section 26–53 of the ITAA 1997 specifically denies deductibility to a taxpayer for a loss or outgoing that is determined to be a bribe to a public official. The full text of section 26–53 ITAA 1997 is as follows:

26-53(1) You cannot deduct under this Act a loss or outgoing you incur that is a bribe to a public official.

26-53(2) An amount is a bribe to a public official to the extent that:

(a) you incur the amount in, or in connection with:

- (i) providing a benefit to another person; or
- (ii) causing a benefit to be provided to another person; or
- (iii) offering to provide, or promising to provide, a benefit to another person; or
- (iv) causing an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the benefit is not legitimately due to the other person (see subsection (3)); and

(c) you incur the amount with the intention of influencing a public official (who may or may not be the other person) in the exercise of the official’s duties as a public official in order to:

- (i) obtain or retain business; or
- (ii) obtain or retain an advantage in the conduct of business that is not legitimately due to you, or another person, as the recipient, or intended recipient, of the advantage in the conduct of business (see subsection (4)).

The benefit may be any advantage and is not limited to property.

Benefit not legitimately due

26-53(3) In working out if a benefit is not legitimately due to another person in a particular situation, disregard the following:

- (a) the fact that the benefit may be customary, or perceived to be customary, in the situation;
- (b) the value of the benefit;
- (c) any official tolerance of the benefit.

Advantage in the conduct of business that is not legitimately due

26-53(4) In working out if an advantage in the conduct of business is not legitimately due in a particular situation, disregard the following:

- (a) the fact that the advantage may be customary, or perceived to be customary, in the situation;
- (b) the value of the advantage;
- (c) any official tolerance of the advantage.

Duties of public official

26-53(5) The duties of a public official are any authorities, duties, functions or powers that:

- (a) are conferred on the official; or
- (b) the official holds himself or herself out as having.

Definitions

Division 995 of the ITAA 1997 defines public official as follows:

‘Means an employee or official of an Australian Government Agency or of a local governing body.’

Division 995 of the ITAA 1997 defines Australian government agency as follows:

‘Means

- (a) the Commonwealth, a State or a Territory; or
- (b) an authority of the Commonwealth or of a State or a Territory.’

Links

- Income Tax Assessment Act 1997- Definitions Division 995
- *Income Tax Assessment Act 1997* – Section 26-53 Bribes to public officials

Bribery is also a criminal offence

Division 70 of the Criminal Code 1995 includes provisions making the bribery of foreign public officials a criminal offence.

Divisions 141 and 142 of the Criminal Code 1995 include provisions making the bribery of Commonwealth public officials a criminal offence. These provisions can be found at the following links:

- *Criminal Code Act 1995* – Division 70 – Bribery of Foreign Public Officials
- *Criminal Code Act 1995* – Division 141 – Bribery of a Commonwealth Public Official
- *Criminal Code Act 1995* – Division 142 – Offences relating to bribery

Whilst this should not influence decisions made by tax officers in the furtherance of compliance action, it should be borne in mind that the actions and observations of the tax officer(s) may later be used as evidence in criminal proceedings.

Practical examples

Practical examples of how to identify bribes that may be concealed in business transactions

Since 1986–87 Australia has operated under a system of self assessment under which the Tax Office accepts returns on face value. In addition, section 8-1 of the ITAA 1997 is a general deduction provision allowing taxpayers to deduct from their assessable income any loss or outgoing to the extent that it is incurred in gaining or producing assessable income, or it is necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. Our system of self assessment and the broad nature of section 8–1 ITAA 1997 can be abused by unscrupulous taxpayers to conceal bribes in a large variety of business transactions making the identification of bribe payments difficult.

In order to conceal bribes, taxpayers will generally use the same techniques they use to conceal income. Tax officers will therefore have to look for evidence of bribery in the same way as they look for evidence of evasion. Taxpayers who knowingly understate their tax liability often leave evidence in the form of identifying indicators. It is also acknowledged that obtaining relevant information from overseas sources may sometimes prove problematic, especially where there is no double tax agreement in place to facilitate the exchange of information.

Indicators of evasion can consist of one or more acts of intentional wrongdoing on the part of the taxpayer with the specific purpose of evading tax. Indicators of evasion may be divided into two categories: ‘affirmative indications’ and ‘affirmative acts’. No evasion can be found in any case unless affirmative acts are present. Affirmative indications serve as a sign or symptom, or signify that actions may have been done for the purpose of deceit, concealment or to make things seem other than what they are. Indications in and of themselves do not establish that a particular process was done; affirmative acts also need to be present.

Affirmative acts are those actions that establish that a particular process was deliberately done for the purpose of deceit, subterfuge, camouflage, concealment, some attempt to colour or obscure events, or make things seem other than what they are. Examples include omissions of specific items where similar items are included, concealment of bank accounts, failure to deposit receipts to business accounts, and covering up sources of receipts. The indicators of evasion presented below are also relevant to identifying bribes. These practical examples have been sourced from the Indicators of Fraud or Bribery within the *OECD Bribery Awareness Handbook for Tax Examiners*.

Expenses or deductions

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

Indicators of bribery may take the form of overstatement of deductions or claiming fictitious deductions.

Methods of payment

Some methods employed to channel currency to Australian or foreign public officials are presented below. These methods are by no means new, nor do they represent more than a small fraction of the methods employed, but are identified to emphasise the need for innovative forensic audit techniques to uncover instances of bribes to public officials.

- Exchange of funds through a legitimate business: A firm controlled by a public official pays a large sum of money to an unrelated corporation in return for fictitious invoices for alleged consulting fees. That corporation in turn makes cheques payable to one of its corporate officers who then cash the cheques with the aid of a bank officer. The cash is returned to the first corporation's officers who include the public official.
- Transfer of funds through a spurious business: A bank account is opened in a fictitious name as a conduit for converting cheques to cash. Invoices printed in the fictitious business name are prepared as evidence of purchases. Cheques issued to the fictitious business are deposited and then currency withdrawn.
- Payment of campaign expense: One example of making indirect political contributions is where the campaign committee or candidate provides an unpaid bill for some campaign expense, such as for the hiring of venues or for the printing of handbills, posters, etc.
- Indirect payments to public officials: One method of indirect payments to public officials is by way of making payments to a law firm. In this instance, the lawyer acts merely as a conduit to which cheques are issued for ostensible legal services rendered. The payments are deposited to the lawyer's trust accounts and disbursements made from those accounts to the public official. This method is also used through public relations, advertising, or accounting firms.
- Another indirect bribe payment method is via a request of donation for a non-profit entity that is not founded for the purpose of the carrying on of a business activity by an official who is the member of top management of this non-profit entity.
- Invoicing the client for an inflated amount as compared to the actual market price: The difference between the amount received and the normal price is then paid to an intermediary without the profit of the business being affected (difficulties lie in the identification of the intermediary who is rarely identified as such in the books of the company and in finding details of the actual market price).
- An expense borne by a company and invoiced as an expense for the custody of goods, transport of the company's goods or installation in the country where the market is realised.
- The intervention of consultants for the installation or development of local infrastructures for an enterprise where the related payments are made to accounts located in tax havens.
- Royalty receipts may be recorded as a liability on the books of a company instead of income. The payment of the alleged liability is made before the end of the company's tax year. The payment is made to a management company located in a tax haven that allegedly earned the royalty income. Not recording the royalty as income or the payment to the management company as an expense on the company's books, nor having a liability at year-end, can make detection of a payment to a public official more difficult.
- Traditional audit techniques can be used to discover bribe payments. A careful scrutiny of the various accounts is required to ascertain the validity of the individual expenses and consider what specific items might lend themselves to concealment. Are there really services being performed for certain payments; and, if so, are the services commensurate with the payments being made for them? What is important to remember is that disbursements are not always what they seem to be. An effective audit calls for more analysis to determine if the disbursement is a valid one and not

just a mere conduit or means through which cash can be filtered through with the ultimate payee being a public official.

Professional services

All source documents behind amounts charged to professional service providers should be examined carefully for adequacy of description and explanations of services performed, as well as any unusual increases. One practice found to exist is that many firms exaggerate the amount of fees charged relative to projects and specific cases over and above what the normal billing would have been for the actual work performed. This excess billing would then be used to recover prearranged political payments or payments to public officials by the firms on behalf of the taxpayer. An indicator may also be the existence of large payments to consultant companies where the invoices are not very specific.

Travel and entertainment expenses

Illegal payments may be deducted under the guise of travel and entertainment. Employee expense accounts and correspondence can be used to develop an itinerary of selected employees. Correspondence, as well as the Board of Directors' expense vouchers can be carefully examined to determine political events, functions and travel to make political contributions. All the above sources can be used to identify a date, time and place that the taxpayer was involved in business transactions involving bribes. All travel expenses connected with each particular event can be selected from source documents supplied by the taxpayer. The following categories are usually the prime sources used to disguise illegal payments:

- executive travel expenses;
- charter air travel – whether by the taxpayer's employees or paid directly for travel by a political candidate;
- taxpayer's private aircraft pilots expenses; and
- expenses relating to various selected employees, including direct credit card charges.

Fictitious employees

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

Payrolls may be inflated for numerous reasons including bribery. The purpose is usually the same: to get funds out of a business in the form of a deduction without the recipient paying income tax on the income. This method is commonly used where the paying enterprise is in the type of business which does not deal in cash and where money can only be taken out by cheque. This method could be used to enable the taxpayer to obtain funds needed for bribes.

Another way to inflate the payroll is to have political party workers on the payroll even though the employee performs no services for the income. The same technique may be used for public officials.

To detect indications of fictitious employees, tax officers should focus on payroll records. The following circumstances require special attention:

- if there is a suspicion or knowledge that fictitious employees are being used, then the negotiation of the cheque
- should be pursued. If cheques are cashed in the same bank or through other parties, the payee may be known
- at the bank or by the re-endorsers
- if the company provides or assists in insurance coverage pension plans, etc, employee termination records
- should be tested to determine whether the employee was also withdrawn from the payroll
- a company may continue issuing cheques to an employee who has left. Tax officers should randomly select
- employees and compare endorsements at various times during the year, or
- key employees or officers may be loaned to political parties to perform various services while being paid their salary by their employer. Tax officers should attempt to determine where the

employees' services were performed during the payroll periods in question. An examination of expense reimbursement reports would be of assistance in determining the geographical location of the employee at a particular time. This information may serve as a basis for a follow-up interview of the employee.

Some foreign public officials have few legitimate sources of income, therefore some of them may be tempted to subsidise their income through illegal activities. These individuals will find a business willing to put them on the payroll and issue them regular payroll cheques, even though they perform no services.

The tax officer should extend the examination to the suspected public official and trace their payroll cheques to determine if any of the money was returned to the corporation. When the entity being examined is suspected of being used as a salary haven by a public official, the tax officer should look for certain indications to support the suspicion, such as:

- determining if cheques are cashed by the employer
- establishing whether the employee has the qualifications to perform the function for which he/she receives the salary
- ascertaining if records indicate the employee is still on the payroll at the time of audit. The tax officer should attempt to establish whether they are actually present on the premises, and
- ascertain if the employee holds a position as an outside salesman. The tax officer should determine who the customers are and establish whether the employee actually contacts these customers.

The tax officer may need to request information from overseas when the fictitious employee is a foreign public official, although this may prove to be problematic (see 'Information available from tax treaty partners').

Books and records

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

In order to detect bribes the tax officer should look for traditional methods of manipulating books and records, such as:

- keeping two sets of books or no books
- false entries or alterations made on the books and records, back-dated or post-dated documents, false invoices,
- false applications, statements, other false documents or applications, and
- failure to keep adequate records, concealment of records, or refusal to make certain records available.

Conduct of taxpayer

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

An assessment of the behaviour of the taxpayer may also be useful to determine the existence of bribes. Examples include:

attempts to hinder the examination; for example, failure to answer pertinent questions repeated cancellations of appointments, or refusal to provide records statements by employees concerning irregular business practices by the taxpayer destruction of books and records, especially if it occurred soon after the examination commenced payment of improper expenses by or for officials or trustees back-dating of applications and related documents, and attempts to bribe a tax officer.

Methods of concealment

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

A number of methods of concealment may be used to conceal bribes, such as transactions not in the usual course of business, transactions surrounded by secrecy, false entries in books of transferor or transferee, use of secret bank accounts for income, deposits into bank accounts under nominee names and conduct of business transactions in false names.

Australian transaction reports and analysis centre (AUSTRAC) data

AUSTRAC maintains a database of:

- suspect transactions: any transaction that arouses suspicions with the cash dealer due to either the monies or entities involved in the transaction
- significant cash transactions: any transaction involving a cash component of AUD\$10,000 or more, or the equivalent in foreign currency must be reported by a cash dealer and solicitor
- international funds transfer instructions: any instruction transmitted electronically for the transfer of funds either into or out of Australia
- international currency transfers: a report of physical currency (cash) of AUD\$10,000 or more, or the foreign equivalent, leaving or entering Australia by carriage, mailing or shipping.

AUSTRAC data is a valuable source of information for international funds transfers into and out of Australia and domestic cash transactions over \$10,000.

However, in relation to bribery of Australian or foreign public officials, AUSTRAC data probably cannot be used on its own to determine whether or not bribery is involved. When combined with other information it can be very useful in building a picture of money flows to and from people of interest.

Foreign country profiles

International organisations have compiled a profile of countries where bribes and facilitation fees are more likely to be paid to establish or maintain ongoing trade.

In the risk review or audit of taxpayers, especially multinational companies, where auditors become aware of significant trade with entities in jurisdictions where bribes or facilitation fees seem to be a way of "doing business", they need to make additional enquiries to understand if bribe or non-deductible facilitation fee payments have been claimed as deductions in Australia.

Auditors of multinational companies will need to identify and understand the safeguards and internal controls which boards of directors and senior management have put in place to minimise the risk that bribes are paid to Australian and foreign public officials.

At times, large corporate taxpayers and senior tax officers will meet to gain a detailed understanding of these safeguards as part of a broader discussion about taxpayer approaches to tax risk management.

Some corporates have been very proactive to ensure that bribes are not paid because of the risk to their own reputation and brand image.

At the start of a risk review or an audit, auditors should ask for, review and understand:

- A company's code of conduct or similar document and the extent to which there is an explicit policy of not paying bribes however described in the taxpayer's accounts;
- How that code of conduct has been implemented and enforced at a practical level including how the board of directors, audit committee and internal audit gain assurances that there is compliance with a code which prohibits the payment of bribes;
- Other internal controls and safeguards implemented to minimise the risk that bribes are paid to public officials.

An understanding of these implemented internal controls and safeguards will influence the extent to which auditors may need to make further enquiries and verify if transactions, invoices, agreements and payments are correctly described and characterised for accounting and tax purposes.

If the Tax Office has received specific intelligence regarding the payment of a bribe to public officials this will also influence the extent to which we make enquiries and review specific company records.

Other audit processes may be necessary to conclude these sorts of enquiries.

These additional enquiries and audit processes may include the following:

- Has the company engaged a forensic accountant or other analyst or investigator (internal or otherwise) to establish if bribes or non-deductible facilitation fees have been paid? Auditors will need to establish if this has occurred, when the checks were undertaken and gain a copy of the report filed on completion of the audit or investigation to check if any bribes or non-deductible facilitation fees paid have been claimed as deductions.

- If the taxpayer has no code of conduct or similar policy in place or no checks have been made to test if bribes or non-deductible facilitation fees have been paid and significant trade has commenced or is underway with an entity in a jurisdiction where bribes and facilitation fees are more likely than not, auditors need to review a sample of significant contracts and invoices with entities in those jurisdictions. In particular, auditors should check significant payments made around the time of establishing contracts and all significant components of contract and invoice prices agreed to between the parties. Auditors need to enquire as to why the significant price and invoice costs are appropriate and seek to gain information to confirm that the prices agreed would be appropriate between arm's length parties and contain no significant elements which could be bribes or nondeductible facilitation fees.
- Where taxpayers cannot satisfy auditors that the fees, prices or on-costs are appropriate and would be paid between arm's length parties, auditors need to consider as next steps, the disallowance of the relevant deductions according to the tax laws including section 26-52 of the ITAA 1997.

Record keeping and audit techniques

The purpose of this section is to provide guidelines that may be used in conducting an effective audit where bribery is suspected.

Ensure due diligence in record keeping, corroboration and security

Due diligence in record keeping, corroboration and the security of evidentiary material uncovered during compliance activities is important to ensure the integrity of evidence both for the audit and any subsequent criminal proceedings.

Following are suggestions to enhance the integrity of any evidence collected for the purpose of the audit and also to increase the likelihood that the evidence will also be admitted during possible subsequent criminal proceedings:

- keep contemporaneous notes of all communications and activities associated with the audit
- where possible have another tax officer corroborate communications and/or actions and evidence this corroboration by endorsing a single set of written or electronic notes or by preparing individual sets of written or electronic notes
- keep all original notes notwithstanding that they may have been transferred into an electronic format
- when recording conversations, particularly conversations with the taxpayer suspected to have entered into a bribery transaction, record the conversation in the 'I said, he said' format, and
- keep all documentary and other evidence associated with the audit secure, preferably only accessible by one person in order to maintain the continuity and integrity of the evidence.

Examination plan and compliance checks

During the planning phase and conduct of audits of tax returns, the team leader of the tax officer and the tax officers themselves should be alert to situations that lend themselves to the creation of illegal or improper payments, such as bribes. When deemed appropriate and necessary, the audit plans should include consideration of the following compliance checks:

- examination of internal audit reports, minutes and related working papers to determine if any reference is made to the creation of any secret or hidden corporate fund
- review copies of taxpayer's reports submitted to the Australian Securities and Investment Commission, financial institutions, insurers and other regulatory bodies, and
- give appropriate consideration to any foreign entities, operations, contractual or pricing arrangements, fund transfers, and use of tax haven locations.

Methods for accumulating evidence particularly relevant to identifying bribes

These methods include:

- Analytical Tests – such as analysis of balance sheet items to identify large, unusual, or questionable accounts.
- Analytical tests using comparisons and relationships to isolate accounts and transactions that should be further examined or determine whether further inquiry is needed.
- Documentation - such as examining the taxpayer's books and records to determine the content, accuracy, and to substantiate items claimed on the tax return.
- Inquiry – such as interviewing the taxpayer or third parties. Information from independent third parties can confirm or verify the accuracy of information presented by the taxpayer.
- Testing – such as tracing transactions to determine if they are correctly recorded and summarised in the taxpayer's books and records.

Information gathering – access, notices and interviewing

Access and notices

There are access provisions in many of the Acts administered by the Commissioner of Taxation. Most of these provisions give the Commissioner, or any tax officer he authorises, the right to enter and remain on premises and to have full and free access to documents for any purpose of the applicable Act. Access provisions in most Acts also confer on authorised officers the right of reasonable assistance and facilities. The Access Manual refers to these rights as access powers. Provisions granting access powers are to be distinguished from other provisions governing information and evidence gathering that require the service of a notice. The notice provisions are dealt with separately in the access manual.

The Access Manual

The access manual should be consulted in all cases regarding the application of Tax Office access powers or notice provisions (including offshore information notices) at the following link:

- [Access and information gathering manual](#)

Interviewing

The access manual also provides guidance to tax officers when undertaking formal interviews. The following information provides further guidance in respect to interviewing techniques.

- Who to interview

Interviews to detect the payment of bribes should always be held with the persons having the most knowledge concerning the total financial picture and history of the person or entity being examined, such as the chief executive officer, chief financial officer, officer in charge of international operations, officer in charge of governmental activities, directors who are not corporate officers but who serve on audit committees or have similar responsibilities, and others, as appropriate.

- Interview techniques

Special attention should be given to interview techniques. It is important that the tax officers always maintain control of the interview and even more so when he has suspicion of bribes. Tax officers should establish the pace and direction of the interview. It is also important to continually assess whether the taxpayer is leading to pertinent information or providing little useful information.

- Question construction

When interviewing a taxpayer four types of questions can be asked: open-ended, closed, probing and leading questions. It will be up to the tax officer to decide which type of questions are the most appropriate in order to detect bribes.

- Open-ended questions

Questions are framed to require a narrative answer. They are designed to obtain a history, a sequence of events or a description. Ask open-ended questions about the taxpayer's business. The advantage of this type of question is that it provides a general overview of some aspect of the taxpayer's history. The disadvantage is that this type of question can lead to rambling.

- Closed questions

Questions are more appropriate for identifying definitive information such as dates, names, and amounts. These questions are specific and direct. Ask closed questions for background information such as payments to public officials.

Closed questions are useful when the taxpayer has difficulty giving a precise answer. They are also useful to clarify a response to an open-ended question. The disadvantage to closed questions is that the response is limited to exactly what is asked and can make the taxpayer uncomfortable.

- Probing questions

Probing questions combine the elements of open and closed-ended questions. They are used to pursue an issue more deeply. For example, when questioning a taxpayer's consulting expense, ask, 'What is the business purpose of this expense?' The advantage of this type of question is that the taxpayer's response is directed but not restricted.

- Leading questions

Leading questions suggest that the interviewer has already drawn a conclusion or indicate what the interviewer wants to hear. The use of leading questions should be limited. Use them when looking for confirmation, since the answer is stated in the form of a question. For example: 'So you did not keep invoices for your consulting expenses?'

- Suggested interview question structure

The following interview questions provide guidance in respect of the structure of questions that can be put to a taxpayer at interview who are suspected of having deducted a loss or outgoing that is a bribe.

- During the period from to , did the corporation, any corporate officer or employee, or any other person acting on behalf of the corporation, make, directly or indirectly, any bribe, kickback, or other payment of a similar or comparable nature, whether lawful or not, to any person or entity, private or public, domestic or foreign, regardless of form, whether in money, property, or services, to obtain favourable treatment in securing business or to obtain special concessions, or to pay for favourable treatment for business secured or for special concessions already obtained?
- During the period from XX to XX, were corporate funds, or corporate property of any kind, donated, loaned, or made available, directly or indirectly, for the benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, political candidate, or political committee, whether domestic or foreign?
- During the period from XX to XX, was any corporate officer, employee, contractor, or agent compensated, directly or indirectly, by the corporation, for time spent or expenses incurred in performing services, for the benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, political candidate, or political committee, whether domestic or foreign?
- During the period from XX to XX, did the corporation make any loan, donation, or other disbursement, directly or indirectly, to any corporate officer or employee, or any other person, for contributions made or to be made, directly or indirectly, for the benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, political candidate, or political committee, whether domestic or foreign?
- During the period from XX to XX, did the corporation, or any other person or entity acting on its behalf, maintain a bank account, or any other account of any kind, whether domestic or foreign, which account was not reflected in the corporate books and records, or which account was not listed, titled, or identified in the name of the corporation?

Evaluating the taxpayer's internal controls

Internal controls are defined as the taxpayer's policies and procedures to identify, measure and safeguard business operations and avoid material misstatements of financial information. An evaluation of a taxpayer's internal controls is necessary to determine the reliability of the books and records which is particularly relevant when there is suspicion of bribery. It is also essential to evaluate internal controls to determine the appropriate audit techniques to be used by the tax officer during the audit.

Key steps for evaluating internal controls

The evaluation of internal controls can be described as an analysis completed by the tax officer to understand and document the entire business operation. The key steps of the evaluation process are to understand the control environment, the accounting system and the control procedures.

Control environment

The first area tax officers must understand is the control environment of the business. The control environment is made up of many factors that affect the policies and procedures of the business. Factors such as management philosophy, management operating style, organisational structure, personnel policies and external influences affecting the business all provide an indication of potential bribery. To make an assessment of the control environment, tax officers must understand, in detail, how the business operates.

Accounting system

The second key area of internal control that tax officers must understand is the accounting system. Gaining knowledge of the accounting system provides information about many of the taxpayer's transactions.

Tax officers must acquire knowledge of how the business operates on a daily basis with respect to customers, suppliers, management, sales, work performed, pricing, location, employees, assets used, production and record keeping.

Control procedures

Control procedures are the policies and procedures established by management to achieve the objectives of the business. The control procedures are the methods established to assure that the business operates as intended.

Separation of duties is the primary control procedure that should concern tax officers. If properly executed, separation of duties will reduce the opportunity for any person to perpetrate and conceal errors or irregularities made; for instance, in order to pay bribes in the normal course of their duties.

Slush funds

This section provides auditing techniques and compliance checks to help identify and examine corporate 'slush funds' or any other schemes which may be used to circumvent tax laws or pay bribes to public officials.

Definition

Corporate slush funds are accounts or groups of accounts generally created through intricate schemes outside of normal corporate internal controls for the purpose of making political contributions, bribes, kickbacks, personal expenditures by corporate officials and other such activities. Top level corporate officers are generally involved and the schemes are carried out by various transactions through the use of both domestic and foreign subsidiaries.

Examples of slush funds

- The usual practice in schemes operating in the foreign arena is for the domestic parent corporation to use a foreign subsidiary, a foreign consultant, or a foreign bank account to 'launder' funds so that cash could be generated and repatriated back to the domestic parent to provide a slush fund for payments to Australian public officials. The funds would not be repatriated of course if the payment were made to a foreign public official.
- A slush fund generated by rebates from a foreign legal consultant: The foreign legal consultant, who also
- performed legitimate consulting services for the domestic corporation, over bills the company and then transfers the money back to the corporation in cash.
- Officers and/or key employees may be paid additional compensation based on their promise that they will contribute either a percent of the bonus or the net amount (net of income taxes) as a political payment or bribe payment.
- Corporate over-capitalisation: Real or personal property may be acquired by the business entity for more than fair market value. The excess is rebated or 'kicked back' and used by the promoter of the scheme to make the contribution to the political organisation or the payment to the public official.

- Contributions may be paid to law firms which act as conduits by depositing the funds in trustee accounts from which they are disbursed to the political campaign committee designated by officers of the contributing corporation or to a public official.

Referral of instances of suspected bribery

The Tax Office is primarily concerned with the protection of the revenue and maintaining community confidence in its administration by identifying and dealing with deductions that are bribe payments. However, the Tax Office also has an important part to play in the whole of government effort to combat corruption and bribery by referring information on suspected or actual bribe transactions to the Australian Federal Police for potential criminal investigation and /or prosecution.

□ If a tax officer encounters a transaction they suspect may be a bribe to an Australian or foreign public official, it is imperative that the information be referred, at the earliest opportunity, to the Serious Non-Compliance business line.

Within the requirements of the legislation, an authorised officer from within the Serious Non-Compliance business line will seek to disseminate the information to the Australian Federal Police pursuant to section 3E of the *Taxation*

Administration Act 1953.

Information available

Other government agencies

During the planning and examination of corporate entities, tax officers should consider what information, if any, could be requested from other Government agencies.

Tax treaty partners

In some cases involving foreign bribery, tax officers may be able to obtain information from Australia's tax treaty partners.

Tax treaties are signed by sovereign states, are binding at international law and set out each party's rights and obligations. These treaties are titled either Agreements or Conventions, and they direct that the parties shall perform certain actions or give effect to certain undertakings. Australia's tax treaties are given the force of law by the *International Tax Agreements Act 1953*. The following information is provided to assist tax officers in obtaining relevant information from tax treaty partners.

Treaty partners

Australia has entered into 42 tax treaties with other countries to prevent double taxation and allow cooperation between Australia and overseas tax authorities in enforcing their respective tax laws. In addition, there is a special treaty with East Timor (Timor Sea Treaty) which contains exchange of information provisions. The full list of our tax treaties can be found at CCH 2004 edition, Volume 4, page 779.

The exchange of information unit

The exchange of information (EOI) unit of international strategy and operations (ISO) administers the Australian competent authority function, via which the Tax Office can exchange taxpayer specific information with other tax agencies. The EOI unit receives requests from business lines for information from our treaty partners and also receives requests from our treaty partners which are sent to business lines for investigation and response. The EOI unit issues competent authority letters based on the information that tax officers request or provide.

The competent authority

Under Australia's tax agreements, the competent authority is the Commissioner of Taxation or an authorized representative. The Commissioner has delegated this function to the Second Assistant Commissioner of ISO and the Assistant Commissioner of the Transfer Pricing Practice within ISO. For practical purposes several other senior officers within ISO have also been authorised to sign on behalf of the Competent Authority. All our major treaty partners have a similar central administration for administering and authorising exchanges of information.

In special circumstances, which could include complex tax investigations in which the bribery of foreign public officials is a feature, our Competent Authority may authorise officers to directly liaise with similarly authorised representatives of the foreign tax administration.

Contact for exchange of information

If you need to request information from or provide information to an overseas tax authority, or need to liaise directly on a complex case, please contact the EOI unit directly by email to:

AustralianCompetentAuthority@ato.gov.au

Conclusion

These guidelines are only intended as a guide to tax officers undertaking compliance activities with a view to identifying and dealing with payments suspected of being bribes to Australian or foreign public officials. These guidelines provide guidance in determining whether a loss or outgoing is an allowable deduction in cases where bribery is suspected. The guidelines also identify that bribery is a criminal offence and asks that, in circumstances where bribery is suspected, there be increased due diligence and that at the earliest opportunity a referral to Serious Non-Compliance is made. The information will be directed to the Australian Federal Police who will determine whether or not to commence a criminal investigation.

These guidelines are not a definitive audit resource but rather designed to highlight the non-deductibility of bribes to Australian and foreign public officials, provide referral guidelines, identify some indicators of bribery, address offshore information gathering procedures and finally highlight some record keeping and audit techniques which may be useful when undertaking an audit where bribes have been discovered, or are suspected of having been committed.

Contact

Phone: 1800 060 062, 8.00am to 6.00pm, Monday to Friday, excluding National public holidays

Fax: 1800 804 544

Post: Tax Evasion

Locked Bag 6050

Dandenong Vic 3175

Web: Information is available at www.ato.gov.au/reportevasion

Note:

The Tax Office acknowledges the contribution to these guidelines by the OECD Centre for Tax, Policy and Administration from their 'OECD Bribery Awareness Handbook for Tax Examiners' (CTPA/CFA(2005)36).

Attachment D – Australia Phase 3 evaluation report (2012)



PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN AUSTRALIA

October 2012

This Phase 3 Report on Australia by the OECD Working Group on Bribery evaluates and makes recommendations on Australia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the Working Group on 12 October 2012.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

TABLE OF CONTENTS

EXECUTIVE SUMMARY	5
A. INTRODUCTION	7
1. The On-site Visit	7
2. Outline of the Report	7
3. Economic Background.....	7
4. Cases Involving the Bribery of Foreign Public Officials.....	8
B. IMPLEMENTATION AND APPLICATION BY AUSTRALIA OF THE CONVENTION AND THE 2009 RECOMMENDATIONS	9
1. Foreign Bribery Offence.....	9
(a) Guidance on the Facilitation Payment Defence	9
(b) Public Consultation on the Facilitation Payment Defence	10
(c) Application and Awareness of the Facilitation Payment Defence	10
(d) Proof of Intention to Bribe a Particular Foreign Official	11
2. Responsibility of Legal Persons	12
3. Sanctions for Foreign Bribery and Related Offences	13
(a) Sanctions against Natural Persons	13
(b) Sanctions against Legal Persons	14
(c) Summary vs. Indictable Offence.....	15
(d) Sanctions for False Accounting	15
4. Confiscation of the Bribe and the Proceeds of Bribery	17
5. Investigation and Prosecution of the Foreign Bribery Offence	19
(a) Principal Enforcement Agencies	19
(b) Case Categorisation and Prioritisation Model (CCPM)	20
(c) Sources of Foreign Bribery Allegations.....	20
(d) Terminated Foreign Bribery Cases	22
(i) Lack of Sufficient Inquiries before Rejecting an Allegation for Full Investigation	22
(ii) Cases Involving Related Companies	24
(iii) Terminations Due to Deferrals to Other Agencies	24
(e) Foreign Bribery-Related False Accounting and Money Laundering	25
(f) Case Referral and Co-ordination.....	26
(i) Referrals and Co-ordination between the AFP and ASIC	26
(ii) Referrals and Co-ordination between the AFP and Other Commonwealth Bodies.....	26
(iii) Referrals and Co-ordination between the AFP and State Law Enforcement Authorities.....	27
(g) Plea Bargaining and Self-Reporting.....	28
(h) Resources and Expertise	29
(i) Article 5 of the Convention.....	30
(j) Investigative Techniques.....	31
6. Money Laundering.....	32

7.	Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes	33
(a)	Accounting Standards	33
(b)	Detection of Foreign Bribery by External Auditors	33
(c)	Reporting of Foreign Bribery by External Auditors	34
(d)	Corporate Compliance, Internal Controls and Ethics Programmes	34
8.	Tax Measures for Combating Bribery	35
(a)	Tax Deductibility of Bribes and Facilitation Payments	36
(b)	Detection and Awareness-Raising	36
(c)	Reporting Foreign Bribery and Sharing Tax Information.....	37
9.	International Co-operation.....	38
(a)	Mutual Legal Assistance Generally	38
(b)	Providing MLA in Non-Criminal Proceedings	39
(c)	Extradition.....	40
(d)	Co-operation through ASIC and the AFP	40
10.	Public Awareness and the Reporting of Foreign Bribery	40
(a)	Efforts to Raise Awareness of Foreign Bribery	41
(b)	Hospitality, Promotional Expenditure and Charitable Donations	42
(c)	Reporting of Foreign Bribery.....	42
(d)	Austrade's Practice of Introducing Agents	44
(e)	Whistleblowing and Whistleblower Protection.....	44
11.	Public Advantages	45
(a)	Public Procurement	46
(b)	Official Development Assistance (ODA)	46
(c)	Officially Supported Export Credits	47
C.	RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP	48
1.	Recommendations of the Working Group	49
2.	Follow-up by the Working Group	52
ANNEX 1	PREVIOUS WORKING GROUP RECOMMENDATIONS TO AUSTRALIA AND WORKING GROUP ASSESSMENT OF THEIR IMPLEMENTATION	54
ANNEX 2	PARTICIPANTS AT THE ON-SITE VISIT.....	57
ANNEX 3	LIST OF ABBREVIATIONS AND ACRONYMS.....	59
ANNEX 4	SUMMARIES OF AUSTRALIAN FOREIGN BRIBERY ENFORCEMENT ACTIONS	60
ANNEX 5	EXCERPTS OF RELEVANT LEGISLATION	64
	Commonwealth Criminal Code Act Division 70 - Bribery of Foreign Public Officials.....	64
	Commonwealth Criminal Code Act Division 12 - Corporate Criminal Responsibility	70

EXECUTIVE SUMMARY

The Phase 3 report on Australia by the OECD Working Group on Bribery evaluates and makes recommendations on Australia's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in Australia's legislative and institutional framework, as well as progress made since Australia's Phase 2 evaluation. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement.

While the Working Group on Bribery welcomes Australia's recent efforts, it has serious concerns that overall enforcement of the foreign bribery offence to date has been extremely low. Only one foreign bribery case has led to prosecutions. These prosecutions were commenced in 2011 and are on-going. Out of 28 foreign bribery referrals that have been received by the Australian Federal Police (AFP), 21 have been concluded without charges. The Working Group thus recommends 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. Australia recently began strengthening its enforcement efforts, such as by establishing a Foreign Bribery Panel of Experts to advise AFP investigation teams. The Working Group encourages Australia to continue these efforts, and looks forward to evaluating the impact of these developments on Australia's enforcement of its foreign bribery laws.

The report identifies additional areas for improvement. Usage of the corporate liability provisions should be enhanced. 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 appropriate. Steps should be taken to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases. The maximum sanctions against legal persons for false accounting should be increased commensurate with Australia's legal framework. Awareness should continue to be raised about the difference between a bribe and a facilitation payment. The record-keeping requirements for facilitation payments in tax legislation should be harmonised with those in the Criminal Code Act. The same requirements to report foreign bribery should apply equally to the public service and independent statutory authorities. Protection of whistleblowers in the public and private sectors need to be strengthened.

The report also notes positive developments. The foreign bribery offence is becoming a priority for the Australian government. Australia's first National Anti-Corruption Plan aims to create a "whole-of-government approach" to corruption; it is expected to be adopted by December 2012. In February 2012, Australia concluded a proactive public consultation on the facilitation payment defence. Guidance has been amended to clarify that the facilitation payment defence is restricted to payments of a minor value, and to eliminate certain examples that had caused concerns. The maximum fine against legal persons for foreign bribery was substantially raised in 2010. The sharing of tax information was enhanced with the ratification in August 2012 of the Convention on Mutual Administrative Assistance in Tax Matters and the amending Protocol.

The report and its recommendations reflect findings of experts from Canada and Japan and were adopted by the Working Group on 12 October 2012. It is based on legislation and other materials provided by Australia and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its four-day on-site visit to Canberra and Sydney on 28-31 May 2012, during which the team met representatives of Australia's public and private sectors, legislature,

judiciary, civil society, and media. Within one year of the Working Group's approval of this report, Australia will make an oral follow-up report on its implementation of certain recommendations. It will further submit a written report on the implementation of all recommendations within two years.

A. INTRODUCTION

1. The On-site Visit

1. On 28-31 May 2012, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Canberra and Sydney as part of the Phase 3 evaluation of Australia's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation), and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners from Canada and Japan as well as members of the OECD Secretariat.¹ Before the on-site visit, Australia responded to the Phase 3 Questionnaire and supplementary questions, and provided relevant legislation and documents. The evaluation team also referred to publicly available information. During the on-site visit, the evaluation team met representatives of the Australian public and private sectors, legislature, judiciary, civil society, and media. In particular, the evaluation team met the Attorney-General for Australia. Private sector representation was satisfactory.² The evaluation team expresses its appreciation to the participants for their openness during the discussions, and to Australia for its co-operation throughout the evaluation.

2. Outline of the Report

3. This report is structured as follows. Part B examines Australia's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group's recommendations and issues for follow-up.

3. Economic Background

4. Australia is a federal state with three tiers of government: Commonwealth (federal), State/Territory, and local. Of the six States and two Territories, New South Wales (NSW) and Victoria are the two most populous States. Australia is a significant economy, exporter and international investor among Parties to the Convention. In 2010, it was the 11th largest economy and 14th largest exporter of goods and services among the 40 Working Group members. In 2010, its largest trading partner was China,

¹ Canada was represented by: Ms. Cheryl Cruz, Deputy Director, Economic Law Section, United Nations, Human Rights and Economic Law Division, Department of Foreign Affairs and International Trade; Ms. Ann Sheppard, Senior Counsel, Criminal Law Policy Section, Department of Justice; Ms. Gisele Rivest, Staff Sergeant, Commercial Crime Branch, Royal Canadian Mounted Police. Japan was represented by Mr. Takeyoshi Imai, Vice-Dean, Professor of Law and Attorney at Law, School of Law, Hosei University; Mr. Kenichi Masamoto, Counselor, Permanent Delegation to the OECD; Messrs. Kazumitsu Ota and Hirotochi Enomoto, respectively Deputy Director and Deputy Chief of the Corporate Accounting and Disclosure Division, Planning and Coordination Bureau, Financial Services Agency. The OECD Secretariat was represented by Messrs. William Loo and Chiawen Kiew, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

² See Annex 2 for a list of participants.

while India, Thailand, and Indonesia were also in the top ten.³ Australia ranked 16th and 9th in the Working Group in terms of outward foreign direct investment (FDI) flows and stocks respectively.⁴ Australia also plays a significant economic role in many countries in Polynesia and the South Pacific that have serious corruption risks.

5. A significant portion of Australia's international economic activities are exposed to risks of foreign bribery. A recent study found that 75% of the top 100 companies and 63% of the top 200 companies listed on the Australian Stock Exchange operate in a high risk sector, a high risk country, or both.⁵ Of particular note is Australia's large mining and resource sector. Australia is home to some of the largest multinational corporations in this area, though many small- and medium-sized enterprises (SMEs) are also active. Over 220 listed exploration and mining companies with a combined market capitalisation in excess of AUD 250 billion (EUR 208.7 billion) are active in Africa. Australian companies in this sector have more projects in Africa than any other region of the world. Projects have nearly tripled since 2005, and investment has increased from AUD 20 billion (EUR 16.7 billion) in 2009 to an expected AUD 50 billion (EUR 41.7 billion). The sector also contributes to almost half of Australia's exports.⁶

4. Cases Involving the Bribery of Foreign Public Officials

6. Australia's first set of foreign bribery prosecutions began in July 2011 with charges in the *Securrency/NPA* case. Securrency is a Melbourne-based company jointly owned by a UK company and the Reserve Bank of Australia (RBA), Australia's central bank. RBA appointed half of Securrency's board of directors and the chairman from its board appointees. Note Printing Australia (NPA) is wholly-owned subsidiary of RBA. The allegations concern bribery of foreign public officials in Vietnam, Indonesia, Nepal and Malaysia in 1999-2005 to secure contracts to produce bank notes. Securrency, NPA, and nine former executives and sales agents of the two companies have been charged with foreign bribery, conspiracy to commit foreign bribery, and/or false accounting. One former executive pleaded guilty to false accounting in July 2012. Australian courts have imposed a suppression order prohibiting the publication of certain information concerning the case. Consequently, some aspects of the case are not part of the public record and could not be explored in this evaluation. At the time of this report, a court hearing was also being held to determine whether several of the accused should be committed to trial. Information about the hearing that has been made public is not subject to the suppression order, however, and is referred to in various parts of this report. Criminal investigations in the case are also on-going.

7. This case aside, Australia has had limited enforcement of its foreign bribery laws, despite its companies' risk of exposure to foreign bribery solicitation in the industries in which they operate. This lack of enforcement is not due to an absence of allegations, however. Since Phase 2 in 2005, the Australian

³ In 2010, trade with China accounted for 19.7% of the total, up 35% from 2009. Singapore, Japan, UK and US were also among the top 10 export destinations (WTO Trade Statistics; UNCTAD; DFAT (2011), *Australia Trade-at-a-Glance*).

⁴ UNCTAD and DFAT (2011), *Australia Trade-at-a-Glance*. Outward FDI was targeted at the US, UK, New Zealand and other OECD countries.

⁵ ACSI (October 2011), "Anti-Corruption and Bribery Practices in Corporate Australia", p. 20.

⁶ Forbes, "2000 Largest Public Companies 2011"; Financial Review (1 March 2012), "Miners Reject Anti-Corruption Reforms"; Australia-Africa Mining Industry Group (aamig.com); Harrap, A. (3 March 2011), "Australian Mining Engagement in Africa"; Austrade Media Release (8 February 2011), "Australian Business Interest in Africa's Resources Sector Triples"; International Mining for Development Centre (12 February 2012), "Australian Mining Investment in Africa More than \$50 billion: DFAT"; Australian Financial Review (11 February 2012), "Funding Still a Challenge for Miners in Africa"; DFAT (2011), *Australia Trade-at-a-Glance*, p. 19.

Federal Police (AFP) has received 28 allegations of foreign bribery involving Australian companies and individuals (including the *Securrency/NPA* case). To date, 12 of these cases have been evaluated, rejected for investigation, and “terminated”, while 9 cases were accepted for investigation but have been closed without resulting in charges because of insufficient evidence (i.e. “finalised”, using terminology suggested by the Australian authorities). The remaining 7 cases are on-going. Two additional cases involving allegations received before Phase 2 have also been investigated and “finalised” without charges. The *Securrency/NPA* case was initially rejected without investigation when a whistleblower first approached the AFP in 2008. An investigation began only after the company self-reported wrongdoing to the AFP in the following year (see Annex IV for summaries of selected enforcement actions).

Commentary

The lead examiners are seriously concerned that Australia’s overall enforcement of the foreign bribery offence to date has been extremely low. This report notes certain deficiencies and makes recommendations to address this concern. The lead examiners, however, welcome Australia’s first foreign bribery prosecutions, acknowledge Australia’s efforts to remedy the situation and anticipate these efforts to bear fruit in due course.

The lead examiners recommend that the Working Group monitor Australia’s foreign bribery enforcement efforts through Australia’s Phase 3 Oral Follow-up Report in 2013 and its Written Follow-up Report in 2014. This should include, if possible, exploration of the relevant issues in the Securrency/NPA case that could not be discussed in this evaluation because of a suppression order or on-going investigations.

B. IMPLEMENTATION AND APPLICATION BY AUSTRALIA OF THE CONVENTION AND THE 2009 RECOMMENDATIONS

8. This part of the report considers Australia’s approach to key horizontal (Group-wide) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to vertical (country-specific) issues arising from Australia’s progress on weaknesses identified in Phase 2, or from changes to Australia’s domestic legislative or institutional framework.

1. Foreign Bribery Offence

9. Australia’s foreign bribery offence is in Division 70 of the Criminal Code Act. Facilitation payments are allowed if certain record-keeping requirements are met. The defence is the subject of outstanding Phase 2 Recommendations and a recent public consultation conducted by the Australian federal government. The tax deductibility of facilitation payments is discussed at p. 36. This section also considers two elements of the foreign bribery offence that were the subject of the public consultation, and recent developments regarding hospitality, promotional expenditures, and charitable donations.

(a) Guidance on the Facilitation Payment Defence

10. Phase 2 Recommendation 5(c) asked Australia to revise and clarify guidance on the defence of facilitation payments issued by the Attorney-General’s Department (AGD) and the Australian Taxation Office (ATO). Australia had amended the guidance by the time of its 2008 Written Follow-Up Report. The Working Group, however, was still concerned that the revised guidance referred to government actions “of a minor nature” rather than payments of a minor value. The Working Group was also concerned that the examples in the guidance may not be of facilitation payments in certain circumstances. Australia has now addressed both concerns by amending the guidance to refer to payments of a minor value and removing the examples of facilitation payments. Phase 2 Recommendation 5(c) is thus fully implemented.

(b) *Public Consultation on the Facilitation Payment Defence*

11. The Australian government commenced a public consultation on 15 November 2011 concerning the facilitation payment defence.⁷ A consultation paper described arguments in favour of and against repealing the defence. The consultation closed on 15 December 2011, though late submissions were accepted until February 2012. At the time of this report, the Australian government was considering the responses to the consultation.

(c) *Application and Awareness of the Facilitation Payment Defence*

12. Phase 2 Recommendation 1(b) asked Australia to raise awareness of the facilitation payment defence. The Working Group also decided that it would follow up “the application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements” in the statute (Follow-up Issue 8(a)). Since Phase 2, the defence has not been tested in the courts.

13. Overall, there is general confusion about the facilitation payment defence, according to some representatives of civil society and the accounting and auditing profession at the on-site visit. The evaluation team noted a lack of understanding of what constitutes a “facilitation payment” under Australian law, leading to a misunderstanding of how the requirement to properly record facilitation payments applies in practice. In particular, facilitation payments appear to be frequently equated with any bribes of small value. Often overlooked is the requirement that such payments must be made to secure routine governmental action of a minor nature that does not result in the obtaining of a business advantage.⁸ For instance, a recent media article quoted the director of an Australian law firm who stated that “the law would distinguish whether paying a consultant constituted a bribe, depending on the size of the payment made.”⁹ A private sector representative believed that a facilitation payment includes paying an official who was threatening grievous physical harm at a roadblock, or supplying diesel to a police vehicle used to arrest a criminal. One company said facilitation payments include those made under duress. The uncertainty over the meaning of a facilitation payment is one reason why many on-site visit participants favoured abolishing the defence.

14. There is a perception that Australian companies may be making facilitation payments, and that the practice may be prevalent, at least in certain regions. A government Minister recently referred to “anecdotal evidence about the need to retain the defence because it is a reality of doing business, especially in the Asia-Pacific region”.¹⁰ At the on-site visit, several companies stated that they had made (and recorded) facilitation payments. Accountants and auditors indicated that they had seen such payments recorded in companies’ books. Several on-site visit participants said that Australian companies are increasingly banning facilitation payments. Yet, one recent study showed that 48% of major Australian companies continue to permit facilitation payments under certain conditions, and only 16-17% prohibit such payments outright.¹¹ However, some of these perceptions about the prevalence of facilitation payments may be distorted by the misunderstandings described above of what constitutes such a payment.

⁷ Attorney-General’s Department (15 November 2011), “Assessing the ‘Facilitation Payments’ Defence to the Foreign Bribery Offence and Other Measures”, paras. 16-27.

⁸ Criminal Code Act, Section 70.4(1)(b) and (2).

⁹ Financial Review (1 March 2012), “Miners Reject Anti-Corruption Reforms”.

¹⁰ Trust Law (16 November 2011), “Bribery Reforms: Australia Proposes Ban on Facilitation Payments”.

¹¹ ACSI (October 2011), “Anti-Corruption and Bribery Practices in Corporate Australia”, pp. 14, 18 & 23.

15. The Australian authorities have made some efforts to discourage the making of facilitation payments. The AGD guidance “recommends that individuals and companies make every effort to resist making facilitation payments.” It goes on to recognise that this “can be a difficult position to take, with short-term risks for business, and that this difficulty is increased for smaller businesses that may feel they lack the bargaining power of major companies.” Presentations by the Department of Foreign Affairs and Trade (DFAT) described further at p. 41 also discourage facilitation payments. On the other hand, the ATO guidance does not discourage facilitation payments, but states that, “For tax purposes, facilitation payments are not bribes and may be deductible.”

Commentary

Australia has made efforts to raise awareness of the facilitation payment defence, including through its proactive consultation process. Nevertheless, there continues to be substantial confusion over the scope of the facilitation payment defence. The lead examiners therefore recommend that Australia continue to raise awareness of the distinction between bribes and facilitation payments, and encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies’ books and financial records. Finally, the lead examiners recommend that the Working Group follow up the outcome of Australia’s public consultation on the facilitation payment defence. The lead examiners also reiterate Phase 2 Follow-up Issue 8(a) and recommend that the Working Group continue to follow up the application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code.

(d) Proof of Intention to Bribe a Particular Foreign Official

16. The government public consultation paper (paras. 32-33) describes an issue with Australia’s foreign bribery offence that was not considered by the Working Group in previous evaluations. The consultation paper proposes amending the offence to expressly state that proof of an intention to influence a particular foreign official is not required. On one view, to establish the foreign bribery offence, the prosecution may be required to prove that the defendant had an intention to influence a *particular* foreign public official, as mere proof of an intention to influence an unidentified foreign public official is not enough. At the on-site visit, two judges stated that in a domestic bribery case the prosecution is usually required to “close the loop” by proving the intention to bribe a specific official. They added that their statements were not intended to be authoritative. A prosecutor suggested that the proposed amendment might simply clarify rather than change the current law. The consultation paper should not be read to suggest that the current law required proof of an intention to influence a particular foreign official. He acknowledged that defendants might make an alternative argument at trial.

17. Though it is not clear that Australian law requires proof of an intention to bribe a specific foreign public official, such a requirement would significantly reduce the effectiveness of the offence. Foreign bribery is frequently committed through intermediaries; a briber hence rarely meets, and often does not know the identity of, the bribed official. In its questionnaire responses, Australia acknowledged that the use of intermediaries makes it difficult to identify a bribed official.

Commentary

The lead examiners recommend that Australia take appropriate steps to clarify that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery

offence. They also recommend that the Working Group follow up whether the foreign bribery offence requires the proof of this element.

2. Responsibility of Legal Persons

18. Prior to 2001, liability of legal persons for criminal offences was governed by the “identification theory” that originated from English common law. Under this theory, a company is liable only if individuals that constitute its “directing mind” (i.e. most senior officers) commit a crime. The Working Group has repeatedly criticised the identification theory for two reasons. First, a legal person’s directing mind is restrictively defined to a board of directors, managing director, and perhaps other senior officers. Second, liability cannot be based on aggregating the knowledge/states of mind of different people.

19. In December 2001, Australia extended the scope of liability of legal persons substantially. Under Division 12 of the Criminal Code Act, a legal person is liable for crimes committed by an employee, agent or officer acting within the actual or apparent scope of his/her employment if the company’s board or a “high managerial agent” intentionally, knowingly or recklessly committed the offence, or expressly, tacitly or impliedly authorised or permitted the offence. In the latter case of misconduct involving a high managerial agent, the company may escape liability if it had exercised due diligence to prevent the offence, or the authorisation or permission of the offence. In addition, a company is also liable if its “corporate culture” encouraged, tolerated or led to the offence, or if it failed to create and maintain a “corporate culture” that required compliance with the relevant law. (See p. 70 for the full text of these provisions.) A parent company may be held liable for crimes committed by a subsidiary or a joint venture if the parent is a party to the offence by aiding, abetting, counselling, procuring or inciting the commission of the offence by the subsidiary or joint venture. The parent may also be liable if it commits the offence jointly with a subsidiary or joint venture. Australia’s approach to foreign bribery committed by related companies is considered at p. 24.

20. The Phase 2 Report (paras. 151-153) lauded these provisions for being “well-suited to prosecutions for foreign bribery”. However, this conclusion was based on an analysis of the law and not actual practice. At the time of Phase 2, these provisions had not been applied to offences involving intentional crimes (e.g. bribery) but only regulatory offences, such as environmental, and health and safety offences. The Working Group thus decided to follow up the application of these provisions to foreign and domestic bribery (Follow-Up Issue 8(c)).

21. Practice under these provisions for intentional criminal offences remains scant in Phase 3 eleven years after their enactment. Two legal persons – both in the *Securency/NPA* case – have been charged with foreign bribery. Australia could not identify any Commonwealth criminal convictions against companies for domestic bribery, false accounting, money laundering, fraud or tax evasion.¹²

22. The corporate liability provisions founded on “corporate culture” are somewhat novel and have not, to date, been used. The *Securency/NPA* case involves the complicity of senior corporate officers;¹³ liability has thus not been asserted on the basis of the “corporate culture” provisions. Commentators (including one senior Australian prosecutor) have stated that how these provisions would operate in practice is unclear. Prosecutors could have evidentiary difficulties establishing liability under these

¹² Australia referred to the case of *McArdle and Power Financial Planning*, which dealt with an offence of providing financial services without a license contrary to the Corporations Act.

¹³ AFP Press Release (1 July 2011) (www.afp.gov.au).

provisions.¹⁴ Consequently, the provisions to date “remain largely of academic interest through lack of use”.¹⁵ The Commonwealth Director of Public Prosecutions has not had to deal with these provisions because it has not received from the AFP referrals alleging corporate liability due to intentional crimes.

Commentary

Phase 2 Follow-up Issue 8(c) concerns the application of the criminal liability of legal persons for foreign bribery. The lead examiners consider that Australia’s corporate liability provisions meet the standard set out in Annex 1 of the 2009 Anti-Bribery Recommendation. There are serious concerns that these provisions have not produced criminal prosecutions or convictions in cases of domestic bribery, false accounting, money laundering, fraud or tax evasion. As noted later in this report, only one case has produced charges against legal persons for foreign bribery out of the 28 allegations received by the Australian authorities. The reason for this is not entirely clear. The lead examiners therefore recommend that Australia take steps to enhance the usage of the corporate liability provisions, including those on corporate culture, where appropriate, and provide on-going training to law enforcement authorities relating to the enforcement of corporate liability in foreign bribery cases.

3. Sanctions for Foreign Bribery and Related Offences

(a) Sanctions against Natural Persons

23. The maximum penalties for foreign bribery against natural persons have not been changed since Phase 2. The offence is punishable by 10 years’ imprisonment and/or an AUD 1.1 million (EUR 920 000) fine.¹⁶ Australia stated that offenders are also automatically disqualified from managing corporations for 5 years, which may be extended to up to 20 years upon application to the court.¹⁷ They may also be disqualified from being a “responsible officer” in a financial institution.¹⁸

24. In the absence of convictions for foreign bribery, the Phase 2 Report (paras. 157-160) considered sentences imposed for Commonwealth offences such as fraud and domestic bribery. Both offences carry the same maximum penalty as foreign bribery. Of the 1 713 sentences for fraud imposed in an 18-month period in 2003-2004, a “vast majority” (1 266) resulted in imprisonment of less than 12 months. Periodic detention and home detention were imposed 83 and 73 times respectively, while 1 067 sentences were suspended. Data on fines imposed were not available. In addition, 60 convictions for the Commonwealth domestic bribery offence in 1984-2005 yielded 33 imprisonment sentences, 8 community service sentences, 17 good behaviour bonds, and 9 fines. These statistics raised two concerns. First, the penalties imposed for domestic bribery were much lower than the maximum available, although it also recognised

¹⁴ Thornton, J. (2008), “Criminal Liability of Organisations”, pp. 10-11 (www.isrc.org); Allens Arthur Robinson (February 2008), “[‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations](#)”, pp. 17 and 70. Difficulties cited include how “corporate culture” is to be ascertained, especially when a corporate group or large multinational company is involved.

¹⁵ Clough, J. and Mulhern, C. (2002), *The Prosecution of Corporations*, OUP, Melbourne, p. 148.

¹⁶ Section 70.2(4)(a) provides that the fine is 10 000 “penalty units”. Each penalty unit equates to AUD 110 (Commonwealth Crimes Act 1914 Section 4AA).

¹⁷ Corporations Act 2001, Section 206B.

¹⁸ Superannuation Industry (Supervision) Act 1993 Section 126H; Banking Act 1959 Section 21; Insurance Act 1973, Section 25A; Life Insurance Act 1995, Section 245A.

that most of the cases involved bribes of small or unascertained value. Second, there were questions whether monetary sanctions were routinely sought in domestic bribery cases.

25. Since Phase 2, sanctions have not been imposed for foreign bribery as there have not been convictions. Statistics provided by Australia show that 14 individuals have been convicted for domestic bribery and corruption under Commonwealth law from 1 July 2005 to 22 August 2012. These convictions yielded 13 imprisonment sentences (5 of which were suspended and 3 were for periodic detention). The longest sentence was imprisonment for 29 months. These convictions also yielded 1 fine (AUD 1 000 or EUR 835), 4 reparation orders (two of which were in the amount of AUD 1 560 690 or EUR 1.3 million), 2 community service sentences and 3 good behaviour bonds.

Commentary

In Phase 2 (Follow-up Issue 8(d)), the Working Group decided to monitor the sanctions imposed on natural persons in Australia for foreign bribery to determine whether monetary sanctions, including fine penalties and confiscation. Since Phase 2, no sanctions have been imposed for foreign bribery. The lead examiners therefore recommend that the Working Group continue to follow up the sanctions imposed in Australia against natural persons for foreign bribery to ensure that they are effective, proportionate, and dissuasive.

(b) Sanctions against Legal Persons

26. Phase 2 Recommendation 6(a) asked Australia to increase the maximum fine against legal persons for foreign bribery. At that time, legal persons were punishable by a maximum fine of AUD 330 000 (EUR 275 000) which the Working Group and Australia both recognised as being too low. Australia implemented Recommendation 6(a) when it increased the penalties in February 2010 to a fine of not more than the greatest of the following:

- (a) a fine of AUD 11 million (EUR 9.18 million);
- (b) three times the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence, if the court can determine the value of the benefit; or
- (c) if the court cannot determine the value of that benefit, then 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

27. “Benefit” includes “any advantage and is not limited to property” (Criminal Code Act, Section 70.2). The Australian authorities state that “benefit” thus covers “non-financial and non-pecuniary advantages such as a customer base, a market share, or an undefined increase in the profit obtained from the sale of a good or service.” The last part of this statement suggests that the net profit, not gross revenues, of a contract won by bribery would be considered the “benefit”. However, there is no judicial authority on this point as it has yet to be interpreted and applied by the courts. The term “reasonably attributable” is undefined and will also require further interpretation by the courts.

28. Australia has not provided information concerning sanctions imposed against legal persons in practice for domestic bribery or other intentional economic crimes under the Criminal Code Act. This was likely because of a lack of convictions of such crimes against companies (see p. 12).

Commentary

The lead examiners welcome that Australia has significantly increased the maximum penalties against legal persons for foreign bribery. However, no legal persons have been sanctioned for foreign bribery. The lead examiners therefore recommend that the Working Group continue to follow up whether the sanctions imposed in Australia against legal persons for foreign bribery are effective, proportionate and dissuasive as practice develops.

(c) Summary vs. Indictable Offence

29. Proceedings for foreign bribery may be commenced by indictment or as a summary offence. In the latter case, the maximum penalties are reduced. Summary offences can arise under two situations. First, a prosecutor, with the consent of the defendant, may decide to proceed with an offence summarily. The offence is then punishable by two years' imprisonment and/or an AUD 13 200 (EUR 11 020) fine. Second, a prosecutor may seek a court's permission to proceed summarily if the offence relates to property whose value does not exceed AUD 5 000 (EUR 4 174). The offence is then punishable by 12 months' imprisonment and/or an AUD 6 600 (EUR 5 510) fine.¹⁹ As part of a plea bargain (see p. 28), a prosecutor may also agree to proceed summarily instead of by indictment.

30. The Phase 2 Report (paras. 156 and 158) expressed concerns over whether foreign bribery offences would be proceeded with summarily, and whether the resulting sanctions would be sufficient in these cases. Of the 60 convictions for the Commonwealth domestic bribery offence in 1984-2005, at least 27 were proceeded as summary offences. The Working Group decided to follow up the issue as practice developed (Follow-Up Issue 8(d)).

31. Australia provided some additional information on this issue in Phase 3. The *Secrecy/NPA* proceedings were commenced by way of indictment. The Prosecution Policy of the Commonwealth (para. 6.12) requires a prosecutor to consider the certain factors when deciding whether to proceed summarily. One consideration is the nature and seriousness of the case. At the on-site visit, the CDPP stated that most foreign bribery cases would be considered sufficiently serious to require proceeding by indictment.

Commentary

Given that there have only been foreign bribery prosecutions arising from one case, the lead examiners reiterate Phase 2 Follow-up Issue 8(d), and recommend that the Working Group follow up the choice of proceeding in foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive.

(d) Sanctions for False Accounting

32. Article 8 of the Convention requires Parties to prohibit foreign bribery-related accounting misconduct by companies, and to provide effective, proportionate and dissuasive sanctions for such misconduct. In Phases 1 and 2, Australia relied on Sections 286 and 1307 of the Corporations Act to implement Article 8. Section 286 requires a company to keep written financial records that "correctly record and explain its transactions and financial position and performance" and "would enable true and fair financial statements to be prepared and audited". This is a strict liability offence (i.e. proof of fault is not required) and may apply to legal persons. Breach of this provision by a natural person is punishable by six

¹⁹ Commonwealth Crimes Act 1914, Section 4J.

months' imprisonment and/or a fine of 25 penalty units, i.e. AUD 2 750 (EUR 2 295). Breach of the provision by a legal person is punishable by 125 penalty units, i.e. AUD 13 750 (EUR 11 478). Section 1307 prohibits the concealment, destruction, mutilation or falsification of any securities of or belonging to the company or any books affecting or relating to affairs of the company. The misconduct is punishable by 2 years' imprisonment and/or a fine of AUD 11 000 (EUR 9 183). This offence applies only to former or current officers, employees, and members of a company; it does not apply to legal persons. The Australian Securities and Investment Commission (ASIC) is principally responsible for enforcing both offences.

33. In previous evaluations, the Working Group did not appear to have considered whether the maximum sanctions available under these provisions are effective, proportionate and dissuasive. On its face, the available sanctions against legal persons are not adequate. ASIC described the maximum penalties available under Section 286 as "very minor". Within Australia's legal system and practice, substantially higher maximum penalties for this offence would be out of step with the strict liability nature of the offence. A Bill introduced in Parliament on 10 October 2012 would raise the amount of a penalty unit from AUD 110 to AUD 170. This would in turn increase the maximum penalties against legal persons under Section 286 to AUD 21 250 (EUR 17 739). Multiple counts of false accounting may be laid against an accused in a single case where supported by the facts. The total sanctions imposed must be of a severity that is appropriate in all the circumstances of the offences (Crimes Act Section 16A). Cumulative penalties are subject to the principle of totality, i.e. the aggregate sentence must be a just and appropriate measure of the total criminality.

34. In Phase 3, Australia appears to also rely on State-level criminal legislation to implement Article 8, but this approach brings other difficulties. In the *Securrency/NPA* case, three individuals have been charged with false accounting under the Victoria Crimes Act 1958 Section 83(1), one of whom has pleaded guilty to the charge. Legal persons have not been charged with this offence in the case potentially due to miscommunication and lack of co-ordination between AFP and ASIC (see p. 26). The offence is punishable by a maximum of 10 years' imprisonment and a fine of AUD 169 008 (EUR 141 000). Legal persons are punishable by a fine of up to AUD 845 040 (EUR 705 000). The maximum fines may not be effective, proportionate and dissuasive, given the size of bribes and contracts involved in many foreign bribery cases. A further concern is that criminal liability against legal persons at the State level relies on the identification theory. The Working Group has repeatedly criticised this approach (see p. 12). Relying on State-level offences also requires co-ordination with State authorities (see p. 27).

35. The Phase 2 Report (paras. 126-128 and Follow-up Issue 8(f)) expressed additional concerns about the sanctions for false accounting that have been imposed in practice. The Report noted that in 1991-2005, 18 prosecutions under Section 1307 resulted in fines of AUD 500-3 000 (EUR 417-2 504) and jail sentences of 6-12 months. The CDPP had not prosecuted any cases under Section 286 since at least 1991. There was no information on whether ASIC prosecuted any cases under this section. Since Phase 2, four individuals have been convicted under Section 286. Three were fined ranging from AUD 1 500-5 000 (EUR 1 300-4 000) and the other sentenced to a suspended term of imprisonment. There were also five convictions under Section 1307 which yielded three suspended jail sentences, one community service order and one fine of AUD 10 000 (EUR 8 300). There have not been convictions against legal persons for false accounting under the Corporations Act since Phase 2.

36. In the *Securrency/NPA* case, one individual has been sentenced to a suspended six-month sentence of imprisonment for one count of false accounting under the Victoria Crimes Act 1958.²⁰ The defendant was Securrency's chief financial officer and a company secretary. The misconduct concerned the use of false accounting records to hide commissions paid to a Malaysian agent. The court considered the

²⁰ *R. v. Ellery*, [2012] VSC 349.

offending to be in the mid-range of false accounting offences. In passing sentence, the court took into account mitigating factors such as the defendant's lack of criminal history and personal gain from the offence. The defendant also pleaded guilty at the earliest opportunity and co-operated fully with the police, including by turning over physical evidence. He is expected to be an "important prosecution witness" in the subsequent trial of other accused. In light of these factors, the court granted a "substantial discount" to the sentence, which would otherwise have been of one year's imprisonment.

Commentary

The lead examiners are concerned that Australia's maximum penalties against legal persons for false accounting are not effective, proportionate and dissuasive. The fines available under the Corporations Act Section 286, a strict liability offence, against legal persons is AUD 13 750 (EUR 11 478). The offence under Section 1307 is not available against legal persons. The maximum fines available under State-level legislation are higher but still inadequate. Furthermore, liability under these provisions is difficult to establish in practice because of the reliance on the identification theory.

The lead examiners therefore recommend that Australia increase the maximum sanctions against legal persons for false accounting under Commonwealth legislation to a level that is effective, proportionate and dissuasive within the meaning of Article 8(2) of the Convention, commensurate with Australia's legal framework. Alternatively, Australia could increase the maximum sanctions and broaden the scope of liability of legal persons for false accounting offences at the State level.

The lead examiners are also concerned with the low level of enforcement of Australia's false accounting offences. They therefore recommend that Australia vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate. Finally, the lead examiners recommend that the Working Group continue to follow up the actual sanctions imposed against natural and legal persons for false accounting in connection with foreign bribery as practice develops.

4. Confiscation of the Bribe and the Proceeds of Bribery

37. Australia has modified the legislative and institutional framework for confiscation since Phase 2. Confiscation in foreign bribery cases is available under the Proceeds of Crime Act 2002 (POCA). Two types of conviction-based confiscation are available. First, upon a conviction for a "serious offence", property that is already subject to a restraining order will be automatically forfeited without a further forfeiture order. Foreign bribery is a "serious offence" if it causes, or is intended to cause, a benefit of at least AUD 10 000 (EUR 8 348) (POCA Sections 92-94 and 338). Second, if a person is convicted of foreign bribery, then a court must order the forfeiture of the *proceeds* of the offence if the Australian authorities have applied for the order, and the court is satisfied that the subject property is proceeds of an offence. A court may also order the forfeiture of an *instrument* of the offence. "Proceeds" include property situated in or outside Australia that is wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence. "Instrument" includes property used or intended to be used in, or in connection with, the commission of an offence which presumably would cover a bribe (POCA Sections 48 and 329).

38. Two types of confiscation are also available without a conviction. First, a court must order forfeiture of property that has been restrained for at least six months if it is satisfied on a balance of probabilities that (a) the person whose conduct or suspected conduct formed the basis of the restraining order engaged in a "serious offence" (POCA Section 47); or (b) the property in question is proceeds of an

indictable offence (e.g. foreign bribery), or an instrument of a “serious offence” (see definition above). The Australian authorities must also take reasonable steps to identify and notify persons with an interest in the property (POCA Section 49). In some circumstances, the court may decline to order forfeiture if it is in the public interest to do so (POCA Sections 47(4) and 49(4)).

39. As an alternative to confiscation, a court may impose a pecuniary penalty order if satisfied that a person has been convicted of an indictable offence or has committed a “serious offence”. The value of the order is generally equal to the value of the benefits derived by the person from the offence. Where the benefits exceed AUD 10 000 (EUR 8 348), then the value of the order may be increased to cover the benefits derived from other unlawful activity (POCA Sections 116, 121 and 130).

40. The Working Group has questioned the application of confiscation in practice. The Phase 2 Report (para. 158) noted that, of the 60 domestic bribery convictions in 1984-2005, none resulted in confiscation, and only one pecuniary penalty order was imposed (in a case involving bribe-taking). The Working Group thus decided to follow up this issue (Follow-up Issue 8(d)). In Phase 3, Australia stated that, of the 19 convictions for domestic active and passive bribery under Commonwealth law from 1 July 2005 to 22 August 2012, 2 resulted in forfeiture orders under POCA Section 48. The two orders were for AUD 11 275 (EUR 9 400) and AUD 98 (EUR 81). Two superannuation orders under the Crimes (Superannuation Benefits) Act 1989 were also made and two were under consideration. These orders can be made in relation to an employee of the Commonwealth or a Commonwealth Agency if that person commits a “corruption offence”. Such orders require the employee’s contribution to superannuation not be paid or be recovered if already paid. Information from other sources indicates a general increase since 2002 in the total amount forfeited and the number of forfeitures and pecuniary penalty orders.²¹

41. On 14 January 2011, the Criminal Assets Confiscation Taskforce (CACTF) commenced operations to implement a more integrated and proactive approach towards recovering proceeds of crime. The AFP leads the Taskforce and contributes staff, including its existing Financial Investigations Teams which include forensic accountants and financial investigators. The ATO and Australian Crime Commission provide additional staff. The CACTF appears to focus mainly on proceeds of organised crime.²² At the on-site visit, the CACTF stated that it would be involved in a foreign bribery case only if requested by the investigators which have conduct of the case. The AFP stated that its investigators would consider a role for the Taskforce in every foreign bribery investigation. However, the AFP did not explain the Taskforce’s role in the foreign bribery investigations to date.

Commentary

The lead examiners are concerned that, of the 19 recent convictions for domestic bribery from 1 July 2005 to 22 August 2012, only 2 resulted in forfeiture orders. The creation of the CACTF is encouraging, but its impact on foreign bribery cases remains to be seen. The lead examiners therefore recommend that Australia take further concrete steps (such as providing guidance and training) to ensure that its law enforcement authorities routinely considers confiscation in foreign bribery cases.

²¹ Bartels, L. (2010), “A Review of Confiscation Schemes in Australia”, pp. 8-9. See also CDPP Annual Report 2010-2011, p. 151.

²² See a description on the Taskforce at www.afp.gov.au/policing/proceeds-of-crime.aspx.

5. Investigation and Prosecution of the Foreign Bribery Offence

42. As noted at p. 8, the level of foreign bribery enforcement is extremely low, having regard to the significant number of Australian companies that are exposed to risks of foreign bribery solicitation. As noted at the outset, of the 28 foreign bribery allegations received by the Australian authorities, only 1 has resulted in a prosecution, and 21 other have been terminated or finalised without charges. Even the *Securrency/NPA* case was initially rejected without investigation when the AFP first learned of the allegations in 2008.

43. This evaluation examines how the Australian authorities have dealt with many of the 28 allegations received (Annex 4 of summaries of these cases). As described in greater detail below, there are concerns that some of these cases have been terminated or finalised before certain lines of inquiry or bases of liability were fully considered. Australia has made efforts to address its low level of enforcement. But these measures have yet to produce additional foreign bribery prosecutions.

Commentary

That Australia has only one case that has led to foreign bribery prosecutions since it enacted its foreign bribery offence in 1999 is of serious concern. Out of 28 referrals received, 21 have been concluded without charges, and only one has resulted in prosecutions. This level of enforcement is not commensurate with the size of its economy and the risk profile of Australian companies. The lead examiners therefore recommend that Australia review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials.

(a) Principal Enforcement Agencies

44. As in Phase 2, Australia's main criminal law enforcement bodies in foreign bribery cases are the AFP and the CDPP. The AFP is the main criminal investigative agency for offences against Commonwealth criminal law, including the foreign bribery offence in the Criminal Code Act. The AFP may also investigate State criminal offences that have a federal aspect. The AFP is independent at the operational level. The CDPP may issue written directions to the AFP Commissioner that may relate to particular cases (CDPP Act Section 11). The AFP routinely seeks legal advice from the CDPP during an investigation. The advice is not binding and the AFP has ultimate decision-making authority in an investigation. Once the AFP completes an investigation, the matter is referred to the CDPP to consider whether prosecution should be commenced.²³

45. On a policy level, the Minister of Justice issues a direction to the AFP articulating priority areas designated by the government and which the AFP is required to address through its investigations.²⁴ The current direction identifies "serious fraud, money laundering and corruption" as a "strategic priority" in the context of "safeguarding the economic interests of the nation from criminal activities".²⁵ The AFP clearly stated that this statement of priority covers both foreign and domestic corruption.

²³ Australian Federal Police Act Part II (particularly Section 8) and Section 17.

²⁴ AFP Act Section 37-38; Financial Management and Accountability Act 1997 Section 44; Ministerial Direction to the AFP (1 July 2010).

²⁵ www.afp.gov.au/about-the-afp/governance/ministerial-direction.aspx

46. ASIC is Australia's corporate, markets and financial services regulator. ASIC is the principal enforcer of the Commonwealth Corporations Act 2001 and ASIC Act 2001, including the false accounting offences in the Corporations Act (see p. 15). Additional Corporations Act offences could apply to company directors who authorise foreign bribery, or who learn that foreign bribery has been committed but failed to respond adequately.²⁶ ASIC's investigative powers include the examination of persons, inspection of books and audit information, requirements to disclose information, and search warrants to seize books. ASIC has used these powers to carry out numerous investigations and prosecutions of corporate crime generally, including corporate fraud. ASIC does not have legislated jurisdiction in relation to foreign bribery; its role is limited to investigations for the due administration of the corporations legislation referred to above. The AFP states that it has worked with ASIC, such as in the Australian Wheat Board case. ASIC officials in this case investigated the same target, but given its mandate, focused on breaches of corporations legislation, and not the corruption offences that were the focus of the AFP's inquiry. Evidence gathered by ASIC through coercive measures also could not be shared with the AFP absent a search warrant.

Commentary

As the principal corporate regulator, ASIC is in a prime position to interact with companies that may commit foreign bribery. In addition, its experience and expertise in investigating corporate economic crimes could be a useful complement to the AFP. The lead examiners therefore recommend that Australia take steps to ensure that ASIC's experience and expertise in investigating corporate economic crimes are used to assist the AFP to prevent, detect and investigate foreign bribery where appropriate. As stated at p. 17, the lead examiners also recommend that Australian law enforcement authorities, including ASIC, vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate.

(b) Case Categorisation and Prioritisation Model (CCPM)

47. As in Phase 2, after the AFP receives a foreign bribery allegation, it applies a two-stage process to determine whether to open an investigation. First, a preliminary assessment is conducted to determine whether the allegation should be formally "evaluated". If the allegation meets this test, then a formal evaluation is conducted by applying the Case Categorisation and Prioritisation Model (CCPM). The CCPM is essentially a decision-making framework. It requires consideration of numerous factors such as the type of crime; the impact of the matter on Australian society; the importance of the matter to the AFP and the referring agency; and the resources required to investigate the matter. In Phase 2 (paras. 50-52), the Working Group asked Australia to amend a publicly available document explaining the CCPM to expressly classify foreign bribery as an offence with "high impact" on Australian society. The AFP has made the requested amendment. Phase 2 Recommendation 2(a) is therefore fully implemented.

(c) Sources of Foreign Bribery Allegations

48. In Phase 2 (paras. 53-56 and Recommendation 2(b)), there were concerns that the AFP would not consider information from the following sources as the basis for opening an investigation: (i) media reports, (ii) incoming mutual legal assistance (MLA) requests, and (iii) foreign court documents. Instead, foreign bribery investigations may only be triggered by : (a) a formal referral, i.e. a complaint from an

²⁶

These include the offence against a director who recklessly or dishonestly fail to exercise their powers and discharge their duties for a proper purpose or in good faith in the best interests of the corporation (Section 184); and offences of making false or misleading statements, or giving false information in relation to the affairs of the company.

individual or government agency; (b) proactive intelligence gathering by the AFP; (c) information that surfaces while investigating a different offence; and (d) proactive investigation of persons or organisations where foreign bribery is suspected.

49. The AFP's position on foreign bribery allegations in media reports has evolved. Initially in Phase 2, the AFP stated that it would not initiate foreign bribery investigations based on media reports, regardless of the report's credibility (para. 53). After the on-site visit, it stated that it would review media reports that were corroborated by independent information (para. 54). The AFP subsequently undertook orally to the Working Group to evaluate foreign bribery allegations contained in "credible media reports" (Written Follow-Up Report para. 7). In Phase 3, the AFP stated in the questionnaire responses that it "does not search all media sources. While the AFP does not generally evaluate media articles, recently the AFP has used information contained in a media article to establish further lines of enquiry in a current investigation." This suggests that the AFP would use media reports to further an opened investigation but not as the sole basis for starting an investigation. At the on-site visit, the AFP said that the media was important and was a source of intelligence and witness information.

50. As for MLA requests and foreign court documents, the AFP stated in Phase 2 (paras. 55-56) that an incoming MLA request would trigger a domestic investigation only if it provided "clear evidence" of "substantial allegations" of foreign bribery. Australia also declined to investigate allegations contained in foreign court documents which claimed that an Australian public official had engaged in foreign bribery. In its 2008 Written Follow-Up Report (para. 7), Australia orally undertook to the Working Group to evaluate foreign bribery allegations contained in "publicly available documents from foreign courts" and in MLA requests. In Phase 3, Australia did not refer to this oral undertaking. Instead, the AFP stated that it would evaluate information that "is made available" but that it "does not search all [...] foreign courts for the information". No information was provided concerning allegations in MLA requests. ASIC added that it would forward to the AFP foreign bribery allegations contained in requests for information under the IOSCO MMOU (see p. 40) only with the consent of the requesting authority.

51. These approaches have yet to lead to actual investigations. The AFP has considered 28 foreign bribery allegations for investigation since Phase 2. According to Australia, these cases came from referrals from government agencies, members of parliament, non-government agencies, members of the public, and corporations. None originated from a media report, MLA request, or foreign court document. In the *Securrency/NPA* case, Australian media referred to foreign press articles that may have emerged as early as 2007 and which described the company's possible misconduct.²⁷

52. Overall, the evaluation team believes that Australia should be more proactive in seeking foreign bribery allegations. For example, the AFP's International Liaison Network consists of over 93 officers stationed in 30 countries, including many that are perceived to have high levels of corruption.²⁸ Officers in the Network, along with Australian embassy officials, are well-positioned to come across foreign bribery allegations involving Australian companies in the media, court documents, and from other sources abroad. These embassy and AFP officials should thus be instructed to be alert to allegations from these sources. They should also proactively reach out to bodies in these foreign countries (such as local business organisations and anti-corruption NGOs) that may have information about Australian companies engaging in foreign bribery. At the international level, the AFP should network with bodies in the anti-corruption community, such as multilateral development banks and NGOs. In addition, the AFP should evaluate all foreign bribery allegations involving Australian entities contained in incoming MLA requests to determine

²⁷ Sydney Morning Herald (24 January 2011), "RBA Must Investigate the Securrency Board".

²⁸ www.afp.gov.au/policing/international-liaison/international-network.aspx.

whether to open a domestic investigation. As well, whenever ASIC receives an IOSCO MMOU request that contains similar information, it should proactively seek the permission of the foreign authorities to forward the information to the AFP.

Commentary

The AFP has received 28 foreign bribery allegations since Phase 2. While this figure is significant, the relevant Australian authorities should be more proactive in gathering information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations. In 2008, the AFP stated to the Working Group that they were “willing to undertake evaluations on suspected foreign bribery instances based on credible media reports, publicly available documents from foreign courts or mutual legal assistance requests”.²⁹ Since then, the AFP has not opened a foreign bribery investigation based on information from these sources.

The lead examiners welcome the establishment by the AFP of a Foreign Bribery Panel of Experts (see p. 23) to advise foreign bribery investigation teams. They recommend that the Panel consider the Working Group’s recommendations to the AFP. Finally, the lead examiners note that whether securities regulators proactively seek the permission of the foreign authorities to forward foreign bribery allegations contained in an IOSCO MMOU request to other law enforcement authorities, is a horizontal issue among Working Group members.

(d) Terminated Foreign Bribery Cases

53. As mentioned at p. 8, the AFP has received 28 foreign bribery allegations since Phase 2. To date, 12 of these allegations have been “terminated”, i.e. evaluated and then rejected for investigation. Another 9 cases were “finalised”, i.e. closed after an investigation had been conducted. This section examines issues raised by some of these closed cases. The names of some cases have been anonymised at Australia’s request. The section also considers the *Securency/NPA* case which has resulted in a prosecution but only after the AFP initially declined to investigate the matter.

(i) Lack of Sufficient Inquiries before Rejecting an Allegation for Full Investigation

54. The AFP described the inquiries that it would make before declining to conduct a full investigation of a foreign bribery allegation (i.e. termination). As described earlier, the AFP conducts an initial assessment followed by an evaluation with the CCPM before deciding whether to accept an allegation for investigation. One factor in this determination is the sufficiency of evidence. The AFP explained that an allegation must be sufficiently detailed and more than “mere rumour or innuendo” before it would be evaluated. Media reports containing foreign bribery allegations must be corroborated by independent information (see p. 20). If the necessary details are missing from the allegation, then the AFP would ask the party who referred the allegation for more information. The AFP would not necessarily speak to a journalist who writes a press article containing foreign bribery allegations, or seek information or documents from other sources to corroborate the allegation.

55. The *Joint Venture Buyout Case* concretely illustrates the inquiries that would be made before a foreign bribery case is terminated without a formal investigation. Media reports indicated that an Australian company bought out its joint venture partner’s stake in a gold mine in a foreign country. To

²⁹ Phase 2 Written Follow-up Report, para. 7.

facilitate the transaction, part of the proceeds of the buy-out were allegedly channelled to board members of the joint venture partner. These board members reportedly were closely related to public officials of the foreign country, thus raising the prospect that these officials were the ultimate beneficiaries of the buy-out proceeds. The AFP declined to open an investigation because it received information from the AFP's overseas network that the transaction had been undertaken with due diligence and that all payments were made at the joint venture partner's request. The AFP did not inquire into key matters that could have corroborated the allegations, such as whether the board members were indeed related to foreign public officials; the due diligence conducted by the company was sound; and the buy-out proceeds were channelled to the board members.

56. The initial rejection of the *Securrency/NPA* case also shows what inquiries the AFP would make before terminating a foreign bribery case without a full investigation. In April 2008, a Securrency employee informed the AFP of foreign bribery allegations involving Securrency. The AFP explained that the officer in charge of the case spoke to the employee, but then incorrectly applied the CCPM by misunderstanding the nature and seriousness of the offence. The officer then concluded that there was insufficient information to open an investigation. It was not until after a second referral by the Securrency board of directors in May 2009 that the AFP opened an investigation which led to the numerous foreign bribery charges that are currently before the courts. The AFP Commissioner has admitted publicly that the AFP "could have done more" to act on the initial complaint in 2008.³⁰ AFP officers expressed similar views at the on-site visit. A subsequent "quality assurance review" of the *Securrency/NPA* case, the report of which was finalised in August 2010, made 29 recommendations for improving future multijurisdictional investigations. Many of the recommendations are applicable beyond the *Securrency/NPA* case.

57. The AFP recognises that it may have been overly stringent in filtering out foreign bribery allegations for investigation. In August 2011, the AFP reviewed 17 foreign bribery cases that had been closed without charges, including the 7 cases that had been evaluated but rejected for investigation. The review was initiated by an AFP Commander shortly after he had assumed responsibilities for dealing with foreign bribery matters. The review was conducted by AFP officers who do not normally deal with foreign bribery cases so that a "fresh look" could be taken at the cases in question. The review found two cases that had been rejected for investigation before fully exhausting all of the normal lines of inquiry. Both cases were subsequently re-opened and closed again after these lines of inquiry were investigated.

58. At the on-site visit, the AFP stated that it would create a Foreign Bribery Panel of Experts comprising officers with prior foreign bribery experience. The Panel would take part in "periodic operations reviews" of foreign bribery cases to provide expert knowledge on best practices, to identify areas for improvement, and to monitor the allocation of resources. The Panel will also assist and oversee the regional Operations Committee that evaluates all foreign bribery referrals and decides whether to open an investigation. After the on-site visit, the AFP stated that the Panel had become operational.

Commentary

The lead examiners are concerned that the AFP may have closed foreign bribery cases before thoroughly investigating the allegations. This may be supported by the Joint Venture Buyout Case, the Securrency/NPA case, and the overall percentage of foreign bribery cases that have been closed without investigation. The lead examiners recommend that the AFP take sufficient steps to ensure that foreign bribery allegations are not prematurely closed. In this regard, the lead examiners commend Australia for conducting a review to address concerns that insufficient inquiries were made in foreign bribery cases.

³⁰ The Age (26 May 2010), "Bank Bribery Probe Widens to Europe and Asia".

The lead examiners further recommend that the AFP's Foreign Bribery Panel of Experts consider the Working Group's recommendations to the AFP.

(ii) *Cases Involving Related Companies*

59. The AFP may not have been fully exploring all potential avenues for exercising jurisdiction. In the *Phosphate Mining Case*, company X allegedly bribed parliamentarians in a foreign country to obtain a phosphate mining permit. There were in fact two corporate entities, X(A) and X(B). Only X(B) was implicated in the allegations; X(B) was incorporated in a third country, while X(A) was incorporated in Australia. The two companies did not have cross shareholdings or common directors, and the owners of both companies were not Australian nationals. For these reasons, the AFP concluded that it did not have jurisdiction and could not proceed with a foreign bribery investigation on the basis of the evidence available to it.

60. After the on-site visit, in response to a question of whether financial flows between X(A) and X(B) had been examined, the AFP stated that it could not investigate financial transactions from foreign-owned companies to countries other than Australia. The AFP opened a separate investigation concerning possible acts of foreign bribery that were not related to the original allegation of foreign bribery, which remains finalised.

Commentary

The lead examiners are seriously concerned that the AFP may not have been fully exploring all potential avenues for exercising jurisdiction in foreign bribery cases. The 2009 Anti-Bribery Recommendation Annex I.C states that "Member countries should ensure that [...] a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf." In the lead examiners' view, the term "related" in this context should be interpreted purposively. The AFP and other relevant investigative agencies should therefore continue to take steps to ensure that it explores all avenues for exercising jurisdiction over related legal persons in foreign bribery cases. The AFP stated that its recently-established Foreign Bribery Experts Panel would create an aide mémoire to ensure that future investigations would consistently consider the involvement of related legal persons. The lead examiners recommend that the Working Group follow up the implementation of the aide mémoire.

(iii) *Terminations Due to Deferrals to Other Agencies*

61. In two terminated cases, the AFP referred the matter to another agency instead of conducting domestic investigations. The *Casino Foreign Bribery Case* concerned an Australian company that owned and managed casinos, including two in Macau, China. In 2008, a former senior public works official in the Macau Government was convicted of accepting bribes. The indictment against the official listed the two casinos in question as among at least ten "suspect projects". The AFP has not commenced a domestic investigation, but has merely exchanged information with the authorities in Macau in July 2009. There was no indication that the Australian company would be prosecuted in Macau.

62. The *Mining Company Case* raises similar concerns. Company Z is a multinational mining company with headquarters in Australia and management offices overseas. In 2010, the company announced that it had disclosed to the US authorities evidence that it had uncovered regarding possible foreign bribery. The AFP reacted following a referral from the Australian Attorney-General's Department, which in turn had received information from the US authorities. Based on material received from the US, the AFP identified suspicious transactions that had been recorded as legitimate business payments. After

consulting the US authorities and ASIC, the AFP referred the case to ASIC without conducting an investigation. At the on-site visit, ASIC stated that it was only concerned with issues in this case relating to corporate governance and accounting standards, given its mandate is limited to investigations for the due administration of corporations legislation (see p. 19). ASIC ultimately did not commence proceedings because Company Z had documented the suspicious payments and disclosed them to the market. The end result is that no Australian body conducted an investigation in Australia into whether crime – including foreign bribery – had been committed and whether Company Z's staff in Australia were complicit in the crime.

63. After the on-site visit, the AFP explained that it does consider joint investigations and/or parallel investigations with other enforcement bodies. The AFP would not, however, duplicate investigations where possible, but would rather assist and support a partner enforcement body, and achieve maximum impact through the use of the most appropriate agency. Avoiding duplication is an unquestionably worthwhile goal. However, such concerns did not arise in the *Mining Company Case* given ASIC's decision not to investigate this matter.

Commentary

There are concerns that the AFP has deferred to other enforcement bodies rather than conduct its own investigations in the foreign bribery cases referred to above. The lead examiners recommend that the AFP and other enforcement bodies should, as a matter of policy and practice, continue to systematically consider whether it would be appropriate to conduct concurrent or joint investigations. This is especially the case when foreign bribery is allegedly committed by a company that has its headquarters or substantial operations in Australia.

(e) Foreign Bribery-Related False Accounting and Money Laundering

64. There are continuing concerns about Australia's enforcement of its false accounting offences. As mentioned at p. 15, the Phase 2 Report (paras. 126-128) noted that there were 18 false accounting prosecutions under Section 1307 of the Corporations Act in 1991-2005, and none under Section 286. The Working Group accordingly decided to follow up this issue (Follow-up Issue 8(f)). Since 2005, there have been nine convictions under these sections.

65. The *Securrency/NPA* case illustrates the basis for these concerns. A former executive of Securrency has been charged with foreign bribery-related false accounting under State-level criminal legislation. However, the companies (Securrency and NPA) have not been charged with this offence. At the on-site visit, the AFP stated that it referred the case to ASIC. ASIC stated, that it only considered (and eventually declined) charges against the companies' directors for breaches of duties. It did not consider whether to charge the two companies with false accounting since it believed that the criminal charges against the companies sufficiently captured the alleged misconduct. In the end, neither the AFP nor the ASIC considered false accounting charges against Securrency or NPA.

66. In the *Gold Mining Case*, the AFP may not have adequately considered false accounting and money laundering charges as an alternative to substantive foreign bribery charges. In 2007, the AFP received a complaint that a company listed in Australia had bribed officials in a Southeast Asian country to secure a contract to develop a gold mine. The AFP terminated the matter because foreign bribery was not an offence under Australian law before 1999. It did not consider pursuing money laundering and false accounting offences, which did exist before 1999. Furthermore, publicly available information indicates that the company in question continues to operate (and thus generate revenues from) the gold mine. These revenues could conceivably be confiscated in Australia as proceeds of crime, the crime in question being

bribery of a (domestic) official under the laws of the foreign country where the bribery occurred. The AFP has since indicated that it would refer the matter to the Criminal Assets Confiscation Taskforce.

Commentary

The lead examiners are concerned that, apart from the Securrency/NPA case, none of the foreign bribery allegations received by the AFP have resulted in foreign bribery-related charges such as money laundering and false accounting. They therefore recommend that the AFP routinely consider investigations of foreign bribery-related charges such as false accounting and money laundering, especially in cases where a substantive charge of foreign bribery cannot be proven. The AFP stated that its recently-established Foreign Bribery Experts Panel would create an aide mémoire to ensure that future investigations would regularly consider alternate charges. The lead examiners recommend that the Working Group follow up the implementation of the aide mémoire.

(f) Case Referral and Co-ordination

(i) Referrals and Co-ordination between the AFP and ASIC

67. The *Securrency/NPA* case highlights the potential for miscommunication and a lack of co-ordination between the AFP and ASIC. As described above, the AFP referred the *Securrency/NPA* case to ASIC to consider false accounting charges against the two companies. ASIC, however, only considered charges for breaches of directors' duties given its mandate. In addition, the AFP stated that ASIC may give AFP authority to prosecute offences in the Corporations Act but this was not done in the *Securrency/NPA* case. The AFP also charged an individual with false accounting under State laws, but did not do so against the companies.

68. The *Mining Company Case* (see p. 24) raises similar questions. The AFP referred the case to ASIC without conducting any investigation. ASIC in turn was only interested in confirming whether the company recorded and disclosed the suspicious payments to the market, again because its role is limited to investigations for the due administration of corporations legislation. In the end, neither body investigated.

69. The absence of a clear framework and rules for referral of cases may have been a cause of this problem. The AFP has MOUs with other agencies (e.g. the CDPP) but not with ASIC that would apply to the referral of foreign bribery cases. At various points in on-site visit, the AFP stated that the *Securrency/NPA* was referred to ASIC because these matters were "better managed by ASIC", that they were "a better fit" for ASIC, or that ASIC could obtain "a better outcome". Why referral was "better" was not explained in concrete terms. In any event, these statements by the AFP and ASIC at the on-site visit about case referral and acceptance are not clearly reflected in written policies or agreements between the two bodies.

Commentary

The lead examiners are concerned that miscommunication between the AFP and ASIC may have left important aspects of foreign bribery cases uninvestigated. They therefore recommend that the two bodies clearly define in writing their roles and responsibilities, and rules for case referral and information sharing with greater precision.

(ii) Referrals and Co-ordination between the AFP and Other Commonwealth Bodies

70. The Australian Prudential Regulatory Authority (APRA) regulates Australia's financial services industry. Although its focus is on prudential regulation, APRA may detect foreign bribery committed by a

regulated entity (Phase 2 Report para. 67). APRA may also punish officials of a regulated entity that has committed foreign bribery (see p. 13). In Phase 2, APRA stated that it would refer foreign bribery cases to the AFP. The Phase 2 Report nevertheless raised concerns that APRA is not required by law or directives to make such reports. Recommendation 2(e)(i) thus asked AFP and APRA to enter into a formalised agreement, e.g. an MOU similar to those between the AFP and other Commonwealth agencies.

71. In Australia's 2008 Written Follow-Up Report (p. 14), APRA stated that it had carefully considered Recommendation 2(e)(i). It concluded that the existing documents applying to all Australian civil servants on reporting fraud and crime is sufficient; a specific agreement with the AFP was unnecessary. However, there are concerns that these documents only address fraud and corruption of Australian officials but not foreign bribery. At the on-site visit, APRA added that it had an MOU with ASIC but not with the AFP. APRA also pointed out that it can provide to the AFP information that "will assist [the AFP] to perform its functions or exercise its powers".³¹ However, these provisions fall short of mandating reporting or prescribing a procedure for doing so.

72. The Australian Crime Commission (ACC) is Australia's national criminal intelligence body that focuses on serious and organised crime. The ACC Board may authorise "intelligence operations" and "investigations [related to] federally relevant criminal activity", which includes an offence of foreign bribery under the Criminal Code Act. In conducting such authorised operations and investigations, the ACC has broad powers, including the ability to compel the provision of information and documents from individuals and government agencies, and to obtain search warrants. The ACC is required to work in co-operation with law enforcement agencies so far as is practicable (ACC Act Section 17). The ACC has assisted in several foreign bribery investigations. At the on-site visit, the ACC stated that it could not investigate foreign bribery cases without the ACC Board's authorisation. Instead, it would pass on intelligence in these cases to the AFP whenever possible.

Commentary

The lead examiners reiterate Phase 2 Recommendation 2(e)(i) and recommend that the AFP and APRA set out in writing, following consultations with each other, their complementary roles and responsibilities in foreign bribery and related cases.

(iii) Referrals and Co-ordination between the AFP and State Law Enforcement Authorities

73. Australia's federal system allows both the Commonwealth and State governments to enact criminal laws. Commonwealth and State laws may apply concurrently to the extent that the latter is not inconsistent with the former. Each State's police force and prosecutor's office are principally responsible for enforcing the State's criminal laws. Many States also have specialised anti-corruption agencies, though these generally deal only with domestic corruption cases.

74. None of the States has enacted a specific foreign bribery offence, but many have general corruption or bribery offences that cover foreign bribery. There are also concurrent false accounting offences in the Commonwealth Corporations Act and State-level criminal legislation (see p. 15). A State authority has jurisdiction to charge an offence under its laws if the crime occurred wholly in the State. If the crime occurred partly or wholly outside the State, then jurisdiction arises if there is a "real and substantial connection" between the crime and the State. This test could be met if the briber was a company located in the State, according to one State-level prosecutor at the on-site visit. Given this low threshold, most foreign bribery cases would result in concurrent State and federal jurisdiction.

³¹ APRA Act 1998 Section 56(5)(a); APRA Regulations 1998, Regulation 5.

75. Even if it has jurisdiction, whether a State-authority would investigate and prosecute a particular foreign bribery case under State law depends on an exercise of discretion. How that discretion is exercised differs between States. In Phase 2 (para. 71), Commonwealth officials indicated that the State authorities would be “happy to turn over foreign bribery cases to the AFP” and the AFP stated that it did not envisage foreign bribery investigations at the State level. The NSW authorities stated that it may investigate a Commonwealth offence (e.g. foreign bribery) if the crime is combined with State-level offences. In Phase 3, the NSW authorities indicated that they would not investigate foreign bribery cases. The authorities from the State of Victoria indicated that they may retain primacy over a foreign bribery investigation in some cases. Factors to be considered include the complexity of the case, and the priorities given by the State and Commonwealth authorities to the crime. Another factor is the capacity of the State police, since the AFP is a much smaller police force than the Victoria Police. In practice, the State authorities have not referred any foreign bribery cases to the AFP.

76. There may be valid reasons for different State authorities to apply different tests for referral, e.g. differences in legal systems. However, the AFP may not have a common and agreed understanding with each State authority on when cases would be referred. This lack of communication could lead to the incomplete investigation of foreign bribery allegations.

77. A further question is whether the State authorities would inform their Commonwealth counterparts of foreign bribery allegations and investigations. Phase 2 Recommendation 2(e)(ii) asked the AFP to consider establishing measures (e.g. MOUs) in this regard. In Phase 3, the AFP has yet to implement MOUs. The AFP and State and Territorial authorities meet regularly to discuss co-ordination of enforcement efforts, but it is unlikely that these meetings deal with the referral of all cases.

78. There is also a lack of awareness among State-level law enforcement officials of the foreign bribery offence, according to the State authorities at the on-site visit. Australia stated that State law enforcement officials who are informed of a foreign bribery allegation would likely recognise that some sort of offence had been committed and make further enquiries. Nevertheless, it remains unclear whether the allegation would necessarily be forwarded to the AFP.

Commentary

Phase 2 Recommendation 2(e)(ii) suggested that the AFP consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territorial police and anti-corruption bodies to the AFP even where a State or Territorial law establishes a bribery offence broad enough to cover foreign bribery. Given the continuing lack of referrals from State authorities, the lead examiners reiterate this recommendation and recommend that Australia establish clear guidelines as to when each State and Territorial authority would refer foreign bribery cases to the AFP or commence its own investigations. They further recommend that Australia raise awareness of the foreign bribery offence among State-level law enforcement authorities involved in investigating economic crime.

(g) Plea Bargaining and Self-Reporting

79. Australia’s legal system contains some elements for plea bargaining and co-operation from offenders. The CDPP may enter into an agreement with a defendant to provide testimonial or prosecutorial immunity. It may enter into an agreement in which the defendant pleads guilty to some of the charges or to a lesser charge(s), with the remaining charges dropped or not taken into account. The CDPP may agree to proceed with a charge summarily rather than by indictment. The CDPP may agree to not oppose a defence

submission to the Court on the appropriate sentence range. The Commonwealth Prosecution Policy describe the factors that must be considered when deciding whether to enter into one of these agreements.³² As described at p. 16, one defendant in the *Securrency/NPA* case has agreed to co-operate with the authorities.

80. So far, at least three companies have reported to the AFP evidence of foreign bribery committed by individuals related to the company. All three cases have led to on-going investigations. The AFP expects to see more such referrals, as did some private sector representatives at the on-site visit, though others were more sceptical. At the on-site visit, the AFP stated that “standard procedures” for investigations are followed when it receives reports of foreign bribery from companies, and that it expects the “full co-operation” of companies that report.

Commentary

To ensure transparency and consistency in plea bargaining and self-reporting, the lead examiners recommend that Australia develop a clear framework that addresses matters such as the nature and degree of co-operation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company’s co-operation; measures to monitor the company’s compliance with a plea agreement; and the prosecution of natural persons related to the company.

(h) Resources and Expertise

81. As in Phase 2, the AFP does not have a dedicated unit for foreign bribery. Instead, these cases are assigned to the AFP’s Special References portfolio (SRP). The SRP is generally responsible for all politically sensitive and complex cases, such as high-level corruption, war crimes, espionage, crimes at sea, nuclear proliferation, and Parliamentary leaks. Other parts of the AFP handle economic crimes such as fraud and money laundering. The Criminal Assets Confiscation Taskforce (see p. 18) is also outside the SRP.

82. Although foreign bribery matters are assigned to the SRP, AFP officers outside the unit are involved in the actual investigation. The AFP uses a “flexible resourcing model”. The SRP is responsible for overseeing foreign bribery cases. Case teams are assembled using AFP officers from both within and outside the SRP. This arrangement allows case teams to draw on officers with special expertise not found within the SRP, such as forensic accounting and information technology. The size of a case team can fluctuate during the course of an investigation depending on operational needs.

83. The flexible resourcing model may enhance resource usage and efficiency but may also have certain drawbacks. Foreign bribery cases must compete for resources such as forensic accountants with other crime types. Flexible resourcing also means that investigators with experience in foreign bribery cases are not necessarily called upon to work on subsequent cases involving the same crime.

84. The AFP overall may also, until recently, have had limited expertise and experience in investigating corporate economic crimes. Several civil society representatives at the on-site visit were of this view. Until the recent foreign bribery investigations such as the on-going *Securrency/NPA* case, there have been few Commonwealth-level criminal investigations of companies by AFP, especially for intentional economic crimes. Most corporate commercial crimes such as fraud are investigated by State-level police or ASIC.

³² CDPP Act Sections 9(6), 9(6D) & 9(6E); Commonwealth Prosecution Policy paras. 6.6-6.10 & 6.14-21.

85. To the AFP's credit, it has taken steps to ameliorate the situation. At the on-site visit, the AFP stated that it recognised the need to dedicate resources to foreign bribery cases, and that it was considering upgrading its staff's skills in this area. It has invested in a new software tool to process and manage digital data in its current foreign bribery cases. The tool will likely benefit other foreign bribery investigations in the future. As described at p. 23, the AFP has established a Panel of Experts to advise and oversee investigation teams in future foreign bribery cases. As a follow up to the on-site visit, the AFP stated that the Panel and law enforcement agencies in other countries have formed an International Foreign Bribery Task Force to liaise and meet annually to exchange and discuss best practices. Two Panel members will also be seconded in 2012 to the US Securities and Exchange Commission and Federal Bureau of Investigation.

86. In Phase 3, the AFP stated that its current resources are sufficient to investigate foreign bribery allegations. In 2009, when the AFP terminated an investigation into breaches of UN Oil-for-Food sanctions in the *Australian Wheat Board* case after seeking independent legal advice, there had been public concerns that the AFP was under-resourced.³³ However, the current *Securrency/NPA* case team comprised a core of 20 officers working full-time on the investigation due to the unusual complexity of the case. Of concern are the resources of the CDPP, which is experiencing a 25% decrease in its budget in nominal terms from 2009-2015.³⁴ According to a Parliamentary Library paper, "while the AFP's investigation into matters arising from the Cole Inquiry [into the *Australian Wheat Board* case] had been under resourced, its current investigation into Securrency and NPA has sufficient resources. What is less clear is the level of resources the CDPP will be able to devote to prosecuting the resulting cases."³⁵ The AFP, however, stated that it has not experienced difficulties in obtaining legal advice from the CDPP.

Commentary

The AFP has adopted a flexible resourcing model which applies to all crime types. The model has advantages, but it also raises concerns about the sufficiency of resources. These concerns are exacerbated by the AFP's past lack of experience in corporate investigations and the CDPP's diminishing resources. The lead examiners therefore recommend that the AFP continue to provide its officers with additional training in foreign bribery. Finally, despite an increase in foreign bribery investigations, the resources of the CDPP have not increased correspondingly. They therefore recommend that Australia take steps to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases.

(i) Article 5 of the Convention

87. Article 5 of the Convention states that, "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." Commentary 27 on the Convention adds that, "Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the

³³ The Australian (29 August 2009), "Federal Police Drop AWB Investigation".

³⁴ CDPP Annual Report 2010-2011, p. vii.

³⁵ Barker, C. (7 February 2012), "Australia's Implementation of the OECD Anti-Bribery Convention", Parliamentary Library Background Note, p. 16. The note is a research paper authored by the Commonwealth Parliamentary Library. It does not reflect the views of Parliament, and may refer to open source materials.

basis of professional motives and is not to be subject to improper influence by concerns of a political nature.”

88. Since Phase 2, the CDPP has taken steps to ensure compliance with Article 5. On 11 September 2006, the CDPP issued a direction to all prosecutors to disregard Article 5 factors when deciding whether to prosecute a foreign bribery case. In November 2008, Australia added Annexure A to the Commonwealth Prosecution Policy. The document specifically prohibits prosecutors from being influenced by Article 5 prosecutors when deciding whether to prosecute a person for foreign bribery. At the on-site visit, the CDPP added that prosecutorial decisions are generally subject to internal review by senior prosecutors. Prosecutors that do not abide by the Prosecution Policy may be subject to disciplinary action.

89. Australia could strengthen its implementation of Article 5 by taking similar measures for other bodies involved in foreign bribery cases. The AFP has regard to the Prosecution Policy when selecting cases for investigation³⁶ but it is not bound by the Policy. The AFP’s National Guideline on Politically Sensitive Investigations does not refer to Article 5. The AFP stated that it is independent of the executive branch of government, but Article 5 is not merely concerned with political interference. It also prohibits prosecutors and investigators – acting independently and free from political influence – from considering the factors enumerated in the Article in foreign bribery cases. In any event, the AFP has undertaken to update its existing National Guideline or create a new National Guideline that reflects Article 5.

Commentary

The lead examiners commend Australia for amending the Commonwealth Prosecution Policy to expressly prohibit prosecutors from being influenced by the factors described in Article 5 of the Convention. They recommend that the AFP and other bodies involved in foreign bribery investigations and prosecutions take similar measures to continue to ensure that they are not impermissibly influenced by factors listed in Article 5.

(j) Investigative Techniques

90. Concerning bank and tax information, the AFP may apply to a Magistrate to issue a notice requiring a bank to produce relevant information (Crimes Act Sections 3ZQO and 3ZQR). The Australian Taxation Office has discretion (but is not obliged) to provide to the AFP tax information that is subject to tax secrecy. The Phase 2 Report (para. 94) noted that the ATO had an excellent record of disclosing information to law enforcement. In Phase 3, the AFP stated that it did not have difficulties obtaining information from the ATO. The requirement of a judicial search warrant to obtain information held by ASIC is discussed at p. 26.

91. Sections 17-19 of the Proceeds of Crime Act 2002 (POCA) allows pre-trial freezing of assets in foreign bribery cases. AUD 41 million (EUR 34.2 million) were restrained in 2010-11, more than double the previous year.³⁷ However, freezing orders have never been ordered in foreign bribery cases.

92. Telecommunications interception is used by Australia in foreign bribery investigations. After the on-site visit, Australia indicated that Parliament would consider telecommunication interception legislation in foreign bribery cases as part of broader reforms on national security. In addition, when the recently passed Cybercrime Legislation Amendment Bill 2012 enters into force, law enforcement agencies in

³⁶ Memorandum of Understanding, AFP and CDPP (6 February 2007), Section 2.1.

³⁷ AFP Annual Report 2010-11, pp. 2 & 4. See also Bartels, L. (2010), “A Review of Confiscation Schemes in Australia”, p. 9.

foreign bribery cases will have expanded capacities to access communications such as emails and text messages. This development is welcomed.

6. Money Laundering

93. Sections 400.3 to 400.9 of the Criminal Code Act criminalise the laundering and possession of the proceeds of crime. Bribery of foreign public officials is a predicate offence for money laundering, and sanctions imposed depend on the level of intent and the amount being laundered. Since Phase 2, the Criminal Code Act has been amended to enhance the ability of law enforcement agencies to prosecute persons that launder overseas the proceeds of crime. Australia has also increased penalties under Section 400.9 for laundering proceeds of crime worth over AUD 100 000 (EUR 83 480) to three years' imprisonment.

94. The Australian Transaction Reports and Analysis Centre (AUSTRAC) is the anti-money laundering and counter-terrorism financing regulator as well as the Financial Intelligence Unit (FIU). Two statutes govern reporting to AUSTRAC of suspected money laundering. The Financial Transaction Reports Act 1988 (FTR Act) requires "cash dealers" (e.g., financial institutions, casinos, insurers) to report significant cash or currency transfers, international funds transfer instructions and suspicious transactions (SUSTR). The Anti-Money Laundering and Counter Terrorism Financing Act 2006 (AML/CFT Act) broadens the scope of reporting entities. It also imposes additional obligations to take preventive measures and conduct due diligence. Reporting entities are required to report threshold transactions, international funds transfer instructions and suspicious matters (SMRs).

95. Phase 2 Recommendation 1(d) asked Australia to raise awareness among cash dealers of foreign bribery as a predicate offence, and to provide them with guidance on identifying suspicious transactions. AUSTRAC had issued Information Circular No. 42 which touched upon foreign bribery but did not provide specific guidance on detecting foreign bribery. Since Phase 2, Information Circular No. 42 has not been amended. The circular also referred to maximum penalties for non-reporting that are outdated. AUSTRAC has issued case studies and typologies to reporting entities regarding indicators of suspicious transactions since 2007, but none of these refer specifically to foreign bribery. AUSTRAC stated that a typology on foreign bribery was conceivable given Australia's recent enforcement experience.

96. No foreign bribery cases have been initiated as a result of SMRs/SUSTRs. In 2010-11, AUSTRAC received 44 775 SMRs/SUSTRs. Although Australia does not have statistics on the number of SMRs/SUSTRs raising bribery concerns, they reported that 22 of these SMRs/SUSTRs contained the word "bribery". AUSTRAC also reported a noticeable increase in the number of suspect matter reports relating to politically exposed persons (PEPs). This is possibly linked to know-your-customer obligations and enhanced customer due diligence requirements. AUSTRAC's definition of a PEP is broader than the FATF definition of foreign public official as it extends to domestic public officials. In several instances, a financial institution filed SMRs with AUSTRAC only after the media published bribery allegations in a particular case. AUSTRAC explains that, when the transactions covered by these SMRs were made, there may not have been any red flag indicators to warrant the filing of an SMR. However, AUSTRAC cannot confirm whether this was indeed what happened in these cases, or whether the suspicious transactions were missed and should have been reported earlier.

97. AUSTRAC may provide information to support other agencies' investigations. In 2010-11, it forwarded 55 465 SMRs/SUSTRs to other Australian agencies.³⁸ Most reports were sent to the ATO,

³⁸ AUSTRAC, Annual Report 2010-11, p. 69. The number of reports disseminated exceeds the number of reports received because (1) a report may be sent to multiple agencies; and (2) reports received in previous years may be disseminated during 2010-11.

though the AFP received 3 092 reports. AUSTRAC may also assist investigations by analysing SUSTRs and SMRs. AUSTRAC has assisted the AFP in two foreign bribery cases. In the *Securrency/NPA* case, AUSTRAC provided the AFP with intelligence assessments and assisted with “international exchanges”.

Commentary

The lead examiners reiterate Phase 2 Recommendation 1(d) and recommend that Australia further raise awareness of foreign bribery as a predicate offence, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies.

7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes

98. This section of the report considers Australia’s implementation of outstanding Phase 2 recommendations concerning accounting and auditing. It also looks at post-Phase 2 developments in corporate compliance, internal controls and ethics programmes among Australian companies.

(a) Accounting Standards

99. Section 286 of the Corporations Act 2001 requires a company to keep written financial records that “correctly record and explain its transactions and financial position and performance”, as well as “enable true and fair financial statements to be prepared and audited”. Certain companies are required to meet additional financial reporting requirements based on accounting standards set by the Australian Accounting Standards Boards (AASB). As discussed at p. 15, the false accounting and falsification of books offences are found respectively in Sections 286 and 1307 of the Corporations Act 2001 and State-level laws.

(b) Detection of Foreign Bribery by External Auditors

100. The Corporations Act 2001 requires all companies, registered schemes and disclosing entities to submit to external audits. Such audits must be conducted in accordance with the Australian Auditing Standards (ASAs) that have been developed by the AASB based on the International Standards on Auditing. ASA 240 and ASA 250 are relevant to the detection of foreign bribery. ASA 240 requires an external auditor to identify the risks of material misstatements in financial statements due to fraud, and assess the company’s responses to those risks when planning the audit.³⁹ ASA 250 governs detection of material misstatements due to non-compliance with laws. This includes laws concerning foreign bribery to the extent that they materially impact financial statements.

101. Despite the principal focus on material misstatements due to fraud or non-compliance, auditors would nevertheless consider foreign bribery risk factors when planning an audit, according to auditors at the on-site visit. For companies at risk of foreign bribery, a portion of the audit would be dedicated to testing issues relevant to these risks. Auditors would proactively question management and internal auditors about the organisation’s risk of bribery. Senior members of the audit team are attuned to the risk of foreign bribery due to recent prosecutions in Australia and abroad. The panellists emphasised, however, that the focus of the audit is on finding “material” misstatements within the financial reports. Some auditors thus questioned whether foreign bribery misconduct is usually significant enough to be detected in an external audit of the company.

³⁹ ASA 240, paras. 16, 24, 25 and 28.

(c) Reporting of Foreign Bribery by External Auditors

102. Phase 2 Recommendation 4(a) asked Australia to require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies. Under the ASAs, external auditors must report fraud or possible fraud to management or those charged with the company's governance "on a timely basis". They must similarly report instances of non-compliance with laws unless the non-compliance is "clearly inconsequential". If the non-compliance was intentional, then the auditor must report "as soon as practicable".⁴⁰ These reporting requirements focus not on foreign bribery *per se* but on fraud and non-compliance that materially impact financial statements. Nevertheless, auditors at the on-site visit stated that they would report most cases of foreign bribery to management because the possible reputational and enforcement consequences may materially impact the company's financial statements.

103. Phase 2 Recommendation 4(a) also suggested that Australia "consider requiring external auditors to report indications of a possible illegal act to the competent authorities". Australia did not address this issue in its 2008 Written Follow-up Report (para. 5). As in Phase 2, Australia presently does not oblige auditors to report foreign bribery to competent authorities. Section 311 of the Corporations Act 2001 requires auditors to report to ASIC within 28 days if he/she has reasonable grounds to suspect a "significant" contravention of the Corporations Act. Whether a contravention is "significant" depends on the penalty applicable to the contravention; the effect of the contravention on the company's overall financial position or on the adequacy of the information available about the company's overall financial position; or any other relevant matter. Reporting under Section 311 falls within an express exception to an auditor's duty of confidentiality to his/her client under Section 1317AE of the Corporations Act.

104. This reporting obligation is limited. Auditors are required to report Corporations Act contraventions (such as false accounting) but not breaches of the Criminal Code Act (such as foreign bribery). This leads to the anomalous result that violations of corporate law are reported, but criminal acts – which are generally more serious – are not. In addition, auditors at the on-site visit were of the view that the Corporations Act only mandates reporting of contraventions committed by the audited company and not its subsidiary or joint venture partner.

Commentary

The lead examiners remain concerned that Australian external auditors are not required to report foreign bribery to competent authorities. At present, auditors are already required to report breaches of the Corporations Act to ASIC. The lead examiners therefore recommend that Australia extend this reporting obligation to cover foreign bribery, including foreign bribery committed by an audited company's subsidiary or joint venture partner. To allow such reporting, the exception to an auditor's duty of confidentiality in Section 1317AE of the Corporations Act would need to be extended accordingly.

(d) Corporate Compliance, Internal Controls and Ethics Programmes

105. The Australian government has made efforts to promote corporate compliance measures to prevent and detect foreign bribery. ATO guidelines suggest measures such as an effective code of conduct, and the monitoring third-party agents and intermediaries. The ATO has trained SMEs on bribery and facilitation payments. The ATO explained that such training programmes help companies to implement stronger controls, thereby leading to better compliance with tax laws. No government body has promoted

⁴⁰ ASA 240, paras. 40-42; ASA 250, paras. 22-23.

the Good Practice Guidance in Annex II of the 2009 Anti-Bribery Recommendation,⁴¹ and companies at the on-site visit had not specifically heard of the Guidance.

106. Non-governmental participants at the on-site visit broadly agreed that Australian multinational companies had become more aware of foreign bribery risks in the last five years. Improvements in awareness and corporate compliance programmes have been largely driven by enforcement concerns in the US and UK rather than those in Australia. Recent studies by law and accounting firms corroborate this view.⁴² Australia states that the increased awareness is also due to highly publicised enforcement efforts by Australia.

107. Even so, awareness and corporate compliance programmes remain inadequate in much of the Australian business sector. One study found that 73% of Australian companies perceived only a moderate or low risk of corruption; yet, according to another study, 75% of the top 100 listed companies operate in high-risk or high-risk industries or jurisdictions.⁴³ Compared to their American and British counterparts, few Australian companies have measures to manage bribery risks.⁴⁴ On-site visit participants added that only some of the largest Australian companies have developed anti-corruption compliance programmes. Large pharmaceutical and shipping companies were cited as examples. The situation with SMEs is even more serious. Most of these enterprises may either be unaware of or are unable to address foreign bribery risks. A lack of practical guidance on what is expected of corporate compliance programmes is of particular concern.

Commentary

The lead examiners recommend that Australia continue to raise awareness among companies of the importance of developing and implementing anti-bribery corporate compliance programmes. These efforts should include promoting the Good Practice Guidance in the 2009 Anti-Bribery Recommendation. They should target companies – particularly SMEs – that conduct business abroad. The lead examiners note that corporate compliance programmes among SMEs is a horizontal issue that affects many other Parties to the Convention. Finally, efforts to promote corporate compliance should be co-ordinated with those undertaken by the AFP.

8. Tax Measures for Combating Bribery

108. This section considers the tax deductibility of facilitation payments (a follow-up issue from Phase 2) and recent developments on sharing tax information and detection. Efforts by the Australian Taxation Office to promote corporate compliance are considered in the previous section beginning at p. 34.

⁴¹ The website of the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises contains the official commentaries to the Guidelines. These commentaries briefly refer to but do not reproduce the Good Practice Guidance. The ATO stated that it promotes the Good Practice Guidance but did not provide supporting information.

⁴² Baker & McKenzie (2011), “Bribery: Do Australian Companies Take It Seriously?” p. vi, 12; Ernst & Young, “Driving Ethical Growth – New Markets, New Challenges: 11th Global Fraud Survey”, p. 5; ACSI (2011), “Anti-Corruption and Bribery Practices in Corporate Australia”, p. 27.

⁴³ Baker & McKenzie (2011), “Bribery: Do Australian Companies Take It Seriously?” pp. 20-21; ACSI (2011), “Anti-Corruption and Bribery Practices in Corporate Australia”, p. 20.

⁴⁴ ACSI (2011), “Anti-Corruption and Bribery Practices in Corporate Australia”, pp. 13 and 27; Baker & McKenzie (2011), “Bribery: Do Australian Companies Take It Seriously?” p. vi.

(a) Tax Deductibility of Bribes and Facilitation Payments

109. Section 26-52 of the Income Tax Assessment Act (ITAA) 1997 prohibits the tax deduction of bribes paid to foreign public officials. Like the Criminal Code Act, the ITAA 1997 Section 26-52(4) also provides an exception for facilitation payments. A payment to a foreign official is tax deductible if “the value of the benefit is of a minor nature” and “the amount is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature”. The Working Group has decided to follow up the operation of this provision (Phase 2 Follow-Up Issue 8(b)).

110. The record-keeping requirements for facilitation payments in the ITAA 1997 differ from those in the Criminal Code Act. To deduct a facilitation payment from income tax, a taxpayer need only “keep records that record and explain all transactions and other acts engaged in by the person that are relevant for any purpose of this Act” (ITAA 1936 Section 262A). Unlike under the Criminal Code Act, a taxpayer need not obtain the payer’s signature. He/she also may not need to record the identity of the foreign public official, or the particulars of the routine government action that was sought (Phase 2 Report para. 87). The tax legislation also differs by not requiring a record to be made “as soon as practicable” after the facilitation payment is made. The end result, as Australia openly acknowledges, is that “a failure to maintain records in the form required under the Criminal Code Act will not necessarily mean the person cannot claim a tax deduction.”⁴⁵

111. Australia explains that this discrepancy is warranted because the purpose of the tax system is to identify and verify details of a tax deduction. The requirements to deduct a facilitation payment are identical to those for any other business deduction; a taxpayer is not required to specifically justify the circumstances of a deduction. Australia also states that requiring different record-keeping for deducting facilitation payments than for other deductions would cause confusion and increase compliance costs for taxpayers. However, concerns remain that, without aligning the record-keeping requirements for facilitation payments in the ITAA 1997 with those in the Criminal Code Act, some bribe payments that could be found illegal pursuant to the latter could nonetheless be tax deductible.

Commentary

The lead examiners recommend that Australia align the record-keeping requirements for deducting a facilitation payment under the ITAA 1997 with those for the facilitation payment defence under the Criminal Code Act.

(b) Detection and Awareness-Raising

112. The ATO is responsible for the administration of taxes in Australia and the enforcement of the non-tax deductibility of bribes. The ATO stated that it would re-assess the tax returns of a taxpayer convicted of foreign bribery to determine whether bribes had been deducted. There is no time limit to re-open a tax return in cases where the taxpayer intended to evade taxes, which would be the case in foreign bribery cases, according to the ATO.⁴⁶ However, it is unclear whether or how the ATO would learn of a conviction of foreign bribery. The AFP stated that its new Panel of Experts would ensure that the ATO is informed of foreign bribery convictions.

⁴⁵ ATO (3 April 2009), “The Taxation Office Guidelines for Understanding and Dealing with the Bribery of Australian and Foreign Public Officials” (www.ato.gov.au).

⁴⁶ In the absence of fraud or evasion, the ATO has up to four years to re-open the tax return of a large business, and two years for an individual or small business.

113. Australia has issued guidelines to tax auditors on how to identify bribes, including red flag indicators, practical examples, and investigative techniques. The ATO explained that it trains its officers on the non-tax deductibility of bribes and the definition of facilitation payments. As a result, its tax auditors would consider the risk of bribery based upon the characteristics of the company.

114. The ATO publishes an annual Compliance Programme that describes the most pressing tax compliance risks and efforts to address these risks. At the Working Group's suggestion (Phase 2 Recommendation 3(a)), the ATO added foreign bribery and facilitation payments as compliance risks to the 2006-2007 Programme. Since then, while other topics have re-appeared in the Programme periodically, bribery and facilitation payments have not. The ATO maintained that bribery remains a compliance priority, but taxpayers looking to the Programme may reach the contrary conclusion. Given recent developments in foreign bribery law and enforcement, the Programme should include foreign bribery.

Commentary

The lead examiners recommend that the AFP promptly inform the ATO of foreign bribery-related convictions so that the ATO may verify whether bribes were impermissibly deducted. The Working Group should also follow up on whether the ATO re-assesses the tax returns of taxpayers convicted of foreign bribery. The lead examiners also recommend that ATO consider including periodically bribery and facilitation payments in its Compliance Programme.

(c) Reporting Foreign Bribery and Sharing Tax Information

115. The ATO has undertaken to report all foreign bribery cases to the AFP. Legislation allows but does not oblige the ATO to report foreign bribery discovered through tax audits to competent authorities. ATO guidelines state that authorised officers would “seek to disseminate” information to the AFP “within the requirements of the legislation”.⁴⁷ At the on-site visit, however, the ATO indicated a tax auditor is obliged to refer suspected cases of foreign bribery to the Serious Non-Compliance Area for assessment. If confirmed, all cases of foreign bribery would then be referred to the AFP. Additional ATO guidelines to taxpayers also state that “where warranted”, the ATO “will pass on information” to the AFP.⁴⁸ In practice, the ATO has not referred any foreign bribery cases to the AFP for investigation.

116. The ATO cannot be compelled by any entity, including a court, to disclose information unless it is necessary for “carrying into effect the provisions of a taxation law”.⁴⁹ The ATO has an administrative process to allow Australian competent authorities to seek information. At the on-site visit, the AFP stated that it did not have difficulties obtaining information from the ATO.

117. Regarding sharing of tax information with foreign authorities, Australia stated that its bilateral tax treaties incorporate language from the OECD Model Tax Convention allowing tax information to be shared for criminal investigations, including foreign bribery. Australia ratified the Convention on Mutual Administrative Assistance in Tax Matters and the amending Protocol on 21 August 2012.⁵⁰ This development is welcomed.

⁴⁷ ATO (3 April 2009), “The Taxation Office Guidelines for Understanding and Dealing with the Bribery of Australian and Foreign Public Officials” (www.ato.gov.au).

⁴⁸ ATO (27 August 2008), “Bribes and Facilitation Payments: A Guide to Managing Your Tax Obligations” (www.ato.gov.au/content/00104079.htm).

⁴⁹ Tax Administration Act 1953, Sections 355-25 and 355-70.

⁵⁰ The Convention's signatures and ratifications can be found at www.oecd.org/ctp/eoi/mutual.

Commentary

The 2009 Tax Recommendation asks Parties to the Convention “to establish an effective legal and administrative framework and provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities.” The ATO has undertaken to report all foreign bribery cases to the AFP, but have yet to refer any cases in practice. The lead examiners therefore recommend that the Working Group follow up this issue as practice develops.

9. International Co-operation

(a) Mutual Legal Assistance Generally

118. Since Phase 2, there have not been changes to Australia’s framework for mutual legal assistance in criminal matters (MLA) that would significantly impact foreign bribery cases. Australia has 29 bilateral MLA treaties. It is also party to multilateral conventions that could provide MLA in foreign bribery cases, such as the UN Convention against Corruption (UNCAC).

119. The Mutual Assistance in Criminal Matters Act 1987 (MACMA) governs MLA. Australia may seek and provide MLA with or without an applicable treaty. The lack of dual criminality is a discretionary ground for refusing MLA under MACMA. The AG may also exercise its general discretion to refuse an MLA request if the condition of reciprocity is not met. The types of assistance available include document production, obtaining testimony, search and seizure, and asset tracing, freezing and confiscation. Legislation that entered into force in September 2012 made available additional types of MLA such as the use of surveillance devices, and registration of foreign non-conviction based proceeds of crime orders.

120. The International Crime Cooperation Central Authority (ICCCA) within the AGD is the central authority for MLA requests. The ICCCA monitors all outgoing requests. The AFP also seeks and provides police-level assistance, including through its International Liaison Network (see p. 22). The AFP has MOUs with its foreign counterparts to exchange information.

121. Australia has sought and provided MLA in foreign bribery cases. Since Phase 2 in 2005, it has received 11 MLA requests relating to foreign bribery from 6 other Parties to the Convention. None of the requests was rejected. The time required for executing the requests varied significantly depending on the type of assistance sought, volume of information requested, complexity of the request, and the procedural requirements of the requesting state. Four of the incoming requests concerned the *Securrency/NPA* case and were executed between 3-14 months. Since 2005, Australia has also received 34 MLA requests related to corruption and extortion unrelated to foreign bribery. Since 2003, Australia has sent 24 MLA requests related to foreign bribery, of which 5 were sent to other Parties to the Convention. Nine of these requests remain active, while two were withdrawn because of a lack of progress. Some foreign bribery cases in Australia have been hampered because of an inability to obtain a large amount of evidence overseas. Australia also made MLA requests to 8 foreign countries in the *Australian Wheat Board* case. Evidence in 5 of these requests were received in 6-16 months.

122. Two of the above-mentioned incoming MLA requests sought material that the AFP had already obtained lawfully in a multi-jurisdictional foreign bribery investigation. The two requests were executed in 12 and 14 months respectively. The material in these two requests was sent to the foreign state along with additional requested evidence that was not previously in the AFP’s possession. While Australia noted the benefit of providing material in tranches where possible, it advised that this approach was not available in these two matters. Extensive liaison and significant resources were required to identify the relevant material, given the very significant volume of evidence collected by the AFP in its investigation.

123. Australia has two means of sharing assets with foreign countries. Under the “equitable sharing programme”, Australia may share a proportion of confiscated proceeds of crime with a foreign country that has made a significant contribution to the recovery of those proceeds. Australia may also share proceeds of crime seized under a foreign confiscation order that has been registered in Australia. Fines imposed in foreign bribery cases cannot be shared.

(b) Providing MLA in Non-Criminal Proceedings

124. The Phase 2 Report (para. 173) questioned Australia’s ability to provide MLA to a foreign country that has commenced non-criminal proceedings for foreign bribery. Under MACMA, Australia can seek and provide MLA in criminal matters against natural and legal persons. Several Parties to the Convention (e.g. Germany and Italy) can only institute civil or administrative proceedings against legal persons for foreign bribery. MACMA only provides for MLA in *criminal* matters and thus cannot be used in these cases. MLA in civil or administrative proceedings must instead rely on the Mutual Assistance in Business Regulation Act 1992 (MABRA). Under MABRA, certain information can be obtained on behalf of a foreign country’s regulatory authority, including through some coercive powers, for use in foreign administrative and civil proceedings. The main form of assistance available is obtaining information, documents and evidence (MABRA Section 6).⁵¹ However, MABRA is more limited than MACMA because it does not provide for search and seizure, or the tracing, seizure and confiscation of proceeds of crime.⁵² The Working Group accordingly decided to follow up this issue (Follow-up Issue 8(e)).

125. Australia provided further information in Phase 3. MACMA remains unavailable for providing MLA in civil or administrative proceedings against a company for foreign bribery. In some cases, however, the requesting state may also request MLA in a related criminal proceeding, e.g. in a criminal prosecution against the company’s officers. Australia may decide to allow the evidence gathered in the criminal proceeding under MACMA to also be used in related civil or administrative proceedings against the company. In making this decision, Australia would consider factors such as whether there is a clear nexus between the criminal and civil proceedings, the nature of the evidence in question, the powers used to obtain it, the seriousness of the offence, limitations on disclosure and use under Australian legislation, and the views of the agency that originally obtained the material.

126. Australia has received one request from a foreign country that has commenced related civil and criminal foreign bribery investigations. Assistance under MABRA and MACMA was sought for the civil and criminal aspects of the case respectively. Australia has not, to date, been requested to consent to the alternate or further use of material provided pursuant to MACMA in this case or in any other foreign bribery matter.

Commentary

Article 9 of the Convention states that each Party “shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for [...] non-criminal proceedings within the scope of this Convention brought by a Party against a legal person.” The object of MACMA is to regulate the provision by Australia of international assistance in criminal matters. When a foreign country may only

⁵¹ The maximum penalty for failing to comply with a requirement under the MABRA to give information, documents or evidence without reasonable excuse is two years’ imprisonment (MABRA Section 13).

⁵² The Australian authorities state that they can take action under the MACMA in criminal matters to identify proceeds of crime located in Australia or register foreign orders or, in certain circumstances, consider domestic action under the Commonwealth Proceeds of Crime Act 2002.

bring civil or administrative proceedings against legal persons for foreign bribery, Australia cannot provide MLA under MACMA involving search and seizure, and the tracing, seizure and confiscation of proceeds of crime, to the foreign country in those proceedings. Australia may permit evidence gathered in a criminal proceeding to be used in a related civil or administrative proceeding. But this alleviates the concerns only partially, since permission is not necessarily granted. There may also be instances when a requesting state has not or cannot commence related criminal proceedings.

The lead examiners therefore recommend that Australia take reasonable measures to ensure that a broad range of MLA, including search and seizure, and the tracing, seizure and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons. They also note that this is a horizontal issue among Parties to the Convention.

(c) Extradition

127. Since Phase 2, there have not been changes to Australia's legislative framework for extradition that would significantly impact foreign bribery cases. Foreign bribery is deemed to be an extradition offence under the Extradition Act 1988 by virtue of the Extradition (Bribery of Foreign Public Officials Regulations 1999). Unlike MLA, Australia can only extradite individuals to countries with which it has a treaty or which has been designated as "extradition countries". Australia has 38 bilateral extradition treaties, 17 inherited treaty agreements, and 31 designated extradition countries. Australia also has extradition relations with a number of other countries under the London Scheme for Extradition within the Commonwealth of Nations. Parties to the Anti-Bribery Convention and UNCAC have been declared extradition countries. The ICCCA is the Central Authority for extradition requests (except for requests involving New Zealand, which uses a warrant-endorsement system).

128. Australia has surrendered one individual in a foreign bribery case. An Australian national was arrested in October 2011 and extradited to the UK in February 2012.⁵³ Australia has also requested the extradition of two individuals in foreign bribery cases. A former NPA sales executive was arrested in Germany in July 2011 and surrendered to Australia in September 2011. A second extradition request in an unnamed case was made in 2012 to a country that is not Party to the Convention. This request is on-going.

(d) Co-operation through ASIC and the AFP

129. Co-operation is also available outside of formal MLA based on treaties and/or MACMA. ASIC has signed bilateral MOUs and the IOSCO Multilateral Memorandum of Understanding (MMOU). The exchange of information under such MOUs is subject to confidentiality. As mentioned at p. 22, the AFP International Liaison Network has officers stationed in 30 countries who can facilitate police-to-police level assistance as well as formal extradition and MLA requests.

10. Public Awareness and the Reporting of Foreign Bribery

130. The 2009 Recommendation III.i asks Parties to the Convention to take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine awareness-raising initiatives in the public and private sector for the purpose of preventing and detecting foreign bribery. This section discusses outstanding Phase 2 recommendations and new developments on

⁵³

UK Serious Fraud Office Press Release (15 February 2012) (www.sfo.gov.uk).

public awareness, reporting and whistleblowing. It also covers Austrade's practice of referring agents, a matter of recent controversy. Efforts by ATO, AusAID and EFIC are described at pp. 36, 46 and 47 respectively.

(a) Efforts to Raise Awareness of Foreign Bribery

131. Phase 2 Recommendations 1(b) and (c) asked Australia to raise awareness of the private sector, especially among SMEs. Since 2007, DFAT has spoken annually to businesses in State and Territory capitals about the risks of foreign bribery, and the government's opposition to and discouragement of facilitation payments. These presentations are intended to help companies resist solicitation for bribes and facilitation payments. Austrade has also developed anti-bribery training materials which are available on its website, and provides advice regarding foreign bribery as part of its standard services. In addition, the AGD has distributed the Foreign Bribery Information and Awareness Pack ("Awareness Pack") to industry bodies. The Australian National Contact Point for the OECD Guidelines for Multinational Enterprises meets regularly with companies to raise awareness of the Guidelines, which include anti-bribery provisions.

132. There has also been training and awareness-raising in the public sector. New DFAT employees receive fraud and ethics training that includes foreign bribery. This training is repeated when DFAT employees are posted overseas and every three years for employees already abroad. The Awareness Pack has been disseminated to government agencies including AUSTRAC and Austrade, Australia's trade promotion agency. Austrade's induction and pre-posting training includes ethics and anti-bribery. Specific anti-bribery training and annual governance refresher is also provided for all staff. Austrade also recently strengthened its anti-foreign bribery compliance programme in light of the *Securrency/NPA* case. It updated its policies and client documentation to reinforce that Austrade cannot assist firms that pay bribes. Its website stipulates a zero-tolerance policy toward foreign bribery and states that Austrade officers should not make or arrange facilitation payments. The Department of Industry, Innovation, Science, Research and Tertiary Education provides training on foreign bribery to staff who are posted overseas, which includes a fact sheet explaining the foreign bribery offence.

133. However, there is neither a lead agency responsible for awareness-raising, nor a clear delineation of responsibilities and co-ordination among the agencies involved. This has resulted in gaps. For example, many large enterprises and most SMEs have not been targeted for awareness-raising and thus may not appreciate their exposure to foreign bribery (see p. 35). There is also a lack of awareness in parts of the public sector. For example, the Department of Defence (DoD) stated at the on-site visit that Australian defence procurements are not considered at high risk of foreign bribery despite being aware of the high risk profile of the industry in general. A lack of co-ordination also may result in inconsistent government messages regarding foreign bribery. The AGD, AFP, and DFAT each has a "mailbox" to provide guidance on foreign bribery issues. But it is unclear whether the guidance they provide is consistent and is based on input from the appropriate agencies. Some key agencies also have not made efforts to raise awareness among the private sector. These include ASIC and the Department of Industry, Innovation, Science, Research and Tertiary Education, which interacts with SMEs. The AFP had generally been involved only when requested by other agencies, though this may have slightly changed recently (see p. 42**Error! Bookmark not defined.**).

134. Whether Australia's first National Anti-Corruption Plan (the Plan) would resolve these issues is unclear. The Plan is expected to be adopted by December 2012. It aims to create a "whole-of-government approach" to corruption, and to position Australia to better deliver a co-ordinated approach to fighting corruption. The Plan will likely outline existing Commonwealth anti-corruption arrangements; analyse current and emerging corruption risks; and devise a framework to address these risks. At the time of the

on-site visit, the Plan appeared to address co-ordination only in the context of investigation and enforcement, not awareness-raising.

Commentary

The lead examiners are concerned that Australia's efforts to raise awareness of foreign bribery are not sufficiently co-ordinated and coherent across agencies. They therefore recommend that Australia adopt a "whole-of-government" strategy to this issue.

Australia should also further raise awareness in the private sector. Particular focus should be given to SMEs, which is a horizontal issue among Parties to the Convention.

(b) *Hospitality, Promotional Expenditure and Charitable Donations*

135. Australian legislation does not expressly explain the circumstances under which hospitality, promotional expenditure, and charitable donations may amount to bribes. The Australian authorities have not issued guidance on these topics. Private sector representatives at the on-site visit expressed a wish to see more clarity on these difficult issues. The AFP has begun to discuss these matters with the private sector in general terms.⁵⁴ It stated expenses such as hospitality, promotional expenditure and charitable donations would be assessed "on the basis of legislation and context, including the amount, timing and the actual records maintained." The AFP has not formally publicised its position, such as by issuing written guidance. However, Australia explains that Australian authorities as a matter of policy do not issue guidance on issues of criminal law.

Commentary

The AFP has begun discussing with the private sector on when hospitality, promotional expenditure, and charitable donations may amount to bribes. The lead examiners recommend that the appropriate Australian authority consider summarising publicly available information on when hospitality, promotional expenditure, and charitable donations may amount to bribes.

(c) *Reporting of Foreign Bribery*

136. The Australian Public Service (APS) is encouraged but not obliged to report suspicions of foreign bribery. The APS Code of Conduct (APS Code), provided for under statute, contains general principles to which APS employees must adhere. The APS Values and Code of Conduct in Practice (APS Guide) provides guidance to implement the APS Code. The APS Guide asks civil servants to report foreign bribery committed by another civil servant "in accordance with their agency's instructions". If the information relates to foreign bribery committed by a non-civil servant, an APS employee "should discuss the matter with an appropriate senior person in their agency to determine the most appropriate course of action, including reporting the matter to the Australian Federal Police".

137. The APS Guide contains a separate section for civil servants overseas. Overseas officials must report foreign bribery committed by "another Australian who is not an APS employee" to a senior person within the agency who should "consider the most appropriate course of action, including reporting to local law enforcement authorities or the Australian Federal Police" [emphasis added]. Australia indicates that its employees are trained to report all allegations of foreign bribery to the AFP, and to local authorities as

⁵⁴ Freehills Mining Insights (10 July 2012), "AFP Gives Insight on Australian Anti-Bribery Laws".

appropriate. On its face, however, the guideline allows for reporting to local law enforcement authorities in lieu of the AFP.

138. The reporting requirements in the APS Code and APS Guide do not cover officials of independent Commonwealth authorities like the Reserve Bank of Australia (RBA), Australia's central bank. These officials may instead be subject to reporting obligations under State laws, such as Section 316 of the New South Wales (NSW) Crimes Act 1900.⁵⁵ According to Australia, these laws require the reporting of State offences. As foreign bribery is an offence under the criminal law of NSW and other States (see p. 27), officials and employees of independent Commonwealth authorities would thus be required to report foreign bribery under State law. Nevertheless, there are concerns that foreign bribery allegations reported under these State-level provisions may not necessarily be referred to the AFP (see p. 27). These State-level laws may also be less demanding than the APS Code and Guide. For example, Section 316 of the NSW Crimes Act requires reporting if someone "knows or believes" a crime has been committed; reporting is not required if a crime is only suspected.

139. Government agencies may develop additional rules on reporting. DFAT requires employees to report allegations of bribery to a senior official which are then passed on to the AFP.⁵⁶ DFAT has referred several foreign bribery allegations to the AFP. Austrade officials must report suspicions of foreign bribery to a senior official. Allegations are then "assessed and referred to the AFP".⁵⁷ An exception is an allegation received from a third party that an Australian who is not an Austrade client has committed foreign bribery. Austrade officials do not have to report these matters, and are advised to ask the complainant to report the matter directly to the AFP.

140. It remains to be seen whether these policies are effective in practice. Recent media reports concerning the *Securrency/NPA* case suggest that senior officials of the RBA and Austrade (Australia's trade promotion agency) may have been aware of foreign bribery allegations involving Securrency and NPA before the AFP investigation began, but did not notify the AFP.⁵⁸ Based on other media articles, this may not have been an isolated incident.⁵⁹ Austrade disputes these inferences and rejects the suggestion that it knew of these allegations and did not notify the AFP. The AFP stated that Austrade strongly supported its investigation.

⁵⁵ Section 316(1) reads, "If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years."

⁵⁶ DFAT Code of Conduct for Overseas Service, para. 10.6; DFAT Administrative Circular No. N543/09, "Australian Extraterritorial Offences and the Responsibility to Report" (18 February 2009).

⁵⁷ Austrade Anti-Bribery Policy, paras. 6 and 7.1.

⁵⁸ The Age (4 July 2011), "Bribe Scandal Extends to Vietnam Spy Colonel"; The Age (1 December 2011), "Austrade Officials in Scandal Spotlight"; Sydney Morning Herald (2 December 2011), "Securrency's Taint Just Keeps on Spreading"; Canberra Times (13 August 2012), "Envoy's Link with Viet Spy Revealed"; NewsNine (14 August 2012), "Banknote Bribe Accused Face Court"; WA Today (25 August 2012), "Bank Chiefs Knew of Bribe Claims"; Canberra Times (25 August 2012), "Senior RBA Staff Knew of 'Bribery Memo'"; Dunya News (22 August 2012), "Reserve Bank of Australia Covered Up 'Bribery Evidence'".

⁵⁹ Sydney Morning Herald (30 August 2012), "Australia Post Paid to Secure Deals, Court Told".

Commentary

The lead examiners recommend that Australia align the APS Guide with its practice of requiring Australian civil servants who work overseas to report suspicions of foreign bribery to the AFP in all cases. The lead examiners further recommend that Australia ensure that Australian public servants, and officials and employees of independent statutory authorities, are subject to equivalent reporting requirements. Finally, the Working Group should follow up the issue of foreign bribery reporting by Australian officials in the Securrency/NPA matter when Australian authorities are at liberty to discuss this issue.

(d) Austrade's Practice of Introducing Agents

141. The Australian Trade Commission ("Austrade") is a statutory agency whose role is to advance Australia's international trade, investment, and education interests by providing information, advice, and services.⁶⁰ Austrade provides a paid service of introducing foreign agents to Australian companies. At the on-site visit, Austrade stated that its local staff prepare lists of potential agents based on a cursory background check that draws on "in-country intelligence and other information". Staff are expected to reject agents that "have a track record of corruption". Austrade makes clear to companies that it does not conduct due diligence on these listed agents and that companies should do so before selecting an agent. In addition, Austrade advises companies that they should continually monitor their relationships with intermediaries to ensure compliance with appropriate standards and legal requirements.

142. As described at p. 30, Austrade introduced to Securrency a consultant with close ties to the foreign government. This intermediary allegedly funnelled bribes to foreign officials. Austrade was unable to comment on this as the *Securrency/NPA* case was ongoing but confirmed that it continues to refer agents using the procedure described above.

Commentary

The lead examiners are concerned that Austrade's practice of agent referral may expose Austrade and its clients to risks resulting from a referred agent being involved in foreign bribery. They therefore recommend that Austrade consider taking concrete steps to encourage companies, in the strongest terms, to conduct due diligence on agents, including those referred to them by Austrade. The lead examiners also recognise that the practice of agent referrals may be a horizontal issue among other Working Group members.

(e) Whistleblowing and Whistleblower Protection

143. A patchwork of laws at the Commonwealth level provides some whistleblower protection in foreign bribery cases.⁶¹ Section 16 of the Public Service Act 1999 prohibits victimisation or discrimination against a civil servant as a consequence of having "reported breaches (or alleged breaches) of the Code of Conduct". To qualify for protection, the disclosure must be made to a senior official; external disclosures (e.g. to media or law enforcement) are not protected. The Section also does not protect disclosures of misconduct committed by non-Australian civil servants. This raises concerns because employees of agencies such as AusAID and Austrade regularly work in high-risk situations with individuals who are not civil servants. These employees are encouraged or required to report foreign bribery but are not protected

⁶⁰ Australian Trade Commission Act, Sections 8 and 60; www.austrade.gov.au/About-Austrade/default.aspx.

⁶¹ Whistleblower protection in States and Territories are not discussed in this report as they relate mainly to protection for State-level public sector workers.

under Section 16. Australia also indicated that a Public Interest Disclosure Bill is being developed to enhance whistleblower protection in the Commonwealth public sector. According to Australia, the Bill would cover reporting of illegal conduct, including foreign bribery. The bill would provide protection to a wide range of persons in, or connected to, the public sector, including Australian and foreign nationals who are engaged overseas.

144. Regarding private sector whistleblowers, laws cited by the Australian authorities are insufficient or irrelevant to foreign bribery. Section 317A of the Corporations Act protects officers, employees and contractors of Australian companies who disclose violations of the Corporations Act to ASIC. This covers disclosure of foreign bribery-related false accounting, but not foreign bribery *per se*. Whistleblower laws that apply only to financial institutions are not so restricted and cover disclosures about any misconduct, including foreign bribery.⁶² None of these laws, however, protects disclosures to law enforcement or the media. The Fair Work Act 2009 applies if reprisals impact a whistleblower's "workplace right", which includes exercising collective bargaining rights, settlement of employment disputes, and processes under "a workplace law or workplace instrument".⁶³

145. Despite inadequate protection, some whistleblowing does occur. Some participants at the on-site visit believed that whistleblowing in the private sector has been useful in detecting misconduct such as foreign bribery. In the *Securrency/NPA* case, one whistleblower reported wrongdoing to the company and the AFP, while a second disclosed allegations to the media. The case, however, may also highlight the need to better protect whistleblowers, as two Securrency employees claim to have been dismissed after raising bribery concerns.⁶⁴ Commentators believe that better whistleblower protection could lead to a higher level of foreign bribery enforcement.⁶⁵

Commentary

The lead examiners recommend that Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable grounds from discriminatory or disciplinary action. The Working Group should also follow up the enactment and implementation of the Public Interest Disclosure Bill.

11. Public Advantages

146. This section deals with Phase 2 Recommendation 6(b), which asked Australia to consider introducing a policy and "formal rules" for denying or terminating public advantages against individuals involved in foreign bribery. This includes denial of export credits, procurement contracts and contracts funded by official development assistance (ODA). These agencies' additional anti-foreign bribery measures are also considered.

⁶² Banking Act 1959, Part VIA, Division 1; Insurance Act 1973, Part IIIA, Division 4, Subdivision A; Life Insurance Act 1973, Part IIIA, Division 4, Subdivision A; Superannuation Industry (Supervision) Act, Part 29A, Division 1.

⁶³ Fair Work Act 2009, Section 341(1) and (2).

⁶⁴ Sydney Morning Herald (14 August 2012), "Feds Fail to Suppress Details of Bribery Case"; Sydney Morning Herald (24 August 2012), "Salesman Doubted Securrency over Agent Payments".

⁶⁵ Davids, C. and Schubert, G. (2011), "Criminalising Foreign Bribery: Is Australia's Bark Louder than Its Bite?" 35 Crim. L.J. 98, p. 115; Barker, C. (7 February 2012), "Australia's Implementation of the OECD Anti-Bribery Convention", Parliamentary Library Background Note, p. 16.

(a) Public Procurement

147. The Department of Finance and Deregulation (DFD) is responsible for accountability in government spending and procurement policy.⁶⁶ Even so, the procurement regime is decentralised, and the Chief Executive of each agency has a duty to oversee procurement decisions. Procurement by Commonwealth agencies follows the 2012 Commonwealth Procurement Rules (2012 CPR) which replaced earlier guidelines (2008 CPG) on 1 July 2012.

148. Australia states that its public procurement agencies have discretion to debar companies based on domestic or foreign bribery, and that it is a matter for individual agencies to develop their own policies on how this form of bribery is investigated and managed. Australia stated that it has not clarified government-wide rules on debarment based on foreign bribery because it is inappropriate “to specify particular offences as grounds for termination” (Phase 2 Written Follow-up Report p. 22). However, it appears that Australia does specify some grounds for debarment.⁶⁷

149. Concerns remain that the absence of government-wide guidelines may lead agencies to overlook foreign bribery in exercising their discretion to debar. Without guidelines, agencies also may not verify whether a multilateral development bank (MDB) has debarred a potential contractor.

Commentary

The lead examiners reiterate Phase 2 Recommendation 6(b) and recommend that Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals that have been convicted of foreign bribery.

(b) Official Development Assistance (ODA)

150. The Australian Agency for International Development (AusAID) administers Australia’s ODA.⁶⁸ To reduce fraud and increase controls over contractors, AusAID conducts due diligence of its contractors when assessing a tender bid. Commercial contract provisions allow AusAID to investigate contractors upon allegations of fraud. AusAID provides fraud awareness training to all contractors and partner non-governmental organisations (NGOs), which includes anti-bribery. If a contractor commits fraud or foreign bribery, AusAID has the right to terminate the contract. All AusAID employees are required to undergo fraud training, which includes foreign bribery. The training is also repeated before employees are posted overseas. In the 2011-12 financial year, AusAID provided fraud training to 879 AusAID and implementing partner employees.

151. AusAID has committed to reporting all allegations of foreign bribery committed by an Australian to the AFP. AusAID’s current Fraud Control Policy requires its employees to report foreign bribery to a senior AusAID official “for consideration of referral to the [AFP] or other relevant law enforcement agencies as appropriate”.

⁶⁶ DFD has succeeded the Department of Finance and Administration since Phase 2.

⁶⁷ For example, “suppliers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not paid the claim” are excluded (2012 CPR, para. 6.8; 2008 CPG, para. 6.21).

⁶⁸ Australia committed AUD 4.8 billion (EUR 4.01 billion) to ODA in 2011-2012, representing 0.35% of its Gross National Income (GNI), with plans to increase to 0.5% of GNI by 2015 (Summary of Australia’s Overseas Aid Program 2011-2012 (www.ausaid.gov.au)).

152. Like other procuring agencies, AusAID may debar companies that have been involved in foreign bribery from ODA-funded procurement contracts. AusAID follows the 2012 CPRs and has not issued further guidance concerning debarment, though it is currently revising its due diligence framework. AusAID consults debarment lists of MDBs when considering applicants.

Commentary

The lead examiners recommend that AusAID expressly require that all foreign bribery allegations involving Australian nationals, residents and companies are always reported to the AFP, and that AusAID train its employees on this reporting obligation and procedure.

(c) Officially Supported Export Credits

153. The Export Finance and Insurance Corporation (EFIC) is Australia's officially supported export credit and insurance agency. In 2010-11, over 50% of the support signed by EFIC were in the construction and mining industries. EFIC's website includes a section on its anti-corruption initiatives and links to the AGD's foreign bribery webpage. The website also refers to the 2011 OECD MNE Guidelines.

154. When EFIC provides support for agent commission fees that are less than 5% of the contract value, it only requires disclosure of the amounts to be paid. For commissions above this threshold, EFIC requests additional information (e.g. the purpose of the payments) and evaluates the commissions' "commercial reasonableness." EFIC explains that the 5% threshold is based upon "historical experience" and does not preclude EFIC from deciding to undertake enhanced due diligence below the threshold.

155. In July 2012, EFIC revised its policies to require exporters to disclose the names and addresses of all agents, including those paid commissions of less than 5%. EFIC also checks whether an agent has been involved in corrupt activity by checking a commercial listing. Senior management is informed of any negative findings. While this is an improvement, merely checking for past corrupt activity is inadequate to detect bribery risks. However, because commissions below 5% may still be of large absolute value, such commissions should not be presumptively deemed appropriate and should be subject to additional due diligence.

156. EFIC does not necessarily report all foreign bribery allegations to competent authorities. EFIC assesses the "seriousness" of an allegation based on factors such as the potential consequence on EFIC; the nature, clarity and source of the allegation; and the location of the alleged wrongdoing. Cases determined to be of a low level of seriousness are not referred to an external authority. For cases of a medium or high level seriousness, EFIC decides whether to report the matter to the AFP by applying the CCPM (see p. 20).⁶⁹ This may be inappropriate since the CCPM requires consideration of matters that EFIC may know little about, such as the AFP's resources and priorities.

157. Phase 2 Recommendation 6(b) asked Australia to consider issuing a policy or rules to deny or terminate export credits to entities convicted of foreign bribery. EFIC informs its clients (including in application forms) of the legal consequences of bribery. Applicants must declare whether they or anyone acting on their behalf have engaged, been charged or convicted of foreign bribery. At the on-site visit, EFIC stated that it checks MDB debarment lists, and that there is a "strong likelihood" an applicant on such a list would also be excluded by EFIC. Whether an applicant is excluded also depends on enhanced due diligence conducted by EFIC, which includes reviewing whether the exporter had taken appropriate internal corrective and preventive measures. If bribery is proven after support is granted, EFIC may seek

⁶⁹ EFIC (14 February 2012), Corruption Allegations Procedure, pp. 9-14.

recourse such as invalidating support and seeking sums already paid. In July 2012, EFIC updated its Anti-Bribery and Corruption Procedures. However, they do not set forth criteria to withdraw support due to corruption. They state that the matter “will be dealt with in accordance with” EFIC’s Corruption and Allegation Procedures, which do not include guidelines for withdrawing support.

158. Despite these policies, EFIC has granted support in two transactions that subsequently became the subject of current foreign bribery investigations. In January 2010, EFIC learned of the first investigation which involved a defence contract in 2001-2002.⁷⁰ In March 2012, EFIC confirmed that it had granted two performance bonds in January 2011 in a second transaction that is also under investigation.⁷¹ At the on-site visit, EFIC stated that it has since revised its policies. These changes occurred as a result of EFIC’s efforts to enhance its procedures from time to time. They were not designed to correct deficiencies relating to the two transactions referred to above. EFIC did not explain why its due diligence measures and policies failed to detect these foreign bribery allegations, and whether EFIC would terminate existing support or deny future support against the two companies concerned. EFIC was unable to discuss these cases in detail while investigations were on-going.

Commentary

The lead examiners recommend that EFIC conduct due diligence on agent commission fees below 5% of large absolute value to ensure that funds are not being provided as bribes. They further recommend that EFIC report all credible allegations of foreign bribery involving Australian nationals, residents and companies to the AFP, and not consider the CCPM when deciding whether to report these cases. Finally, EFIC should reduce to writing its criteria and guidelines for terminating support to entities involved in foreign bribery.

Since EFIC is unable to discuss its role in the two on-going investigations that involve EFIC support, the lead examiners recommend that the Working Group follow up the application of EFIC’s procedures in these two cases.

C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP

159. While the Working Group on Bribery welcomes Australia’s recent efforts, it notes that overall enforcement of the foreign bribery offence to date has been extremely low. Only one foreign bribery case has led to prosecutions. These prosecutions were commenced in 2011 and are on-going. Out of 28 foreign bribery referrals that have been received by the Australian authorities, 21 have been concluded without charges. Australia recently began strengthening its enforcement efforts, such as by establishing a Foreign Bribery Panel of Experts to advise AFP investigation teams. The Working Group encourages Australia to continue these efforts, and looks forward to evaluating the impact of these developments on Australia’s enforcement of its foreign bribery laws.

160. Regarding outstanding recommendations from previous evaluations, since its Phase 2 Written Follow-Up Reports, Australia has fully implemented Phase 2 Recommendations 2(a), 5(c), and 6(a). Australia has partially implemented Recommendations 1(b), 1(c), 2(b), 2(e), 4(a), and 6(b). Recommendation 1(d) has not been implemented.

161. In conclusion, based on the findings in this report on Australia’s implementation of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related OECD anti-bribery instruments,

⁷⁰ The Age (7 March 2012), “Defence Firm Faces Defence Probe”.

⁷¹ SmartMoney (8 March 2012), “Australia’s Export Credit Agency Backed Leighton Iraq Work”.

the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Australia to report orally on the implementation of recommendations 6 and 8(a) within one year (i.e., by October 2013). The Working Group invites Australia to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by October 2014).

162. In addition, the Working Group will continue to monitor Australia's foreign bribery enforcement efforts. This should include, if possible, exploration of the relevant issues in the *Securrency/NPA* case that could not be discussed in this evaluation because of suppression orders and on-going investigations. Australia is also invited to provide information on its foreign bribery-related enforcement actions when it reports orally in October 2013 and in writing in October 2014.

1. Recommendations of the Working Group

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

1. The Working Group recommends that Australia review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials (Convention Article 1, 5; 2009 Recommendation V).
2. With respect to the foreign bribery offence, the Working Group recommends that Australia:
 - (a) Continue to raise awareness of the distinction between facilitation payments and bribes, and encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records (2009 Recommendation VI.ii);
 - (b) Take appropriate steps to clarify that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery offence (Convention Article 1);
3. Regarding the liability of legal persons, the Working Group recommends that Australia take steps to enhance the usage of the corporate liability provisions, including those on corporate culture, where appropriate, and provide on-going training to law enforcement authorities relating to the enforcement of corporate liability in foreign bribery cases (Convention Article 2).
4. Regarding the false accounting offence, the Working Group recommends that Australia:
 - (a) Increase the maximum sanctions against legal persons for false accounting under Commonwealth legislation to a level that is effective, proportionate and dissuasive within the meaning of Article 8(2) of the Convention, commensurate with Australia's legal framework; or increase the maximum sanctions and broaden the scope of liability of legal persons for false accounting offences at the State level (Convention Article 8(2));
 - (b) Vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (Convention Article 8(1)).
5. Regarding confiscation, the Working Group recommends that Australia take further concrete steps (such as providing guidance and training) to ensure that its law enforcement authorities routinely considers confiscation in foreign bribery cases (Convention Article 3(3)).

6. Regarding the Australian Securities and Investment Commission (ASIC), the Working Group recommends that Australia take steps to ensure that ASIC's experience and expertise in investigating corporate economic crimes are used to assist the AFP to prevent, detect and investigate foreign bribery where appropriate (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).
7. With respect to co-ordination and information-sharing, the Working Group recommends that:
 - (a) The AFP, ASIC, and APRA set out in writing with greater precision, following consultations with one another, their complementary roles and responsibilities in foreign bribery and related cases, and written rules for case referral and information sharing (Convention Article 5; 2009 Recommendation IX.ii);
 - (b) Australia establish clear guidelines as to when each State and Territorial authority would refer foreign bribery cases to the AFP or commence its own investigations (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).
8. With respect to investigations of foreign bribery, the Working Group recommends that:
 - (a) The AFP (i) take sufficient steps to ensure that foreign bribery allegations are not prematurely closed; (ii) be more proactive in gathering information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations; (iii) take steps to ensure that it explores all avenues for exercising jurisdiction over related legal persons in foreign bribery cases; (iv) as a matter of policy and practice, continue to systematically consider whether it would be appropriate to conduct concurrent or joint investigations with other Australian and foreign law enforcement agencies, especially when foreign bribery is allegedly committed by a company that has its headquarters or substantial operations in Australia; and (v) routinely consider investigations of foreign bribery-related charges such as false accounting and money laundering, especially in cases where a substantive charge of foreign bribery cannot be proven (Convention Articles 2, 5, 7 and 8; Commentary 27; 2009 Recommendation Annex I.C and I.D);
 - (b) The AFP Foreign Bribery Panel of Experts consider the Working Group's recommendations to the AFP (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).
9. Regarding plea bargaining and self-reporting, the Working Group recommends that Australia develop a clear framework that addresses matters such as the nature and degree of co-operation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company's co-operation; measures to monitor the company's compliance with a plea agreement; and the prosecution of natural persons related to the company (Convention Articles 3 and 5; Commentary 27; 2009 Recommendation Annex I.D).
10. With respect to resources and priority, the Working Group recommends that:
 - (a) The AFP continue to provide its officers with additional training in foreign bribery, and training to law enforcement officials to implement the Cybercrime Legislation Amendment Act 2012 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);
 - (b) Australia take steps to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);
 - (c) The AFP and other bodies involved in foreign bribery investigations and prosecutions take measures (such by issuing written guidance or policy) to continue to ensure that they are not

impermissibly influenced by factors listed in Article 5 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

11. With respect to mutual legal assistance (MLA), the Working Group recommends that Australia take reasonable measures to ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons (Convention Article 9(1); 2009 Recommendation XIII.iv).

Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery

12. With respect to awareness-raising, the Working Group recommends that Australia:

- (a) Raise awareness of the foreign bribery offence among State-level law enforcement authorities involved in investigating economic crime (2009 Recommendation III.i);
- (b) Continue to raise awareness among the private sector of the foreign bribery offence and the importance of developing and implementing anti-bribery corporate compliance programmes, including by (i) promoting Annex II of the 2009 Recommendation, (ii) targeting companies (particularly SMEs) that conduct business abroad, and (iii) co-ordinating efforts to promote corporate compliance, including those undertaken by the AFP (2009 Recommendation III.i, III.v, X.C and Annex II);
- (c) Consider summarising publicly available information on when hospitality, promotional expenditure, and charitable donations may amount to bribes (2009 Recommendation III.i and X.C);
- (d) Adopt a “whole-of-government” approach to raise awareness of foreign bribery (2009 Recommendation III.i).

13. With respect to anti-money laundering measures, the Working Group recommends that Australia further raise awareness of foreign bribery as a predicate offence, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies (2009 Recommendation III.i).

14. With respect to tax-related measures, the Working Group recommends that:

- (a) Australia align the record-keeping requirements for deducting a facilitation payment under the ITAA 1997 with those for the facilitation payment defence under the Criminal Code Act (2009 Recommendation VI.ii, VIII.i; 2009 Tax Recommendation I.i);
- (b) The AFP promptly inform the ATO of foreign bribery-related convictions so that the ATO may verify whether bribes were impermissibly deducted (2009 Recommendation VIII.i; 2009 Tax Recommendation I.i);
- (c) The ATO consider including periodically bribery and facilitation payments in its Compliance Programme (2009 Recommendation III.i, VIII.i; 2009 Tax Recommendation I.ii).

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- (a) Australia extend the reporting obligation of external auditors under the Commonwealth Corporations Act to cover the reporting of foreign bribery, including foreign bribery committed by an audited company's subsidiary or joint venture partner (2009 Recommendation III.iv, X.B.v);
- (b) Australia align the APS Guide with its practice of requiring Australian civil servants who work overseas to report suspicions of foreign bribery to the AFP in all cases (2009 Recommendation IX.ii);
- (c) Australia ensure that Australian public servants, and officials and employees of independent statutory authorities are subject to equivalent reporting requirements (2009 Recommendation IX.ii);
- (d) Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable grounds from discriminatory or disciplinary action (2009 Recommendation IX.iii);
- (e) AusAID expressly require that all foreign bribery allegations involving Australian nationals, residents and companies are always reported to the AFP; and train its employees on this reporting obligation and procedure (2009 Recommendation IX.ii);
- (f) Austrade consider taking concrete steps to encourage companies, in the strongest terms, to conduct due diligence on agents, including those referred to them by Austrade (2009 Recommendation X.C.i).

16. With respect to public advantages, the Working Group recommends that:

- (a) Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals that have been convicted of foreign bribery (Convention Article 3(4); 2009 Recommendation XI.i);
- (b) EFIC (i) conduct due diligence on agent commission fees below 5% of large absolute value to ensure funds are not being provided as bribes; (ii) report all credible allegations of foreign bribery involving Australian nationals, residents and companies to the AFP, and not consider the CCPM when deciding whether to report these cases; and (iii) reduce to writing its criteria and guidelines for terminating support to entities involved in foreign bribery (2009 Recommendation XII.ii; 2006 Export Credit Recommendation).

2. Follow-up by the Working Group

17. The Working Group will follow up the issues below as case law and practice develop:

- (a) Outcome of Australia's public consultation on the facilitation payment defence and foreign bribery offence (Convention Article 1);
- (b) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code (Convention Article 1; Commentary 9);

- (c) Whether the foreign bribery offence requires the proof of an intention to bribe a particular foreign public official (Convention Article 1);
- (d) Whether effective, proportionate and dissuasive sanctions (including confiscation) are imposed against natural and legal persons for (i) foreign bribery, and (ii) false accounting in connection with foreign bribery (Convention Articles 3(1), 3(3), 8(2));
- (e) Choice of proceeding in foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive (Convention Articles 3, 5);
- (f) Work of the AFP Foreign Bribery Panel of Experts, including the implementation of recommendations that the AFP (i) be more proactive in gathering information from diverse sources at the pre-investigative stage; (ii) ensure that future foreign bribery investigations consistently consider the involvement of related legal persons, and alternate charges such as money laundering and false accounting; and (iii) the implementation of the *aide mémoire* (Convention Articles 2, 5, 7, 8; 2009 Recommendation Annex I.C, I.D);
- (g) AFP's statement to the Working Group in 2008 that they were "willing to undertake evaluations on suspected foreign bribery instances based on credible media reports, publicly available documents from foreign courts or mutual legal assistance requests" (Convention, Article 5; Commentary 27; 2009 Recommendation Annex I.D);
- (h) Whether the ATO re-assesses the tax returns of taxpayers convicted of foreign bribery (2009 Recommendation VIII.i; 2009 Tax Recommendation);
- (i) Reporting of foreign bribery cases by the ATO to the AFP (2009 Recommendation IX.ii);
- (j) Enactment and implementation of the Public Interest Disclosure Bill (2009 Recommendation IX.iii);
- (k) Application of EFIC's procedures in two cases that involve EFIC support and which is the subject of on-going foreign bribery investigations (2009 Recommendation XII.ii).

ANNEX 1 PREVIOUS WORKING GROUP RECOMMENDATIONS TO AUSTRALIA AND WORKING GROUP ASSESSMENT OF THEIR IMPLEMENTATION

<i>Phase 2 Recommendation</i>	<i>2008 Working Group Evaluation</i>
<i>Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials</i>	
1. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by:	
(a) further promoting awareness within the Commonwealth public service,	Fully implemented
(b) continuing efforts to raise the awareness of the private sector, including the distinction between bribery and facilitation payments and the record-keeping requirement for the defence of facilitation payments,	Partially implemented
(c) paying special attention to raising the awareness of SMEs through, for instance, Australian diplomatic and trade missions in foreign countries, and	Partially implemented
(d) raising the awareness of cash dealers of the foreign bribery offence as a predicate offence for the offence of money laundering, and providing them with guidance on identifying suspicious transactions.	Not implemented
2. Concerning the <u>detection and investigation</u> of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:	
(a) it is clarified in the publicly available explanatory document on the Case Categorisations Prioritisation Model (CCPM), that implementation of the Convention is to be given “high priority”;	Partially implemented
(b) the AFP undertakes evaluations where appropriate of the veracity of allegations of foreign bribery involving Australian nationals and companies contained in (i) media reports from credible sources, (ii) publicly available court documents filed in foreign countries, and (iii) requests to Australia from foreign countries for mutual legal assistance;	Partially implemented
(c) Australia clarify that all cases of foreign bribery be referred to the AFP by Commonwealth agencies;	Fully implemented
(d) the process be revised under the National Guidelines for Referring Politically Sensitive Matters to the AFP so that referrals of politically sensitive cases of foreign bribery to the AFP are not potentially delayed by notification to the Minister of Justice and Customs, and	Fully implemented
(e) the AFP take the following steps to ensure the effective transmission of information to it about foreign bribery cases: (i) enter into a formalized agreement with the Australian Prudential Regulation Authority (APRA) concerning areas of overlapping jurisdiction respecting foreign bribery, and (ii) consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territorial police and anti-corruption bodies to the AFP even where a State or Territorial law establishes a bribery offence broad enough to cover foreign bribery. (Convention, Art. 5; Commentary 27; Revised Recommendation I, II)	Partially implemented
3. Concerning the prevention and detection of foreign bribery through <u>measures for disallowing the tax deductibility of bribe payments to foreign public officials</u> , the Working Group recommends that the Australian Taxation Office (ATO):	
(a) consider revising its Compliance Program to specifically include bribe payments to foreign public officials in their risk profile; and	Fully implemented

(b) issue as soon as possible the bribery awareness audit guidelines that it is currently drafting on identifying bribe payments to foreign public officials and determining whether a particular payment meets one of the defences, and include within the bribery awareness audit guidelines a requirement that tax auditors report all information regarding foreign bribery to the Serious Non Compliance Business Line (SNC). (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)	Fully implemented
4. Concerning <u>other measures for preventing and detecting foreign bribery</u> , the Working Group recommends that Australia:	
(a) should require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies, and consider requiring external auditors to report indications of a possible illegal act to the competent authorities; (Revised Recommendation V.B.iii, iv)	Partially implemented
(b) consider taking appropriate measures to ensure that members of the Australian Public Service who come into contact with companies involved in international business understand that the Australian Public Service Code of Conduct requires Commonwealth officials to report to the AFP credible evidence of foreign bribery offences that they uncover in the course of performing their duties, encourage and facilitate such reporting, and consider strengthening reporting provisions, such as those included in the Department of Foreign Affairs and Trade (DFAT) Overseas Code and Export Finance and Insurance Corporation (EFIC) internal rules; (Revised Recommendation I)	Fully implemented
(c) ensure that AusAID staff are aware of the policy for responding to indications of foreign bribery in relation to ODA contacts, including the reporting of such indications to the AFP, amend the standard contract with AusAID to clarify that the Contractor shall not engage in foreign bribery in relation to the execution of the contract, and ensure that contracts with subcontractors contain a similar prohibition; (Revised Recommendation I, VI. iii) and	Fully implemented
(d) consider reviewing the Commonwealth whistleblower provisions in the context of the ongoing review on this subject to ensure effective whistleblower protections for Commonwealth officials and staff of Commonwealth agencies who report suspicions of foreign bribery, and consider introducing stronger whistleblower protections for private sector employees who report suspicions of foreign bribery. (Revised Recommendation I)	Fully implemented
<i>Recommendations for Ensuring Effective Prosecution and Sanction of Foreign Bribery and related Offences</i>	
5. Concerning the <u>implementation of the offence of bribing a foreign public official</u> under the Commonwealth Criminal Code, the Working Group recommends that Australia:	
(a) clarify that the foreign bribery offence applies regardless of the results of the conduct or the alleged necessity of the payment; (Convention, Art. 1; Commentary 7)	Fully implemented
(b) carry out its undertaking to amend as soon as possible the defence for conduct that is “lawful” in the foreign public official’s country to ensure consistency with Commentary 8 on the Convention; (Convention, Art. 1; Commentary 8) and	Fully implemented
(c) carry out the undertaking to revise the existing publicly available guidance document on the foreign bribery offence as soon as possible to clarify the defence of facilitation payments. (Convention, Art. 1; Commentary 9)	Partially implemented
6. Concerning the <u>sanctions</u> for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:	
(a) increase the fine for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia; (Convention, Art. 3.1)	Not implemented

(b) with respect to companies that have been convicted of foreign bribery (i) consider introducing formal rules on the imposition of civil or administrative sanctions upon legal persons and individuals convicted of foreign bribery, so that public subsidies, licenses, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied or terminated, including through the provisions of the relevant contracts, as a sanction for foreign bribery in appropriate cases, and include provisions for the termination of such contracts in appropriate cases; and (ii) consider establishing a policy for denying access to contracting opportunities with public agencies, such as the public procurement agencies, EFIC and AusAID, as well as including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after entering the contract; (Convention, Art. 3.4; Revised Recommendation II.v, VI ii) and	Partially implemented
(c) continue compiling statistics on the offence of money laundering, including the level of sanctions and the confiscation of proceeds of crime. (Convention, Art. 7)	Fully implemented
7. Concerning the <u>discretion to prosecute the offence of bribing a foreign public official</u> , the Working Group recommends that Australia clarify that the Guidelines on the Prosecution Policy of the Commonwealth prohibits consideration of the factors listed in Article 5 of the Convention. (Convention, Art. 5)	Fully implemented
<i>Follow-up by the Working Group</i>	
8. The Working Group will follow-up the following issues once there has been sufficient practice:	
(a) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code; (Convention, Art. 1; Commentary 9)	Continue to follow up
(b) the application of the tax deduction for facilitation payments; (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)	Continue to follow up
(c) application of the criminal liability of legal persons for the bribery of foreign public officials; (Convention, Art. 2)	Continue to follow up
(d) the choice of proceeding with foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive, as well as the sanctions imposed on natural persons for foreign bribery, to determine whether monetary sanctions, including fine penalties and confiscation, are imposed where appropriate; (Convention, Art. 3.1, 5)	Continue to follow up
(e) whether in practice Australia's capacity to provide mutual legal assistance in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence (The Working Group notes that this is a horizontal issue affecting many Parties.); (Convention, Art. 9.1) and	Continue to follow up
(f) the use of false accounting offences under the Corporations Act, including the level of sanctions. (Convention, Art. 8.1, 8.2)	Continue to follow up

ANNEX 2 PARTICIPANTS AT THE ON-SITE VISIT

Commonwealth Government Departments and Bodies

- Attorney-General's Department
- Australian Federal Police
- Commonwealth Director of Public Prosecutions
- Australian Securities and Investments Commission
- Australian Taxation Office
- Department of Foreign Affairs and Trade
- Australian Trade Commission
- AusAID
- Australian Prudential Regulation Authority
- Australian Crime Commission
- AUSTRAC
- Department of Industry, Innovation, Science, Research and Tertiary Education
- Australian Public Service Commission
- Department of Finance and Deregulation
- Department of Defence
- Export Finance and Insurance Corporation
- Department of Prime Minister and Cabinet
- Treasury

State-Level Government Departments and Bodies

- New South Wales Police
- New South Wales Independent Commission Against Corruption
- Victoria Department of Justice
- Victoria Department of Premier and Cabinet
- Victoria Police

Judiciary

- Chief Justice, Supreme Court of New South Wales
- Chief Judge at Common Law, Supreme Court of New South Wales

Legislature

- The Hon. Nicola Roxon MP, Attorney-General of Australia

Private Sector

Private enterprises

- BHP Billiton
- C4i
- Commonwealth Bank
- CSL Ltd.
- Macquarie Bank
- Paladin Energy Ltd
- Sebel Furniture
- Woodside

Business associations

- ACI
- Australia-Africa Mining Group (AAMIG)
- Australian Industry Group
- Australian Institute of Company Directors
- International Trade Advisors

Legal profession and academics

- Baker McKenzie
- Clayton Utz
- DLA Piper
- Freehills
- International Anti-Corruption Consultants Australia
- Johnson Winter Slattery
- Law Council of Australia
- Middletons
- Professor Ross Buckley, University of New South Wales

Accounting and auditing profession

- CPA Australia
- Deloitte
- Ernst & Young
- Korda Mentha
- KPMG
- McGrath Nicol
- PWC

Civil Society

- Transparency International Australia
- Corporate Analysis, Enhanced Responsibility
- The Age Newspaper

ANNEX 3 LIST OF ABBREVIATIONS AND ACRONYMS

AASB	Australian Accounting Standards Boards
ACC	Australian Crime Commission
ACSI	Australian Council of Super Investors
AFP	Australian Federal Police
AG	Attorney-General
AGD	Attorney-General's Department
AML	anti-money laundering
APRA	Australian Prudential Regulation Authority
APS	Australian Public Service
APS Code	APS Code of Conduct
APS Guide	APS Values and Code of Conduct in Practice
ASA	Australian Auditing Standard
ASIC	Australian Securities and Investments Commission
ATC	Australian Trade Commission
ATO	Australian Taxation Office
AUD	Australian dollar
AusAID	Australian Agency for International Development
CACTF	Criminal Assets Confiscation Taskforce
CCPM	Case Categorisation and Prioritisation Model
CDPP	Commonwealth Director of Public Prosecutions
CPG	Commonwealth Procurement Guidelines
DFAT	Department of Foreign Affairs and Trade
DFD	Department of Finance and Deregulation
EFIC	Export Finance and Insurance Corporation
EU	European Union
EUR	euro
FATF	Financial Action Task Force
ICCCA	International Crime Cooperation Central Authority (Australia)
IOSCO MMOU	International Organization of Securities Commissions Multilateral Memorandum of Understanding
MABRA	Mutual Assistance in Business Regulation Act 1992
MACMA	Mutual Assistance in Criminal Matters Act 1987
MDB	multilateral development bank
MER	mutual evaluation report (FATF)
MLA	mutual legal assistance
MOU	memorandum of understanding
NGO	non-governmental organisation
NSW	New South Wales
ODA	official development assistance
POCA	Proceeds of Crime Act 2002
SME	small- and medium-sized enterprise
SRT	Special References Team (Australian Federal Police)
STR	suspicious transaction report
UNCAC	United Nations Convention against Corruption

ANNEX 4 SUMMARIES OF AUSTRALIAN FOREIGN BRIBERY ENFORCEMENT ACTIONS

The following are anonymised descriptions of certain terminated, finalised or ongoing investigations by Australian authorities. This list is not exhaustive and represents the cases considered by the evaluation team. As discussed in the Report at p. 8, the Australian Federal Police (AFP) has received 28 allegations of foreign bribery involving Australian companies and individuals (including the *Securrency/NPA* case). 12 of these cases have been evaluated, rejected for investigation, and “terminated”, while 9 cases were accepted for investigation but have been “finalised” without resulting in charges because of insufficient evidence. There currently 7 cases are on-going.

Terminated Cases

Mining Pit Case

In 2005, an Australian company operating a mining pit in a foreign country allegedly provided support to the army of the foreign government to quell a rebellion, which resulted in the cancellation of the mining pit contract. The AFP looked into the allegations, but concluded that it did not have enough evidence to open an investigation. One international Mutual Assistance Request (MAR) was made by the AFP to facilitate interviews with witnesses outside Australia. The AFP also sought assistance at a police-to-police level outside the formal MAR process from two other countries. The AFP obtained a number of statements from possible witnesses, including from Non-Governmental Organisations; however, no statements obtained provided evidence to support the allegations.

Iron Ore Case

An Australian, who is an executive of an Australian mining company, was alleged to have stolen confidential documents from a foreign government. The information obtained allegedly could have given the Australian mining company an advantage in its annual iron ore price negotiations with Chinese steel mills. Australian authorities did not open an investigation and reported that, “no evidence has been presented to support these allegations” and were not pursued by the foreign government.

Casino Foreign Bribery Case

In 2009, authorities in a foreign country brought charges against one of their officials for domestic bribery and listed two projects by an Australian casino company as “suspect projects” in the indictment. According to media reports, indications of bribery included the fact that the casinos were granted land that was originally planned for the construction of a university, and construction began before formal rezoning procedures were completed and recorded. Australia reported to the Working Group that the AFP supported investigations by the foreign authorities, but did not start a domestic investigation.

Joint Venture Buyout Case

In 2009, media reports indicated that an Australian company bought out its joint venture partner’s stake in a gold mine in a foreign country. To facilitate the transaction, part of the proceeds of the buy-out were allegedly channelled to board members of the joint venture partner. These board members reportedly were closely related to public officials of the foreign country, thus raising the prospect that these officials were the ultimate beneficiaries of the buy-out proceeds. The AFP declined to open an investigation because it received information from the AFP’s overseas network that the transaction had been undertaken with due diligence and that all payments were made at the joint venture partner’s request.

Mining Company Case

In 2010, a multinational mining company with headquarters in Australia and management offices overseas announced that it had disclosed to the US authorities evidence that it had uncovered regarding possible foreign bribery. The AFP reacted following a referral from the Australian Attorney-General's Department, which in turn had received information from the US authorities. Based on material received from the US, the AFP identified suspicious transactions that had been recorded as legitimate business payments. After consulting the US authorities and ASIC, the AFP referred the case to ASIC without conducting an investigation. ASIC also ultimately did not commence proceedings because the company had documented the suspicious payments and disclosed them to the market.

Finalised Cases

Petroleum Case

A publicly listed Australian petroleum exploration and production company entered a contract to invest in a project in a foreign country. The contract was subsequently amended by an authoritarian leader in the foreign country and, two years after the amendments, the foreign government denounced the contract [for bribery. In June 2006, the Australian Federal Police began investigating the Australian company for allegations of bribery and corruption. In May 2008, the AFP officially cleared the company of any wrongdoing, stating that "there is no evidence to support a charge of foreign bribery." Before the Working Group, Australia explained that the company and the foreign government resolved the legal and contractual issues and that the contract in dispute was re-executed.

Banking Case

In a government tender to privatise a bank in a foreign country, it was alleged that the prime minister of the foreign country improperly exerted his influence to favour a consortium of companies that included interests by an Australian individual. The AFP closed the investigation after a visit by two policemen from the foreign country in May 2007 who advised the AFP that time that their investigations into this matter have been finalised and there was no evidence pointing to bribery by Australian citizens. Investigations by the foreign government into domestic bribery were also closed.

Gold Mining Case

A gold mining company listed in Australia, Canada, and New Zealand, was alleged to have bribed officials in a foreign country to secure development rights in a gold and copper mine. An NGO referred the allegations to the Australian Federal Police to investigate the allegations in October 2007. In 2008, the AFP finalised the investigation, because the alleged conduct took place before 1999 and the AFP received legal advice that there is no retrospective operation of the Australian foreign bribery offence.

Wheat Board Case

Two unnamed former employees of an Australian grain marketing organisation were alleged to have bribed officials in three foreign countries during the 1990s, and that payments in two foreign countries continued in 2000 after enactment of anti-bribery laws. The AFP closed an investigation into corruption in three foreign countries for lack of evidence, based on the legal advice received from independent Queen's Counsel that there was no reasonable prospect of conviction and that it was unclear whether breach of UN sanctions was a crime in Australia. The AFP has assisted in civil proceedings by ASIC against six former directors and officers of the Australian organisation. As of June 2012, two directors of the grain marketing organisation have been found to have contravened the Corporations Act.

Property Development Case

A property development company based in Australia accused a state-backed company in a foreign country of defrauding the company into paying a consultancy fee to facilitate a waterfront property purchase. In 2009, authorities in the foreign country charged two Australian individuals with fraud against the property development company. The AFP assisted foreign authorities in their investigation, but did not open an investigation because it considered that the citizens were charged with fraud-related offences rather than bribery-related offences. The AFP also concluded that there was insufficient evidence to substantiate allegations of foreign bribery by Australian companies or citizens.

Ongoing Cases

Anonymous Case

In 2009, AFP received a referral from an Australian company that another Australian company committed bribery in relation to contracts with an enforcement agency in a foreign country. The AFP has executed search warrants on 3 premises and 2 business premise, and sent MLA requests to the foreign country. The AFP has identified 8 individuals in Australia and the foreign country who either caused bribery or conspired to cause bribery. The case is being referred to the CDPP for consideration before charges are laid.

Phosphate Mining Case

A company allegedly bribed parliamentarians in a foreign country to obtain a phosphate mining permit. The company includes two corporate entities: one incorporated in a third country and one incorporated in Australia. Only the entity incorporated in a third country was implicated in the allegations. The AFP interviewed two complainants regarding the allegations, but concluded that the investigation could not continue for lack of jurisdiction. However, in the course of investigation, a number of unrelated financial transactions by the company were identified as suspicious. These transactions were passed to AUSTRAC, who conducted a financial analysis that enabled the AFP to establish a separate evaluation into other possible foreign bribery offences, which is ongoing.

Construction Case

In February 2012, An Australian construction company self-reported allegations that a foreign subsidiary may have made improper payments to facilitate a wharf construction in a third country. EFIC has announced that it provided two “performance bonds” to the construction company to cover projects in Southern Iraq. The AFP is currently conducting an ongoing investigation.

Engineering Case

In 2009, the Australian subsidiary of a foreign defence firm referred allegations to the AFP that an Australian engineering and infrastructure firm was allegedly paying bribes to win contracts in several foreign countries. It is alleged that the Australian firm enlisted serving and former government officials and hired intermediaries close to government officials to facilitate deals. The AFP is currently investigating up to five deals by the Australian firm.

Securrency/NPA Case

Securrency is a Melbourne-based company jointly owned by a UK company and the Reserve Bank of Australia (RBA), Australia’s central bank. RBA appointed half of the board of directors, and from its appointees, it appointed Securrency’s chairman. Note Printing Australia (NPA) is wholly-owned subsidiary

of RBA. The allegations concern bribery of foreign public officials in Vietnam, Indonesia, Nepal and Malaysia in 1999-2005 to secure contracts to produce bank notes. Securency, NPA, and nine former executives and sales agents of the two companies have been charged with foreign bribery, conspiracy to commit foreign bribery, and/or false accounting. One former executive pleaded guilty to false accounting in July 2012. At the time of this report, a court hearing was also being held to determine whether several of the accused should be committed to trial. Information about the hearing that has been made public is not subject to the suppression order, however, and is referred to in various parts of this report. Criminal investigations in the case are also on-going.

ANNEX 5 EXCERPTS OF RELEVANT LEGISLATION

Commonwealth Criminal Code Act Division 70 - Bribery of Foreign Public Officials

70.1 Definitions

In this Division:

benefit includes any advantage and is not limited to property.

business advantage means an advantage in the conduct of business.

control, in relation to a company, body or association, includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

duty, in relation to a foreign public official, means any authority, duty, function or power that:

- (a) is conferred on the official; or
- (b) that the official holds himself or herself out as having.

foreign government body means:

- (a) the government of a foreign country or of part of a foreign country; or
- (b) an authority of the government of a foreign country; or
- (c) an authority of the government of part of a foreign country; or
- (d) a foreign local government body or foreign regional government body; or
- (e) a foreign public enterprise.

foreign public enterprise means a company or any other body or association where:

- (a) in the case of a company—one of the following applies:
 - (i) the government of a foreign country or of part of a foreign country holds more than 50% of the issued share capital of the company;
 - (ii) the government of a foreign country or of part of a foreign country holds more than 50% of the voting power in the company;
 - (iii) the government of a foreign country or of part of a foreign country is in a position to appoint more than 50% of the company's board of directors;
 - (iv) the directors (however described) of the company are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country;
 - (v) the government of a foreign country or of part of a foreign country is in a position to exercise control over the company; and
- (b) in the case of any other body or association—either of the following applies:
 - (i) the members of the executive committee (however described) of the body or association are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country;
 - (ii) the government of a foreign country or of part of a foreign country is in a position to exercise control over the body or association; and
- (c) the company, body or association:
 - (i) enjoys special legal rights or a special legal status under a law of a foreign country or of part of a foreign country; or
 - (ii) enjoys special benefits or privileges under a law of a foreign country or of part of a foreign country;

because of the relationship of the company, body or association with the government of the foreign country or of the part of the foreign country, as the case may be.

foreign public official means:

- (a) an employee or official of a foreign government body; or
- (b) an individual who performs work for a foreign government body under a contract; or
- (c) an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country; or
- (d) an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country; or
- (e) an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force); or
- (f) a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country; or
- (g) an employee of a public international organisation; or
- (h) an individual who performs work for a public international organisation under a contract; or
- (i) an individual who holds or performs the duties of an office or position in a public international organisation; or
- (j) an individual who is otherwise in the service of a public international organisation; or
- (k) a member or officer of the legislature of a foreign country or of part of a foreign country; or
- (l) an individual who:
 - (i) is an authorised intermediary of a foreign public official covered by any of the above paragraphs; or
 - (ii) holds himself or herself out to be the authorised intermediary of a foreign public official covered by any of the above paragraphs.

public international organisation means:

- (a) an organisation:
 - (i) of which 2 or more countries, or the governments of 2 or more countries, are members; or
 - (ii) that is constituted by persons representing 2 or more countries, or representing the governments of 2 or more countries; or
- (b) an organisation established by, or a group of organisations constituted by:
 - (i) organisations of which 2 or more countries, or the governments of 2 or more countries, are members; or
 - (ii) organisations that are constituted by the representatives of 2 or more countries, or the governments of 2 or more countries; or
- (c) an organisation that is:
 - (i) an organ of, or office within, an organisation described in paragraph (a) or (b); or
 - (ii) a commission, council or other body established by an organisation so described or such an organ; or
 - (iii) a committee, or subcommittee of a committee, of an organisation described in paragraph (a) or (b), or of such an organ, council or body.

share includes stock.

70.2 Bribing a foreign public official

- (1) A person is guilty of an offence if:
 - (a) the person:
 - (i) provides a benefit to another person; or
 - (ii) causes a benefit to be provided to another person; or

- (iii) offers to provide, or promises to provide, a benefit to another person; or
- (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
- (b) the benefit is not legitimately due to the other person; and
- (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:
 - (i) obtain or retain business; or
 - (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Note: For defences see sections 70.3 and 70.4.

- (1A) In a prosecution for an offence under subsection (1), it is not necessary to prove that business, or a business advantage, was actually obtained or retained.

Benefit that is not legitimately due

- (2) For the purposes of this section, in working out if a benefit is **not legitimately due** to a person in a particular situation, disregard the following:
- (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;
 - (b) the value of the benefit;
 - (c) any official tolerance of the benefit.

Business advantage that is not legitimately due

- (3) For the purposes of this section, in working out if a business advantage is **not legitimately due** to a person in a particular situation, disregard the following:
- (a) the fact that the business advantage may be customary, or perceived to be customary, in the situation;
 - (b) the value of the business advantage;
 - (c) any official tolerance of the business advantage.

Penalty for individual

- (4) An offence against subsection (1) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

Penalty for body corporate

- (5) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:
- (a) 100,000 penalty units;
 - (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;
 - (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the **turnover period**) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.
- (6) For the purposes of this section, the **annual turnover** of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than the following supplies:
- (a) supplies made from any of those bodies corporate to any other of those bodies corporate;
 - (b) supplies that are input taxed;

- (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*);
- (d) supplies that are not made in connection with an enterprise that the body corporate carries on.
- (7) Expressions used in subsection (6) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning in that subsection as they have in that Act.
- (8) The question whether 2 bodies corporate are related to each other is to be determined for the purposes of this section in the same way as for the purposes of the *Corporations Act 2001*.

70.3 Defence—conduct lawful in foreign public official’s country

- (1) A person is not guilty of an offence against section 70.2 in the cases set out in the following table:

Defence of lawful conduct			
Item	In a case where the person’s conduct occurred in relation to this kind of foreign public official...	and if it were assumed that the person’s conduct had occurred wholly...	this written law requires or permits the provision of the benefit ...
1	an employee or official of a foreign government body	in the place where the central administration of the body is located	a written law in force in that place
2	an individual who performs work for a foreign government body under a contract	in the place where the central administration of the body is located	a written law in force in that place
3	an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be
4	an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be
5	an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force)	in the place where the central administration of the body is located	a written law in force in that place
6	a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be

Defence of lawful conduct			
Item	In a case where the person's conduct occurred in relation to this kind of foreign public official...	and if it were assumed that the person's conduct had occurred wholly...	this written law requires or permits the provision of the benefit ...
7	an employee of a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
8	an individual who performs work for a public international organisation under a contract	in the place where the headquarters of the organisation is located	a written law in force in that place
9	an individual who holds or performs the duties of a public office or position in a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
10	an individual who is otherwise in the service of a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
11	a member or officer of the legislature of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

(2) A person is not guilty of an offence against section 70.2 if:

- (a) the person's conduct occurred in relation to a foreign public official covered by paragraph (1) of the definition of ***foreign public official*** in section 70.1 (which deals with intermediaries of foreign public officials covered by other paragraphs of that definition); and
- (b) assuming that the first-mentioned person's conduct had occurred instead in relation to:
 - (i) the other foreign public official of whom the first-mentioned foreign public official was an authorised intermediary; or
 - (ii) the other foreign public official in relation to whom the first-mentioned foreign public official held himself or herself out to be an authorised intermediary;
 subsection (1) would have applied in relation to the first-mentioned person.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3).

(3) To avoid doubt, if:

- (a) a person's conduct occurred in relation to a foreign public official covered by 2 or more paragraphs of the definition of ***foreign public official*** in section 70.1; and
- (b) at least one of the corresponding items in subsection (1) is applicable to the conduct of the first-mentioned person;

subsection (1) applies to the conduct of the first-mentioned person.

70.4 Defence—facilitation payments

- (1) A person is not guilty of an offence against section 70.2 if:
- (a) the value of the benefit was of a minor nature; and
 - (b) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and
 - (c) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3); and
 - (d) any of the following subparagraphs applies:
 - (i) the person has retained that record at all relevant times;
 - (ii) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;
 - (iii) a prosecution for the offence is instituted more than 7 years after the conduct occurred.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

Routine government action

- (2) For the purposes of this section, a routine government action is an action of a foreign public official that:
- (a) is ordinarily and commonly performed by the official; and
 - (b) is covered by any of the following subparagraphs:
 - (i) granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;
 - (ii) processing government papers such as a visa or work permit;
 - (iii) providing police protection or mail collection or delivery;
 - (iv) scheduling inspections associated with contract performance or related to the transit of goods;
 - (v) providing telecommunications services, power or water;
 - (vi) loading and unloading cargo;
 - (vii) protecting perishable products, or commodities, from deterioration;
 - (viii) any other action of a similar nature; and
 - (c) does not involve a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business; and
 - (d) does not involve encouraging a decision about:
 - (i) whether to award new business; or
 - (ii) whether to continue existing business with a particular person; or
 - (iii) the terms of new business or existing business.

Content of records

- (3) A record of particular conduct engaged in by a person complies with this subsection if the record sets out:
- (a) the value of the benefit concerned; and
 - (b) the date on which the conduct occurred; and
 - (c) the identity of the foreign public official in relation to whom the conduct occurred; and

- (d) if that foreign public official is not the other person mentioned in paragraph 70.2(1)(a)—the identity of that other person; and
- (e) particulars of the routine government action that was sought to be expedited or secured by the conduct; and
- (f) the person's signature or some other means of verifying the person's identity.

70.5 Territorial and nationality requirements

- (1) A person does not commit an offence against section 70.2 unless:
 - (a) the conduct constituting the alleged offence occurs:
 - (i) wholly or partly in Australia; or
 - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
 - (b) the conduct constituting the alleged offence occurs wholly outside Australia and:
 - (i) at the time of the alleged offence, the person is an Australian citizen; or
 - (ii) at the time of the alleged offence, the person is a resident of Australia; or
 - (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Note: The expression **offence against section 70.2** is given an extended meaning by subsections 11.2(1), 11.2A(1) and 11.6(2).

- (2) Proceedings for an offence against section 70.2 must not be commenced without the Attorney-General's written consent if:
 - (a) the conduct constituting the alleged offence occurs wholly outside Australia; and
 - (b) at the time of the alleged offence, the person alleged to have committed the offence is:
 - (i) a resident of Australia; and
 - (ii) not an Australian citizen.
- (3) However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence against section 70.2 before the necessary consent has been given.

70.6 Saving of other laws

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

Commonwealth Criminal Code Act Division 12 - Corporate Criminal Responsibility

12.1 General principles

- (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.

Note: Section 4B of the *Crimes Act 1914* enables a fine to be imposed for offences that only specify imprisonment as a penalty.

12.2 Physical elements

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

12.3 Fault elements other than negligence

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

- (2) The means by which such an authorisation or permission may be established include:
 - (a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
 - (c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
 - (d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
 - (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
 - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:

board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.

corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.

high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.

12.4 Negligence

- (1) The test of negligence for a body corporate is that set out in section 5.5.
- (2) If:
 - (a) negligence is a fault element in relation to a physical element of an offence; and
 - (b) no individual employee, agent or officer of the body corporate has that fault element;that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
 - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
 - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.5 Mistake of fact (strict liability)

- (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:
 - (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

- (b) the body corporate proves that it exercised due diligence to prevent the conduct.
- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
 - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
 - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

12.6 Intervening conduct or event

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

Attachment E – Australia’s report-back to the Working Group following Phase 3 evaluation (December 2014, published March 2015)



AUSTRALIA: FOLLOW-UP TO THE PHASE 3 REPORT & RECOMMENDATIONS

APRIL 2015

This report, submitted by Australia provides information on the progress made by Australia in implementing the recommendations of its Phase 3 report. The OECD Working Group on Bribery's summary of and conclusions to the report were adopted on 3 April 2015.

The Phase 3 report evaluated Australia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

TABLE OF CONTENTS

SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY	4
PHASE 3 WRITTEN FOLLOW-UP REPORT – AUSTRALIA.....	6
PART I: RECOMMENDATIONS FOR ACTION	6
PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP	36
ANNEX 1: AFP MEDIA RELEASE	42
ANNEX 2: AFP – REGIONAL PRESENTATIONS ON FOREIGN BRIBERY	44
ANNEX 3: AFP FOREIGN BRIBERY FACTSHEET	45
ANNEX 4: FOREIGN BRIBERY OUTREACH ACTIVITIES – ATTORNEY GENERAL'S DEPARTMENT	46
ANNEX 5: AUSTRADE – USE OF AGENTS UPDATE (DECEMBER 2014)	49

SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

1. In December 2014, Australia presented its written follow-up report to the Working Group on Bribery (the Working Group), outlining its responses to the recommendations and follow-up issues identified by the Working Group at the time of Australia's Phase 3 evaluation in October 2012. Australia has taken steps to implement a number of recommendations, with 16 out of 33 recommendations fully implemented, 9 partially implemented and 8 not implemented.
2. With regard to enforcement, 15 new foreign bribery allegations have surfaced since Phase 3. The number of foreign bribery investigations has increased to 17 (from 7 in October 2012). Australia still has only 1 prosecution in the *Securrency/NPA case*; this has been before the courts since prior to Phase 3. The Australian Federal Police (AFP) has transmitted 1 investigation to the Commonwealth Director of Public Prosecutions (CDPP) for the purposes of assessment and prosecution, and more investigations are expected to be transmitted in 2015. The Working Group noted that suppression orders which prevented a full discussion of the *Securrency/NPA case* at the time of Phase 3 remain in place. In addition, a new suppression order was issued in June 2014 raising further questions for the Group. The existence of these suppression orders continues to prevent in-depth discussion in the WGB of Convention-related issues in the *Securrency/NPA case*. The WGB expressed its intent to follow this up in the context of future monitoring, once the case is completed and the suppression orders are lifted.
3. Australia has made good progress on addressing a number of important recommendations. In particular, the AFP has been active in improving its policy and operations regarding foreign bribery. Australia has reviewed its overall approach to enforcement, resulting notably in the establishment of an inter-agency Fraud and Anti-Corruption Centre (FAC Centre) (*recommendation 1*). The Centre is hosted by the AFP with officials seconded from the Australian Taxation Office (ATO), Australian Securities and Investments Commission (ASIC), Australian Crime Commission, Australian Customs and Border Protection Service, Department of Human Services, Department of Immigration and Border Protection, Department of Defence, and Department of Foreign Affairs and Trade (DFAT). The FAC Centre will in particular ensure the involvement of Australia's confiscation authorities in foreign bribery cases and the routine consideration of confiscation of foreign bribery proceeds (*recommendation 5*). The FAC Centre has improved coordination between the AFP and ASIC (*recommendation 6*). The coordination between these two agencies was further increased through staff secondments, knowledge-sharing, and an inter-agency MOU setting out the roles and responsibilities of the two agencies (*recommendation 6 and 7a*). The AFP has also entered into an MOU with the Australian Prudential Regulation Authority (APRA) (*recommendation 7a*). It is further intended that the FAC Centre will ensure the ATO is informed of foreign bribery convictions, although it remains to be seen how this is carried out in practice, once foreign bribery cases are finalised (*recommendation 14b*).
4. An AFP Foreign Bribery Panel of Experts was also established, which considered all of the Working Group's recommendations to the AFP (*recommendation 8b*). AFP officers have benefited from foreign bribery training by the Panel of Experts, in addition to other foreign bribery training (*recommendation 10a*). The AFP has also engaged with state-level law enforcement to establish guidelines on reporting foreign bribery (*recommendation 7b*) and to raise awareness of the foreign bribery offence (*recommendation 12a*). In addition, the AFP has made progress towards ensuring that foreign bribery investigations are thoroughly investigated, that all avenues are pursued, and that allegations come from diverse sources; although the Group would like to see an increase in enforcement before it can conclude that *recommendation 8a* has been fully implemented. Similarly, increased enforcement is required to determine whether the use of Australia's corporate liability provisions has been enhanced (*recommendation 3*) and whether false accounting is being vigorously pursued (*recommendation 4b*). On the topic of enforcement, the Group also felt that more could be done to explicitly prohibit the interference of Article 5 factors in investigations or prosecutions (*recommendation 10c*). On a more positive note, the Working Group welcomed the restructuring of its operating model by the Office of the CDPP to ensure sufficient resources are available to prosecute foreign bribery (*recommendation 10b*).

5. The Group also recognised positive steps which Australia had taken in relation to awareness-raising. The Attorney-General's Department (AGD) has developed and led a whole-of-government approach to awareness-raising in which the AFP, DFAT and Austrade have been active (*recommendation 12d*). This programme has raised the private sector's awareness of foreign bribery and corporate compliance (*recommendation 12b*) and has resulted in online foreign bribery training which, amongst other things, summarises publicly-available information on hospitality and bribery (*recommendation 12c*). The programme has discouraged facilitation payments, although the distinction between facilitation payments and bribes has however not systematically been covered: while Australia explains that its agencies go to quite some effort in their outreach presentations to explain the distinction, written publications by the AFP or Austrade do not clearly address the distinction (*recommendation 2a*). Similarly, while efforts have been made to raise awareness of plea-bargaining, a framework has not been established to address matters related to compliance system reform or prosecution of natural persons (*recommendation 9*). Some steps have been taken to raise awareness of foreign bribery as a predicate offence for money laundering and the Working Group looks forward to the forthcoming typology on foreign bribery, the release of which will fully implement *recommendation 13*. As recommended by the Working Group, the ATO has also considered the issue of bribery and small facilitation payments in its awareness raising and training activities, although it has yet to effectively include the topic in its *Compliance in Focus* publication (*recommendation 14c*).

6. On the topics of detection and reporting, the Working Group welcomed Australia's adoption of public sector whistleblower protection, but recommended that similar protections be adopted for the private-sector (*recommendation 15d*). With the integration of AusAID into DFAT, Australian officials in charge of official development assistance are now subject to an obligation to report foreign bribery suspicions to the AFP, and have received training in that respect (*recommendation 15e*). The Government is reportedly still considering extending the reporting requirements for external auditors (*recommendation 15a*). The Australian Public Service guide has yet to be amended to require overseas-based civil servants to report foreign bribery to the AFP (*recommendation 15b*) and employees of independent statutory authorities remain beyond the scope of the public sector's reporting obligations (*recommendation 15c*). Finally, Australia has yet to put in place transparent debarment policies for procuring agencies (*recommendation 16a*). *Recommendation 15f*, however, has been fully implemented by Austrade, which has encouraged companies to conduct due diligence on all agents. The Export Finance and Insurance Corporation (EFIC) has also improved due diligence and reporting requirements and established clear guidelines on the termination of support due to foreign bribery (*recommendation 16b*).

7. At the time of Phase 3, the Working Group had also recommended legislative change in several areas. Australia expressed its intention to introduce such legislative amendments to clarify that intention to bribe a particular official is not a requirement of Australia's foreign bribery offence (*recommendation 2b*), and to increase sanctions for the false accounting offence (*recommendation 4a*). On the other hand, Australia reports no action in respect of the Working Group's recommendation on record-keeping requirements relating to facilitation payments, which remain inconsistent between the criminal and tax legislation (*recommendation 14a*). Australia has also taken no steps to support other states' enforcement by providing the broad range of mutual legal assistance in respect of civil or administrative proceedings (*recommendation 11*).

Conclusions of the Working Group on Bribery

8. Based on these findings, the Working Group concludes that Australia has fully implemented recommendations 1, 5, 6, 7a, 7b, 8b, 10a, 10b, 12a, 12b, 12c, 12d, 14c, 15e, 15f, and 16b; recommendations 2a, 3, 4b, 8a, 9, 10c, 13, 14b, and 15d are partially implemented; and recommendations 2b, 4a, 11, 14a, 15a, 15b, 15c, and 16a are not implemented. Follow-up issues 17a and 17j no longer need be followed up. The Working Group will follow up on the recommendations that remain only partially or not implemented in the context of future monitoring, as well as on follow-up issues 17b-i and 17k. The Working Group invites Australia to report back in writing in 6 months (June 2015) on progress on enforcement action as it relates to recommendation 8a.

PHASE 3 WRITTEN FOLLOW-UP REPORT – AUSTRALIA

Name of country: AUSTRALIA

Date of approval of Phase 3 report: 12 October 2012

Date of information: 13 November 2014

Instructions

This document seeks to obtain information on the progress each participating country has made in implementing the recommendations of its Phase 3 evaluation report. Countries are asked to answer all recommendations as completely as possible. Further details concerning the written follow-up process is in the Phase 3 Evaluation Procedure [DAF/INV/BR(2008)25/FINAL, paragraphs 55-67].

Responses to the first question should reflect the current situation in your country, not any future or desired situation or a situation based on conditions which have not yet been met. For each recommendation, separate space has been allocated for describing future situations or policy intentions.

Please submit completed answers to the Secretariat on or before 31 October 2014.

PART I: RECOMMENDATIONS FOR ACTION

Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery

Text of recommendation:

1. The Working Group recommends that Australia review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials (Convention Article 1, 5; 2009 Recommendation V).

Action taken as of the date of the follow-up report to implement this recommendation:

Australia has reviewed its approach to enforcement of the foreign bribery offence, and has implemented a number of initiatives as a result.

As a part of its one year follow-up report, Australia responded to two key recommendations from the OECD Working Group – recommendation 6 on cooperation between the Australian Federal Police (AFP) and the Australian Securities and Investment Commission (ASIC); and recommendation 8(a) regarding AFP investigation of foreign bribery cases. This response noted key measures undertaken which will help to bolster Australia's approach to enforcement.

In April 2012 (before the Phase 3 evaluation), AFP established an internal Foreign Bribery Panel of Experts. This Panel is made up of senior investigators who have had responsibility for at least one significant foreign bribery investigation, and who also have experience in investigating large and complex matters that span international jurisdictions.

In line with recommendation 8(a), the Panel of Experts is now responsible for:

- ensuring foreign bribery evaluations are not closed prematurely
- proactively gathering information, including monitoring credible media sources for new allegations and collecting data from overseas law enforcement bodies to better inform our investigators
- evaluating foreign bribery referrals and investigations and providing expert advice to investigators, including ensuring consideration of jurisdiction over related legal persons, consideration of concurrent and joint investigations and related offences, and recovery of proceeds of crime
- delivering foreign bribery specific training modules, and awareness-raising activities, and
- engagement with financial intelligence agencies.

Australia's reviewed approach to enforcement is also demonstrated by the establishment of dedicated Fraud and Anti-Corruption teams within the AFP in February 2013. This is an important shift from the 'flexible teams model' that Australia had in place during our Phase 3 evaluation and enables the AFP to better address serious and complex fraud and corruption, including foreign bribery. These teams are located across Australia, in Brisbane, Canberra, Melbourne, Sydney and Adelaide.

In 2013, the AFP established the Fraud and Anti-Corruption Centre (the FAC Centre), which was formally launched in July 2014. The Minister for Justice issued a media release on this, a copy of which is attached (Annex 1).

The FAC Centre has important functions for implementing foreign bribery investigations. The Panel of Experts works with the FAC Centre to deliver key functions to address foreign bribery matters through:

- assessment of all foreign bribery referrals in consultation with participating members, in particular ASIC
- a dedicated training cell focused on the delivery of fraud and anti-corruption training, external presentations, and the coordination of specific foreign bribery training modules
- a multi-agency evaluation and triage cell, including members from ASIC and the Australian Taxation Office (ATO), that can better inform the evaluation and investigative strategies of foreign bribery referrals
- targeted quality standards assurance for ongoing AFP FAC investigations, and
- the provision of tactical and strategic intelligence. Working with the Australian Crime Commission (ACC), the FAC Centre collates and analyses criminal methodologies and trends, identifies vulnerable groups, develops risk profiles, and informs the development of prevention and deterrence strategies relating to serious and complex fraud and corruption, including foreign bribery.

Following on from the first AFP Foreign Bribery Workshop, held in October 2013, the Panel Of Experts held a specialist workshop in June 2014, focussing on corporate compliance programs and the development of a Foreign Bribery Investigators Reference Guide. The AFP expects to finalise this Guide in January 2015. The Guide will be an integral tool for all investigators when conducting foreign bribery investigations.

The Panel of Experts engaged a specialist consultant (former private sector), with expertise in designing and implementing integrity and compliance frameworks for global companies, to present at the June 2014 workshop. This consultant helped the Panel maximise their understanding on corporate issues including company compliance and governance. A senior member of ASIC also presented at the workshop.

Text of recommendation :

2. With respect to the foreign bribery offence, the Working Group recommends that Australia:

- a) Continue to raise awareness of the distinction between facilitation payments and bribes, and encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records (2009 Recommendation VI.ii);

Action taken as of the date of the follow-up report to implement this recommendation:

Australia has continued to raise awareness of the distinction between facilitation payments and bribes through outreach engagements at workshops, forums and training opportunities. Australian agencies encourage businesses to refuse requests for facilitation payments and to recognise that such payments represent a business risk.

To assist with our whole-of-government approach to outreach, the Attorney-General's Department (AGD) is developing an online learning module on foreign bribery, in consultation with other agencies involved in foreign bribery outreach activities.

The module is intended for use by industry and Government, and will be publicly available on the AGD website once launched. It will provide information on:

- bribery and its consequences
- forms of bribery
- Australia's anti-bribery policy
- the relevant laws and how they apply
- steps business can take to reduce the risk of breaching the laws, and
- how to report suspected foreign bribery.

The module is intended to complement our existing outreach activities, and provide an effective means of reaching a broader audience. It is expected to be publicly released in late 2014 (a copy can be shared with the OECD Secretariat and lead reviewing countries in advance of this). The module will include the Government's messaging on facilitation payments, as outlined above.

In an effort to reach Australian companies operating overseas, the AFP Foreign Bribery Fact Sheet has been sent to all AFP overseas posts for distribution during business events and is also available online. The Department of Foreign Affairs and Trade (DFAT) also encourages affected businesses to contact the relevant Australian diplomatic mission for assistance. The FAC Centre has distributed an AFP Foreign Bribery PowerPoint presentation to AFP international liaison officers deployed across 28 countries. The officers use the presentation and fact sheet to present to Australian business communities, providing a consistent message on Australian legislation regarding foreign bribery, including the distinction between bribes and facilitation payments, as well as the potential associated implications concerning other international legal frameworks.

A summary of these presentations is attached (Annex 2). A copy of the AFP factsheet is attached (Annex 3).

Also attached is an updated list of outreach activities undertaken by the Attorney-General's Department in 2013-14 (Annex 4), with a focus on reaching small to medium enterprises and highlighting the distinction

between facilitation payments and bribes, and discouraging businesses from making facilitation payments.

As part of direct engagement with Australian businesses working overseas, the Australian Trade Commission (Austrade) has implemented an outreach anti-corruption program in high risk/low governance locations (consistent with Transparency International's Corruption Perceptions Index 2013), where Austrade operates an office.

Within this program, Austrade's legal team provides detailed guidance on the risk presented by use of facilitation payments and how to implement policies and processes to avoid such payments.

Austrade will not advise or assist any Australian company to make a facilitation payment and is obliged to report any instance of suspected bribery. This policy is clearly articulated to clients and Australian business generally.

Further details of the outreach program are set out in the response to recommendation 12(b) below. Austrade's website also includes information on anti-bribery and a link to the AGD site for information relevant to facilitation payments. See: <http://www.austrade.gov.au/Export/About-Exporting/Legal-issues/Bribery-of-foreign-public-officials>.

Text of recommendation :

2. With respect to the foreign bribery offence, the Working Group recommends that Australia:

- b) Take appropriate steps to clarify that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery offence (Convention Article 1);

Action taken as of the date of the follow-up report to implement this recommendation:

Australia regards that the legislation currently operates to not require proof of an intention to bribe a particular official. However, noting the Working Group's recommendation, we are taking steps to make this beyond doubt to remove a possible barrier to enforcing the foreign bribery offence.

Australia is developing a minor technical amendment to the foreign bribery offence in Division 70 of the Criminal Code in a proposed legislative bill to clarify the operation of the offence. This bill is scheduled for introduction to Commonwealth Parliament in the Autumn 2015 sitting session (February-March 2015).

Text of recommendation :

3. Regarding the liability of legal persons, the Working Group recommends that Australia take steps to enhance the usage of the corporate liability provisions, including those on corporate culture, where appropriate, and provide on-going training to law enforcement authorities relating to the enforcement of corporate liability in foreign bribery cases (Convention Article 2).

Action taken as of the date of the follow-up report to implement this recommendation:

Australia is taking steps to enhance the use of the corporate liability provisions in relation to foreign bribery.

As noted in the response to recommendation 1, in June 2014, the AFP held a Panel Of Experts Foreign Bribery workshop focussing on the corporate compliance programs. Corporate criminal liability was included as a key aspect of this workshop. It will also be included in the new AFP Foreign Bribery Investigators Reference Guide.

The AFP considers all extensions of criminal responsibility when evaluating and investigating allegations of foreign bribery, including corporate liability. The possibility of corporate criminal liability is a consideration in all foreign bribery investigation plan templates.

The AFP also works closely with ASIC (see recommendation 6) to further ensure all corporate liability provisions are considered throughout the lifecycle of all foreign bribery investigations. Where appropriate, matters will be referred to ASIC for investigation of possible civil action.

Text of recommendation :

4. Regarding the false accounting offence, the Working Group recommends that Australia:

- a) Increase the maximum sanctions against legal persons for false accounting under Commonwealth legislation to a level that is effective, proportionate and dissuasive within the meaning of Article 8(2) of the Convention, commensurate with Australia's legal framework; or increase the maximum sanctions and broaden the scope of liability of legal persons for false accounting offences at the State level (Convention Article 8(2));

Action taken as of the date of the follow-up report to implement this recommendation:

Australia is exploring options to introduce a new false accounting offence for the purposes of foreign bribery, noting the offence introduced by Canada in response to a similar recommendation from the OECD Working Group. AGD is currently consulting with relevant agencies on this, with the aim of including the new offence in a bill scheduled for introduction to Parliament in 2015.

We note that directors of companies that are found to be engaging in false accounting may be liable for a range of sanctions (including disqualification) under the existing Corporations legislation.

Text of recommendation :

4. Regarding the false accounting offence, the Working Group recommends that Australia:

- b) Vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (Convention Article 8(1)).

Action taken as of the date of the follow-up report to implement this recommendation:

Australia has taken steps in response to this recommendation.

All foreign bribery investigations undertaken or evaluated by AFP FAC involve analysis of whether false accounting offences may be applicable. This includes state and territory accounting offences as well as those under the federal Corporations Act. Noting this, foreign bribery is preferred as the primary offence as it has the most appropriate penalties.

As part of the closer engagement between the AFP and ASIC on foreign bribery matters, the two agencies engage in the early planning stages as well as during operational reviews of investigations to evaluate whether false accounting offences can be utilised. False accounting will also be addressed as a topic in the AFP's Foreign Bribery Investigators Reference Guide, to ensure the possibility of false accounting investigation is appropriately considered.

All AFP FAC investigators are now trained to identify and pursue false accounting offences. This has been achieved through training modules and workshops run by the AFP Foreign Bribery Panel of Experts.

The AFP works closely with ASIC from beginning to end of an investigation to identify and investigate false accounting offences. The AFP currently has an ASIC officer embedded in the team in Sydney, who is available to teams Australia wide on an ongoing basis. Additionally, an ASIC member attends the monthly foreign bribery case management forums, where all offences and progress of the investigation are explored.

As noted above, Australia is also considering a new false accounting offence at the Commonwealth level, and is consulting with relevant agencies on the best form of such an offence.

In recent years ASIC has taken 10 criminal actions in relation to false accounting/falsification of books offences. A further two matters are currently under investigation, one of which involves foreign bribery allegations.

One defendant in the Secrecy/Note Printing Australia prosecutions was convicted of a state-based false accounting charge. On 20 August 2012, David Ellery, a former Chief Financial Officer of Secrecy, was sentenced to six months imprisonment (suspended for two years) after pleading guilty to one count of false accounting, contrary to section 83(1) of the *Crimes Act 1958* (Vic).

Text of recommendation :

5. Regarding confiscation, the Working Group recommends that Australia take further concrete steps (such as providing guidance and training) to ensure that its law enforcement authorities routinely consider confiscation in foreign bribery cases (Convention Article 3(3)).

Action taken as of the date of the follow-up report to implement this recommendation:

The AFP has taken a number of steps to address this recommendation.

- As part of the new FAC Centre, foreign bribery referrals are evaluated by a representative of the AFP Criminal Asset Confiscation Taskforce for full asset confiscation consideration.
- Criminal Asset Confiscation Taskforce case officers are then attached to each foreign bribery investigation to advise and take action via asset confiscation processes.
- AFP incorporated confiscation as a topic in the June 2014 foreign bribery investigations workshop and the proposed Foreign Bribery Investigators Reference Guide.
- The possibility of proceeds of crime action is a standard consideration for all AFP investigations and is noted in the case log.
- The AFP also has a Money Laundering Investigation Program for investigators that includes training on confiscation actions.

Text of recommendation :

6. Regarding the Australian Securities and Investment Commission (ASIC), the Working Group recommends that Australia take steps to ensure that ASIC's experience and expertise in investigating corporate economic crimes are used to assist the AFP to prevent, detect and investigate foreign bribery where appropriate (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

Action taken as of the date of the follow-up report to implement this recommendation:

Note – Australia responded to this recommendation at the one year follow-up. The following material builds on that input with relevant updates.

In October 2013, AFP and ASIC entered into a Memorandum of Understanding (MoU) on collaborative working arrangements. The MoU was made at the highest levels of these agencies (by the Chairman of ASIC and the AFP Commissioner). The specific purpose of Annexure A of the MoU is to support the implementation of the Anti-Bribery Convention.

The MoU expressly provides a mechanism for coordination of interagency information-sharing and corporate economic crime expertise to evaluate and investigate foreign bribery allegations. The MoU comprehensively covers cooperation on foreign bribery matters and improves the AFP's ability to take advantage of ASIC's experience and expertise in the context of foreign bribery.

In addition to the MoU:

- ASIC is a member of the AFP-hosted FAC Centre, and has seconded a lawyer, experienced in Corporations Act investigations and enforcement matters, to support the AFP investigation teams.
- ASIC has appointed two senior members of its enforcement team as the principal operational contacts between ASIC and the AFP in relation to foreign bribery. The purpose of these appointments is to:
 - ensure effective day to day oversight of the ASIC-AFP relationship and promote consistent application of the MoU
 - provide assurance in relation to the prompt handling of referrals and inquiries made between those agencies, and
 - provide an internal process within ASIC to identify and utilise resources on a case-by-case basis.
- ASIC has provided several training sessions to the AFP in relation to matters within ASIC's expertise, including in relation to possible Corporations Act offences that may be of application to foreign bribery, including false accounting.

Text of recommendation :

7. With respect to co-ordination and information-sharing, the Working Group recommends that:

- a) The AFP, ASIC, and APRA set out in writing with greater precision, following consultations with one another, their complementary roles and responsibilities in foreign bribery and related cases, and written rules for case referral and information sharing (Convention Article 5; 2009 Recommendation IX.ii);

Action taken as of the date of the follow-up report to implement this recommendation:

The AFP, ASIC and the Australian Prudential Regulation Authority (APRA) have set out their respective responsibilities and formal information-sharing arrangements through bilateral memoranda of understanding (MoU) between the agencies.

In recognition of their lead roles in dealing with foreign bribery, the MoU between the AFP and ASIC includes an annexure dealing specifically with the roles and responsibilities of each agency in relation to foreign bribery matters.

On 7 July 2014, APRA and the AFP signed an MoU which sets out how those two agencies will share information. Under the MoU, APRA have a dedicated point of contact to refer matters to the AFP through the FAC Centre, which is the central point for assessment of all foreign bribery matters. The MoU is available on the APRA website at: <http://www.apra.gov.au/AboutAPRA/Documents/MoU-APRA-AFP.pdf>.

ASIC and APRA also have an MoU in place, which was signed on 18 May 2010. This is available online at: <https://dv8nx270cl59a.cloudfront.net/media/1340876/MOU-APRA-and-ASIC-May-2010.pdf>. The MoU covers responsibilities, collaboration on regulatory and policy development, mutual assistance and information sharing. The quarterly enforcement liaison meetings and other information-sharing arrangements between these agencies provide additional means by which issues (such as foreign bribery allegations) can be shared.

As noted above, ASIC is a member of the FAC Centre. In addition, since November 2013, ASIC has had an experienced senior lawyer seconded to the AFP as part of the Centre's arrangements. The senior lawyer's role is to provide ASIC expertise on foreign bribery matters being investigated by the AFP.

Text of recommendation :

7. With respect to co-ordination and information-sharing, the Working Group recommends that:

- b) Australia establish clear guidelines as to when each State and Territorial authority would refer foreign bribery cases to the AFP or commence its own investigations (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

Action taken as of the date of the follow-up report to implement this recommendation:

The AFP has protocols in place with State and Territory authorities for the referral of Commonwealth matters. Additionally, the AFP has formally written to state-level law enforcement agencies to raise awareness of the offence of foreign bribery and to remind them to refer reports to the AFP. The protocols on referring foreign bribery offending have been published on State and Territory police intranet pages.

The new FAC Centre works in partnership with state and territory enforcement and regulatory agencies in order to prevent, detect and investigate fraud and corruption against the Commonwealth. Since the establishment of the FAC Centre, the AFP has strengthened its engagement with State and Territory counterparts in relation to foreign bribery and corruption and fraud offences. The AFP Fraud and Anti-Corruption management team also engages regularly on fraud and corruption matters with State and Territory Police counterparts. This engagement has resulted in intelligence from a state police force that

led to a foreign bribery referral to the AFP FAC Centre.

Text of recommendation :

8. With respect to investigations of foreign bribery, the Working Group recommends that:

- a) The AFP (i) take sufficient steps to ensure that foreign bribery allegations are not prematurely closed; (ii) be more proactive in gathering information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations; (iii) take steps to ensure that it explores all avenues for exercising jurisdiction over related legal persons in foreign bribery cases; (iv) as a matter of policy and practice, continue to systematically consider whether it would be appropriate to conduct concurrent or joint investigations with other Australian and foreign law enforcement agencies, especially when foreign bribery is allegedly committed by a company that has its headquarters or substantial operations in Australia; and (v) routinely consider investigations of foreign bribery-related charges such as false accounting and money laundering, especially in cases where a substantive charge of foreign bribery cannot be proven (Convention Articles 2, 5, 7 and 8; Commentary 27; 2009 Recommendation Annex I.C and I.D);

Action taken as of the date of the follow-up report to implement this recommendation:

Note – Australia responded to this recommendation at the one year follow-up. The following material builds on that input with relevant updates. These measures also implement recommendation 1, which asked Australia to review its overall approach to enforcement.

In April 2012 (before the Phase 3 evaluation), the AFP established an internal Foreign Bribery Panel of Experts. This Panel is made up of senior investigators who have had responsibility for at least one significant foreign bribery investigation, and who also have experience in investigating large and complex matters that span international jurisdictions.

In line with recommendation 8(a), the Panel of Experts is now responsible for:

- ensuring foreign bribery evaluations are not closed prematurely
- proactively gathering information, including monitoring credible media sources for new allegations and collection of data from overseas law enforcement bodies to better inform our investigators
- evaluating foreign bribery referrals and investigations and providing expert advice to investigators, including ensuring consideration of jurisdiction over related legal persons, consideration of concurrent and joint investigations and related offences, and recovery of proceeds of crime
- delivering foreign bribery specific training modules, and awareness-raising activities, and
- engagement with financial intelligence agencies.

Australia's renewed approach to enforcement is also demonstrated by the establishment of dedicated Fraud and Anti-Corruption teams within the AFP in February 2013. This is an important shift from the 'flexible teams model' that Australia had in place during our Phase 3 evaluation and enables the AFP to better address serious and complex fraud and corruption, including foreign bribery. These teams are located across Australia, in Brisbane, Canberra, Melbourne, Sydney and Adelaide.

In 2013, the AFP established the Fraud and Anti-Corruption Centre (the FAC Centre), which was

formally launched in July 2014. The Minister for Justice issued a media release on this, a copy of which is attached (Annex 1).

The FAC Centre has important functions for implementing foreign bribery investigations. The Panel of Experts works with the FAC Centre to deliver key functions to address foreign bribery matters through:

- assessment of all foreign bribery referrals in consultation with participating members, in particular ASIC
- a dedicated training cell focused on the delivery of fraud and anti-corruption training, external presentations, and the coordination of specific foreign bribery training modules
- a multi-agency evaluation and triage cell, including members from ASIC and the ATO, that can better inform the evaluation and investigative strategies of foreign bribery referrals
- targeted quality standards assurance for ongoing AFP FAC investigations, and
- the provision of tactical and strategic intelligence. Working with the Australian Crime Commission, the FAC Centre collates and analyses criminal methodologies and trends, identifies vulnerable groups, develops risk profiles, and informs the development of prevention and deterrence strategies relating to serious and complex fraud and corruption, including foreign bribery.

Following on from the first AFP Foreign Bribery Workshop, held in October 2013, the Panel of Experts held a specialist workshop in June 2014, focussing on corporate compliance programs and the development of a Foreign Bribery Investigators Reference Guide. This will be an integral tool for all investigators when conducting foreign bribery investigations.

The Panel of Experts engaged a specialist consultant (a former compliance specialist from the private sector), with expertise in designing and implementing integrity and compliance frameworks for global companies, to present at the June 2014 workshop. This consultant helped the Panel maximise their understanding on corporate issues including company compliance and governance. A senior member of ASIC also presented at the workshop.

As noted in the response to recommendation 6, ASIC is actively engaged with the AFP through the FAC Centre and has seconded an experienced lawyer to assist the AFP with foreign bribery matters. ASIC and the AFP also consult on matters where both agencies are investigating the same conduct to ensure coordination between the separate investigations.

Text of recommendation :

8. With respect to investigations of foreign bribery, the Working Group recommends that:

- b) The AFP Foreign Bribery Panel of Experts consider the Working Group's recommendations to the AFP (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

Action taken as of the date of the follow-up report to implement this recommendation:

The AFP Foreign Bribery Panel of Experts has considered the Working Group's recommendations to the AFP, and has ensured that Article 5 has been appropriately captured in foreign bribery training to avoid improper influences from affecting the AFP's decision to investigate allegations of foreign bribery.

Specific reference to Article 5 is also contained in the DFAT/AFP information-sharing protocol as well as

the Foreign Bribery Investigators Reference Guide.

The DFAT/AFP information sharing protocol was signed on 13 June 2014, after both agencies identified the benefits in articulating inter-agency arrangements between the AFP and DFAT with such complex and politically sensitive matters. The protocol's purpose is to:

- support a whole of government approach towards Foreign Bribery investigations and prosecutions consistent with Australia's obligations under the OECD Anti-Bribery Convention, and
- outline procedures for the handling and protection of sensitive information that may arise during foreign bribery investigations.

The Protocol states (in part):

1. Introduction

- 1.1 In 1999 Australia ratified the Organisation for Economic Co-Operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Anti-Bribery Convention). As a result, Australia introduced legislation to make it a criminal offence under Australian law to bribe a foreign public official. Details of the offence can be found within section 70.2 of the *Criminal Code* (Cth).
- 1.2 Foreign bribery is an offence for both individuals and bodies corporate. The offence includes extraterritorial provisions making the offence applicable to criminal activities both domestically and internationally.
- 1.3 Foreign bribery prosecutions are complex and challenging and naturally involve allegations implicating foreign public officials. During the prosecution phase of the Australian Federal Police (AFP) foreign bribery investigation, Operation Rune, it became clear that a protocol would be of assistance in respect of inter-agency arrangements in such matters.

2. Purpose

- 2.1 The purpose of this Protocol is to:
 - 2.1.1 support a whole-of-government approach towards foreign bribery investigations and prosecutions consistent with Australia's obligations under the OECD Anti-Bribery Convention, and
 - 2.1.2 outline procedures for the handling and protection of sensitive information that may arise during foreign bribery investigations and prosecutions.

3. Agreed Principles

- 3.1 That Commonwealth agencies recognise the potential harm caused by Australian citizens or entities committing foreign bribery and the need to investigate allegations of this nature thoroughly.
- 3.2 That Commonwealth agencies support a whole-of-government approach towards foreign bribery prosecutions consistent with Australia's obligations under the OECD Anti-Bribery Convention.
- 3.3 That Commonwealth agencies, wherever possible, should present a unified position during prosecutions.

Text of recommendation :

9. Regarding plea bargaining and self-reporting, the Working Group recommends that Australia develop a clear framework that addresses matters such as the nature and degree of co-operation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company's co-operation; measures to monitor the company's compliance with a plea agreement; and the prosecution of natural persons related to the company (Convention Articles 3 and 5; Commentary 27; 2009 Recommendation Annex I.D).

Action taken as of the date of the follow-up report to implement this recommendation:

Promoting self-disclosure by corporations

The CDPP and the AFP have worked together to develop an external presentation for industry on the benefits of self-reporting and cooperating with authorities, and the availability of charge negotiations. The following talking points are extracted from these presentations:

Talking Points for Foreign Bribery Presentations: encouraging self-disclosure

General points

- Under Australian law, bribery of a foreign official is a serious criminal offence punishable by a period of imprisonment of up to 10 years, a fine or both for an individual, and a fine for a corporation.
- Other criminal offences such as money laundering, false accounting and breaches of director duties may also be identified during the course of a foreign bribery investigation. These offences are also punishable by periods of imprisonment and, in some cases, a fine.
- The AFP is able to take action on a civil basis to recover the proceeds of foreign bribery and related Commonwealth offences under the *Proceeds of Crime Act 2002*.

Self-reporting

- Corporations should report to the AFP any suspicions of foreign bribery that arise within the corporation or involving a competitor.
- In a criminal matter, the degree to which a person or company has cooperated with law enforcement in the investigation of the offence can be taken into account by the Court on sentencing under s 16A of the *Crimes Act 1914*.
- In some instances, offenders who co-operate with the AFP's investigation can enter an early guilty plea through an agreed statement of facts and have matters dealt with swiftly by the Courts. This co-operation and the early guilty plea can be taken into account by the Court on sentencing for the purpose of reducing the severity of the penalty given.
- Offenders may also enter into an undertaking to cooperate with law enforcement agencies under s 21E of the *Crimes Act 1914*, which also can be taken into account on sentencing.
- Other advantages of a corporate entity self-reporting suspected instances of foreign bribery to law

enforcement include:

- opportunity to be included in the police investigation
 - potential to limit corporate criminal liability and for innocent company officers to avoid liability
 - minimise reputational damage
 - opportunity to identify and address wrongdoing within the corporation, and
 - assist law enforcement to detect and investigate serious criminal conduct.
- In certain circumstances, the Commonwealth Director of Public Prosecutions (CDPP) may indemnify a witness against prosecution. The decision whether to indemnify a witness is made by the CDPP in accordance with the Prosecution Policy of the Commonwealth, usually upon the recommendation of an investigative agency (eg the AFP).
 - Australia does not have a scheme of deferred and non-prosecution agreements, that corresponds with the legislation utilised by United States agencies in enforcing the Foreign Corrupt Practices Act.

Industry cooperation

- If foreign bribery offences are suspected the matter should be referred to the AFP at the earliest opportunity. The referral should identify all suspects, witnesses and identify the location of evidence that can support the allegations.
- Evidence that has the potential to be destroyed should be retained and handed to the AFP investigators in a manner that best preserves its authenticity and integrity for use in evidence.
- The AFP will be required to present a ‘prima facie’ case to the CDPP to prosecute offenders. Cooperation from witnesses in producing company records and statements is often valuable to support a brief of evidence in foreign bribery matters.
- A trusted point of contact within a company should be appointed to liaise with AFP investigators to facilitate access to records and witnesses.

Decision to prosecute and charge negotiation

Australia’s framework for matters such as the decision to prosecute and charge negotiation is articulated in publicly available documents, including the *Prosecution Policy of the Commonwealth* (see: <http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>).

The decision to prosecute a person, whether that person is a company or a natural person, in relation to an allegation of foreign bribery will be made in accordance with Chapter 2 of the Prosecution Policy. The CDPP conducts charge negotiations in accordance with paragraphs 6.14 to 6.21 of the Prosecution Policy.

Consideration of cooperation

Section 16A of the *Crimes Act 1914* (Cth) sets out the matters that a court must take into account when sentencing a person for a Commonwealth offence. They include whether or not a person has pleaded guilty to the offence, and the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences and shown contrition for the offence.

The CDPP will always identify, by way of submissions to the sentencing court, any cooperation by the offender with the CDPP and law enforcement agencies. This will generally involve a description of the

type and timing of the cooperation provided, copies of any relevant witness statements and, where applicable, any characterisation by the law enforcement agency or the CDPP of the value of that cooperation overall. Reference will also be made to any relevant case law. In this respect, the process is the same for a foreign bribery offence as it is for Commonwealth offences generally.

Ultimately, the extent of any sentencing discount given to an offender in recognition of the offender's cooperation will be at the discretion of the sentencing court, within the confines of relevant law. Where an offender undertakes to give cooperation in future (eg by giving evidence as a Crown witness in a prosecution of another person) there is a formal process for enforcing compliance with that undertaking (see section 21E of the Crimes Act).

Text of recommendation :

10. With respect to resources and priority, the Working Group recommends that:

- a) The AFP continue to provide its officers with additional training in foreign bribery, and training to law enforcement officials to implement the Cybercrime Legislation Amendment Act 2012 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);

Action taken as of the date of the follow-up report to implement this recommendation:

All AFP investigators, including those working on foreign bribery, have been made aware of powers and obligations under the *Cybercrime Legislation Amendment Act 2012* through emails to all AFP staff.

This was also raised at the Investigators Workshop in October 2013 and the Panel of Experts workshop in June 2014. It has also been incorporated in ongoing refresher training.

Text of recommendation :

10. With respect to resources and priority, the Working Group recommends that:

- b) Australia take steps to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);

Action taken as of the date of the follow-up report to implement this recommendation:

Relevant agencies within the Australian Government (including AGD and the Department of Finance) work closely with the CDPP on funding issues to enable the CDPP to continue to prosecute offences, including foreign bribery.

On 2 June 2014, the CDPP implemented a new operating model consisting of nationally organised and run practice groups, as opposed to the previous regional based model. The objective of the new operating model is to provide a more effective, efficient and nationally consistent federal prosecution service. The CDPP's national practice reform will help to deliver greater prosecutorial expertise in relation to foreign bribery.

The Practice Groups are based on compatible crime types. They are:

1. Commercial, Financial & Corruption (responsible for foreign bribery)

2. Revenue & Benefits Fraud
3. International Assistance & Specialist Agencies
4. Organised Crime & Counter Terrorism
5. Illegal Imports & Exports
6. Human Exploitation & Border Protection

Each Practice Group is led by a Deputy Director who has responsibility for:

- the prosecutions conducted by that Practice Group across Australia
- national liaison in relation to the Practice Group
- policy development for issues that concern the Practice Group, and
- the CDPP's contribution to law reform in relation to the crime types in that Practice Group.

The AFP engages the CDPP early on foreign bribery matters and provides ongoing advice as required throughout the investigation through to prosecution.

Text of recommendation :

10. With respect to resources and priority, the Working Group recommends that:

- c) The AFP and other bodies involved in foreign bribery investigations and prosecutions take measures (such by issuing written guidance or policy) to continue to ensure that they are not impermissibly influenced by factors listed in Article 5 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

Action taken as of the date of the follow-up report to implement this recommendation:

The factors listed in Article 5 are inherent in the AFP values, as articulated in the AFP Integrity Framework. While Article 5 is not articulated in specific AFP governance, it is well documented in AFP training and protocols. The OECD Anti-Bribery Convention is a part of all AFP training material on foreign bribery. Article 5 is specifically referenced in all presentations.

The factors were included in the 2013 Foreign Bribery Investigations Workshop and will be included in the Foreign Bribery Investigators Reference Guide.

Reference to Article 5 has also been included in the recent AFP/DFAT protocol on the investigation and prosecution of foreign bribery matters.

Text of recommendation :

11. With respect to mutual legal assistance (MLA), the Working Group recommends that Australia take reasonable measures to ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons (Convention Article 9(1); 2009 Recommendation XIII.iv).

Action taken as of the date of the follow-up report to implement this recommendation:

Australia has a comprehensive framework for dealing with incoming and outgoing Mutual Assistance Requests (MARs).

Mutual assistance in Australia is governed by the *Mutual Assistance in Criminal Matters Act 1987* (MA Act). This legislative framework is consistent with the 2013 *G20 High-level Principles on Mutual Legal Assistance*, and enables Australia to seek and provide a comprehensive range of mutual assistance. Under the MA Act, Australian authorities can execute search warrants, take evidence from a witness in Australia (including by video link), arrange for the production of documents or other articles, arrange for prisoner witnesses to travel with their consent to a foreign country to give evidence, and take action to locate assets and register or otherwise enforce foreign orders restraining and forfeiting the proceeds of crime. Australia can also provide other assistance such as voluntary witness statements or service of documents.

Australia has entered into bilateral mutual legal assistance treaties with 29 countries but can receive MARs from any country on the basis of reciprocity.

The International Crime Cooperation Central Authority (ICCCA) within AGD is responsible for all incoming and outgoing MARs, including requests in relation to foreign bribery matters.

Over recent years Australia has made and actioned an increasing number of MARs relating to foreign bribery criminal investigations, and requests to target the proceeds of crime obtained from alleged foreign bribery. Since 2006, Australia has actioned approximately 66 mutual assistance requests relating to foreign bribery offences (18 incoming and 47 outgoing). Of these, 28 have occurred since Australia's Phase 3 report was adopted in October 2012.

Since September 2012, when amendments to the MA Act entered into force, Australia is able to register both conviction and non-conviction based proceeds of crime orders. Previously, Australia could only register non-conviction based proceeds of crime orders from countries specified in the regulations (namely the United Kingdom, United States, South Africa, Canada and Ireland). Action to register foreign proceeds of crime orders, or to take domestic proceeds of crime action in relation to property suspected of being the proceeds of a 'foreign indictable offence' (an offence punishable in the foreign country by a period of imprisonment of more than 12 months) is undertaken by the AFP-led Criminal Assets Confiscation Taskforce.

While proceeds of crime action in Australia is a civil proceeding, under the MA Act Australia can only register a foreign order that relates to alleged criminal offending. As previously detailed, Australia may decide to allow evidence gathered in relation to a criminal investigation or proceeding under the MA Act to also be used in related civil or administrative proceedings against the company. Since the publication of the Phase 3 report, Australia has not received any MARs seeking assistance for the purpose of foreign bribery-related civil or administrative proceedings against a legal person.

Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery

Text of recommendation :

12. With respect to awareness-raising, the Working Group recommends that Australia:

- a) Raise awareness of the foreign bribery offence among State-level law enforcement authorities involved in investigating economic crime (2009 Recommendation III.i);

Action taken as of the date of the follow-up report to implement this recommendation:

The AFP contributes to this recommendation through participation on inter-agency law enforcement forums and presenting on the AFP's foreign bribery investigation framework. Additionally, the AFP has formally written to state and territory law enforcement agencies to raise awareness of the offence of foreign bribery and that it should be reported to the AFP. The AFP informed states and territories about the Foreign Bribery Panel of Experts, the FAC Centre and the role that the AFP plays in the investigation of foreign bribery. Further information has been provided detailing the AFP's foreign bribery reporting protocols and relevant website links for members of the public to report foreign bribery.

This engagement with state and territory police forces has resulted in intelligence from a state police force, which led to a current investigation.

AGD has also raised the issue with State and Territory police through the Australia New Zealand Policing Advisory Agency (ANZPAA) Crime Forum meeting in May 2014. The ANZPAA Crime Forum is responsible for developing consistency, coordination and alignment across policing in Australia and New Zealand, and consists of senior police representatives from all Australian jurisdictions and New Zealand (Assistant Commissioner level) and the Commonwealth AGD.

Text of recommendation :

12. With respect to awareness-raising, the Working Group recommends that Australia:

- b) Continue to raise awareness among the private sector of the foreign bribery offence and the importance of developing and implementing anti-bribery corporate compliance programmes, including by (i) promoting Annex II of the 2009 Recommendation, (ii) targeting companies (particularly SMEs) that conduct business abroad, and (iii) co-ordinating efforts to promote corporate compliance, including those undertaken by the AFP (2009 Recommendation III.i, III.v, X.C and Annex II);

Action taken as of the date of the follow-up report to implement this recommendation:

Australia has continued to raise awareness of the foreign bribery offence and the importance of effective corporate compliance programs. These efforts place a focus on reaching companies operating overseas (particularly small to medium enterprises which may not have as developed internal governance and compliance mechanisms). Annex II of the 2009 Recommendation is promoted in our outreach efforts.

Details on agencies' recent outreach activities are below:

The Attorney-General's Department (AGD)

AGD plays a key role in Australia's outreach efforts in relation to foreign bribery, and coordinates with other agencies to ensure consistent messaging. This includes organising joint presentations to provide a strong, unified message to industry on Australia's zero tolerance approach to foreign bribery and other forms of corruption. AGD has also led the development of the online learning module, discussed in further detail in the response to recommendation 2(a).

A list of outreach activities undertaken by AGD is attached (Annex 4).

The Department of Foreign Affairs and Trade (DFAT)

DFAT seeks to ensure that Australian businesses are aware of their obligations under Australian anti-bribery laws and continues to conduct outreach activities to the private sector about these laws. This program outlines the Australian Government's zero tolerance approach to foreign bribery, discusses the distinction between facilitation payments and bribes, and encourages any Australian individuals or entities unable to repel a corrupt approach through their own efforts, to contact the relevant Australian diplomatic mission for assistance.

DFAT's outreach activities target a broad audience, including industry, small and medium enterprises, legal and accounting professionals, financial institutions, universities and relevant Commonwealth and State Government departments. Outreach is conducted in a variety of formats, including DFAT-hosted events, in partnership with non-government or private sector organisations, individual briefings, and as keynote conference speakers. In 2014, DFAT-hosted private sector outreach events in Brisbane, Sydney, Melbourne and Hobart, and is planning similar events in Adelaide, Darwin and Perth in early 2015. DFAT's website also includes a page outlining Australia's measures against corruption.

The Australian Federal Police (AFP)

The AFP continues to support multi-agency activities, and responds to requests from special interest groups for presentations. This support will be further developed through the FAC Centre.

The AFP is routinely represented at various forums to raise awareness of the offence of foreign bribery such as:

- Non-Executive Directors-Clayton Utz Breakfast – 19 March 2014
- Australian Fraud Summit – 30 April 2014
- ICAA/AFAANZ Business Forum 2014 – 14 May 2014
- United Nations Global Compact /Allens – 4 and 13 June 2014
- Vietnamese Anti-Corruption Program – 10 June 2014
- 4th Annual National Public Sector Fraud and Corruption Congress – 31 July 2014
- Deloitte Australia bribery and corruption panels in Melbourne and Brisbane – July and August 2014
- Queensland Police Fraud and Cyber Crime Symposium – 26 August 2014
- Vietnamese Anti-Corruption Program – 30 September 2014

The AFP Foreign Bribery Fact Sheet, available online, has been sent out to all AFP overseas posts for distribution during business events. Foreign Bribery material is also distributed during UN Anti-Corruption day events.

The Australian Securities and Investments Commission (ASIC)

ASIC has presented at various forums including jointly presenting with the AFP and AGD (eg United Nations Global Compact/Allens forum) to raise awareness of foreign bribery and ASIC's role in

investigating alleged contraventions.

In late October 2014, ASIC attended and presented with the AFP at the US Securities and Exchange Commission-hosted Foreign Bribery and Corruption Conference in Washington DC.

The Australian Trade Commission (Austrade)

In 2012, Austrade developed a targeted outreach program for Australian businesses. The program clearly articulates what bribery is, the legal issues surrounding facilitation payments, the risks to businesses in using foreign agents, and that Austrade will not provide services when bribery is suspected, and is obliged to report these instances to Australian authorities. The sessions include discussions of possible changes to Australian law regarding facilitation payments, challenges businesses often experience in different jurisdictions, and the effect of other extraterritorial and local legislation.

The outreach program has been delivered via Austrade's overseas offices to Australian chambers of commerce and local business councils in eleven high risk/low governance locations where Austrade operates an office, consistent with Transparency International's Corruption Perceptions Index 2013. Delivery of this program will continue in 2015.

In addition to its outreach program, Austrade works to ensure its staff are aware of the law and of their obligations. Austrade staff located in-market are asked to continue informing Australian businesses 'on the ground' on ethical business practice. As part of the staff awareness program, Austrade officers have received refresher training on anti-bribery. This program also contains practical advice on:

- how to deal with competitive Government tenders
- raising awareness of behaviour that may lead to corrupt practices
- raising awareness of Austrade's gift policy and hospitality limits
- how to deal with clients seeking advice on making facilitation payments
- how to deal with foreign public officials, and
- the qualification and referral of agents.

In addition, Austrade has updated its anti-bribery checklist and circulated it to all Austrade staff.

Austrade has conducted its outreach program, within Australia and overseas, in collaboration with various Australian Government agencies and other organisations including DFAT, the AFP, Treasury, AGD, the Department of Defence, Transparency International, and law societies.

The outreach program is conducted in a variety of formats including Austrade-hosted events and in partnership with non-government or private sector organisations. The outreach program is regularly delivered to businesses and industry representatives through local Australian chambers of commerce chapters overseas in conjunction with representation from industry. Austrade has also, on invitation, provided keynote conference speakers. Bespoke presentations to business have also been delivered to address anti-bribery and corruption issues including to major banks, mining companies and Australian education institutions.

Austrade has also prepared a generic anti-bribery governance package for business to be made available on local Australian chambers of commerce websites for the benefit of members. This package is consistent with OECD better practice guidance and includes policies and practical information on implementing an anti-corruption program, steps to set the tone of an organisation from the top, conducting training (with sample materials), steps to minimise demands for bribes, reporting procedures, ethics training and suggested practice in monitoring key roles and maintaining documentation. This has been positively received by Australian business with feedback that it is useful, particularly to those businesses

with underdeveloped compliance programs.

Australian and overseas outreach will continue throughout 2015.

Australian Taxation Office (ATO)

The ATO focuses on bribes and facilitation payments as part of its compliance activities, with the intention of ensuring that only legitimate expenses are claimed as deductions. This includes:

- reviewing significant, one-off, regular or embedded payments by Australian businesses to entities in jurisdictions where bribes and facilitation payments are known to be 'part of doing business'
- checking that businesses with particular international trade profiles have appropriate codes of conduct and systems in place to detect bribes and confirm facilitation payments, and
- reviewing organisations that do not have appropriate systems in place

The ATO also works with businesses on the issue of bribes and facilitation payments. The cornerstone of this work is boosting self-regulation and enhancing governance processes that help identify risks before they eventuate. The ATO strongly recommends to businesses that they have a code of conduct across the business relating to bribes, have a strong internal audit function and audit committee, and act to rectify any relevant internal control weaknesses identified and reported to the board by external auditors.

The ATO has also prepared a publication for businesses, *Bribes and facilitation payments: A guide to managing your tax obligations*, which is available on the ATO website. This publication provides practical guidance to businesses, including suggested initiatives that company boards can put in place and suggestions to help businesses meet their obligations under the law. This publication complements the OECD publication, *OECD Bribery Awareness Handbook for Tax Examiners*, and builds on advice from Transparency International.

The Export Finance and Insurance Corporation (EFIC)

EFIC also contributes to Australia's effort to raise awareness among the private sector of the foreign bribery offence and the importance of developing and implementing anti-bribery corporate compliance programs.

In advance of providing a facility to a customer, EFIC generally requires that the customer sign a form declaring that to their best of their knowledge, they (or any of their employees or agents) have not engaged in corrupt activity in relation to any "relevant matter" (meaning the application to EFIC or the transaction/agreement/arrangement to be supported by Efic), or are currently under charge or have been convicted for violation of laws against bribery of foreign public officials of any country.

All EFIC customers are referred to EFIC's Anti-Corruption Initiatives, available on its website at: (www.EFIC.gov.au/corp-responsibility/Pages/anticorruptioninitiatives.aspx). Multinational customers are also referred to the OECD Guidelines for Multinational Enterprises published by EFIC and available on its website at: (www.EFIC.gov.au/corp-responsibility/Pages/Guidelinesformultinationalenterprises.aspx).

In addition:

- EFIC's contractual terms require the customer to disclose to EFIC if they become aware of corrupt activity, including foreign bribery, in connection with the contract (including any transaction, agreement, arrangement or event contemplated by, or referred to in, the application for financial assistance), and
- Specific references to foreign bribery in relevant documents (including the finance

documents), EFIC provides clarity to its clients that there are serious consequences for engaging in foreign or domestic bribery or corruption.

Text of recommendation :

12. With respect to awareness-raising, the Working Group recommends that Australia:

- c) Consider summarising publicly available information on when hospitality, promotional expenditure, and charitable donations may amount to bribes (2009 Recommendation III.i and X.C);

Action taken as of the date of the follow-up report to implement this recommendation:

The online learning module on foreign bribery (mentioned in response to recommendation 2(a)) will summarise the publicly available information on reasonable hospitality. As Australia does not have any case law in this area, it is difficult to provide advice on what may constitute a bribe in certain circumstances. The module also directs to the relevant advice documents for the US and UK, noting the extraterritorial application of their laws. The AFP Foreign Bribery Fact Sheet also addresses aspects of this and is available on the AFP website.

Text of recommendation :

12. With respect to awareness-raising, the Working Group recommends that Australia:

- d) Adopt a “whole-of-government” approach to raise awareness of foreign bribery (2009 Recommendation III.i).

Action taken as of the date of the follow-up report to implement this recommendation:

Noting that many Australian agencies have an interest in foreign bribery matters and conduct outreach, Australia has adopted a whole-of-government approach to awareness raising. As the lead policy agency in relation to foreign bribery, AGD leads this whole-of-government approach. This includes ensuring that messaging does not conflict and identifying opportunities for joint presentations.

In June 2014, AGD convened an inter-agency roundtable meeting to discuss foreign bribery, which included representatives from the AFP, ASIC, Treasury, CDPP, Austrade and DFAT. At this meeting, agencies discussed on opportunities to collaborate on outreach activities. Agencies regularly engage at the working level on prospective outreach activities.

Joint awareness-raising activities help convey the respective roles of the agencies involved in Australia’s response to corruption and foreign bribery. In June 2014, the UN Global Compact Network Australia hosted four presentations (two in Sydney, two in Melbourne) by an anti-corruption regulatory panel featuring the AFP, AGD and ASIC at the offices of international law firm Allens Linklaters.

The AFP, AGD, DFAT and the New Zealand Serious Fraud Office co-presented on a foreign bribery panel at the C5 Anti-Corruption Conference on 29 April 2013.

As noted above in Austrade’s response to recommendation 12(b), Austrade conducted its 2014 Outreach Program in collaboration with a range of other agencies including DFAT, the AFP, Treasury and

AGD. Austrade is also collaborating with the Department of Defence in anti-corruption awareness training.

Text of recommendation :

13. With respect to anti-money laundering measures, the Working Group recommends that Australia further raise awareness of foreign bribery as a predicate offence, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies (2009 Recommendation III.i).

Action taken as of the date of the follow-up report to implement this recommendation:

The Australian Transaction Reports and Analysis Centre (AUSTRAC) provides information circulars to regulated entities, which provide information on issues that may affect their business or their compliance with anti-money laundering and counter-terrorism financing obligations.

AUSTRAC updated their information circular on Bribery of Foreign Public Officials in March 2014. This is available online at http://www.austrac.gov.au/files/aic42_bribery_foreign_public_officials.pdf.

The updated circular notes that foreign bribery is a predicate offence, as per the extract below:

‘Bribery of a foreign public official can also trigger criminal charges for money laundering, under Division 400 of the Criminal Code. Any benefit obtained from a bribe may be considered “proceeds of crime” and property offered, or intended to be offered, as a bribe may be considered an “instrument of crime”. Any person who knowingly, recklessly or negligently deals with proceeds or instruments of crime may be liable under Division 400 of the Criminal Code for committing a money laundering offence.’

In addition, a statement has been posted on the AUSTRAC website dealing with bribery of foreign public officials, available online at: http://www.austrac.gov.au/our_partners.html.

AUSTRAC is currently developing a typologies brief on foreign bribery. The typologies brief includes information on the offence of foreign bribery and sets out various money laundering methods and indicators that could involve foreign bribery

As part of its outreach activities, the AFP is preparing presentations for financial institutions which provide a detailed breakdown of the offence, information about related offences such as money laundering, case studies and an explanation of how the financial industry is exposed to foreign bribery risks. This is the most effective method the AFP can contribute to generating awareness among reporting entities of the offence of foreign bribery and its role as a predicate offence to money laundering. In this way the AFP supports (but not duplicate) AUSTRAC’s efforts.

Text of recommendation :

14. With respect to tax-related measures, the Working Group recommends that:

- a) Australia align the record-keeping requirements for deducting a facilitation payment under the ITAA 1997 with those for the facilitation payment defence under the Criminal Code Act (2009 Recommendation VI.ii, VIII.i; 2009 Tax Recommendation I.i);

Action taken as of the date of the follow-up report to implement this recommendation:

No action to implement this recommendation.

If no action has been taken to implement recommendation 14(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Australia will continue to consider this recommendation. At present, other tax measures announced by the Australian Government have taken priority over the alignment of record-keeping requirements.

Text of recommendation :

14. With respect to tax-related measures, the Working Group recommends that:

- b) The AFP promptly inform the ATO of foreign bribery-related convictions so that the ATO may verify whether bribes were impermissibly deducted (2009 Recommendation VIII.i; 2009 Tax Recommendation I.i);

Action taken as of the date of the follow-up report to implement this recommendation:

This had not yet had to occur, as Australia's first foreign bribery prosecutions are currently being tried. However, the AFP and ATO have put in place appropriate frameworks to ensure the prompt communication of matters relating to foreign bribery.

The ATO is a member of the AFP-hosted FAC Centre which facilitates close liaison on financial crime, including foreign bribery. The importance of early liaison with the ATO will also be included as part of the AFP's Foreign Bribery Investigations Workshop.

Text of recommendation :

14. With respect to tax-related measures, the Working Group recommends that:

- c) The ATO consider including periodically bribery and facilitation payments in its Compliance Programme (2009 Recommendation III.i, VIII.i; 2009 Tax Recommendation I.ii).

Action taken as of the date of the follow-up report to implement this recommendation:

The ATO has considered this recommendation. The format, content and size of the ATO annual Compliance Program has changed significantly since the recommendation was made. The publication, now known as *Compliance in Focus*, contains only the highest priority risks and is updated as new risks emerge throughout the year. The inclusion of content related to incorrect claiming of deductions related to bribery and facilitation payments will be determined by the assessment of the likelihood and consequence of it happening relative to other risks.

Text of recommendation :

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- a) Australia extend the reporting obligation of external auditors under the Commonwealth Corporations Act to cover the reporting of foreign bribery, including foreign bribery committed by an audited company's subsidiary or joint venture partner (2009 Recommendation III.iv, X.B.v);

Action taken as of the date of the follow-up report to implement this recommendation:

Australia's audit reporting requirements are contained in Chapter 2M of the *Corporations Act 2001*. Statutory audit requirements are supplemented by Australian Auditing Standards (ASA) that are developed with reference to international audit standards and the international audit reporting framework more broadly.

If no action has been taken to implement recommendation 15(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

While Australia will continue to consider this recommendation, the Australian Government is currently focused on other efforts to reduce the regulatory burden for individuals, businesses and community organisations.

Text of recommendation :

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- b) Australia align the APS Guide with its practice of requiring Australian civil servants who work overseas to report suspicions of foreign bribery to the AFP in all cases (2009 Recommendation IX.ii);

Action taken as of the date of the follow-up report to implement this recommendation:

The *Public Service Act 1999* (s.13(11)) requires APS employees to report misconduct (including foreign bribery) by public servants to uphold the APS Values.

The Australian Public Service Commission's (APSC) current guidance on this issue is contained within the publication *APS Values and Code of Conduct In Practice* (copy available here: <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice>). This sets out the guide to official conduct for Australian Public Service (APS) employees and agency heads. It applies to APS employees working overseas.

The publication notes the following in relation to foreign bribery:

Employees should also note that, consistent with Australia's obligations under the OECD Convention on the Bribery of Foreign Public Officials in International Business Transactions, under section 70.2 of the Criminal Code it is an offence to bribe a foreign public official, whether in Australia or in

another country. An Australian in another country who bribes or attempts to bribe an official of that country can be prosecuted for bribery in an Australian court.

Such an offence has a maximum penalty of 10 years imprisonment.

Where an employee becomes aware of information which they suspect relates to the bribery of a foreign public official by another employee, consistent with their obligations under the APS Values and Code of Conduct to behave ethically, honestly and with integrity, they should report the information in accordance with their agency's instructions on reporting breaches of the Code of Conduct (see Chapter 17: Whistleblowing). If the information relates to a person who is not an APS employee, the employee should discuss the matter with an appropriate senior person in their agency to determine the most appropriate course of action, including reporting the matter to the Australian Federal Police.

More information is available on the AGD website at Foreign Bribery Offences.

In relation to APS employees working overseas, AFP liaison officers in overseas posts have been provided with a fact sheet and presentation on the AFP's role in combating foreign bribery. AFP liaison officers are well placed to receive referral and intelligence of this nature. In the past six months, the FAC Centre has already received a referral and intelligence from overseas posts.

Text of recommendation :

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- c) Australia ensure that Australian public servants, and officials and employees of independent statutory authorities are subject to equivalent reporting requirements (2009 Recommendation IX.ii);

Action taken as of the date of the follow-up report to implement this recommendation:

As per response to recommendation 15(b), above, the APS Values and Code of Conduct apply to employees and heads of statutory and executive agencies employed under the *Public Service Act 1999*..

Text of recommendation :

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- d) Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable grounds from discriminatory or disciplinary action (2009 Recommendation IX.iii);

Action taken as of the date of the follow-up report to implement this recommendation:

Australia has appropriate reporting channels and protections for whistleblowers in both the public and private sectors.

Public sector whistleblower protection

Within the Australian Commonwealth public sector, the *Public Interest Disclosure Act 2013* (PID Act) promotes integrity and accountability by encouraging the disclosure of information about suspected wrongdoing, protecting people who make disclosures, and requiring agencies to take action. Wrongdoing is broadly defined in the PID Act as ‘disclosable conduct’, which includes a contravention of a law, abuse of public trust and corruption. The PID Act applies across the Australian Government public sector, and commenced on 15 January 2014.

The scheme provides that disclosures will be made and investigated within Government. A public official can make a disclosure outside Government where the requirements are met. External disclosures must not divulge intelligence information.

The Commonwealth Ombudsman is responsible for promoting awareness and understanding of the PID Act, and monitoring and reporting on its operation to Parliament. The Ombudsman also provides general information, guidance to agencies about their management of the PID scheme, and advice to people who are thinking about making a disclosure of wrongdoing. Details on the implementation on the PID Act are covered in follow-up item 17(j), below.

The PID Act gives effect to the Guiding Principles for legislation set out in the G20 Study on Whistleblower Protection Frameworks.

All Australian states and territories have public interest disclosure or whistleblower protection legislation which sets out protection arrangements within their jurisdiction. These laws vary in the reporting channels available to whistleblowers, in the range of protections provided, in who can make a protected disclosure and in the types of conduct covered.

Private sector whistleblower protection

Provisions in the *Corporations Act 2001* and ASIC’s organisational approach to dealing with whistleblowers provide reporting channels for corporate whistleblowers.

The whistleblower protections in Pt 9.4AAA of the Corporations Act include protection from any civil liability, criminal liability or the enforcement of any contractual right that arises from the disclosure, as well as the prohibition against victimisation of whistleblowers, and the right to seek compensation if damage is suffered as a result of the disclosure.

A ‘corporate whistleblower’ is a person working in the private sector who makes a disclosure about a company that he or she works for, where a suspected contravention has occurred. Corporate whistleblowers may be able to access protections under Pt 9.4AAA of the Corporations Act, and similar protections in relation to financial institutions are available under the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995* and the *Superannuation Industry (Supervision) Act 1993*.

Access to protections under Pt 9.4AAA is available where the whistleblower is a current officer, employee or contractor of the company about which they are making the disclosure, and where the disclosure is made to:

- ASIC
- the company’s auditor or audit team
- a director, secretary or senior manager of the company, or
- a person authorised by the company to receive whistleblower disclosure.

Furthermore, protections apply where:

- the whistleblower reveals their identity in making the disclosure
- the disclosure is made in good faith, and
- the disclosure relates to a suspected contravention of the Corporations Act, *Australian Securities and Investments Commission Act 2001* (ASIC Act) or associated regulations.

Where a report of misconduct is made outside these requirements, no statutory protection is available. However, ASIC provides additional reporting channels at an organisational level as part of its approach to dealing with whistleblowers. That approach includes:

- maintaining a coordinated, centralised procedure for the tracking and monitoring of all whistleblower reports
- giving appropriate weight to the inside nature of the information provided by whistleblowers in its assessment and ongoing handling of the matter
- providing prompt, clear and regular communication to whistleblowers to the extent possible and appropriate during investigations, and
- maintaining the confidentiality of whistleblowers within the applicable legal framework.

ASIC has extended this approach to persons who do not fall within the definition of whistleblower under the Corporations Act, but who still have inside information (for example, because they are no longer employed at the company about which they are making the disclosure, or because they make the disclosure anonymously).

Australia's whistleblower protections meet Australia's international obligations in related areas, including its commitments to the G20.

While Pt 9.4AAA does not impose any specific or general obligations on a person to disclose contraventions, company auditors must notify ASIC about matters that they have reasonable grounds to suspect amount to a contravention of the Corporations Act. This obligation exists for 'significant' contraventions, as well as contraventions that are not significant, but that the auditor believes have not or will not be adequately dealt with.

Office of the Whistleblower to be created

On 26 June 2014, the Senate Economics References Committee issued its report on its inquiry into ASIC's performance. This report made a number of recommendations in relation to the whistleblower protection in the *Corporations Act 2001*. Notably, the Committee recommends that the Government initiate a review of the adequacy of Australia's current framework for protecting corporate whistleblowers, with a view to:

- updating them to make them generally consistent with and complementary to the protections afforded to public sector whistleblowers under the *Public Interest Disclosure Act 2013*, and
- amending the legislation to expand the definition of a whistleblower and expand the scope of information protected by Part 9.4AAA to cover any misconduct that ASIC may investigate, rather than merely breaches of the *Corporations Act 2001*.

The Government has tabled its response to the Committee's report (available online here:

<http://www.financeminister.gov.au/media/2014/docs/Austrn-gov-response-senate-economics-references-committee%20report.pdf>).

The Government noted the recommendations relating to whistleblower protections

(recommendations 12-16). ASIC has agreed to establish an Office of the Whistleblower, which will monitor the handling of all whistleblower reports, manage staff development and training and handle the relationship with whistleblowers on more complex matters. The Office will build on improvements that ASIC has made to whistleblower arrangements through the adoption of a centralised monitoring procedure.

Text of recommendation :

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- e) AusAID expressly require that all foreign bribery allegations involving Australian nationals, residents and companies are always reported to the AFP; and train its employees on this reporting obligation and procedure (2009 Recommendation IX.ii);

Action taken as of the date of the follow-up report to implement this recommendation:

Following the 2013 federal election, the Australian Agency for International Development (AusAID) has been integrated into DFAT.

DFAT officials are under an obligation to report all allegations of extra-territorial offences committed by Australian citizens, permanent residents or companies, including information they receive about bribes paid to foreign public officials. Information regarding allegations of the foreign bribery offence are reported to the Transnational Crime Section within DFAT and referred to the AFP. DFAT refers all allegations of the foreign bribery offence which it becomes aware of to the AFP FAC Centre.

DFAT has formalised and clarified these obligations and reporting procedures through a number of policy documents, including Administrative Circular P1197 – Australian extraterritorial offences and the responsibility to report; Administrative Circular P1179 – DFAT guidance and procedures for dealing with fraud; and a Fraud Policy Statement (copies can be provided if required).

DFAT staff receive training regarding the foreign bribery offence both as part of their initial induction training and prior to undertaking any overseas posting. DFAT has also provided training for staff working overseas through regional training programs.

DFAT has a dedicated team responsible for the management and oversight of external fraud within the Australian aid program. DFAT staff are provided with technical advice and training to support the effective identification and management of fraud and corruption.

Text of recommendation :

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- f) Austrade consider taking concrete steps to encourage companies, in the strongest terms, to conduct due diligence on agents, including those referred to them by Austrade (2009 Recommendation X.C.i).

Action taken as of the date of the follow-up report to implement this recommendation:

Austrade's outreach program targets Australian businesses operating in high risk locations. Austrade also takes steps to ensure its staff is aware of the law and of their obligations.

Austrade's outreach program clearly states what Austrade can and cannot do to assist Australian businesses operating overseas. Austrade advises it will only provide referrals within tightly established processes and that Australian businesses are to conduct their own due diligence when considering using foreign agents, suppliers, or distributors, before they engage them for in-market assistance. A disclaimer on conducting due diligence is also a standard term in the provision of all Austrade's services to Australian businesses.

Austrade reminds Australian businesses that culpability for the crime of bribery operates through the whole chain-of-command, from agents to principal, that local laws apply to the foreign agent, and that the AFP does not distinguish between the illegal activities of agents and those who instruct them.

Finally, Austrade emphasises that each Australian business must ensure that any agent it engages must have anti-bribery and corruption training comparable to that given to the business' Australian employees, as part of its obligation to integrate staff, agents and contractors into a consistent compliance program.

In late 2012, PwC undertook a review of Austrade's current policies and practices related to referring Australian businesses to agents (see Annex 5). The review assessed better practice in a number of overseas markets and provided recommendations to Austrade of changes or enhancements to Austrade's operations in relation to maintaining an effective anti-corruption program (including for the use of agents).

The recommendations included:

1. Policies and procedures are in place, communicated to staff and third parties (including through training), and monitored effectively
2. There is clear and visible support from the top for active management of risk arising from the use of agents
3. Risk assessments are up to date and mitigation strategies are in place, including appropriate controls
4. Compliance with policies and procedures is regularly reported to senior management
5. All contracts with third parties (e.g. clients, agents) include appropriate provisions for mutual obligation and expectations, e.g. level of due diligence to be performed by clients on third party providers
6. The use of agents risk management framework is tested regularly and updated to align with changing practices

Austrade can report sound progress against each recommendation, as detailed in the document attached (Annex 5).

Text of recommendation :

16. With respect to public advantages, the Working Group recommends that:

- a) Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals that have been convicted of foreign bribery (Convention Article 3(4); 2009 Recommendation XI.i);

Action taken as of the date of the follow-up report to implement this recommendation:

No action to implement this recommendation.

If no action has been taken to implement recommendation 16(a), please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Australia will continue to consider this recommendation. At present, no specific measures are being progressed to implement recommendation 16(a).

Text of recommendation :

16. With respect to public advantages, the Working Group recommends that:

- b) EFIC (i) conduct due diligence on agent commission fees below 5% of large absolute value to ensure funds are not being provided as bribes; (ii) report all credible allegations of foreign bribery involving Australian nationals, residents and companies to the AFP, and not consider the CCPM when deciding whether to report these cases; and (iii) reduce to writing its criteria and guidelines for terminating support to entities involved in foreign bribery (2009 Recommendation XII.ii; 2006 Export Credit Recommendation).

Action taken as of the date of the follow-up report to implement this recommendation:

- i) Conduct due diligence on agent commission fees:

EFIC has amended its procedures so that it requests the name and address of agents used in connection with the contract. EFIC then conducts due diligence on all agent commission fees, regardless of value. For project finance transactions where there may be an extremely large number of persons acting on the borrower's behalf and it is not feasible to request the name and address of all agents, EFIC has the right to request the name of such persons and the amount and purpose of commissions paid or payable to such persons. EFIC exercises this right using a risk-based approach.

- ii) Report credible allegations of bribery to the AFP:

EFIC has amended its procedures so that it reports all credible allegations of foreign bribery to the AFP and does not consider the CCPM in deciding whether to refer these cases to the AFP. The AFP Panel of Experts reviewed EFIC's anti-bribery policies and procedures and provided advice which assisted EFIC develop the policies and procedures to better address allegations of Foreign Bribery.

- iii) Document its guidelines for terminating support to entities involved in foreign bribery:

EFIC has amended its procedures to document the circumstances in which it will terminate support in a transaction involving bribery.

PART II: ISSUES FOR FOLLOW-UP BY THE WORKING GROUP

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (a) Outcome of Australia's public consultation on the facilitation payment defence and foreign bribery offence (Convention Article 1);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

From November 2011 to February 2012, the former Australian Government conducted public consultation on the possibility of removing the 'facilitation payment' defence to the Commonwealth offence of bribing a foreign public official. The 15 submissions received indicate that stakeholder views are split on the issue of whether to retain the facilitation payments defence. The previous Government did not make a decision to maintain or repeal the defence before the September 2013 federal election.

The facilitation defence is under active consideration by the current Government but there is no timeframe on any possible law reform at this stage.

In line with our obligations under the OECD Convention and 2009 Recommendation, Australia continues to actively discourage individuals and businesses from making facilitation payments, as discussed in the response to recommendation 2(a).

As noted in the responses to recommendations 2(b) and 4(a), Australia is currently considering legislative amendments in relation to the foreign bribery offence. These amendments would:

- clarify that the legislation operates to not require proof of an intention to bribe a particular official to establish the foreign bribery offence, and
- introduce a new false accounting offence, noting the offence introduced by Canada in response to a similar recommendation from the OECD Working Group.

AGD is aiming for these amendments to be presented to Parliament in 2015.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (b) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under

section 70.4(3) of the Commonwealth Criminal Code (Convention Article 1; Commentary 9);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The facilitation payment defence has not been raised in any foreign bribery criminal proceedings. As per the response to recommendation 2(a), Australian agencies provide advice on facilitation payments as a part of all outreach activity, and actively discourage Australian businesses from relying on this defence, noting the business risks involved.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (c) Whether the foreign bribery offence requires the proof of an intention to bribe a particular foreign public official (Convention Article 1);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

No new case law on this issue. As noted in the response to recommendation 2(b) above, a legislative amendment is being progressed to address this.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (d) Whether effective, proportionate and dissuasive sanctions (including confiscation) are imposed against natural and legal persons for (i) foreign bribery, and (ii) false accounting in connection with foreign bribery (Convention Articles 3(1), 3(3), 8(2));

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Australia's first foreign bribery prosecutions are currently before the courts.

On 20 August 2012, David Ellery, a former Chief Financial Officer of Securrency, was sentenced to six months imprisonment (suspended for two years) after pleading guilty to one count of false accounting, contrary to section 83(1) of the *Crimes Act 1958* (Vic).

In December 2007, ASIC commenced civil penalty proceedings in the Supreme Court of Victoria against six defendants for alleged breaches of their duties as directors and officers of AWB Limited. The proceedings arose from investigations conducted by ASIC following the completion of the Inquiry into certain Australian companies in relation to the UN Oil-For-Food Program that had been established by the

Australian Government.

While some aspects are still before the courts, the following outcomes have been achieved:

- In August 2012, Andrew Lindberg, the former Managing Director of AWB was disqualified from managing corporations for two years and ordered to pay a pecuniary penalty of \$100,000.
- In March 2013, Paul Ingleby, the former Chief Financial Officer of AWB was disqualified from managing corporations for 15 months and ordered to pay a pecuniary penalty of \$40,000.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (e) Choice of proceeding in foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive (Convention Articles 3, 5);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Australia's first foreign bribery prosecutions are currently being prosecuted on indictment in the Supreme Court of Victoria, which is the highest trial court in Victoria.

The prosecutions resulted from a major investigation into the activities of Securrency International Pty Ltd (Securrency) and Note Printing Australia Limited (NPA) in marketing Australian banknote technologies overseas. It is alleged that Securrency, NPA and a number of their employees used agents to engage in bribery of foreign public officials in countries that purchased a polymer substrate which is used in the process of printing money. Some of the alleged offending dates back to 1999.

By virtue of section 4J of the *Crimes Act 1914* (Cth), an offence against section 70.2 of the *Criminal Code* ('Bribing a foreign public official') is an indictable offence which may be also dealt with summarily. In determining the mode of trial in a particular matter, the CDPP will apply the principles set out in the *Prosecution Policy of the Commonwealth* (paragraphs 6.11–6.13).

Paragraph 6.12 states that:

'In determining whether or not a case is appropriate for trial on indictment regard should be had to:

- a. the nature of the case, and whether the circumstances make the alleged offence one of a serious character
- b. any implied legislative preference for a particular mode of trial
- c. the adequacy of sentencing options and available penalties if the case were determined summarily
- d. any delay, cost and adverse effect upon witnesses likely to be occasioned by proceeding on indictment
- e. in situations where a particular type of criminal activity is widespread, the desirability of a speedy resolution of some prosecutions by proceeding summarily in order to deter similar breaches
- f. the greater publicity, and accordingly the greater deterrent effect, of a conviction obtained on

indictment

as well as such of the criteria relevant to the decision whether to prosecute as appear to be significant.’

Given the serious nature of the offence under s70.2, the CDPP anticipates that foreign bribery matters would almost always proceed on indictment. (It may be different where the CDPP determines that the available, admissible evidence is incapable of establishing an offence against s70.2 and a lesser summary charge is the only viable alternative.)

Given that Australia’s foreign bribery prosecutions are all still on foot and subject to suppression orders, it is not appropriate to comment further.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (f) Work of the AFP Foreign Bribery Panel of Experts, including the implementation of recommendations that the AFP (i) be more proactive in gathering information from diverse sources at the pre-investigative stage; (ii) ensure that future foreign bribery investigations consistently consider the involvement of related legal persons, and alternate charges such as money laundering and false accounting; and (iii) the implementation of the *aide mémoire* (Convention Articles 2, 5, 7, 8; 2009 Recommendation Annex I.C, I.D);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The AFP Foreign Bribery Panel of Experts has considered and is acting upon the recommendations directed at the AFP. In relation to the matters raised, relevant activities include the following.

- The Panel of Experts looks at daily media articles and monitors international forums for information pertaining to current and new allegations. Any reporting involving Australian entities is referred to the FAC Centre for consideration. An agency internal newsletter is generated by the Panel of Experts derived from media reporting.
- The Panel of Experts provides advice in the initial investigation planning processes to ensure relevant issues (including those mentioned in this follow-up item) are considered at the commencement and throughout an investigation.
- A Panel of Experts case officer is now assigned to each foreign bribery investigation, to ensure consistent and appropriate advice is provided to investigators.
- The Panel of Experts is developing a Foreign Bribery Investigators Reference Guide that includes the issues mentioned in this follow-up item.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (g) AFP’s statement to the Working Group in 2008 that they were “willing to undertake evaluations on suspected foreign bribery instances based on credible media reports, publicly available documents from foreign courts or mutual legal assistance requests” (Convention,

Article 5; Commentary 27; 2009 Recommendation Annex I.D);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

In addition to the measures mentioned in response to follow-up issue 17(f), the AFP advises that it has evaluated three matters that were identified by the AFP through media reporting, and a further matter as a result of identifying Australian interests through the receipt of a Mutual Legal Assistance Request.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (h) Whether the ATO re-assesses the tax returns of taxpayers convicted of foreign bribery (2009 Recommendation VIII.i; 2009 Tax Recommendation);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

As noted in the response to recommendation 14(b), the AFP and ATO have taken steps to ensure the prompt communication of foreign bribery matters. The ATO is a member of the AFP-hosted FAC Centre which facilitates communication relating to allegations of foreign bribery. Early liaison with the ATO was included as part of the Foreign Bribery Investigations Workshop held in October 2013.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (i) Reporting of foreign bribery cases by the ATO to the AFP (2009 Recommendation IX.ii);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

As noted in the response to recommendation 14(b), the AFP and ATO have taken steps to ensure the prompt communication on foreign bribery matters. The ATO is a member of the AFP-hosted FAC Centre which facilitates communication relating to allegations of foreign bribery. Early liaison with the ATO was included as part of the Foreign Bribery Investigations Workshop held in October 2013.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (j) Enactment and implementation of the Public Interest Disclosure Bill (2009 Recommendation IX.iii);

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

As noted in the response to recommendation 15(d), the PID Act has been passed by the Australian Parliament and commenced on 15 January 2014.

The PID Act confers a number of roles on the Commonwealth Ombudsman to ensure the scheme provides robust protections to public officials who report wrongdoing in the public sector. The office is responsible for promoting awareness and understanding of the Act and monitoring its operation; as well as providing guidance, information and resources about making, managing and responding to public interest disclosures.

Since the commencement of the Act, 48 of the 191 Commonwealth agencies covered by the scheme received one or more disclosure. Within those 48 agencies, 3782 disclosures were made by public officials, former public officials or people taken to be public officials.

The Ombudsman's Annual Report 2013-14 details the first six months of the scheme's operation. It is available online at: http://www.ombudsman.gov.au/pages/publications-and-media/reports/annual/ar2013-14/pdf/commonwealth_ombudsman_annual_report_1314.pdf.

Text of issue for follow-up:

17. The Working Group will follow up the issues below as case law and practice develop:

- (k) Application of EFIC's procedures in two cases that involve EFIC support and which is the subject of on-going foreign bribery investigations (2009 Recommendation XII.ii).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

This item relates to two cases referred to in para 158 of the Phase 3 report, about which EFIC was unable to comment at the time of the Phase 3 review.

The AFP is still conducting ongoing investigations into these matters. As such, EFIC is not in a position to discuss these matters in detail.

Under EFIC's procedures, and in accordance with the OECD Council Recommendation on Bribery and Officially Supported Export Credits, where bribery is proven in a transaction where EFIC has provided financial support, EFIC has the right, under its contractual provisions, to terminate the transaction and will do so in a manner that is not prejudicial to the rights of parties not responsible for illegal payments.

ANNEX 1: AFP MEDIA RELEASE



**The Hon Michael Keenan MP
Minister for Justice**

MEDIA RELEASE

31 July 2014

AFP-HOSTED FRAUD AND ANTI-CORRUPTION CENTRE

The Coalition Government has formally established the Fraud and Anti-Corruption (FAC) Centre located in the Australian Federal Police (AFP) headquarters, with the recent signing of a Commonwealth multi-agency Memorandum of Understanding – marking a new era in the approach to dealing with fraud and corruption at a federal level.

The FAC Centre brings together the Australian Taxation Office, Australian Securities and Investments Commission, Australian Crime Commission, Australian Customs and Border Protection Service, Department of Human Services, Department of Immigration and Border Protection, Department of Defence, and Department of Foreign Affairs and Trade in order to assess, prioritise and respond to serious fraud and corruption matters.

The FAC Centre has been designed to triage and evaluate serious and complex fraud and corruption referrals to deliver an effective Commonwealth multi-agency response when serious concerns are raised.

The FAC Centre will be resourced by the AFP, with partner agencies all contributing seconded members with relevant areas of expertise. It will deliver whole-of-government fraud training through a joint training team.

AFP FAC investigation teams are also based in Melbourne, Sydney, Canberra, Brisbane and Adelaide. They will investigate serious and complex fraud, corruption and foreign bribery matters, including identity crimes.

Partner agencies will work to prioritise the most effective and appropriate investigative response to allegations of fraud and corruption matters. This will ensure that serious fraud and anti-corruption issues are dealt with in the most effective manner.

The FAC Centre will also engage existing intelligence resources, such as the Australian Crime Commission's National Criminal Intelligence Fusion Capability, drawing on specialists, data and analytics to develop fraud-related intelligence.

The establishment of the FAC Centre is consistent with the Government's zero tolerance approach to corruption in all its forms – seen most recently the establishment of Task Force Pharos which is targeting

hidden corruption in the Australian Customs and Border Protection Service, and the establishment of the Royal Commission into Trade Union Governance and Corruption.

We are proud of Australia's position and reputation – consistently ranked by Transparency International as one of the least corrupt countries in the world. This announcement further enhances our ability to prevent and respond to serious fraud and corruption at the Commonwealth level.

Media contact: Emily Broadbent 0400 390 008

ANNEX 2: AFP – REGIONAL PRESENTATIONS ON FOREIGN BRIBERY

Guangzhou, China

- Presented on Foreign Bribery to the Australian/China business communities in Shenzhen and Guangzhou through the Australian Chamber of Commerce.
- Provided the Foreign Bribery Fact Sheet to Department of Foreign Affairs and Trade and Australian Trade Commission (Austrade) officials for dissemination amongst relevant businesses.

Hanoi and Ho Chi Minh City, Vietnam

- Delivered two presentations to Australian Chamber of Commerce (Hanoi and Ho Chi Minh City) on Foreign Bribery, with the Foreign Bribery Fact Sheet distributed at both events.
- Promotion of Foreign Bribery as an issue in the Peoples Police Academy and have provided Foreign Bribery Fact Sheets for the library there.
- Attended, mentored and delivered presentations at 33rd AFP/Vietnamese Asia Region Law Enforcement Management Program (ARLEMP). This course was themed 'Fraud, Corruption, and Foreign Bribery'.

Beijing, China

- Spoke at Australian Chamber of Commerce in Beijing on Foreign Bribery and Corruption and provided Fact Sheets.
- AFP attended and presented at the High level APEC Anti-Corruption Workshop on Combating Business Bribery (14 Aug) and the Anti-Corruption law Enforcement Network on 15 August.

Kuala Lumpur, Malaysia

- Attended and presented at the Austrade Seminar titled 'trading with integrity'. Handed out Foreign Bribery Fact Sheet at the function.
- Presentation to Malaysian Anti-Corruption Commission Roundtable on Corporate Liability, Kuala Lumpur, Malaysia (invitation extended via OECD - William Loo) on 17 Feb 2014.

Siem Reap, Cambodia

- Regional meeting on curbing foreign bribery in ASEAN Economic Community (2 October 2014), United Nations Office on Drugs and Crime.

ANNEX 3: AFP FOREIGN BRIBERY FACTSHEET

Available online: <http://www.afp.gov.au/~media/afp/pdf/f/foreign-bribery-afpfactsheet.pdf>.

ANNEX 4: FOREIGN BRIBERY OUTREACH ACTIVITIES – ATTORNEY GENERAL'S DEPARTMENT

2013 – 2014

Date	Event / Location	Comments
January 2013	AGD foreign bribery website update / online	Update to foreign bribery fact sheets to reflect increase in value of penalty unit and add international dialling codes for people overseas to more easily report foreign bribery.
18 April 2013	International Foreign Bribery Taskforce workshop / Sydney	Daniel Mossop presented to this event at the invitation of AFP. Covered issues such as foreign bribery policy development, and awareness raising. The workshop was attended by a range of stakeholders including civil society, international law enforcement from the FBI, RCMP and City of London Police. The world Bank, EFIC, ASIC, CDPP, Trade Commission and AusAID also attended the workshop attending.
6 May 2013	International Trade Law Symposium / Canberra	Graeme Gunn and Rishi Gulati presented. Covering the historical development of foreign bribery offences up to modern developments including the OECD Phase 3 evaluation report. Discussed importance of understanding the offences and increased investigative and prosecutorial activity. Co-presenter was Ms Annette Hughes of Corrs. Audience of people interested in international trade.
29 April 2013	C5 Anti-Corruption Conference / Sydney	Graeme Gunn presented with Linda Champion of AFP and Stephen Clark of DFAT. Major anti-corruption forum and the first C5 conference in Australia. Brief introductory remarks and a panel discussion that covered a wide range of anti-bribery topics. Large audience including lawyers, compliance experts, large and small companies, academics. Some media coverage of the event.
10 July 2013	Snedden Hall & Gallop Lawyers / Canberra	Graeme Gunn presented. This was the first presentation on foreign bribery to a law firm that services SME clients. Audience was lawyers and support staff approx. 15 pax. Introduction to foreign bribery offences and preventive measures and discussion (1 hour). Good feedback to say the subject matter was likely to be relevant to their clients.

16 July 2013	UN Global Compact anti-corruption leadership group / Sydney	Graeme Gunn presented. Key Australian anti-corruption network. High level of interest in anti-corruption. Discussion included foreign bribery offences, new developments and alternative approaches and case studies. Audience included civil society, lawyers, UN GC member companies, consultants.
18 July 2013	UN Global Compact anti-corruption leadership group / Melbourne	Graeme Gunn presented. Key Australian anti-corruption network. High level of interest in anti-corruption. Discussion included foreign bribery offences, new developments and alternative approaches and case studies. Audience included civil society, lawyers, UN GC member companies, consultants.
18 July 2013	Madgwicks Lawyers / Melbourne	Graeme Gunn met with a partner and senior consultant lawyer of this law firm which serves SME clients. Discussed foreign bribery offences and risks etc. Lawyers thought many clients would not be aware of these risks and said they would publish a client alert.
12 September 2013	Corruption Prevention Network Annual Forum / Sydney	Andrew Lawrence attended and ran a Departmental information stall at the forum, with material on fraud, corruption, foreign bribery, protective security and identity security. There was significant interest in foreign bribery from attendees from state and territory jurisdictions as well as private corporations.
20 November 2013	C5 Anti-Corruption Event for Extractive Industries / Perth	Graeme Gunn presented on Australia's foreign bribery offences, defences, enforcement trend including annex 2 of the anti-bribery convention, corporate controls and other matters.
20 November 2013	WA Law Society / Perth	Graeme Gunn presented on Australia's foreign bribery offences, defences, enforcement trend including annex 2 of the anti-bribery convention, corporate controls and other matters. Well attended by lawyers including those that represent SMEs, academics and others.
20 November 2013	AFP, WA police and other Cth agencies / Perth	Graeme Gunn presented on Australia's foreign bribery offences, defences, enforcement trend including annex 2 of the anti-bribery convention, corporate controls and other matters. Well attended by AFP based in WA, and other agencies including ATO, ASIC, WA police.
6 February 2014	Anti-corruption event / Brisbane	Graeme Gunn presented on Australia's FB offences, defences (discourage FPs etc), enforcement trends. Co-presented with King Wood Mallesons law firm. Well attended, approximately 60 persons, by lawyers in Brisbane from a wide range of private sector companies.

17 March 16 June 9 April 22 September 2014	Commonwealth Agency Investigator Workshops (Sydney, Adelaide, Brisbane and Melbourne)	Andrew Lawrence presented on the Commonwealth's foreign bribery response, including on offences, defences, investigation procedures and reporting to Commonwealth investigators from a range of Government agencies.
27 May 11 November 25 November 2014	Diploma in Fraud Control – Department of Human Services	Andrew Lawrence presented on the Commonwealth's foreign bribery response, including on offences, defences, investigation procedures and reporting to staff from the Department of Human Services.
4 June 2014 (Sydney) 13 June (Melbourne)	Global Compact Network Australia breakfast seminars	Federal regulators panel discussion on enforcement approach to anti-bribery law. Attendees were Global Compact Network members, ranging from small and medium sized companies to large corporations, as well as a handful of civil society and academic representatives. Media release here . Presenters: Anthony Coles (AGD), Linda Champion (AFP), Chris Savundra (ASIC – Sydney), Simon Temple (ASIC – Melbourne).
4 June 2014 (Sydney) 13 June (Melbourne)	Allens Linklaters seminars	Federal regulators panel discussion on enforcement approach to anti-bribery law. Attendees were Allens clients, including those from various industry section mining and resources, financial services, manufacturing, logistics and supply chain. Media release here . Presenters: Anthony Coles (AGD), Linda Champion (AFP), Chris Savundra (ASIC – Sydney), Simon Temple (ASIC – Melbourne).
11 September 2014	Corruption Prevention Network Annual Forum / Sydney	Andrew Lawrence attended and ran a Departmental information stall at the forum, with material on fraud, corruption, foreign bribery, protective security and identity security. There was significant interest in foreign bribery from attendees from state and territory jurisdictions as well as private corporations.

ANNEX 5: AUSTRADE – USE OF AGENTS UPDATE (DECEMBER 2014)



Background

In late 2012, PwC undertook a review of Austrade's current policies and practices related to referring Australian businesses to agents. The review assessed better practice in a number of overseas markets and provided recommendations to Austrade of changes or enhancements to Austrade's operations in relation to maintaining an effective anti-corruption program (including for the use of agents).

The recommendations included:

1. Policies and procedures are in place, communicated to staff and third parties (including through training), and monitored effectively
2. There is clear and visible support from the top for active management of risk arising from the use of agents
3. Risk assessments are up to date and mitigation strategies are in place, including appropriate controls
4. Compliance with policies and procedures is regularly reported to senior management
5. All contracts with third parties (e.g. clients, agents) include appropriate provisions for mutual obligation and expectations, e.g. level of due diligence to be performed by clients on third party providers
6. The use of agents risk management framework is tested regularly and updated to align with changing practices

Austrade can report sound progress against each recommendation as detailed below.

Progress against recommendations

Ref.	Better Practice	Austrade
1	Policies and procedures are in place, communicated to staff and third parties (including through training), and monitored effectively	<p>In 2013, Austrade introduced an eligibility check for services that applies to all organisations that seek its services in Australia and overseas. This eligibility check is as follows:</p> <ol style="list-style-type: none"> 1. Registration We only work with registered organisations. 2. Net benefit test We only work with organisations whose activities demonstrate a net benefit to Australia. 3. Best interest test We only work with organisations if it is in the 'best interest' of Austrade, the Australian Government or Australia and will not harm our reputation. 4. Ethical test We only work with organisations that are committed to maintaining appropriate business ethics and legal obligations including anti-bribery law in both Australia and overseas. <p>The eligibility check can be found on Austrade's website and was reinforced through staff training through 2013 and 2014.</p> <p>In 2014, Austrade published a new Service Handbook outlining all the Austrade policies that apply to the provision of services to Australian and international companies, including Australian exporters, offshore agents and third-party service providers. All policies were updated to reflect Austrade's strong anti-corruption stance. The policies also reinforce that: <i>Austrade cannot and does not undertake due diligence for any organisation. This means that Austrade cannot:</i></p> <ul style="list-style-type: none"> › interpret financial statements or company audits › collect information on the financial details or private affairs of individuals within companies, agencies or other organisations › prepare credit status reports (however, a referral to reputable local service providers can be provided) › guarantee or confirm the financial stability or commercial reliability of organisations › select staff members or potential business partners or customers for Australian organisations. <p>Austrade policies now include specific reference to working foreign agents and distributors: <i>Finding potential offshore agents and distributors for Australian exporters is an integral element of our client servicing activities.</i></p> <p><i>Although Austrade identifies and introduces potential agents and distributors, exporters are responsible for conducting their own due diligence before entering into commercial arrangements with the parties we introduce.</i></p> <p><i>To support good outcomes for exporters, we recommend the following approaches:</i></p> <ul style="list-style-type: none"> › Wherever possible, identify and introduce exporters to at least three potential agents or distributors so they have several options to consider. › While it is difficult to fully qualify foreign organisations in the early stages of an introduction, use market contacts, internet and database searches to uncover information and insights into their business. › Remind clients about the requirements for due diligence on all potential agents and partners, including those introduced through Austrade services or opportunities. › Always include a disclaimer clause and advice about bribery when providing lists of potential agents and distributors. <i>If an appointed agent, distributor or joint venture partner becomes involved in the bribery of foreign public officials, the Australian entity engaging the foreign organisation may potentially be held responsible and prosecuted under both Australian and foreign laws.</i> <p>Austrade provides a referral service to qualified Australian exporters and international investors that seek specialist professional services to further their international business objectives. Over the past few years, Austrade has built up a strong database of third-party service providers that can be included in referral services. To register for this database, the service providers must complete an online registration form on the Austrade website. The form outlines the terms and conditions of the registration, including anti-bribery provisions. Upon receipt, Austrade staff conduct an eligibility assessment before confirming the registration. This assessment may include independent research of the service provider and third-party checks through relevant industry bodies or associations. All referral services are provided in writing in a template that explicitly states that the recipient must undertake their own due diligence.</p>

Ref.	Better Practice	Austrade
		Staff training has also included the need to document all interactions with third-parties in the Austrade database. Upgraded technology has significantly streamlined this process, enhancing Austrade's record keeping procedures.
2	<i>There is clear and visible support from the top for active management of risk arising from the use of agents</i>	<p>All Austrade staff at posts and in Australia have completed mandatory training on bribery and corruption. Training is included in induction programs and annual refresher courses.</p> <p>Austrade's Executive regularly review any incidents or allegations of bribery that arise in the Australian exporter community. Austrade declines services to exporters that face bribery allegations or proceedings.</p> <p>Externally, Austrade has actively presented to Australian exporter groups in Australia and overseas on combatting anti-bribery in their international engagements. In particular, Austrade provides advice to these companies on setting up their internal and external governance structures to monitor and counter corrupt activities by their staff and agents.</p>
3	<i>Risk assessments are up to date and mitigation strategies are in place, including appropriate controls</i>	All Austrade planning documentation including corporate plans, market plans and individual performance plans include reference to the integrity and ethical conduct of its activities. In high-risk markets, managing bribery and corruption specific risks and controls are explicitly mentioned in the relevant market plan. Austrade's Audit and Risk Committee actively reviews these risks on a quarterly basis. Any detected instance of bribery or corruption is reported to the Audit and Risk Committee; all suspected cases of bribery are referred to the Australian Federal Police.
4	<i>Compliance with policies and procedures is regularly reported to senior management</i>	<p>Breaches of policies and procedures are reported to Austrade senior management and Austrade's Audit and Risk Committee.</p> <p>All staff are aware of bribery reporting processes and escalation procedures. All staff complete a mandatory annual policy refresher module which includes anti-bribery and corruption mitigation policies.</p>
5	<i>All contracts with third parties (e.g. clients, agents) include appropriate provisions for mutual obligation and expectations, e.g. level of due diligence to be performed by clients on third party providers</i>	<p>Austrade's templates, disclaimers and email signatures contain standard wording regarding the need to apply one's own discretion when using the information provided through Austrade's service provision. Austrade staff also provide written and verbal reinforcement that companies must undertake their own due diligence when contracting third-party service providers or agents.</p> <p>Further, all Austrade templates, disclaimers and email signatures highlight that Australia's anti-bribery laws apply overseas and Austrade will not provide business related services to any party who breaches the law and will report credible evidence of any breach.</p>
6	<i>The use of agents risk management framework is tested regularly and updated to align with changing practices</i>	The Service Handbook is reviewed quarterly and updated to reflect any changes to Austrade's policies and procedures.

Attachment F – Summary of the status of the outstanding recommendations

Outstanding recommendations from Australia's Phase 3 report – July 2015

In 2012, Australia underwent its Phase 3 review by the OECD Working Group on Bribery. The Working Group made 33 recommendations for Australia to strengthen its implementation and enforcement of the OECD Anti-Bribery Convention.¹

In December 2014, Australia provided a written report-back to the Working Group on progress in addressing these recommendations. This report-back was well-received. The OECD commended Australia for making good progress, particularly on important recommendations relating to enforcement. The report-back and covering assessment by the Working Group is available online at www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf.

The Working Group regarded 16 out of 33 recommendations fully implemented, nine partially implemented and eight not implemented. The following table sets out the current status of recommendations not regarded as fully implemented.

- Recommendation 2a (*Partially Implemented*) –
 - 2. *With respect to the foreign bribery offence, the Working Group recommends that Australia:*
 - a) *Continue to raise awareness of the distinction between facilitation payments and bribes, and encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records (2009 Recommendation VI.ii).*

As noted in the noted in Australia's report-back to the Working Group from December 2014 (the 2014 update), Australia takes a whole-of-government approach to outreach on foreign bribery. A key part of outreach efforts is encouraging businesses to refuse requests for facilitation payments and to recognise that such payments represent a business risk.

AGD will work continue to work with agencies to address any outstanding concerns that the Working Group may have in relation to this recommendation.

To assist with outreach, AGD has developed an online learning module on foreign bribery, in consultation with other agencies involved in foreign bribery outreach activities. This does not replace outreach work, but complements it. AGD and other agencies have continued with present to business on foreign bribery.

The AFP contributes to the implementation of this recommendation through participation in industry outreach activities both domestically and internationally. The AFP's International Posts have been provided with copies of the AFP Foreign Bribery Fact Sheet and a targeted PowerPoint presentation which they present to Australian business communities operating overseas.

¹ The Working Group's report on Australia is available online here: <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf>.

- Recommendation 2b (*Not Implemented*) –

2. *With respect to the foreign bribery offence, the Working Group recommends that Australia:*

b) Take appropriate steps to clarify that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery offence (Convention Article 1);

As noted in Australia's report-back to the Working Group from December 2014, Australia regards that the legislation currently operates to not require proof of an intention to bribe a particular official. However, noting the Working Group's recommendation, AGD is taking steps to make this beyond doubt to remove a possible barrier to enforcing the foreign bribery offence.

The 2014 update noted that AGD would develop a minor technical amendment to clarify the intended operation of foreign bribery offence in Division 70 of the Criminal Code. This is now before Parliament, in the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015.

- Recommendation 3 (*Partially Implemented*) –

3. *Regarding the liability of legal persons, the Working Group recommends that Australia take steps to enhance the usage of the corporate liability provisions, including those on corporate culture, where appropriate, and provide on-going training to law enforcement authorities relating to the enforcement of corporate liability in foreign bribery cases (Convention Article 2).*

The AFP considers all extensions of criminal responsibility when evaluating and investigating allegations of foreign bribery, including corporate liability. The possibility of corporate criminal liability is a consideration in all foreign bribery investigation plan templates.

In June 2014, the AFP held a Panel Of Experts Foreign Bribery workshop focusing on the corporate compliance programs. Corporate criminal liability was included as a key aspect of this workshop. It is also be included in the new AFP Foreign Bribery Investigators Reference Guide.

The AFP also works closely with ASIC to further ensure all corporate liability provisions are considered throughout the lifecycle of all foreign bribery investigations. Where appropriate, matters will be referred to ASIC for investigation of possible civil action.

- Recommendation 4a (*Not Implemented*) –

4. *Regarding the false accounting offence, the Working Group recommends that Australia:*

a) Increase the maximum sanctions against legal persons for false accounting under Commonwealth legislation to a level that is effective, proportionate and dissuasive within the meaning of Article 8(2) of the Convention, commensurate with Australia's legal framework; or increase

the maximum sanctions and broaden the scope of liability of legal persons for false accounting offences at the State level (Convention Article 8(2));

As noted in Australia's report-back to the Working Group from December 2014, Australia is exploring options to introduce a new false accounting offence.

- Recommendation 4b (*Partially Implemented*) –

4. *Regarding the false accounting offence, the Working Group recommends that Australia:*
 - b) *Vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (Convention Article 8(1)).*

All foreign bribery investigations undertaken or evaluated by AFP FAC involve analysis of whether false accounting offences may be applicable. This includes state and territory accounting offences as well as those under the federal Corporations Act. Noting this, foreign bribery is preferred as the primary offence as it has the most appropriate penalties.

All AFP FAC investigators are now trained to identify and pursue false accounting offences. This has been achieved through training modules and workshops run by the AFP Foreign Bribery Panel of Experts. False accounting is also addressed as a topic in the AFP's Foreign Bribery Investigators Reference Guide.

The AFP and ASIC engage in the early planning stages as well as during operational reviews of investigations to evaluate whether false accounting offences can be utilised. The AFP currently has an ASIC officer embedded in the team in Sydney, who is available to teams Australia wide on an ongoing basis. Additionally, an ASIC member attends the monthly foreign bribery case management forums, where all offences and progress of the investigation are explored.

One defendant in the Securrency/Note Printing Australia prosecutions was convicted of a state-based false accounting charge. On 20 August 2012, David Ellery, a former Chief Financial Officer of Securrency, was sentenced to six months imprisonment (suspended for two years) after pleading guilty to one count of false accounting, contrary to section 83(1) of the *Crimes Act 1958* (Vic).

As noted above, Australia is also exploring options for a new false accounting offence at the Commonwealth level.

- Recommendation 8a (*Partially Implemented*) –

8. *With respect to investigations of foreign bribery, the Working Group recommends that:*
 - a) *The AFP (i) take sufficient steps to ensure that foreign bribery allegations are not prematurely closed; (ii) be more proactive in gathering information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations; (iii) take steps to ensure that it explores all avenues for exercising jurisdiction over related legal persons in foreign bribery cases; (iv) as a matter of policy and*

practice, continue to systematically consider whether it would be appropriate to conduct concurrent or joint investigations with other Australian and foreign law enforcement agencies, especially when foreign bribery is allegedly committed by a company that has its headquarters or substantial operations in Australia; and (v) routinely consider investigations of foreign bribery-related charges such as false accounting and money laundering, especially in cases where a substantive charge of foreign bribery cannot be proven (Convention Articles 2, 5, 7 and 8; Commentary 27; 2009 Recommendation Annex I.C and I.D);

In April 2012 (before the Phase 3 evaluation), the AFP established an internal Foreign Bribery Panel of Experts. This Panel is made up of senior investigators who have had responsibility for at least one significant foreign bribery investigation, and who also have experience in investigating large and complex matters that span international jurisdictions.

In line with recommendation 8(a), the Panel of Experts is now responsible for:

- ensuring foreign bribery evaluations are not closed prematurely;
- proactively gathering information, including monitoring credible media sources for new allegations and collection of data from overseas law enforcement bodies to better inform investigators;
- evaluating foreign bribery referrals and investigations and providing expert advice to investigators, including ensuring consideration of jurisdiction over related legal persons, consideration of concurrent and joint investigations and related offences, and recovery of proceeds of crime;
- delivering foreign bribery specific training modules, and awareness-raising activities; and
- engagement with financial intelligence agencies.

Australia's renewed approach to enforcement is also demonstrated by the establishment of dedicated Fraud and Anti-Corruption teams within the AFP in February 2013. This is an important shift from the 'flexible teams model' that Australia had in place during Australia's Phase 3 evaluation and enables the AFP to better address serious and complex fraud and corruption, including foreign bribery. These teams are located across Australia, in Brisbane, Canberra, Melbourne, Sydney and Adelaide.

In 2013, the AFP established the Fraud and Anti-Corruption Centre (the FAC Centre), which was formally launched in July 2014. The FAC Centre has important functions for implementing foreign bribery investigations. The Panel of Experts works with the FAC Centre to deliver key functions to address foreign bribery matters through:

- assessment of all foreign bribery referrals in consultation with participating members, in particular ASIC;
- a dedicated training cell focused on the delivery of fraud and anti-corruption training, external presentations, and the coordination of specific foreign bribery training modules;
- a multi-agency evaluation and triage cell, including members from ASIC and the ATO, that can better inform the evaluation and investigative strategies of foreign bribery referrals;
- targeted quality standards assurance for ongoing AFP FAC investigations; and
- the provision of tactical and strategic intelligence. Working with the Australian Crime

Commission, the FAC Centre collates and analyses criminal methodologies and trends, identifies vulnerable groups, develops risk profiles, and informs the development of prevention and deterrence strategies relating to serious and complex fraud and corruption, including foreign bribery.

Following on from the first AFP Foreign Bribery Workshop, held in October 2013, the Panel of Experts held a specialist workshop in June 2014 which:

- focused on corporate compliance programs and the development of a Foreign Bribery Investigators Reference Guide;
- included a presentation from a specialist consultant with expertise in designing and implementing integrity and compliance frameworks for global companies to maximise their understanding on corporate issues including company compliance and governance; and
- included a presentation from a senior member of ASIC.

ASIC is actively engaged with the AFP through the FAC Centre and has previously seconded two lawyers, and presently a senior investigator, experienced in Corporations Act investigations and enforcement matters, to support the AFP investigation teams.. ASIC and the AFP also consult on matters where both agencies are investigating the same conduct to ensure coordination between the separate investigations.

Australia provided a further oral update to the Working Group in June 2015 on the implementation of recommendation 8(a). The Working Group further noted that, while it was not able to update the implementation status of recommendations following an oral update, it regarded Australia's efforts in this area as satisfying the intent of this particular recommendation. Australia will have the opportunity to have outstanding recommendations finalised through the Phase 4 review process.

- Recommendation 9 (*Partially Implemented*) –

9. *Regarding plea bargaining and self-reporting, the Working Group recommends that Australia develop a clear framework that addresses matters such as the nature and degree of co-operation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company's co-operation; measures to monitor the company's compliance with a plea agreement; and the prosecution of natural persons related to the company (Convention Articles 3 and 5; Commentary 27; 2009 Recommendation Annex I.D).*

The CDPP and the AFP have worked together to develop an external presentation for industry on the benefits of self-reporting and cooperating with authorities, and the availability of charge negotiations.

AGD is considering options to improve the enforcement options available to investigating and prosecuting agencies in response to the corporate crime, with reference to international experiences.

- Recommendation 10c (*Partially Implemented*) –

10. With respect to resources and priority, the Working Group recommends that:

- c) The AFP and other bodies involved in foreign bribery investigations and prosecutions take measures (such by issuing written guidance or policy) to continue to ensure that they are not impermissibly influenced by factors listed in Article 5 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).*

The factors listed in Article 5 are inherent in the AFP values, as articulated in the AFP Integrity Framework. While Article 5 is not articulated in specific AFP governance, it is well documented in AFP training and protocols. The OECD Anti-Bribery Convention is a part of all AFP training material on foreign bribery. Article 5 is specifically referenced in all presentations.

The factors were included in the 2013 Foreign Bribery Investigations Workshop and also included in the Foreign Bribery Investigators Reference Guide. Reference to Article 5 has also been included in the recent AFP/DFAT protocol on the investigation and prosecution of foreign bribery matters.

Australia noted these further efforts to address this recommendation at its oral update to the Working Group in June 2015, and is confident that it has taken sufficient steps for the recommendation to be assessed as ‘fully implemented’ at the next opportunity (Australia’s Phase 4 evaluation, which will occur in the coming years).

- Recommendation 11 (*Not Implemented*) –

11. With respect to mutual legal assistance (MLA), the Working Group recommends that Australia take reasonable measures to ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons (Convention Article 9(1); 2009 Recommendation XIII.iv).

As noted in Australia’s 2014 update on this recommendation, Australia has a comprehensive framework for dealing with incoming and outgoing Mutual Assistance Requests (MARs), which is used frequently in relation to foreign bribery matters. In addition, Australia may allow evidence gathered in relation to a criminal investigation or proceeding under the MA Act to also be used in related civil or administrative proceedings against the company.

Australia will continue to consider this recommendation, but is not currently taking any specific steps to make changes to the mutual assistance regime specifically in relation to foreign bribery.

- Recommendation 13 (*Partially Implemented*) –

13. With respect to anti-money laundering measures, the Working Group recommends that Australia further raise awareness of foreign bribery as a

predicate offence, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies (2009 Recommendation III.i).

Australia has taken further steps to raise awareness of foreign bribery as a possible predicate offence for money laundering. In July 2015, AUSTRAC issued a Strategic Analysis Brief on Politically Exposed Persons, Corruption and Foreign Bribery. This is an evidence-based report on money laundering methodologies, vulnerabilities and indicators associated with politically exposed persons and the laundering of the proceeds of corruption including foreign bribery.

As part of its outreach activities, the AFP has published a Fact Sheet for reporting entities and cash dealers on the AFP website which provides a detailed breakdown of the offence, information about related offences such as money laundering, case studies and an explanation of how the financial industry is exposed to foreign bribery risks.

Through this, the AFP helps to raise awareness among reporting entities of the foreign bribery offence and its role as a predicate offence to money laundering, in support of AUSTRAC's outreach efforts.

- Recommendation 14a (*Not Implemented*) –

14. With respect to tax-related measures, the Working Group recommends that:

- a) Australia align the record-keeping requirements for deducting a facilitation payment under the ITAA 1997 with those for the facilitation payment defence under the Criminal Code Act (2009 Recommendation VI.ii, VIII.i; 2009 Tax Recommendation I.i).*

The 2014 update noted that Australia will continue to consider this recommendation. At present, other tax measures announced by the Australian Government have taken priority over the alignment of record-keeping requirements.

- Recommendation 14b (*Partially Implemented*) –

14. With respect to tax-related measures, the Working Group recommends that:

- b) The AFP promptly inform the ATO of foreign bribery-related convictions so that the ATO may verify whether bribes were impermissibly deducted (2009 Recommendation VIII.i; 2009 Tax Recommendation I.i);*

This has not yet had to occur, as Australia's first foreign bribery prosecutions are currently before the courts. However, the AFP and ATO have put in place appropriate frameworks to ensure the prompt communication of matters relating to foreign bribery.

The ATO is a member of the AFP-hosted FAC Centre which facilitates close liaison on financial crime, including foreign bribery. The importance of early liaison with the ATO is included as part of the AFP's Foreign Bribery Investigations Workshop.

- Recommendation 15a (*Not Implemented*) –

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- a) Australia extend the reporting obligation of external auditors under the Commonwealth Corporations Act to cover the reporting of foreign bribery, including foreign bribery committed by an audited company's subsidiary or joint venture partner (2009 Recommendation III.iv, X.B.v);*

The format, content and size of the ATO annual Compliance Program has changed significantly since the recommendation was made. The publication, now known as Compliance in Focus, contains only the highest priority risks and is updated as new risks emerge throughout the year. The inclusion of content related to incorrect claiming of deductions related to bribery and facilitation payments will be determined by the assessment of the likelihood and consequence of it happening relative to other risks.

- Recommendation 15b (*Not Implemented*) –

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- b) Australia align the APS Guide with its practice of requiring Australian civil servants who work overseas to report suspicions of foreign bribery to the AFP in all cases (2009 Recommendation IX.ii);*

The *Public Service Act 1999* (subsection 13(11)) requires APS employees to report misconduct, including foreign bribery, by public servants as part of upholding the APS Values. There is no general requirement to report foreign bribery that does not involve misconduct by a public servant. Some APS agency heads have made a direction to their employees to require reporting of all cases foreign bribery of which the employee is aware, but such a direction will apply only to employees in that agency.

The APS guide does not 'require' reporting of foreign bribery. It is guidance only, phrased in terms of 'should' rather than 'must'. The authority for the requirement is the Public Service Act.

- Recommendation 15c (*Not Implemented*) –

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- c) Australia ensure that Australian public servants, and officials and employees of independent statutory authorities are subject to equivalent reporting requirements (2009 Recommendation IX.ii);*

Employees of independent statutory authorities may be, but are not necessarily, within scope of the APS reporting obligations. It will depend on whether they are employed under the Public Service Act, or under other legislation.

- Recommendation 15d (*Partially Implemented*) –

15. With respect to prevention, detection and reporting, the Working Group recommends that:

- d) Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable grounds from discriminatory or disciplinary action (2009 Recommendation IX.iii);*

ASIC has established an Office of the Whistleblower, which monitors the handling of all whistleblower reports, manages staff development and training and handles the relationship with whistleblowers on more complex matters. The Office will build on improvements that ASIC has made to whistleblower arrangements through the adoption of a centralised monitoring procedure.

- Recommendation 16a (*Not Implemented*) –

16. With respect to public advantages, the Working Group recommends that::

- a) Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals that have been convicted of foreign bribery (Convention Article 3(4); 2009 Recommendation XI.i);*

As noted in the 2014 update, Australia will continue to consider this recommendation, but is not currently progressing any specific measure to implement it.

Attachment G – *Prosecution Policy of the Commonwealth*



CDPP

Australia's Federal Prosecution Service

PROSECUTION POLICY OF THE COMMONWEALTH
GUIDELINES FOR THE MAKING OF DECISIONS IN THE PROSECUTION PROCESS



The Hon. Robert McClelland M.P.
Parliament House Canberra ACT 2600

FOREWORD

In February 1986 the then Attorney-General presented to the Parliament a Statement prepared by the Office of the Director of Public Prosecutions setting out the guidelines to be followed in the making of decisions relating to the prosecution of Commonwealth offences. That document, the *Prosecution Policy of the Commonwealth*, reflected the significant changes to the Commonwealth prosecution process effected by the *Director of Public Prosecutions Act 1983*. The *Prosecution Policy of the Commonwealth* was revised in 1990 and has recently been reviewed and revised again.

Although this revised version of the *Prosecution Policy of the Commonwealth* deals with some new areas, including victims, mental health of the alleged offender and prosecution disclosure, in most respects it represents a refinement of the 1986 and 1990 Statements.

The test in the *Prosecution Policy of the Commonwealth* in relation to the decision to commence or continue a prosecution remains the same and this test is contained in the Prosecution Policies of all the Australian States and Territories.

The *Prosecution Policy of the Commonwealth* will continue to serve two main purposes. The first is to promote consistency in the making of the various decisions which arise in the institution and conduct of prosecutions. The second is to inform the public of the principles upon which the Office of the Director of Public Prosecutions performs its statutory functions.



Robert McClelland
Attorney-General of Australia

TABLE OF CONTENTS

General Principles	2
1. Introduction	3
2. The decision to prosecute	4
Criteria governing the decision to prosecute	4
Prosecution of juveniles	7
Choice of charges	7
Consent to prosecution	8
3. The institution and conduct of Commonwealth Prosecutions	8
4. Control of prosecutions for a Commonwealth offence	10
Introduction	10
Discontinuance of a prosecution instituted by a Commonwealth officer	10
Intervention in a private prosecution	11
5. Victims of Crime	12
6. Some other decisions in the prosecution process	12
Undertakings under section 9(6), 9(6B) or 9(6D) of the DPP Act	12
Mode of trial	14
Charge negotiation	14
Declining to proceed further after commitment	16
Ex-officio indictment	16
Prosecution appeals against sentence	17
7. Mental health of the alleged offender	17
8. Prosecution Disclosure	18
ANNEXURES	19
Annexure A: Note on prosecutions for the bribery of foreign public officials under Division 70 of the Criminal Code	19
Annexure B: Immunity from Prosecution in Serious Cartel Offences	20
Annexure C: Work Health and Safety Undertakings	24

GENERAL PRINCIPLES

The Prosecution Policy of the Commonwealth provides guidelines for the making of decisions regarding the prosecution process.

The Policy is a public document based on the principles of fairness, openness, consistency, accountability and efficiency that the Office of the Director of Public Prosecutions (DPP) seeks to apply in prosecuting offences against the laws of the Commonwealth.

The Policy does not attempt to cover all questions that may arise in the prosecution process and the role of the prosecutor in their determination. It is sufficient to state that throughout a prosecution the prosecutor must conduct himself or herself in a manner which will maintain, promote and defend the interests of justice. In the final analysis the prosecutor is not a servant of government or individuals - he or she is a servant of justice.

It is also important not to lose sight of the fact that prosecutors discharge their responsibilities in an adversarial context and seek to have the prosecution case sustained. Accordingly, while that case must at all times be presented to the Court fairly and justly, the community is entitled to expect that it will also be presented fearlessly, vigorously and skilfully.

The Policy will be reviewed regularly, and any changes will be made public.

1. INTRODUCTION

- 1.1 On 5 March 1984 the *Director of Public Prosecutions Act 1983* (the Act) came into operation. It established an Office of the Director of Public Prosecutions (DPP) controlled by the Director of Public Prosecutions (the Director).
- 1.2 The Act effected a number of significant changes to the Commonwealth prosecution process. Perhaps the most significant change is the effective removal of the prosecution process from the political arena by affording the Director an independent status in that process. The Attorney-General as First Law Officer is responsible for the Commonwealth criminal justice system and remains accountable to Parliament for decisions made in the prosecution process, notwithstanding that those decisions are now in fact made by the Director and lawyers of the DPP, subject to any guidelines or directions which may be given by the Attorney-General pursuant to section 8 of the Act. Such guidelines or directions may only be issued after consultation with the Director, and must be published in the Gazette and tabled in each House of the Parliament. Although the power under section 8 may be exercised in relation to particular cases, in his second reading speech to the Director of Public Prosecutions Bill the then Attorney-General, Senator Evans QC, indicated that it would be very unusual for that to be done in relation to a particular case. Directions under section 8 occur very rarely and have not been provided in relation to a particular case.
- 1.3 The Act has also ensured that there is a separation of the investigative and prosecutorial functions in the Commonwealth criminal justice system. Prosecution decisions will be made independently of those who were responsible for the investigation. If a prosecution is commenced by arrest and charge, once it has been referred to the DPP, the decision whether to proceed with that prosecution is made by the DPP.
- 1.4 The DPP seeks to meet standards of fairness, openness, consistency, accountability and efficiency in prosecuting offences against the laws of the Commonwealth and in meeting these standards maintain the confidence of the public it serves.
- 1.5 The DPP has regional offices in New South Wales, Victoria, Queensland, Western Australia, South Australia, Tasmania and the Northern Territory. Prosecutions in the Australian Capital Territory for offences against Commonwealth law are conducted by DPP Canberra Office.

2. THE DECISION TO PROSECUTE

Criteria governing the decision to prosecute

- 2.1 It has long been recognised that not all criminal offences must automatically result in a criminal prosecution. The resources available for prosecution action are finite and should not be wasted pursuing inappropriate cases, a corollary of which is that the available resources are employed to pursue with appropriate vigour those cases worthy of prosecution.
- 2.2 The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.
- 2.3 It follows that the objectives previously stated - especially fairness and consistency - are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.
- 2.4 The initial consideration in the exercise of the discretion to prosecute or not prosecute is whether the evidence is sufficient to justify the institution or continuation of a prosecution. A prosecution should not be instituted or continued unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender.
- 2.5 When deciding whether the evidence is sufficient to justify the institution or continuation of a prosecution the existence of a bare prima facie case is not sufficient to justify the prosecution. Once it is established that there is a prima facie case it is then necessary to give consideration to the prospects of conviction. **A prosecution should not proceed if there is no reasonable prospect of a conviction being secured.** In indictable matters this test presupposes that the jury will act in an impartial manner in accordance with its instructions. This test will not be satisfied if it is considered to be clearly more likely than not that an acquittal will result.
- 2.6 The decision as to whether there is a reasonable prospect of a conviction requires an evaluation of how strong the case is likely to be when presented in Court. It must take into account such matters as the availability, competence and credibility of witnesses and their likely impression on the arbiter of fact, and the admissibility of any alleged confession or other evidence. The prosecutor should also have regard to any lines of defence which are plainly open to, or have been indicated by, the alleged offender and any other factors which in the view of the prosecutor could affect the likelihood or otherwise of a conviction. This assessment may be a difficult one to make, and of course there can never be an assurance that a prosecution will succeed. Indeed it is inevitable that some will fail. However, application of this test dispassionately, after due deliberation by a person experienced in weighing the available evidence, is the best way of seeking to avoid the risk of prosecuting an innocent person and the useless expenditure of public funds.
- 2.7 When evaluating the evidence regard should be had to the following matters:
 - (a) Are there grounds for believing the evidence might be excluded bearing in mind the principles of admissibility at common law and under statute? For example, prosecutors will wish to satisfy themselves that confession evidence has been properly obtained. The possibility that any evidence might be excluded should be taken into account and, if it is crucial to the case, may substantially affect the decision whether or not to institute or proceed with a prosecution.

- (b) If the case depends in part on admissions by the defendant, are there any grounds for believing that they are of doubtful reliability having regard to the age, intelligence and apparent understanding of the defendant?
- (c) Does it appear that a witness is exaggerating, or that his or her memory is faulty, or that the witness is either hostile or friendly to the defendant, or may be otherwise unreliable?
- (d) Has a witness a motive for telling less than the whole truth?
- (e) Are there matters which might properly be put to a witness by the defence to attack his or her credibility?
- (f) What impression is the witness likely to make on the arbiter of fact? How is the witness likely to stand up to cross-examination? Does the witness suffer from any physical or mental disability which is likely to affect his or her credibility?
- (g) If there is conflict between eye witnesses, does it go beyond what one would expect and hence materially weaken the case?
- (h) If there is a lack of conflict between eye witnesses, is there anything which causes suspicion that a false story may have been concocted?
- (i) Are all the necessary witnesses available and competent to give evidence, including any who may be abroad?
- (j) Where child witnesses are involved, are they likely to be able to give sworn evidence?
- (k) If identity is likely to be an issue, how cogent and reliable is the evidence of those who purport to identify the defendant?
- (l) Where two or more defendants are charged together, is there a reasonable prospect of the proceedings being severed? If so, is the case sufficiently proved against each defendant should separate trials be ordered?

This list is not exhaustive, and of course the matters to be considered will depend upon the circumstances of each individual case, but it is introduced to indicate that, particularly in borderline cases, the prosecutor must be prepared to look beneath the surface of the statements.

- 2.8 Having satisfied himself or herself that the evidence is sufficient to justify the institution or continuation of a prosecution, the prosecutor must then consider whether, in the light of the provable facts and the whole of the surrounding circumstances, the public interest requires a prosecution to be pursued. It is not the rule that all offences brought to the attention of the authorities must be prosecuted.
- 2.9 The factors which can properly be taken into account in deciding whether the public interest requires a prosecution will vary from case to case. While many public interest factors militate against a decision to proceed with a prosecution, there are public interest factors which operate in favour of proceeding with a prosecution (for example, the seriousness of the offence, the need for deterrence). In this regard, generally speaking the more serious the offence the less likely it will be that the public interest will not require that a prosecution be pursued.
- 2.10 Factors which may arise for consideration in determining whether the public interest requires a prosecution include the following non-exhaustive matters:
 - (a) the seriousness or, conversely, the relative triviality of the alleged offence or that it is of a 'technical' nature only;
 - (b) mitigating or aggravating circumstances impacting on the appropriateness or otherwise of the prosecution;
 - (c) the youth, age, intelligence, physical health, mental health or special vulnerability of the alleged offender, a witness or victim;
 - (d) the alleged offender's antecedents and background;
 - (e) the passage of time since the alleged offence when taken into account with the circumstances of the alleged offence and when the offence was discovered;
 - (f) the degree of culpability of the alleged offender in connection with the offence;

- (g) the effect on community harmony and public confidence in the administration of justice;
- (h) the obsolescence or obscurity of the law;
- (i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
- (j) the availability and efficacy of any alternatives to prosecution;
- (k) the prevalence of the alleged offence and the need for deterrence, both personal and general;
- (l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
- (m) whether the alleged offence is of considerable public concern;
- (n) any entitlement of the Commonwealth or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
- (o) the attitude of the victim of the alleged offence to a prosecution;
- (p) the actual or potential harm, occasioned to an individual;
- (q) the likely length and expense of a trial;
- (r) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
- (s) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the Court;
- (t) whether the alleged offence is triable only on indictment;
- (u) the necessity to maintain public confidence in the rule of law and the administration of justice through the institutions of democratic governance including the Parliament and the Courts;
- (v) the need to give effect to regulatory or punitive imperatives;
- (w) the efficacy, as an alternative to prosecution, of any disciplinary proceedings that have been found proven against the alleged offender to the extent that they encompass the alleged offence; and
- (x) the adequacy in achieving any regulatory or punitive imperatives, of relevant civil penalty proceedings, either pending or completed, and whether these proceedings may result, or have resulted, in the imposition of a financial penalty.

The applicability of and weight to be given to these and other factors will depend on the particular circumstances of each case.

- 2.11 As a matter of practical reality the proper decision in many cases will be to proceed with a prosecution if there is sufficient evidence available to justify a prosecution. Although there may be mitigating factors present in a particular case, often the proper decision will be to proceed with a prosecution and for those factors to be put to the Court at sentence in mitigation. Nevertheless, where the alleged offence is not so serious as plainly to require prosecution the prosecutor should always apply his or her mind to whether the public interest requires a prosecution to be pursued.
- 2.12 In the case of some offences, the legislation provides an enforcement mechanism which is an alternative to prosecution. Examples are the customs prosecution procedure under the *Customs Act 1901* and the administrative penalties that can be levied under various taxation Acts. The fact that a mechanism of this kind is available does not necessarily mean that criminal proceedings should not be instituted. The alleged offence may be of such gravity that prosecution is the appropriate response. However, in accordance with paragraph 2.10(j) above, the availability of an alternative enforcement mechanism is a relevant factor to be taken into account in determining whether the public interest requires a prosecution.
- 2.13 A decision whether or not to prosecute must clearly not be influenced by:
- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
 - (b) personal feelings concerning the alleged offender or the victim;
 - (c) possible political advantage, disadvantage or embarrassment to the Government or any political group or party; or

- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

2.14 A prosecution should only proceed in accordance with this Policy. A matter which does not meet these requirements, for example, a matter which tests the law but which does not have a reasonable prospect of conviction, should not be proceeded with.

Prosecution of juveniles

- 2.15 The welfare of the juvenile must be considered when prosecutorial discretion is exercised in relation to an offence alleged to have been committed by a juvenile. Prosecution of a juvenile should always be regarded as a severe step, and generally speaking a much stronger case can be made for methods of disposal which fall short of prosecution unless the seriousness of the alleged offence or the circumstances of the juvenile concerned dictate otherwise. In this regard, ordinarily the public interest will not require the prosecution of a juvenile who is a first offender in circumstances where the alleged offence is not serious.
- 2.16 In deciding whether or not the public interest warrants the prosecution of a juvenile regard should be had to such of the factors set out in paragraph 2.10 as appear to be relevant, but particularly to:
- (a) the seriousness of the alleged offence;
 - (b) the age and apparent maturity and mental capacity of the juvenile;
 - (c) the available alternatives to prosecution, such as a caution, and their efficacy;
 - (d) the sentencing options available to the relevant Children's Court if the matter were to be prosecuted;
 - (e) the juvenile's family circumstances, particularly whether the parents of the juvenile appear able and prepared to exercise effective discipline and control over the juvenile;
 - (f) the juvenile's antecedents, including the circumstances of any previous caution the juvenile may have been given, and whether they are such as to indicate that a less formal disposal of the present matter would be inappropriate; and
 - (g) whether a prosecution would be likely to have an unduly harsh effect on the juvenile or be inappropriate, having regard to such matters as the vulnerability of the juvenile and his or her family circumstances.
- 2.17 Under no circumstances should a juvenile be prosecuted solely to secure access to the welfare powers of the Court.
- 2.18 The practice of the DPP is for any decision to proceed with a prosecution in respect of a juvenile to be made by a senior lawyer.

Choice of charges

- 2.19 In many cases the evidence will disclose an offence against several different laws. Care must therefore be taken to choose a charge or charges which adequately reflect the nature and extent of the criminal conduct disclosed by the evidence and which will provide the Court with an appropriate basis for sentence.
- 2.20 In the ordinary course the charge or charges laid or proceeded with will be the most serious disclosed by the evidence. Nevertheless, when account is taken of such matters as the strength of the available evidence, the probable lines of defence to a particular charge, and the considerations set out later in this Policy under Mode of Trial, it may be appropriate to lay or proceed with a charge which is not the most serious revealed by the evidence.
- 2.21 Under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiation.
- 2.22 A decision concerning a choice of charge may arise where the available evidence will support a charge under both a provision of a specific Act and an offence of general application, such as under the Criminal Code. The

decision in relation to which offence should be charged in this circumstance is made in accordance with paragraphs 2.19 and 2.20.

- 2.23 A number of judgments have highlighted the need for restraint in laying conspiracy charges. Whenever possible, substantive charges should be laid. However, there are occasions when a conspiracy charge is the only one which is adequate and appropriate on the available evidence. Where it is proposed to lay or proceed with conspiracy charges against a number of defendants jointly, those responsible for making the necessary decision must guard against the risk of the joint trial being unduly complex or lengthy, or otherwise causing unfairness to defendants.

Consent to prosecution

- 2.24 A small number of Commonwealth Acts provide that a prosecution for an offence under the Act cannot be commenced or, if commenced, cannot proceed except with the consent of the responsible Minister or some specified officer. There are a variety of reasons for the inclusion of such consent requirements in legislation, but all are basically intended to ensure that prosecutions are not brought in inappropriate circumstances.
- 2.25 The Director has been authorised to give consent to prosecutions for offences under a number of Acts. In appropriate cases the power to give consent has been delegated to senior DPP lawyers where that course has been available.
- 2.26 Often the reason for the requirement for consent is a factor which will ordinarily be taken into account in deciding whether to prosecute. For example, consent may be required to ensure that mitigating factors are taken into account or to prevent prosecutions in trivial matters. In such cases the question of consent is really bound up in the decision whether to prosecute. In some cases the consent provision will have been included as it was not possible to define the offence so precisely that it covered the mischief aimed at and no more. Other cases may involve a use of the criminal law in sensitive or controversial areas, or must take account of important considerations of public policy. In appropriate cases the decision whether to consent to a prosecution is made after consultation with a relevant department or agency.
- 2.27 Mention should be made of those prosecutions which require the consent of a Minister or some officer other than the Director or a DPP lawyer. Although there are unlikely to be any differences of view between the person authorised to give consent and the DPP on a question whether a prosecution is required in the public interest, it is clearly desirable that there be prior consultation with the DPP where there appear to be difficult questions of fact or law involved.

3. THE INSTITUTION AND CONDUCT OF COMMONWEALTH PROSECUTIONS

- 3.1 As a general rule any person has the right at common law to institute a prosecution for a breach of the criminal law. That right is recognised in section 13 of the *Crimes Act 1914* (Cth). Nevertheless, while that is the position in law, in practice all but a very small number of Commonwealth prosecutions are instituted by Commonwealth officers.
- 3.2 The decision to initiate investigative action in relation to possible or alleged criminal conduct ordinarily rests with the department or agency responsible for administering the relevant legislation. The DPP is not usually involved in such decisions, although it may be called upon to provide legal advice. The DPP may be consulted where, for example, there is doubt whether alleged misconduct constitutes a breach of Commonwealth law.
- 3.3 The DPP does not investigate allegations that offences have been committed. Investigations are carried out by the Australian Federal Police (AFP) or another Government investigation agency or agency with

investigative capabilities (“investigative agency”). The DPP may provide advice to the investigative agency on legal issues during the investigation.

- 3.4 If as a result of the investigation an offence appears to have been committed the established practice (subject to the exceptions referred to in paragraphs 3.5 and 3.6 below) is for a brief of evidence to be forwarded to the DPP where it will be examined to determine whether a prosecution should be instituted and, if so, on what charge or charges. Although an AFP or other Commonwealth officer has authority to make the initial decision to prosecute, the Director has the responsibility under the Act to determine whether a prosecution, once commenced, should proceed. It is therefore generally desirable wherever practicable that matters be referred to the DPP prior to the institution of a prosecution.
- 3.5 Inevitably cases will arise where it will be necessary and appropriate that a prosecution be instituted by way of arrest and charge without an opportunity for consultation with the DPP. However, in cases where difficult questions of fact or law are likely to arise it is most desirable that there be consultation on those issues before the arrest provided the exigencies of the situation permit. The decision to arrest is a decision of the investigating official.
- 3.6 Most Commonwealth prosecutions are conducted by the DPP. However, there are a few areas where Commonwealth agencies conduct summary prosecutions for straight- forward regulatory offences by arrangement with the DPP. This policy will be observed by those agencies in the conduct of such prosecutions and the DPP will be consulted when difficult questions of fact or law arise.
- 3.7 If an investigation has disclosed sufficient evidence for prosecution but the department or agency concerned considers that the public interest does not require prosecution, or requires some action other than prosecution, the DPP should still be consulted in any matter which involves alleged offences of particular seriousness. The DPP should also be consulted whenever a department or agency has any doubt about what course of action is most appropriate in the public interest. The decision to refer a matter for prosecution is a matter for the investigative agency concerned.
- 3.8 In deciding whether or not a prosecution is to be instituted or continued and, if so, on what charge or charges, any views put forward by the AFP, or the department or agency responsible for the administration of the law in question, are carefully taken into account. Ultimately, however, the decision is to be made by the DPP having regard to the considerations set out earlier.
- 3.9 Pursuant to section 6(1) of the Act the Director may either institute summary or committal proceedings in the Director's own name or carry on such proceedings that have been instituted by another. In virtually all cases the DPP in fact carries on proceedings in which an AFP or other Commonwealth officer is the informant or complainant as the case may be. Only in exceptional cases will summary or committal proceedings be instituted in the Director's own name.
- 3.10 The Act does not in fact require that a prosecution, once commenced, must be carried on by the Director. Nevertheless, it is most unusual for that not to happen in the case of a prosecution instituted by an AFP or other Commonwealth officer, except in the limited circumstances mentioned above. The Director possesses sufficient statutory powers to assume control of prosecutions sought to be carried on by others.
- 3.11 Mention should be made of a prosecution for a Commonwealth offence instituted by a State or Territory public officer. While ordinarily Commonwealth prosecutions should be carried on or, if necessary, taken over by the Director, there are exceptions to that general rule. If a person has been charged with both State/Territory and Commonwealth offences it may be appropriate for the matter to remain with the State/Territory authorities. That will require consideration of:
 - (a) the relative seriousness of the State/Territory and Commonwealth charges;
 - (b) the degree of inconvenience or prejudice to either the defendant or the prosecution if the prosecution is split; and

- (c) if the charges are to proceed on indictment, any arrangements between the Director and the relevant State/Territory authorities making provision for a joint trial on an indictment containing both Commonwealth and State/Territory counts.

There may also be cases where the balance of convenience dictates that a prosecution for a Commonwealth offence should remain with State/Territory authorities notwithstanding that no State/Territory charge is involved, for example, where a prosecution relates to a minor Commonwealth offence brought in a remote locality and it would be impracticable for a DPP lawyer to attend.

4. CONTROL OF PROSECUTIONS FOR A COMMONWEALTH OFFENCE

Introduction

- 4.1 Under the Act the Director is given a supervisory role as to the prosecution of offences against Commonwealth law, and is empowered to intervene **at any stage** of a prosecution for a Commonwealth offence instituted by another. In particular, pursuant to section 9(5) of the Act the Director may take over a proceeding instituted by another person for commitment or for summary conviction. Having taken over the proceeding the Director may continue it as the informant or decline to carry it on further. This provision encapsulates in a statutory form one of the main purposes in establishing the DPP - that the decision whether and how a prosecution proceeds should be made by the DPP independently of those who were responsible for the investigation.

Discontinuance of a prosecution instituted by a Commonwealth officer

- 4.2 This section is concerned with discontinuing a proceeding for either summary conviction or committal for trial. The discontinuance of a proceeding on indictment is dealt with later in this Policy.
- 4.3 The final decision whether or not a prosecution proceeds rests with the DPP. Consistent with the objective of ensuring that only fit and proper cases are brought before the Courts, the DPP will discontinue a prosecution if appropriate.
- 4.4 Where a prosecution is instituted by an AFP or other Commonwealth officer in circumstances where there was no prior consultation with the DPP, that decision should be reviewed as soon as practicable after the case has been referred to the DPP.
- 4.5 However, it is important that cases should be kept under continuous review whether or not there was consultation with the DPP prior to the institution of the prosecution. New evidence or information may become available which makes it no longer appropriate for the prosecution to proceed.
- 4.6 Whenever the DPP is contemplating discontinuing a prosecution the practice is for the DPP to first consult the AFP or responsible department or agency. In this regard, the independence of the DPP in the prosecution process does not mean that those who investigated the matter should be excluded from the decision-making process. Indeed, where the DPP is contemplating discontinuing a prosecution close liaison is vital to the maintenance of a harmonious relationship between the Office and the relevant Commonwealth agency. Of course, the extent of that consultation will depend on the circumstances of the case in question, and in particular on the reasons why the DPP is contemplating discontinuing the prosecution. If it is considered the available evidence is insufficient, it can be expected the AFP or responsible department or agency will accept the DPP's assessment of the evidence, and the consultation will be largely confined to the prospects of obtaining additional evidence. On the other hand, the AFP or responsible department or agency can legitimately expect to have its views taken into account if discontinuance on public interest grounds is contemplated. The more finely balanced the factors involved,

the greater is the need for discussion. In determining the public interest the views of the victim may also be taken into consideration if those views are available and if it is appropriate to take those views into account.

Intervention in a private prosecution

- 4.7 In a formal sense all prosecutions in the summary Courts are private prosecutions, even if the informant holds an official position. For the purposes of the following paragraphs a private prosecution means any prosecution where the informant is a private individual as distinct from a police officer or some other official acting in the course of a public office or duty.
- 4.8 The right of a private individual to institute a prosecution for a breach of the law has been said to be "a valuable constitutional safeguard against inertia or partiality on the part of authority" (per Lord Wilberforce in *Gouriet -v- Union of Post Office Workers* [1978] AC 435 at 477). Nevertheless, the right is open to abuse and to the intrusion of improper personal or other motives. Further, there may be considerations of public policy why a private prosecution, although instituted in good faith, should not proceed, or at the least should not be allowed to remain in private hands. The power under section 9(5) of the Act therefore constitutes an important safeguard against resort to this right in what may be broadly described as inappropriate circumstances.
- 4.9 The question whether the power under section 9(5) should be exercised to take over a private prosecution will usually arise at the instance of one or other of the parties to the prosecution, although clearly the Director may determine of his or her own motion that a private prosecution should not be allowed to proceed. Alternatively, some public authority, such as a government department or agency, may be concerned that to proceed with the prosecution would be contrary to the public interest and refer the matter to the Director.
- 4.10 Where a question arises whether the power under section 9(5) should be exercised to intervene in a private prosecution, and the private prosecutor has indicated that he or she is opposed to such a course, the private prosecutor will be permitted to retain conduct of the prosecution unless one or more of the following applies:
- (a) there is insufficient evidence to justify the continuation of the prosecution, that is to say, there is no reasonable prospect of a conviction being secured on the available evidence;
 - (b) there are reasonable grounds for suspecting that the decision to prosecute was actuated by improper personal or other motives, or otherwise constitutes an abuse of the prosecution process such that, even if the prosecution were to proceed it would not be appropriate to allow it to remain in the hands of the private prosecutor;
 - (c) to proceed with the prosecution would be contrary to the public interest - law enforcement is necessarily a discretionary process, and sometimes it is appropriate for subjective considerations of public policy, such as the preservation of order or the maintenance of international relations, to take precedence over strict law enforcement considerations;
 - (d) the nature of the alleged offence, or the issues to be determined, are such that, even if the prosecution were to proceed, it would not be in the interests of justice for the prosecution to remain in private hands;
 - (e) the nature of the charges do not disclose an offence under any Commonwealth law; or
 - (f) the Court in which the private prosecutor has commenced proceedings has no jurisdiction.
- 4.11 A private individual may institute a prosecution in circumstances where he or she disagrees with a previous decision of the DPP. If, upon reviewing the case, it is considered the decision not to proceed with a prosecution was the proper one in all the circumstances, the appropriate course may be to take over the private prosecution with a view to discontinuing it.
- 4.12 In some cases the reason for intervening in the private prosecution will necessarily result in its discontinuance once the Director has assumed responsibility for it. In this regard, once the decision is made

to take over responsibility for a private prosecution the same criteria should be applied at all stages of the proceeding as would be applied in any other prosecution being conducted by the DPP.

- 4.13 If it is considered that it may be appropriate to intervene in a private prosecution, it may be necessary for the DPP to request police assistance with enquiries before a final decision can be made whether or not to do so, and if so, whether or not to continue the prosecution. In addition, pursuant to section 12 of the Act, the person who instituted or is carrying on the private prosecution can be required to furnish to the Director a full report of the circumstances of the matter the subject of the proceeding together with other relevant information or material.

5. VICTIMS OF CRIME

- 5.1 It is important in all prosecution action that victims are treated with respect for their dignity.
- 5.2 In the context of this Policy, a victim of crime is an identified individual who has suffered harm as the direct result of an offence or offences committed against Commonwealth law or prosecuted by Commonwealth authorities. 'Harm' includes physical or mental injury, emotional suffering or economic loss.
- 5.3 This Policy provides for the views of any victims where those views are available, and where it is appropriate, to be considered and taken into account when deciding whether it is in the public interest to:
- (a) commence a prosecution;
 - (b) discontinue a prosecution;
 - (c) agree to a plea negotiation; or
 - (d) decline to proceed with a prosecution after a committal.
- 5.4 The DPP will also comply with the DPP's *Victims of Crime Policy* in its dealings with victims.

6. SOME OTHER DECISIONS IN THE PROSECUTION PROCESS

Undertakings under section 9(6), 9(6B) or 9(6D) of the DPP Act

- 6.1 This section is concerned with the broad considerations involved in deciding whether to give an accomplice an undertaking under the Act in order to secure that person's testimony for the prosecution.
- 6.2 A decision whether to call an accomplice to give evidence for the prosecution frequently presents conflicting considerations calling for the exercise of careful judgment in the light of all the available evidence. Inevitably, however, there will be instances where there is a weakness in the prosecution evidence that makes it desirable, or even imperative, to call an accomplice for the prosecution if that accomplice appears to be the only available source of the evidence needed to strengthen the weakness.
- 6.3 In conjunction with the question whether to call an accomplice the question may arise whether that accomplice should also be prosecuted. In this regard, unless the accomplice has been dealt with in respect of his or her own participation in the criminal activity the subject of the charge against the defendant, he or she will be in a position to claim the privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce into evidence. Where, however, an accomplice has been given an undertaking under the Act that undertaking will override what would otherwise be an allowable claim of privilege.
- 6.4 As a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a reduction in the sentence that would otherwise have been appropriate. Such a reduction may be substantial. However, this course may not be practicable in all cases.

- 6.5 In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others (for example, by granting them immunity from prosecution). However, it has long been recognised that in some cases granting an immunity from prosecution may be appropriate in the interests of justice.
- 6.6 An undertaking under the Act will only be given provided the following conditions are met:
- (a) the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant or is essential to fully disclose the nature and scope of the offending and that evidence is not available from other sources. In this regard, the stronger the case without the evidence the accomplice can give, the less appropriate it will be to grant an undertaking to the accomplice; and
 - (b) the accomplice can reasonably be regarded as significantly less culpable than the defendant.
- 6.7 The central issue in deciding whether to give an accomplice an undertaking under the Act is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person's testimony in the prosecution of another. In determining where the balance lies, account should be taken of the following matters:
- (a) the degree of involvement of the accomplice in the criminal activity in question compared with that of the defendant;
 - (b) the strength of the prosecution evidence against the defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would reflect the defendant's criminality;
 - (c) the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies - apart from taking into account such matters as the availability of corroborative evidence, and the weight that the arbiter of fact is likely to give to the accomplice's testimony, it will also be necessary to consider the likely effect on the prosecution case if the accomplice does not come up to proof;
 - (d) the need to assess whether the prosecution's evidence is likely to be strengthened if an accomplice testifies, which requires the prosecution to consider a range of factors, including examination of corroborative evidence; assessment of the weight the fact finder will place on the evidence; and an assessment of whether the evidence itself is cogent, complete and truthful;
 - (e) the likelihood of any weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness);
 - (f) whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice, and whether it would be in the public interest that the accomplice be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the Act; and
 - (g) whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment.
- 6.8 Where an accomplice receives any concession from the prosecution in order to secure his or her evidence, for example, whether as to choice of charge, or the grant of an undertaking under the Act the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed to the Court and to the defence.
- 6.9 In the course of an investigation the investigative agency may identify a participant in the criminal activity under investigation as a person who is likely to be of more value as a prosecution witness than as a defendant. Thereafter the investigation may be directed to constructing a case against the remaining participants based on the evidence it is expected this person will give. Unless for some reason it is not practicable to do so, the investigative agency should always seek advice from the DPP as to the appropriateness of such a course. This will minimise the potential for an otherwise meritorious prosecution

being abandoned as a consequence of the Director deciding that it would not be in the interests of justice to grant the accomplice an undertaking under the Act in order to secure his or her testimony.

- 6.10 Annexure B to this Policy and the Memorandum of Understanding between the Australian Competition and Consumer Commission and DPP make provision with respect to the circumstances in which the DPP will consider applications for immunity in respect of the offences in sections 44ZZRF and 44ZZRG of the *Trade Practices Act 1974* (including a relevant ancillary liability offence). Annexure B and the Memorandum of Understanding deal with applications for immunity by the first participant in the cartel activity to seek immunity. Subsequent applications for immunity will be dealt with in accordance with this Policy.

Mode of trial

- 6.11 Where an indictable offence can be determined by a Court of summary jurisdiction the prosecution plays a major role in the decision as to mode of trial; indeed, under some Acts the request or the consent of the prosecution is a pre-condition to summary disposition.

- 6.12 In determining whether or not a case is appropriate for trial on indictment regard should be had to:

- (a) the nature of the case, and whether the circumstances make the alleged offence one of a serious character;
- (b) any implied legislative preference for a particular mode of trial;
- (c) the adequacy of sentencing options and available penalties if the case were determined summarily;
- (d) any delay, cost and adverse effect upon witnesses likely to be occasioned by proceeding on indictment;
- (e) in situations where a particular type of criminal activity is widespread, the desirability of a speedy resolution of some prosecutions by proceeding summarily in order to deter similar breaches;
- (f) the greater publicity, and accordingly the greater deterrent effect, of a conviction obtained on indictment;

as well as such of the criteria relevant to the decision whether to prosecute as appear to be significant.

- 6.13 The prosecution's attitude on the question of mode of trial should be made and communicated to the defendant and the Court at the earliest possible stage.

Charge negotiation

- 6.14 Charge negotiation involves negotiations between the defence and the prosecution in relation to the charges to be proceeded with. Such negotiations may result in the defendant pleading guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.

- 6.15 The considerations in this section in relation to charge negotiations should be read with reference to the general principle in paragraph 2.21 that under no circumstances should charges be laid with the intention of providing scope for subsequent charge negotiations.

- 6.16 Charge negotiation is to be distinguished from private consultations with the trial judge as to the sentence the judge would be likely to impose in the event of the defendant pleading guilty to a criminal charge. As to such consultations the Full Court of the Supreme Court of Victoria in *R -v- Marshall* [1981] VR 725 at 732 said:

Anything which suggests an arrangement in private between a judge and counsel in relation to the plea to be made or the sentence to be imposed must be studiously avoided. It is objectionable because it does not take place in public, it excludes the person most vitally concerned, namely the defendant, it is embarrassing to the Crown and it puts the judge in a false position which can only serve to weaken public confidence in the administration of justice.

- 6.17 Negotiations between the defence and the prosecution are to be encouraged, may occur at any stage of the progress of a matter through the Courts and may be initiated by the prosecution. Negotiations between defence and the prosecution as to charge or charges and plea can be consistent with the requirements of justice subject to the following constraints:
- (i) the charges to be proceeded with should bear a reasonable relationship to the nature of the criminal conduct of the defendant;
 - (ii) those charges provide an adequate basis for an appropriate sentence in all the circumstances of the case; and
 - (iii) there is evidence to support the charges.
- 6.18 Any decision whether or not to agree to a charge negotiation proposal must take into account all the circumstances of the case and other relevant considerations including:
- (a) whether the defendant is willing to co-operate in the investigation or prosecution of others, or the extent to which the defendant has done so;
 - (b) whether the sentence that is likely to be imposed if the charges are varied as proposed (taking into account such matters as whether the defendant is already serving a term of imprisonment) would be appropriate for the criminal conduct involved;
 - (c) the desirability of prompt and certain dispatch of the case;
 - (d) the defendant's antecedents;
 - (e) the strength of the prosecution case;
 - (f) the likelihood of adverse consequences to witnesses;
 - (g) whether it will save a witness, particularly a victim or other vulnerable witness from the stress of testifying in a trial;
 - (h) in cases where there has been a financial loss to the Commonwealth or any person, whether the defendant has made restitution or arrangements for restitution;
 - (i) the need to avoid delay in the dispatch of other pending cases;
 - (j) the time and expense involved in a trial and any appeal proceedings;
 - (k) the views of the referring department or agency; and
 - (l) the views of the victim, where those views are available and if it is appropriate to take those views into account.
- 6.19 The prosecution should not agree to a charge negotiation proposal initiated by the defence if the defendant continues to assert his or her innocence with respect to a charge or charges to which the defendant has offered to plead guilty.
- 6.20 Where the relevant legislation permits an indictable offence to be dealt with summarily, a proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may involve a request that the proposed charges be dealt with summarily and that the prosecution either consent to or not oppose (as the legislation requires) summary disposition of the matter. Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the matter is dealt with summarily. While the decision of the prosecution in respect of such a request should be determined having regard to the above considerations, reference should also be made to the considerations set out earlier under Mode of Trial.
- 6.21 A proposal by the defence that a plea be accepted to a lesser number of charges or a lesser charge or charges may include a request that the prosecution not oppose a defence submission to the Court at sentence that the penalty fall within a nominated range. Alternatively, the defence may indicate that the defendant will plead guilty to an existing charge or charges if the prosecution will not oppose such a submission. The prosecution may consider agreeing to such a request provided the penalty or range of sentence nominated is considered to be within acceptable limits to a proper exercise of the sentencing discretion.

Declining to proceed further after commitment

- 6.22 After the defendant has been committed for trial the question may arise, either on the initiative of the DPP lawyer involved in the prosecution or as a result of an application by the defence, whether the defendant should be indicted, or, if an indictment has already been presented, whether the trial on that indictment should proceed. In this regard, pursuant to section 9(4) of the Act the Director may decline to proceed further in the prosecution of a person under commitment or who has been indicted.
- 6.23 Notwithstanding that a committal order has been obtained, events may have occurred after the committal that make it no longer appropriate for the prosecution to proceed. Alternatively, the strength of the prosecution case may have to be reassessed having regard to the course of the committal proceedings. Where a question arises as to the exercise of the power under section 9(4), it is determined on the basis of the criteria governing the decision to prosecute set out earlier in this Policy. In the normal course the AFP or relevant department or agency is consulted before any decision is made. In determining the public interest the views of the victim may also be taken into consideration if those views are available and if it is appropriate to take those views into account.
- 6.24 A defence application that the Director decline to proceed further in the prosecution may be based on the fact that the offence charged is a relatively minor one and does not warrant the time and expense involved in a trial on indictment. Such an application is most unlikely to receive favourable consideration if the alleged offence is one that could have been determined summarily but the defendant refused to consent to the matter being dealt with in that way.
- 6.25 Where a decision has been made not to proceed with a trial on indictment, that decision will not be reversed unless:
- (a) significant fresh evidence has been produced that was not previously available for consideration;
 - (b) the decision was obtained by fraud; or
 - (c) the decision was based on a mistake of fact;
- and in all the circumstances it is in the interests of justice that the decision be reversed.
- 6.26 Where a trial has ended with the disagreement of the jury consideration should always be given to whether the circumstances require a retrial, and whether a second jury is likely to be in a better position to reach a verdict. The seriousness of the alleged offence and the cost to the community and the defendant should be taken into account. If it is decided to proceed with a retrial and the second jury also disagrees, it will only be in rare and exceptional circumstances that the defendant will be required to stand trial a third time.
- 6.27 Special mention should be made of no bill applications addressed to the Attorney-General. Shortly after the establishment of the Office the then Attorney-General indicated that such applications should be determined by the Director and further stated that he would consider such applications addressed to him following an earlier refusal by the Director only in exceptional circumstances, and only after consultation with the Director. This practice has been invariably followed.

Ex-officio indictment

- 6.28 Pursuant to section 6(2D) of the Act the Director "may institute a prosecution of a person for an indictable offence against the laws of the Commonwealth in respect of which the person has not been examined or committed for trial".
- 6.29 The holding of committal proceedings, and the committal of the defendant for trial, are not by law obligatory steps in the prosecution of an indictable offence. For example, committal hearings are no longer held in Tasmania and Western Australia, although the prosecution in those States is required to meet stringent pre-trial disclosure obligations. In other jurisdictions, committals have taken on a less substantial, paper form. Nevertheless in practice almost all prosecutions on indictment are preceded by a committal of

the defendant for trial. The following paragraphs set out the criteria applied by the DPP in determining whether the circumstances of a particular case are such as to justify a departure from the usual course.

- 6.30 A decision to indict in the absence of prior committal proceedings will only be justified if any disadvantage to the defendant that may thereby ensue will nevertheless not be such as to deny the defendant a fair trial. Further, such a decision will only be justified if there are strong and powerful grounds for so doing. Needless to say, an ex-officio indictment should not be presented in the absence of committal proceedings unless the usual evidentiary and public interest considerations are satisfied.
- 6.31 It should be noted that where an ex-officio indictment is presented in the absence of committal proceedings the defendant will be provided with disclosure in accordance with the Statement on Prosecution Disclosure.
- 6.32 On the other hand, a decision to indict notwithstanding the defendant was discharged at the committal proceedings will not constitute as great a departure from accepted practice. The result of committal proceedings has never been regarded as binding on those who have the authority to indict. The magistrate may have erred in discharging the defendant, and in such a case the filing of an ex-officio indictment may be the only feasible way that that error can be corrected. Nevertheless, a decision to indict following a discharge at the committal proceedings should never be taken lightly. An ex-officio indictment should not be presented in such cases unless it can be confidently asserted that the magistrate erred in declining to commit, or fresh evidence has since become available and it can be confidently asserted that, if that evidence had been available at the time of the committal proceedings, the magistrate would have committed the defendant for trial.

Prosecution appeals against sentence

- 6.33 The prosecution right to appeal against sentence should be exercised with appropriate restraint. In deciding whether to appeal, consideration is to be given as to whether there is a reasonable prospect that the appeal will be successful. Factors which may be considered include whether:
- (a) the sentence is manifestly inadequate;
 - (b) the sentence reveals an inconsistency in sentencing standards;
 - (c) the sentence proceeded on the basis of a material error of law or fact requiring appellate correction;
 - (d) the sentence is substantially and unnecessarily inconsistent with other relevant sentences;
 - (e) an appeal to a Court of Appeal would enable the Court to lay down some general principles for the governance and guidance of sentencers;
 - (f) an appeal will enable the Court to establish and maintain adequate standards of punishment for crime;
 - (g) an appeal will ensure, so far as the subject matter permits, uniformity in sentencing; and whether
 - (h) an appeal will enable an appellate Court to correct an error of legal principle.
- 6.34 A prosecution appeal against sentence should also be instituted promptly, even where no time limit is imposed by the relevant legislation. Undue delay by the prosecution in the institution of an appeal may render oppressive the substitution of an increased sentence, and the appeal Courts have indicated on numerous occasions that in such cases they will not intervene although the prosecution's appeal is otherwise meritorious.

7. MENTAL HEALTH OF THE ALLEGED OFFENDER

- 7.1 Issues concerning the mental health of the alleged offender may arise in considering the commencement and conduct of a prosecution. This Policy provides that in determining whether the public interest requires a prosecution, factors which may arise for consideration include the intelligence, mental health or special vulnerability of the alleged offender. Where these factors arise for consideration, other factors that may also arise for consideration in determining whether the public interest requires a prosecution include the

seriousness or relative triviality of the alleged offence, the need for general and/or specific deterrence and whether the alleged offence is of considerable public concern.

- 7.2 The issue of unfitness to be tried is usually raised with the Court by the defence. However, the issue can also be raised by the defendant personally or the prosecution. In the unusual circumstances where there is an obvious fitness issue and it is not raised by the defence then it should be raised by the prosecution.

8. PROSECUTION DISCLOSURE

- 8.1 The Statement on Prosecution Disclosure is a publicly available document produced by the DPP concerning prosecution disclosure. The requirements imposed by the Statement on Prosecution Disclosure will be complied with, subject to any laws which are applicable in the prosecution of Commonwealth offences, by the DPP in conjunction with investigative agencies in prosecutions conducted by the DPP.

ANNEXURES

Annexure A: Note on prosecutions for the bribery of foreign public officials under Division 70 of the Criminal Code

At paragraph 2.13 the *Prosecution Policy of the Commonwealth* states that a decision whether or not to prosecute must clearly not be influenced by:

- (a) the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
- (b) personal feelings concerning the alleged offender or the victim;
- (c) possible political advantage or disadvantage to the Government or any political group or party; or
- (d) the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

The Director of Public Prosecutions has issued the following to prosecutors to clarify this in relation to prosecutions for foreign bribery.

1. Assessing matters involving allegations of foreign bribery contrary to section 70.2 of the Criminal Code

When deciding whether to prosecute a person for bribing a foreign public official under Division 70 of the Criminal Code, the prosecutor must not be influenced by:

- considerations of national economic interest;
- the potential effect upon relations with another State; or
- the identity of the natural or legal persons involved.

This is because the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which Australia implemented in 1999, provides at Article 5 that:

“Article 5 – Enforcement

Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved.”

Annexure B: Immunity from Prosecution in Serious Cartel Offences

1. Preface

- 1.1 This document outlines the policy of the office of the Commonwealth Director of Public Prosecutions (DPP) in considering an application for immunity from prosecution by a party implicated in a serious cartel offence who meets the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy August 2014 (Immunity and Cooperation Policy). A serious cartel offence refers to the offences in sections 44ZZRF and 44ZZRG of the Competition and Consumer Act 2010 (CCA) and the corresponding offences in the State and Territory Competition Codes.
- 1.2 This policy is based on a recognition by Government that, in respect of serious cartel offences, it is in the public interest to offer immunity from prosecution to a party who is willing to be the first to break ranks with other cartel participants by exposing the illegal conduct and fully cooperating with the Australian Competition and Consumer Commission (ACCC) and the DPP.
- 1.3 Following a recommendation from the ACCC, the DPP will decide whether to grant immunity from prosecution by applying the same criteria as contained in the ACCC's Immunity and Cooperation Policy. The decision of the DPP whether to grant immunity will be generally communicated to the applicant at the same time as the ACCC's decision whether to grant conditional immunity.
- 1.4 Where the DPP considers that the applicant meets the criteria set out in this Annexure, as a first step the DPP will ordinarily provide a letter of comfort to the applicant. Prior to the commencement of any criminal prosecution, the Director will provide a written undertaking under section 9(6D) of the *Director of Public Prosecutions Act 1983* (DPP Act) granting criminal immunity in respect of the disclosed cartel conduct. Both the letter of comfort and any subsequent undertaking will be subject to conditions and on-going obligations on the applicant throughout the period of the ACCC investigation until the conclusion of any criminal proceedings against other cartel participants.
- 1.5 This policy is to be read in conjunction with the Memorandum of Understanding between the DPP and the ACCC regarding Serious Cartel Conduct.

2. Roles of the ACCC and the DPP

- 2.1 The DPP is an independent statutory agency established under the DPP Act and is responsible for prosecuting offences against Commonwealth laws.
- 2.2 The DPP is not an investigative agency and does not investigate criminal offences. The decision to investigate an alleged offence under the CCA and refer the matter to the DPP for prosecution is made by the ACCC. The DPP may however provide advice to the ACCC on legal and related issues during investigations.
- 2.3 The ACCC is an independent Commonwealth statutory authority established under the CCA. The ACCC is responsible for investigating alleged contraventions of the CCA including contraventions of the serious cartel provisions. Where it is alleged that a party has contravened a civil provision of the CCA the ACCC is also responsible for deciding whether to commence court proceedings.
- 2.4 Applications for immunity are made to the ACCC. Subject to the conditions set out in paragraph 3.1 below, the ACCC may make a recommendation to the DPP to grant immunity from prosecution to a party implicated in a serious cartel offence who meets the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy.
- 2.5 Only the Director can grant a party immunity from prosecution. A letter of comfort issued by the DPP or an undertaking provided by the Director under section 9(6D) of the DPP Act can only operate in accordance with its terms and the DPP Act.

3. Obtaining Immunity

ACCC's criteria for conditional immunity

3.1 The ACCC's Immunity and Cooperation Policy outlines a number of mandatory conditions that must be satisfied before conditional immunity will be granted namely:

3.1.1 that the corporation or individual seeking immunity:

- (i) is or was a party to a cartel, whether as a primary contravener or in an ancillary capacity;
- (ii) admits that their conduct in respect of the cartel may constitute a contravention or contraventions of the CCA;
- (iii) is the first party to apply for immunity in respect of the cartel under the ACCC's Immunity and Cooperation Policy;
- (iv) has not coerced others to participate in the cartel;
- (v) has either ceased involvement in the cartel or indicates to the ACCC that they will cease their involvement in the cartel;
- (vi) (for corporations only) makes admissions that are a truly corporate act (as opposed to isolated confessions of individual representatives);
- (vii) has provided full, frank and truthful disclosure, and has cooperated fully and expeditiously while making the application, and undertakes to continue to do so, throughout the ACCC's investigation and any ensuing court proceedings; and

3.1.2 at the time the ACCC receives the application, the ACCC has not received written legal advice that it has sufficient evidence to commence proceedings in relation to at least one contravention of the CCA arising from the conduct in respect of the cartel.

3.2 The party seeking immunity must satisfy the above conditions for conditional immunity to remain in place and to be eligible for final immunity.

DPP's criteria for granting immunity from prosecution

3.3 Where the ACCC is of the view that a party satisfies the conditions for conditional immunity it may make a recommendation to the DPP that immunity from prosecution be granted to that party. This recommendation will provide as much information as possible in relation to the criteria listed in paragraph 3.1.

3.4 The DPP will exercise an independent discretion when considering a recommendation by the ACCC.

3.5 Where the DPP is satisfied that a party meets the ACCC's criteria for conditional immunity contained in the ACCC's Immunity and Cooperation Policy, a two-step process will apply. First, the DPP will issue the party with a "letter of comfort". The letter of comfort will be to the effect that the Director intends to grant criminal immunity to the party in relation to the disclosed cartel conduct in the event that a prosecution is commenced against anyone in relation to that cartel conduct. Second, prior to the commencement of any prosecution, the Director will provide a written undertaking pursuant to section 9(6D) of the DPP Act granting criminal immunity in respect of the disclosed cartel conduct.

3.6 Both the letter of comfort and any subsequent undertaking under the DPP Act will be subject to the party complying with certain conditions throughout the period of the ACCC investigation and until the conclusion of any criminal proceedings against other cartel participants. Those conditions will be specified in the relevant letter of comfort or undertaking under the DPP Act. They will include that:

3.6.1 the party provide on-going full cooperation during the ACCC investigation; and

in respect of an individual that:

3.6.2 they will appear as a witness for the prosecution as and where requested in any proceedings against the other cartel participants; and

3.6.3 any evidence they are called upon to give will be given truthfully, accurately and withholding nothing of relevance.

3.7 The decision of the DPP whether to issue a letter of comfort will be generally communicated to the party at the same time as the ACCC's decision whether to grant conditional immunity.

3.8 Any undertaking provided by the Director under section 9(6D) of the DPP Act will remain in place unless revoked and therefore an undertaking granting final immunity is not required.

4. Derivative immunity

4.1 The ACCC's Immunity and Cooperation Policy provides that where a corporate party qualifies for conditional immunity by the ACCC, it may seek derivative immunity, in the same form as its conditional immunity, for all related corporate entities and/or current and former directors, officers and employees who request immunity, admit their involvement in the cartel conduct, and who undertake to and do provide full disclosure and co-operation to the ACCC.

4.2 Similarly, if a corporate party qualifies for immunity from prosecution by the DPP, it may seek derivative immunity, in the same form as its immunity from prosecution, for all related corporate entities and/or current and former directors, officers and employees who request immunity, admit their involvement in the cartel conduct, and who undertake to and do provide full disclosure and co-operation to the ACCC and the DPP.

4.3 Where the ACCC recommends to the DPP that a corporate party should be granted immunity from prosecution the ACCC will also make a recommendation to the DPP in relation to granting immunity from prosecution to parties who meet the criteria for derivative immunity contained in the ACCC's Immunity and Cooperation Policy. This recommendation will set out all relevant information in relation to a grant of immunity for these parties. The DPP will exercise an independent discretion when deciding whether to grant immunity pursuant to the criteria for derivative immunity.

4.4 Where the DPP considers that a party meets the criteria for derivative immunity contained in the ACCC's Immunity and Cooperation Policy, as a first step it will ordinarily provide a letter of comfort to the party. Prior to the commencement of any criminal prosecution, the Director will provide a written undertaking pursuant to section 9(6D) of the DPP Act granting criminal immunity subject to fulfilment of ongoing obligations and conditions.

4.5 The DPP's decision to issue a letter of comfort will be generally communicated to the party at the same time as the ACCC's decision whether to grant conditional immunity.

5. Revocation of Immunity

5.1 The DPP may withdraw a letter of comfort or the Director may revoke a written undertaking provided under section 9(6D) of the DPP Act at any time during the investigation and prior to the conclusion of criminal proceedings if:

5.1.2 the ACCC makes a recommendation to withdraw the letter of comfort or revoke the undertaking, and the DPP or Director, exercising an independent discretion, agrees with that recommendation; or

5.1.3 the DPP or Director believes on reasonable grounds that:

(i) the recipient of the letter of comfort or undertaking has provided information to the DPP that is false or misleading in a relevant matter; and/or

(ii) the recipient of the letter of comfort or undertaking has not fulfilled any condition(s) of the letter of comfort or undertaking.

5.2 The DPP will notify the recipient in writing if a letter of comfort is to be withdrawn or an undertaking is to be revoked, and the recipient will be afforded a reasonable opportunity to make representations.

6. Disclosure issues

- 6.1 The DPP has a published policy in relation to the prosecution's obligation to disclose relevant material to the defendant. Reference should be made to that policy.
- 6.2 Where a party is granted immunity from prosecution, the terms of the undertaking between the DPP and the party will be disclosed to the court in accordance with the *Disclosure Policy of the Commonwealth*.

7. Prosecution Policy of the Commonwealth

- 7.1 Items 1 to 6 of this Annexure only apply to parties who are first to disclose cartel conduct (i.e. "first in the door" applicants) and who, in all other respects, meet the criteria for conditional immunity under the ACCC's Immunity and Cooperation Policy. A party that is not eligible for conditional immunity under the ACCC's Immunity and Cooperation Policy (for example, a party cooperating under Section H of the ACCC's Immunity and Cooperation Policy) may nevertheless apply for an undertaking under section 9(6D) of the DPP Act but the application will be determined by the Director in accordance with Chapter 6 of the *Prosecution Policy of the Commonwealth*.

Robert Bromwich SC
Commonwealth Director of Public Prosecutions

August 2014

Annexure C: Work Health and Safety Undertakings

Part 11 of the *Work Health and Safety Act* provides for WHS undertakings that may be accepted by Comcare. Section 222 provides:

- (1) Subject to this section, no proceedings for a contravention or alleged contravention of this Act may be brought against a person if a WHS undertaking is in effect in relation to that contravention.
- (2) No proceedings may be brought for a contravention or alleged contravention of the Act against a person who has made a WHS undertaking in relation to that contravention and has completely discharged the WHS undertaking.
- (3) The regulator may accept a WHS undertaking in relation to a contravention or alleged contravention before proceedings in relation to that contravention have been finalised.
- (4) If the regulator accepts a WHS undertaking before the proceedings are finalised, the regulator must take all reasonable steps to have the proceedings discontinued as soon as possible.

When a proposed WHS undertaking is accepted before a prosecution is finalised, Comcare must take all reasonable steps to have the proceedings discontinued. Accordingly, where Comcare decides to accept a WHS undertaking and a prosecution is being conducted in relation to the matter, they will request, in writing, that the Director discontinue the prosecution. In considering whether to discontinue the prosecution on public interest grounds, the Director will have particular regard to following factors in paragraph 2.10:

- (j) the availability and efficacy of any alternatives to prosecution; and
- (v) the need to give effect to regulatory or punitive imperatives

*Note: Annexure C “Work Health & Safety Undertakings” was issued 1 January 2012.

Attachment H – Austrade ‘Use of Agents’ paper

Use of Agents Update

December 2014



Australian Government
Austrade



Australia
UNLIMITED

Background

In late 2012, PwC undertook a review of Austrade's current policies and practices related to referring Australian businesses to agents. The review assessed better practice in a number of overseas markets and provided recommendations to Austrade of changes or enhancements to Austrade's operations in relation to maintaining an effective anti-corruption program (including for the use of agents).

The recommendations included:

1. Policies and procedures are in place, communicated to staff and third parties (including through training), and monitored effectively
2. There is clear and visible support from the top for active management of risk arising from the use of agents
3. Risk assessments are up to date and mitigation strategies are in place, including appropriate controls
4. Compliance with policies and procedures is regularly reported to senior management
5. All contracts with third parties (e.g. clients, agents) include appropriate provisions for mutual obligation and expectations, e.g. level of due diligence to be performed by clients on third party providers
6. The use of agents risk management framework is tested regularly and updated to align with changing practices

Austrade can report sound progress against each recommendation as detailed below.

Progress against recommendations

Ref.	Better Practice	Austrade
1	Policies and procedures are in place, communicated to staff and third parties (including through training), and monitored effectively	<p>In 2013, Austrade introduced an eligibility check for services that applies to all organisations that seek its services in Australia and overseas. This eligibility check is as follows:</p> <ol style="list-style-type: none"> 1. Registration We only work with registered organisations. 2. Net benefit test We only work with organisations whose activities demonstrate a net benefit to Australia. 3. Best interest test We only work with organisations if it is in the 'best interest' of Austrade, the Australian Government or Australia and will not harm our reputation. 4. Ethical test We only work with organisations that are committed to maintaining appropriate business ethics and legal obligations including anti-bribery law in both Australia and overseas. <p>The eligibility check can be found on Austrade's website and was reinforced through staff training through 2013 and 2014.</p> <p>In 2014, Austrade published a new Service Handbook outlining all the Austrade policies that apply to the provision of services to Australian and international companies, including Australian exporters, offshore agents and third-party service providers. All policies were updated to reflect Austrade's strong anti-corruption stance. The policies also reinforce that: <i>Austrade cannot and does not undertake due diligence for any organisation. This means that Austrade cannot:</i></p> <ul style="list-style-type: none"> › interpret financial statements or company audits › collect information on the financial details or private affairs of individuals within companies, agencies or other organisations › prepare credit status reports (however, a referral to reputable local service providers can be provided) › guarantee or confirm the financial stability or commercial reliability of organisations › select staff members or potential business partners or customers for Australian organisations. <p>Austrade policies now include specific reference to working foreign agents and distributors: <i>Finding potential offshore agents and distributors for Australian exporters is an integral element of our client servicing activities.</i></p> <p><i>Although Austrade identifies and introduces potential agents and distributors, exporters are responsible for conducting their own due diligence before entering into commercial arrangements with the parties we introduce.</i></p> <p><i>To support good outcomes for exporters, we recommend the following approaches:</i></p> <ul style="list-style-type: none"> › Wherever possible, identify and introduce exporters to at least three potential agents or distributors so they have several options to consider. › While it is difficult to fully qualify foreign organisations in the early stages of an introduction, use market contacts, internet and database searches to uncover information and insights into their business. › Remind clients about the requirements for due diligence on all potential agents and partners, including those introduced through Austrade services or opportunities. › Always include a disclaimer clause and advice about bribery when providing lists of potential agents and distributors. If an appointed agent, distributor or joint venture partner becomes involved in the bribery of foreign public officials, the Australian entity engaging the foreign organisation may potentially be held responsible and prosecuted under both Australian and foreign laws. <p>Austrade provides a referral service to qualified Australian exporters and international investors that seek specialist professional services to further their international business objectives. Over the past few years, Austrade has built up a strong database of third-party service providers that can be included in referral services. To register for this database, the service providers must complete an online registration form on the Austrade website. The form outlines the terms and conditions of the registration, including anti-bribery provisions. Upon receipt, Austrade staff conduct an eligibility assessment before confirming the registration. This assessment may include independent research of the service provider and third-party checks through relevant industry bodies or associations. All referral services are provided in writing in a template that explicitly states that the recipient must undertake their own due diligence.</p>

Ref.	Better Practice	Austrade
		Staff training has also included the need to document all interactions with third-parties in the Austrade database. Upgraded technology has significantly streamlined this process, enhancing Austrade's record keeping procedures.
2	<i>There is clear and visible support from the top for active management of risk arising from the use of agents</i>	<p>All Austrade staff at posts and in Australia have completed mandatory training on bribery and corruption. Training is included in induction programs and annual refresher courses.</p> <p>Austrade's Executive regularly review any incidents or allegations of bribery that arise in the Australian exporter community. Austrade declines services to exporters that face bribery allegations or proceedings.</p> <p>Externally, Austrade has actively presented to Australian exporter groups in Australia and overseas on combatting anti-bribery in their international engagements. In particular, Austrade provides advice to these companies on setting up their internal and external governance structures to monitor and counter corrupt activities by their staff and agents.</p>
3	<i>Risk assessments are up to date and mitigation strategies are in place, including appropriate controls</i>	All Austrade planning documentation including corporate plans, market plans and individual performance plans include reference to the integrity and ethical conduct of its activities. In high-risk markets, managing bribery and corruption specific risks and controls are explicitly mentioned in the relevant market plan. Austrade's Audit and Risk Committee actively reviews these risks on a quarterly basis. Any detected instance of bribery or corruption is reported to the Audit and Risk Committee; all suspected cases of bribery are referred to the Australian Federal Police.
4	<i>Compliance with policies and procedures is regularly reported to senior management</i>	<p>Breaches of policies and procedures are reported to Austrade senior management and Austrade's Audit and Risk Committee.</p> <p>All staff are aware of bribery reporting processes and escalation procedures. All staff complete a mandatory annual policy refresher module which includes anti-bribery and corruption mitigation policies.</p>
5	<i>All contracts with third parties (e.g. clients, agents) include appropriate provisions for mutual obligation and expectations, e.g. level of due diligence to be performed by clients on third party providers</i>	<p>Austrade's templates, disclaimers and email signatures contain standard wording regarding the need to apply one's own discretion when using the information provided through Austrade's service provision. Austrade staff also provide written and verbal reinforcement that companies must undertake their own due diligence when contracting third-party service providers or agents.</p> <p>Further, all Austrade templates, disclaimers and email signatures highlight that Australia's anti-bribery laws apply overseas and Austrade will not provide business related services to any party who breaches the law and will report credible evidence of any breach.</p>
6	<i>The use of agents risk management framework is tested regularly and updated to align with changing practices</i>	The Service Handbook is reviewed quarterly and updated to reflect any changes to Austrade's policies and procedures.