



**Australian Government**  
**Attorney-General's Department**

September 2015

# **Cross-agency submission to Senate Standing Committee on Economics**

## **Inquiry into Foreign Bribery**

## Introduction

The Attorney-General's Department (AGD) welcomes the opportunity to make a submission to the Senate Economics Committee for its inquiry into foreign bribery.

AGD has coordinated a cross-agency submission to the inquiry, in line with the Australian Government's whole-of-government approach to combating foreign bribery. This submission includes input from the following agencies:

- Australian Federal Police (AFP)
- Australian Securities and Investments Commission (ASIC)
- Australian Taxation Office (ATO)
- Australian Trade Commission (Austrade)
- Australian Transaction Reports and Analysis Centre (AUSTRAC)
- Commonwealth Director of Public Prosecutions (CDPP)
- Department of Finance
- Department of Foreign Affairs and Trade (DFAT)
- Department of the Prime Minister and Cabinet (PM&C)
- Export Finance and Insurance Corporation (Efic), and
- The Treasury.

A summary of relevant agencies' roles in relation to foreign bribery is set out at **Annex 1**.

This submission responds to the inquiry terms of reference and provides additional information which may assist the Committee. All agencies would welcome the opportunity to further expand on information in this submission and respond to any questions from the Committee.

## Overview

Australia is committed to combating corruption and bribery of foreign public officials (referred to as foreign bribery).

Foreign bribery and other types of corruption can impede economic development by skewing competition and causing inefficient allocation of resources. It corrodes good governance and undermines the rule of law. In terms of the effect on business, foreign bribery by Australians and Australian businesses can damage our international standing and shrink the global market for Australian exports and investment.

Australia is a committed member of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the Anti-Bribery Convention), having become a party to the Convention in 1999. Australia gave effect to its obligations under the Convention with the passage of the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth). Australia is a member of the OECD Working Group on Bribery in International Business Transactions (the Working Group).

Australia's first foreign bribery prosecutions commenced in 2011. The AFP laid charges in 2011 (and further charges in 2013) against the companies Securrency and Note Printing Australia (NPA), and former executives and sales agents of those companies. It is alleged that during the period 1999-2005, senior managers from Securrency and NPA used international sales agents to bribe foreign public officials in order to secure banknote contracts. These proceedings are currently before the courts.

In March 2015, the AFP charged three individuals with foreign bribery and money laundering offences, with two of those persons being directors of an Australian construction company. These proceedings are also before the courts.

In addition to these criminal proceedings, ASIC commenced civil penalty proceedings against former directors and officers of the Australian Wheat Board in relation to that company's breach of the UN sanctions regime imposed on Iraq. Two of these actions have resulted in director disqualifications and fines, two are proceeding to trial and two have been discontinued.

## Response to Inquiry terms of reference

The following section responds to each aspect of the Inquiry's terms of reference.

**a) the measures governing the activities of Australian corporations, entities, organisations, individuals, government and related parties with respect to foreign bribery, with specific reference to the effectiveness of, and any possible improvements to, Australia's implementation of its obligations under:**

**i. the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, and**

International cooperation is required to effectively combat foreign bribery. The Anti-Bribery Convention establishes legally binding standards to criminalise bribery of foreign public officials in international business transactions and provides for related measures to make this effective.

The Anti-Bribery Convention establishes an open-ended, peer-driven monitoring mechanism to support the implementation of countries' obligations under the Convention. This work is undertaken by the Working Group, which is responsible for monitoring the implementation and enforcement of the Convention, the *2009 OECD Recommendation for Further Combating Bribery of Foreign Public Officials in International Business Transactions* and related instruments.

The Working Group has developed a phased program for its country monitoring work. After an initial assessment of countries' national legislation to determine their conformity with the Anti-Bribery Convention (Phase 1), there is an examination of the structures in place to enforce these laws, and recommendations are made for improvement (Phase 2). The Phase 3 review process evaluates the practical effectiveness of countries' efforts to fight foreign bribery.

The Working Group is settling the process for the Phase 4 review process which is scheduled to commence in 2016. This process will focus on countries' progress on weaknesses identified in

previous evaluations, enforcement efforts and results, and any issues raised by changes in countries' domestic legislation or institutional framework.

### Australia's evaluations

Australia underwent its Phase 1 evaluation in 1999, and Phase 2 evaluation in 2006. Reports following these evaluations can be found at **Attachments A and B**, with Australia's follow-up to the Phase 2 report (2008) at **Attachment C**.

Australia's most recent evaluation (Phase 3) occurred in 2012, and involved an on-site visit from the OECD Secretariat and experts from the two lead examiner countries (Canada and Japan). The Working Group adopted the Phase 3 report at its December 2012 meeting, a copy of which is at **Attachment D**. The report made 33 recommendations for Australia to strengthen its implementation of the Anti-Bribery Convention, with a focus on enforcement, outreach and inter-agency coordination.

Since then, Australia has reviewed its approach to enforcement of the foreign bribery offence, and Commonwealth agencies have taken significant steps to respond to the Working Group's recommendations. This includes the creation of a new AFP-led Fraud and Anti-Corruption (FAC) Centre, development of memoranda of understanding between agencies to clearly delineate roles and responsibilities, and an expansion of outreach and awareness-raising efforts.

In December 2013, Australia provided an oral update on progress against two key recommendations from the Phase 3 report – recommendation 6 on cooperation between the AFP and ASIC and recommendation 8(a) which relates to the strengthening of investigative processes in foreign bribery matters.

In December 2014, Australia provided a written report-back to the Working Group on progress in addressing the Phase 3 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 at **Attachment E**.

The Working Group regarded 16 out of 33 recommendations fully implemented, nine partially implemented and eight not implemented. A summary of the status of the outstanding recommendations is set out at **Attachment F**.

Australia provided a further oral update to the Working Group in June 2015 on the implementation of recommendation 8(a). Key points from this update are set out below.

- Over the past 12 months, Australia has put considerable efforts towards increasing and improving investigations and prosecutions for foreign bribery.
- Australia has new foreign bribery prosecutions underway.
- Australia has put in place a robust evaluation and quality assurance review framework to ensure foreign bribery allegations are not prematurely closed:

- The AFP Foreign Bribery Panel of Experts provides support, assistance and subject matter expertise to AFP members and their investigations.
  - The AFP-hosted FAC Centre ensures that representatives from key agencies are available to assist the Panel of Experts from the beginning to the end of investigations, as well as with any subsequent referrals arising from those matters.
  - The AFP has increased oversight and governance of foreign bribery investigations to include an executive review process for the finalisation of any matter which has not resulted in prosecution, which includes Deputy Commissioner endorsement.
- Australia has proactively gathered information prior to the commencement of an investigation. Foreign bribery investigations are initiated from a range of sources including referrals from affected companies, media articles, domestic law enforcement partners and self-generated intelligence.
  - The AFP has finalised its Foreign Bribery Investigators Reference Guide, which provides a comprehensive resource accessible to all AFP investigators. This guide covers all areas of consideration for foreign bribery matters, and complements Australia's upgraded foreign bribery training programs.

Australia received significant positive feedback from Working Group members following its update. Members were impressed with Australia's level of participation in the Working Group and commented that Australia had made very concrete steps and was in the upper echelons of countries in relation to foreign bribery enforcement.

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.

## ii. the United Nations Convention against Corruption

The *United Nations Convention against Corruption* (UNCAC) is the first binding global instrument on corruption. It establishes detailed mechanisms for prevention and criminalisation of corruption, as well as international cooperation and asset recovery. It requires States Parties to develop anti-corruption policies, establish bodies to prevent corruption, regulate the recruitment and conduct of public servants, and promote accountability and transparency in public finance. States Parties must also take steps to prevent corruption in the private sector.

Australia signed the UNCAC on 9 December 2003 and ratified it on 7 December 2005. The UNCAC entered into force on 14 December 2005. Australia has implemented all of the mandatory requirements, and some non-mandatory requirements, prescribed in the provisions of the UNCAC. There were 176 State Parties to the UNCAC as at 1 April 2015.

Under the UNCAC, States Parties are required to prohibit their officials from seeking or receiving bribes. The obligation is implemented in Part 7.6 of the *Criminal Code Act 1995* (Cth) (Criminal Code). Under these provisions, a Commonwealth public official is guilty of an offence if the official dishonestly asks for a benefit for himself, herself or another person (sections 141 and 142).

State and territory laws criminalise corruptly giving or offering an inducement or reward to an agent for doing or not doing something in relation to the affairs of the agent's principal. Any person who aids, abets, counsels, procures, solicits or incites the commission of these offences is also guilty of an offence.

#### *UNCAC Review*

In November 2009, the Conference of States Parties to the UNCAC approved the UNCAC Implementation Review Mechanism. The Review Mechanism requires States Parties to undergo a review of their implementation of key chapters of UNCAC every five years. There are two review cycles, with different chapters of UNCAC considered in each cycle. The Review Mechanism is now in the fifth year of its first cycle.

The timing of the second cycle of review, which is scheduled to consider Chapter II (preventative measures) and Chapter V (asset recovery) of the UNCAC, will be discussed by the Conference of State Parties at its sixth session in November 2015.

#### *Australia's review*

In 2011-12, Australia underwent a review of its compliance with Chapter III (criminalisation and law enforcement) and Chapter IV (international cooperation). Chapter III requires countries to criminalise a range of conduct which constitutes corruption, including bribery, embezzlement, trading in influence, abuse of functions, illicit enrichment, and laundering of the proceeds of crime. Chapter IV requires countries to provide international crime cooperation to other countries in corruption matters, including extradition and mutual legal assistance in criminal matters.

The review team comprised anti-corruption experts from Turkey, the United States and the United National Office on Drugs and Crime (UNODC). The review team found Australia fully compliant with chapters III and IV. The executive summary of Australia's country report was made publicly available in June 2012 and is available on the UNODC website.<sup>1</sup> Australia's self-assessment report is available on AGD's website.<sup>2</sup>

The review team conducted an onsite visit in March 2012. As a part of this, the review team met with representatives from civil society, including non-government organisations, and the Australian business community. Those representatives were invited to set their own agenda for the meeting and provide any materials to the review team. Furthermore, Australia invited members of the public and civil society to make submissions to the UNCAC Self-Assessment Report through a dedicated consultation page on AGD's website.

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<sup>1</sup> [www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1253616e.pdf](http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1253616e.pdf)

<sup>2</sup> [www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Documents/Selfassessmentreport.pdf](http://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Documents/Selfassessmentreport.pdf)

**b) as part of, or in addition to, paragraph (a), the effectiveness of, and any possible improvements to, existing Commonwealth legislation governing foreign bribery, including:**

**i. Commonwealth treaties, agreements, jurisdictional reach, and other measures for gathering information and evidence**

Extra-territorial application of foreign bribery offence

Australia's laws on foreign bribery apply with extra-territorial effect. This means the offence applies to:

- conduct occurring in Australia
- conduct occurring outside Australia, where the offence is committed by an Australian citizen or resident, and
- conduct occurring outside Australia, where the offence is committed by an Australian corporation (one which is incorporated by or under a law of the Commonwealth or of a state or territory).

Mutual legal assistance

Foreign bribery will typically involve conduct overseas, evidence of which must be validly obtained to support a prosecution. Mutual legal assistance is a formal government-to-government process for obtaining assistance in a criminal investigation or prosecution, or to recover the proceeds of crime. It is different but often complementary to agency-to-agency assistance which is informal assistance that may be provided by one agency to its foreign counterpart.

Australia has a comprehensive framework for dealing with incoming and outgoing mutual assistance requests (MARs), including requests relating to foreign bribery matters. The International Crime Cooperation Central Authority (ICCCA) within AGD is responsible for all incoming and outgoing MARs.

Australia can make or receive MARs to/from any country on the basis of reciprocity. In addition, Australia has entered into bilateral mutual legal assistance treaties with 29 countries and is a party to multilateral conventions which contain mutual assistance obligations, including the Anti-Bribery Convention and the UN Convention against Corruption.<sup>3</sup>

Australia's mutual assistance regime is set out in the *Mutual Assistance in Criminal Matters Act 1987* (Cth) (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, including:

- executing search warrants

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<sup>3</sup> A list of Australia's mutual assistance arrangements with other countries is available online at: [www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Pages/default.aspx](http://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Pages/default.aspx).

- taking evidence from a witness in Australia (including via video link)
- arranging for the production of documents or other articles
- arranging for consenting prisoner witnesses to travel to a foreign country to give evidence
- taking voluntary witness statements, and
- taking action to locate assets and register or otherwise enforce foreign orders restraining and forfeiting proceeds of crime.

Amendments to the MA Act came into force in September 2012, which allow Australia to register both conviction and non-conviction based proceeds of crime orders from any country. Before these amendments, Australia could only register non-conviction based proceeds of crime orders from five countries specified in regulations. The AFP-led Criminal Assets Confiscation Taskforce is responsible for registering foreign proceeds of crime orders, and for taking action under the *Proceeds of Crime Act 2002* (Cth) (Proceeds of Crime Act) 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).

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 68 MARs relating to foreign bribery offences (20 incoming requests from other countries and 48 outgoing requests made to other countries).

ASIC is a signatory to the International Organisation of Securities Commissions (IOSCO) Multilateral Memorandum of Understanding and other international agreements. These documents outline the relationship between the signing parties with regard to mutual assistance and the exchange of information for the purpose of enforcing the respective laws and regulations of the signing authorities.

## **ii. the resourcing, effectiveness and structure of Commonwealth agencies and statutory bodies to investigate and, where appropriate, prosecute under the legislation, including cooperation between bodies**

Foreign bribery is an inherently resource intensive crime type to investigate and prosecute. As noted above, foreign bribery matters typically involve evidence and witnesses located overseas, which can present jurisdictional and resourcing issues. This resource challenge can be magnified by the types of defendants involved who, both as companies and as officers of companies, are generally well-resourced, often backed by directors' and officers' insurance, and highly motivated to draw out and challenge every step of the prosecution process.

The OECD Foreign Bribery Report highlighted the challenging environment of this crime type, reporting that the average time taken to conclude foreign bribery cases was 7.3 years.<sup>4</sup>

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<sup>4</sup> OECD Foreign Bribery Report: An analysis of the crime of bribery of foreign public officials (2014), page 14. A copy of the report is available online at <http://www.oecd.org/corruption/oecd-foreign-bribery-report-9789264226616-en.htm>.



Noting the challenges posed by foreign bribery and other serious economic crimes, Commonwealth agencies have put in place structures and mechanisms for inter-agency cooperation to maximise their effectiveness in investigating and prosecuting these crimes types.

### Australian Federal Police

As Australia's primary law enforcement agency, the AFP is responsible for investigating allegations of foreign bribery under the Criminal Code. In recent years, the AFP has made structural changes to enable it to better respond to this crime type. In particular, the establishment of the FAC business area and FAC Centre have increased the AFP's capacity to investigate foreign bribery.

In April 2012, the AFP established an internal Foreign Bribery Panel of Experts. This Panel is made up of senior investigators who have been responsible for at least one significant foreign bribery investigation and who also have experience in investigating large and complex matters that span international jurisdictions.

In February 2013, the AFP established dedicated FAC teams. These teams are located across Australia, in Brisbane, Canberra, Melbourne, Sydney and Adelaide.

### Fraud and Anti-Corruption Centre

The FAC Centre is a multi-agency initiative hosted by the AFP's FAC business area. It was formally launched in July 2014. Participating agencies include:

- Australian Taxation Office
- Australian Crime Commission
- Department of Human Services
- Australian Border Force
- Department of Immigration and Border Protection
- Australian Securities and Investments Commission
- Department of Foreign Affairs and Trade
- Department of Defence, and
- Australian Transaction Reports and Analysis Centre.

The FAC Centre's objectives are:

- strengthening law enforcement capability to respond to serious and complex fraud, foreign bribery, corruption by Australian Government employees and complex identity crime
- providing a coordinated approach to prioritising the Commonwealth operational response for matters requiring a joint agency approach, and
- protecting the Australian economy.

The FAC Centre achieves these objectives through the following key functions:

- Referral evaluations, triage and review – the FAC Centre facilitates a collaborative and uniform multi-agency approach to the evaluation of serious and complex fraud and corruption matters referred to the AFP, including those eligible for joint investigations. The

FAC Centre also conducts standardised quality assurance reviews on key investigations for both AFP and partner agencies.

- Training – the FAC Centre delivers whole-of-government fraud investigations training, in partnership with AFP’s Learning and Development capabilities.
- Intelligence – the FAC Centre maintains a coordinated specialist cell that collects and analyses data from Commonwealth partners, disseminates intelligence products, engages with existing local intelligence initiatives such as the Australian Intelligence Community and works with financial intelligence agencies such as AUSTRAC.
- Agency secondment and joint activity coordination – the FAC Centre provides a focal point and coordination function for the operational activities of relevant AFP outposted agents across Australian Government agencies.

In July 2015, the FAC Centre commenced coordination of the new multi-agency Serious and Financial Crime Taskforce. The Taskforce will focus on identifying and treating the threats posed by serious financial crime, and will build upon the successes of Project Wickenby, which focussed on major taxation offences.

The AFP is also a member of the International Foreign Bribery Taskforce (IFBT). The IFBT was established in 2011 by investigators from the AFP, the Federal Bureau of Investigation, the City of London Police and the Royal Canadian Mounted Police. Its mandate is to facilitate cooperative working arrangements and international engagement with like-minded countries. In May 2013, this mandate was made official through the signing of a memorandum of understanding (MoU) between the agencies. The IFBT pursues anti-corruption initiatives, monitors foreign bribery trends and legislative developments, and anticipates challenges presented by the transnational nature of foreign bribery. The IFBT chair agency rotates every year, with the current chair responsible for hosting an annual operational working group meeting. Australia held the Chair position in 2012-13 and will hold the position again in 2016-17.

#### AFP and ASIC coordination

The AFP and ASIC entered into a MoU in October 2013 which formalised the division of responsibility between each agency in relation to investigations of foreign bribery allegations.

Under the MoU, the AFP is responsible for investigating foreign bribery offences under the Criminal Code, with ASIC responsible for investigating breaches of the Corporations Act, including by directors, officers and auditors. The MoU also provides that investigations of the foreign bribery offence will be prioritised over investigation of Corporations Act offences, noting that foreign bribery offence carries more significant penalties and is specific to the conduct. ASIC remains responsible for investigating and prosecution of breaches of the Corporations Act, including concealment and falsification of company books and provision of false information (sections 1307 and 1309 of the Corporations Act).

Through the FAC Centre, the AFP and ASIC work closely in evaluating all foreign bribery referrals to identify the most appropriate treatment for alleged offending.

The collaborative approach continues as referrals move into the investigation phase, with ASIC receiving regular briefings from the AFP on the status of all foreign bribery investigations to identify conduct which may be in breach of the Corporations Act.

The MoU 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 previously seconded two lawyers, and presently a senior investigator, 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 apply to foreign bribery, including false accounting.

The AFP and ASIC also have bilateral MoUs with the Australian Prudential Regulation Authority (APRA) to set outline their respective responsibilities and information-sharing arrangements.

#### AFP coordination with DFAT

DFAT and the AFP signed an information-sharing protocol on 13 June 2014, after both agencies identified the benefits in articulating inter-agency arrangements on complex matters. The purpose of the protocol is to support a connected approach towards foreign bribery investigations and prosecutions.

DFAT officers, both in Australia and those posted overseas, are under an obligation to report all allegations of foreign bribery offences committed by Australians and Australian companies. DFAT refers all information to the AFP for evaluation of any potential breach of Australian laws.

#### AFP coordination with state and territory police

The AFP has protocols in place with state and territory authorities for the referral of Commonwealth matters. Additionally, the AFP has formally engaged all state-level law enforcement agencies to raise awareness of the offence of foreign bribery and to request referrals of foreign bribery offending to be passed 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. This engagement has resulted in intelligence from a state police force that led to an allegation of foreign bribery being referred to the AFP FAC Centre.

A law enforcement Heads of Fraud Forum (HFF) has been established between all Australian law enforcement agencies that promotes information sharing between agencies and regular engagement by way of an annual HFF and quarterly meetings. The forum provides an additional avenue for agencies to engage on fraud and corruption trends, investigation techniques and methodologies.

### CDPP structure and resourcing

From June 2014, the CDPP restructured its operating model from a regionally based model to a national practice group model, based on crime types. 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 Commercial Financial and Corruption Practice Group handles all referrals from agencies relating to foreign bribery, major corruption matters, large scale financial crime and money laundering offences. The national practice group model enhances the quality, consistency and timeliness of advice and decision making, providing greater access for agencies to specialised advice in relation to these complex areas of law, and builds on the collaborative approach to prosecution of these matters.

Due to the complexity and volume of foreign bribery matters, the CDPP provides early and ongoing legal advice to investigative agencies during the course of their investigations, to assist in better focussing and improving the quality of those investigations. This helps to ensure more effective prosecution for matters in which the CDPP views there is sufficient evidence.

On receiving briefs, the CDPP assesses the sufficiency of evidence and makes suggestions to the referring agency aimed at addressing shortfalls and gaps in the evidence, and, if charges are instituted, prosecutes the matters.

### **iii. standards of admissible evidence**

The law of evidence in Australia is a mixture of statute, common law and court rules. The admissibility of evidence in any proceeding is subject to compliance with the rules of admissibility and the interpretation of those rules by the presiding judge.

In relation to foreign bribery investigations and prosecutions, it can often be challenging to obtain evidence from foreign countries in a form admissible for Australian courts in a timely manner. The AFP notes that this is a particular challenge in foreign bribery investigations. The *Foreign Evidence Act 1994* (Cth) allows the prosecution to adduce evidence obtained from overseas sources, particularly in relation to foreign business and banking records.

Further challenges in obtaining evidence in foreign bribery matters include the seizure and analysis of large volumes of electronic data, and the use of legal professional privilege (LPP) claims by those under investigation and other third parties. The AFP notes that blanket LPP claims can make it very difficult to obtain admissible evidence to support prosecutions. This has been an issue in a number of investigations where it has taken a significant period of time for the AFP and the defence to resolve LPP claims.

**iv. the range of penalties available to the courts, including debarment from government contracts and programs,**

Foreign bribery carries significant penalties, which reflect the seriousness of the offence.

The maximum penalty for an individual is 10 years imprisonment and/or a fine of \$1.8 million. The maximum penalty for a body corporate can be a fine or a proportional penalty, calculated according to the value of benefits obtained from bribery, or the annual turnover of the company. If the value of benefits obtained through bribery can be ascertained, the penalty is 100,000 penalty units (\$18 million) or 3 times the value of benefits obtained, whichever is greater. If the value of benefits obtained through bribery cannot be ascertained, the penalty for a body corporate is 100,000 penalty units or 10% of the 'annual turnover' of the body corporate and related bodies corporate, whichever is greater.<sup>5</sup>

In addition, any benefit obtained through foreign bribery may be forfeited under the Proceeds of Crime Act.

Offenders are also automatically disqualified from managing corporations for five years, which may be extended to up to 20 years upon application to the court.<sup>6</sup> They may also be disqualified from being a responsible officer in a financial institution.<sup>7</sup>

The falsification of books offence in the Corporations Act (s1307) carries a maximum fine of \$18,000 and imprisonment of two years. The false information offence in subsection 1309(1) carries a maximum fine of \$36,000 and imprisonment of five years.

Within ASIC's jurisdiction, a civil penalty contravention attracts a maximum penalty of \$200,000 for individuals and \$1 million for companies. The Financial Systems Inquiry Final Report (released in December 2014) recommended that the government review and significantly increase maximum civil penalties.

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<sup>5</sup> The maximum penalty applying to body corporates was significantly increased in February 2010, in line with a recommendation from Australia's Phase 2 report.

<sup>6</sup> Corporations Act, Section 206B.

<sup>7</sup> *Superannuation Industry (Supervision) Act 1993* (Cth) Section 126H; *Banking Act 1959* (Cth) Section 21; *Insurance Act 1973* (Cth) Section 25A; *Life Insurance Act 1995* (Cth) Section 245A.

### Debarment from government contracts and programs

There are no specific debarment policies for procurement by the Australian Government. Commonwealth procuring entities are responsible for undertaking their own procurement procedures in accordance with the Commonwealth Procurement Rules (CPRs).

The CPRs provide that the Australian Government promotes the proper use and management of public resources. Proper means efficient, effective, economical and ethical use that is not inconsistent with policies of the Commonwealth. Entities may exclude a tenderer on grounds such as bankruptcy, insolvency, false declaration, or significant deficiencies in performance of any substantive requirement or obligation under a prior contract.

In addition to the CPRs, a procuring entity's internal policies, such as the Accountable Authority Instructions (AAIs), may have other relevant provisions for debarment.<sup>8</sup>

#### **v. the statute of limitations**

Under section 15B of the *Crimes Act 1914* (Cth) (Crimes Act), there is no limitation period for Commonwealth offences where the maximum penalty includes imprisonment for more than 6 months (for individuals), or includes a fine of more than 150 penalty units (for companies).

As such, no limitation period applies for the offence of foreign bribery or primary Corporations Act offences.

In relation to civil penalty proceedings under the Corporations Act, proceedings must be commenced within six years (section 1317K). ASIC notes that, in cases where criminal proceedings are being contemplated by AFP and civil penalty proceedings are being contemplated by ASIC, there can be difficulties with issuing civil penalty proceedings prior to the limitation period expiring. If criminal proceedings are commenced subsequently, the civil penalty proceedings will be stayed so that the criminal proceedings may proceed (section 1317N). This may lead to wasted effort and the risk of the civil penalty proceedings being struck out. Alternatively, if the criminal proceedings are unsuccessful, the civil case may continue but the delay may result in a permanent stay application or may compromise the reliability of the evidence due to the passage of time.

#### **vi. the range of offences**

There are a range of offences which can apply to foreign bribery.

##### Foreign bribery offence

Australia's foreign bribery offence is contained in section 70.2 of the Criminal Code. A person will be guilty of the offence if:

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<sup>8</sup> AAIs are written instructions which can be issued by accountable authorities under the *Public Governance, Performance and Accountability Act 2013* (Cth), about any matter relating to the finance law to which all officials of the entity must adhere.

- the person provides, causes or offers a benefit to another person, and
- the benefit is not legitimately due to the other person, and
- the 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 in order to obtain/retain business or obtain/retain a business advantage that is not legitimately due.

The Government is progressing a minor amendment to the foreign bribery offence to clarify that it does not require proof of an intention to bribe a particular official. This amendment is contained in the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015.

#### Other applicable offences

Other offences which may apply to foreign bribery related conduct include money laundering and offences under the Proceeds of Crime Act. There are also offences in the Corporations Act including false accounting offences (discussed further below) and directors' duties provisions. State and territory fraud, false accounting and bribery offences may also apply.

### **(A) false accounting along the lines of the books and records head in the US Foreign Corrupt Practices Act**

There are existing provisions in the Corporations Act which create offences for false accounting.

Section 286 imposes obligations on corporations in relation to accounting matters. This includes an obligation to keep financial records that correctly record and explain the financial position of the company and which would enable true and fair financial statements to be prepared. It also imposes an obligation on certain companies, including public companies and large proprietary companies, to prepare financial statements that give a true and fair view of the financial position and performance of the company.

Section 1307 creates, in summary, an offence where a company officer or employee engages in conduct that results in 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.

Subsection 1309(1) creates, in summary, an offence where a company officer or employee provides materially false or misleading information to a director or auditor or to a financial market operator.

Breaches of these requirements may give rise to criminal prosecution. Section 286 applies to both natural persons and corporate entities and is a strict liability offence. Sections 1307 and 1309 apply only to natural persons and are not offences of strict liability. The maximum penalties are:

- a fine of 25 penalty units (\$4,500) and six months imprisonment for an individual who commits an offence against subsection 286(1)
- a fine of 125 penalty units (\$22,500) for a corporation that commits an offence against subsection 286(1)
- a fine of 100 penalty units (\$18,000) and two years imprisonment for an individual who commits an offence against section 1307, and
- a fine of 200 penalty units (\$36,000) and five years for an offence against subsection 1309(1).

False accounting offences exist in state and territory legislation, such as section 83 of the *Crimes Act 1958* (Vic). This offence carries a maximum penalty of 10 years imprisonment or a fine of \$169,008 for individuals, or a fine of \$845,040 for corporations. This offence has been successfully used by the AFP in relation to Securrency.

#### Proposed false accounting offence

In Australia's Phase 3 report, the Working Group found that the Corporations Act false accounting offences attract penalties that fail to meet the test of 'effective, proportionate and dissuasive' for the purposes of Article 8 of the Anti-Bribery Convention. It recommended that Australia increase the maximum sanctions against legal persons for false accounting under Commonwealth legislation.

Further, there are limitations with the applicability of the false accounting offences to foreign bribery. If instance, a failure to accurately describe the payment of a bribe may not be 'material' to the company's financial position and, further, there is no obligation to identify a bribe in such terms. Australian accounting standards are principles-based and not prescriptive about the financial records to be maintained to enable true and fair financial statements to be prepared and audited. For example, if a bribe is recorded as a commission it is possible that section 286 of the Corporations Act has not been contravened.

In response to this recommendation, since late 2014, the Government has been developing a proposed new offence of false accounting. As noted in Australia's report-back to the Working Group, AGD is aiming to have a draft offence finalised in 2015.

### **B) increased focus on the offence of failure to create a 'corporate culture of compliance'**

There is no specific offence of failure to create a corporate culture of compliance under Australian law.

Under the Criminal Code, companies and responsible individuals can be held liable for the activities of employees, agents or officers acting within the actual or apparent scope of their employment or authority where a company expressly, tacitly or impliedly authorised or permitted the commission of the offence.

In certain circumstances, companies may also be liable for the corrupt behaviour of employees or third party representatives about which it has no actual knowledge, for example if the company and/or responsible individuals were wilfully blind to, or deliberately ignorant of, the corrupt behaviour.

Part 2.5 of the Criminal Code sets out the principles for corporate criminal responsibility (that is, when companies can be held criminally liable for Commonwealth offences). For corporate criminal responsibility to apply, the relevant fault element for a Commonwealth offence must be attributed to a body corporate that authorised or permitted the commission of an offence. Subsection 12.3(2) sets out various means by which such authorisation or permission to commit an offence may be attributed to a body corporate.



One such means is proving that a body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision. Where appropriate, Australian agencies will seek to rely upon this means of attributing corporate responsibility. 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 United Kingdom's *Bribery Act 2010* includes a specific offence for failure to prevent bribery of foreign public officials, which goes beyond the requirements of the Anti-Bribery Convention. At present, there are no plans to introduce such an offence in Australia, although the Government will continue to monitor international developments.

#### Other applicable offences

There are provisions under the Corporations Act which can apply to instances of bad corporate culture. Section 180 of the Act places a duty of care and diligence on directors and other officers of the corporation. If employees of a corporation engage in conduct which constitutes a sufficiently serious breach of a substantial requirement under the Corporations Act or otherwise serious damage to the company, action may be taken against the directors and officers if they knew of, and failed to prevent, such activity.

Additional requirements for good corporate practices also exist in specific instances. For example, Australian Financial Services Licence holders are required to have systems in place to comply with the law and ensure financial services are provided efficiently, honestly and fairly.

### **C) liability of directors and senior managers who do not implement a corporate culture of compliance**

As noted above, it is not an offence to fail to implement a corporate culture of compliance. However, directors, senior managers and others may be guilty of offences through other extensions of criminal responsibility, such as aiding, abetting, procuring or counselling, or conspiring with another to commit a foreign bribery or related offence. Their actions as high managerial agents may enable criminal liability to be attributed to the body corporate as well as rendering them personally liable. It is possible that directors who were aware of, and failed to prevent, corrupt activity may be civilly liable under section 180 of the Corporations Act.

### **D) liability of parent companies for subsidiaries and intermediaries, including joint ventures**

Under Australia's legal framework, parent companies and their directors are generally not liable for the activities of subsidiaries or intermediaries including joint ventures (the separate entity doctrine). In limited circumstances, the corporate veil can be lifted and responsibility can lie with the directors and officers of the parent company.

Parent companies may be liable in relation to the conduct of their subsidiaries or intermediaries in that they may be accessorially liable, provided the territorial requirements in section 70.5 of the

Criminal Code are met. The parent companies will not be liable if the relevant fault element cannot be established – for example, intention for a conspiracy offence.

**vii. measures to encourage self-reporting, including but not limited to, civil resolutions, settlements, negotiations, plea bargains, enforceable undertakings and deferred prosecution agreements**

The AFP and other agencies encourage individuals and corporations to report any suspicions of foreign bribery that arise within the corporation or involving a competitor.

Self-reporting instances of suspected foreign bribery benefits both the AFP and the company. The company can have input into the progression of the investigation, avoid the need for search warrants being executed and mitigate possible corporate criminal liability. The AFP can avoid the loss of evidence, ensure the timely interview of witnesses and reduce the investigation period. A true collaborative approach between law enforcement and industry is considered an optimal outcome in a foreign bribery investigation.

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 a court on sentencing under s 16A of the Crimes Act.

In some instances, offenders who cooperate 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 cooperation 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 section 21E of the Crimes Act, 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 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* (Prosecution Policy), usually upon the recommendation of an investigative agency, such as the AFP. A copy of the Prosecution Policy is at **Attachment G**.

Decision to prosecute and charge negotiation

Australia's framework for matters such as the decision to prosecute and charge negotiation is set out in the Prosecution Policy. The decision to prosecute a person or company for foreign bribery is

made in accordance with Chapter 2 of the Prosecution Policy. The Prosecution Policy sets out the guidelines for how the CDPP conducts charge negotiations (6.14 to 6.20) and undertakings/indemnities to witnesses (6.1 to 6.9).

### Enforceable undertakings

Officials tackling serious corporate crime currently have two key approaches available to them: criminal prosecution or, where this is not appropriate, pursuing civil action against the company. Both approaches involve lengthy investigation. Negotiated settlements are used in some contexts for the regulation of companies, such as ASIC's use of enforceable undertakings.

Enforceable undertakings aim to improve compliance with the law through an administrative settlement as an alternative to judicial or administrative actions. Generally speaking, an enforceable undertaking is a settlement that may be enforced in court if the party who agreed to the terms of the undertaking does not comply with them.

ASIC may accept an undertaking:

- in connection with a matter in relation to which it has a function or power under the *Australian Securities and Investments Commission Act 2001* (Cth) (ASIC Act), or
- in the circumstances described in ASIC Regulatory Guide 100.<sup>9</sup>

ASIC's policy is that enforceable undertakings are not available as an alternative to commencing criminal proceedings. Enforceable undertakings are also available to certain other regulatory bodies as a dispute resolution mechanism.

### **viii. official guidance to corporations and others as to what is a 'culture of compliance' and a good anti-bribery compliance program**

A range of Australian agencies undertake outreach to ensure that Australian businesses are aware of their obligations under Australian anti-bribery laws, and the steps they should take to minimise the risk of engaging in foreign bribery.

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.

### Attorney-General's Department

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 participated in a number of joint outreach

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<sup>9</sup> <http://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-100-enforceable-undertakings/>

presentations with the AFP, ASIC and the CDPP, including events hosted by the United Nations Global Compact and Allens Linklaters.

In 2014, AGD led the development of an online learning module on foreign bribery. The module is intended to complement existing outreach activities, and provide an effective means of reaching a broader audience. It is intended for use by industry and government, and provides advice on Australia's anti-bribery policy, relevant laws and how they apply, and steps that business can take to help promote compliance. The module is free to access and supports users with accessibility requirements. It is available on the AGD website at [www.ag.gov.au/foreignbribery](http://www.ag.gov.au/foreignbribery).

The Australian Government's Foreign Bribery Information and Awareness Pack provides key information on the offence of bribing a foreign public official and steps for reporting suspected foreign bribery. This is available on the above website.

#### Australian Federal Police

The AFP is actively engaged in outreach to at-risk industries and professional services. The AFP does not provide specific advice to corporate entities but recommends they engage with private compliance experts for compliance advice specific to their organisation. The AFP currently engages and educates the private sector on foreign bribery legislation and law enforcement activity through presentations to industry groups, presenting on panels, speaking at universities and distributing fact sheets prepared by the Foreign Bribery Panel of Experts.

As part of its outreach activities, the AFP is preparing presentations for financial institutions which provide a detailed breakdown of the foreign bribery 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 an effective method for the AFP to generate awareness among reporting entities of the offence of foreign bribery and its role as a predicate offence to money laundering.

#### Department of Foreign Affairs and Trade

DFAT seeks to ensure that Australian businesses are aware of their obligations under Australian anti-bribery laws and conducts outreach activities to the private sector about these laws. These activities outline the Australian Government's zero tolerance approach to foreign bribery, encourage Australian businesses to contact DFAT for assistance, and highlight the importance of effective internal compliance systems and a culture of compliance.

DFAT's outreach activities target a broad audience, including industry, small and medium enterprises, legal and accounting professionals, financial institutions, universities and Commonwealth, state and territory governments. 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 conference speakers. In 2014-15, DFAT organised private sector outreach events in Adelaide, Brisbane, Hobart, Melbourne, Perth and Sydney. DFAT's network of overseas posts also engages with the local Australian business communities and chambers of commerce on the issue of foreign bribery.

### Australian Securities and Investments Commission

ASIC has presented at various forums including jointly presenting with the AFP and AGD (such as the forums hosted by the United Nations Global Compact and Allens Linklaters) 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 Foreign Bribery and Corruption Conference hosted by the US Securities and Exchange Commission (SEC) in Washington DC.

### Australian Trade Commission (Austrade)

Since 2012, Austrade has delivered a targeted outreach program to Australian businesses, domestically and off-shore, articulating the risks of bribery when conducting trade in high risk/low governance jurisdictions. It is delivered in-country through Austrade's network of overseas offices in a variety of Austrade-hosted events and in collaboration with local Australian Chambers of Commerce and partner agencies.

Austrade's outreach program articulates how to respond where bribes are solicited or bribery appears a necessary part of doing business overseas. It covers facilitation payments and conducting due diligence on foreign agents. The program also details the assistance Austrade can provide business when confronted with trade impediments due to corrupt foreign officials.

The outreach program is supported by anti-bribery governance materials available Austrade's website and to members via local Australian Chambers of Commerce. This provides small to medium enterprises (SMEs) with practical assistance in developing their own anti-bribery programs, to help build a culture of compliance within an organisation.

In December 2014, Austrade participated in the two-year report-back to the OECD Working Group, and provided detail on its awareness raising activities includes its 'Use of Agents' paper (**Attachment H**). The Working Group found Austrade had fully implemented the Phase 3 recommendation (Recommendation 15f) to take 'concrete steps to encourage companies, in the strongest terms, to conduct due diligence on agents'.

Austrade continues to discharge its obligation, to raise awareness of the evolving risks of foreign bribery with Australian business's working overseas. Contemporary materials are part of this continuing outreach program focussed on Australian SMEs in high risk countries who may be unaware or ill-prepared to deal with market access issues and the consequences of breaching Australia's foreign bribery offence or local laws applying to bribery.

The program carries a strong emphasis on creating a culture of compliance within companies and clearly articulates strategies to mitigate and address foreign bribery and the assistance that can be provided by the Australian Government.

### Australian Taxation Office

In relation to bribes and facilitation payments, the ATO does not have a specific focus however ensures that only legitimate expenses are claimed as deductions when undertaking audits and

reviews. Whilst a bribe payment may have occurred, the taxpayer may not have necessarily claimed a tax deduction for this payment.

The ATO does not have staff dedicated to investigating and reviewing facilitation payments or bribes, however, auditors are expected to comprehensively review the tax affairs of taxpayers, including whether or not bribes or facilitation payments have been wrongly claimed as tax deductions. Bribery of public officials is a crime and bribes are not deductible under the tax law. Any suspected bribes that are identified through compliance work would be referred to the AFP for their consideration.

The ATO is a participating agency on the FAC Centre. Where appropriate, the ATO will undertake reviews (including denial of deductions) related to intelligence received on foreign bribery matters.

The ATO provides guidance to staff in relation to understanding and dealing with bribery of Australian and foreign public officials. This guidance is available to the public via the ATO's website.<sup>10</sup> This publication complements the OECD publication, *OECD Bribery Awareness Handbook for Tax Examiners*, and builds on advice from Transparency International.<sup>11</sup>

#### Export Finance and Insurance Corporation

Efic contributes to Australia's efforts 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.<sup>12</sup> Multinational customers are also referred to the OECD Guidelines for Multinational Enterprises published by Efic and available on its website.<sup>13</sup>

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,

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<sup>10</sup> A copy of the Guidelines is available on the ATO website at [www.ato.gov.au/About-ATO/About-us/In-detail/How-we-do-things/ATO-guidelines-for-understanding-and-dealing-with-the-bribery-of-Australian-and-foreign-public-officials/](http://www.ato.gov.au/About-ATO/About-us/In-detail/How-we-do-things/ATO-guidelines-for-understanding-and-dealing-with-the-bribery-of-Australian-and-foreign-public-officials/).

<sup>11</sup> OECD Bribery Awareness Handbook for Tax Examiners, 2009, [www.oecd.org/tax/crime/37131825.pdf](http://www.oecd.org/tax/crime/37131825.pdf).

<sup>12</sup> [www.efic.gov.au/about-efic/our-corporate-responsibility/business-ethics/anti-corruption](http://www.efic.gov.au/about-efic/our-corporate-responsibility/business-ethics/anti-corruption)

<sup>13</sup> [www.efic.gov.au/about-efic/our-corporate-responsibility/business-ethics/oecd-mne-guidelines](http://www.efic.gov.au/about-efic/our-corporate-responsibility/business-ethics/oecd-mne-guidelines)

agreement, arrangement or event contemplated by, or referred to in, the application for financial assistance).

- Through 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.

#### US Foreign Corrupt Practices Act (FCPA) Guidance

In the United States, the Department of Justice (DOJ) and the SEC jointly issued a comprehensive Resource Guide to the US FCPA. The Resource Guide represents DOJ's and the SEC's interpretations of the FCPA and the agencies' enforcement policies and procedures.

In Australia, the online learning module on foreign bribery and other agency outreach material summarises the publicly available information on reasonable hospitality.<sup>14</sup> As Australia does not have any case law in this area, it is difficult to provide comprehensive advice on what may constitute a bribe in certain circumstances. Outreach material directs readers to consider the relevant advice documents prepared by US and UK agencies, noting the extraterritorial application of their laws. While government provides general advice, it is a matter for business to seek specific advice on their particular circumstances.

#### **ix. private sector whistleblower protection and other incentives to report foreign bribery**

Corporate whistleblowers are a key component in detecting fraud and other forms of corporate and financial services misconduct.

There are three key protections recognised as a requirement for an effective whistleblowing regime: protection from physical harm, protection from financial or other harm and the protection of anonymity. In Australia, whistleblowers are protected from physical harm by state and territory police forces and in cases where a whistleblower has agreed to give evidence, through the witness protection program.

Whistleblowers are able to provide information to the AFP anonymously through Crime Stoppers. Alternatively, if a whistleblower has ongoing information to provide the AFP, they can do so as a human source. Registering a whistleblower as a human source will enable the AFP to protect their identity.

There are a range of legislative protections provided for certain whistleblowers under Australian law. Legislative protections for whistleblowers are contained in:

- the Corporations Act (Part 9.4AAA)
- the *Banking Act 1959* (Cth) (Banking Act)
- the *Insurance Act 1973* (Cth) (Insurance Act)

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<sup>14</sup> For example, the AFP Foreign Bribery Fact Sheet addresses aspects of this. This is available on the AFP website: <http://www.afp.gov.au/policing/international-liaison/bribery-of-foreign-officials>.

- the *Life Insurance Act 1995* (Cth) (Life Insurance Act), and
- the *Superannuation Industry (Supervision) Act 1993* (Cth) (Superannuation Industry (Supervision) Act).

The whistleblower legislation contained in the Corporations Act, Banking Act, Insurance Act, Life Insurance Act and Superannuation Industry (Supervision) Act provide protections for individuals that disclose information about breaches under the relevant acts.

The whistleblower provisions under the Corporations Act were introduced to protect whistleblowers from potential reprisal or liability they may suffer as a result of disclosing information about corporate fraud or other forms of misconduct. Whistleblower protections apply to all companies covered by the Corporations Act. The term whistleblower is defined to cover existing employees, not former employees or agents or advisers of a company.

The protections are available to an officer of the company, an employee of the company, a contractor or their employee who has a contract to supply goods or services to the company. ASIC has responsibility for enforcing the Corporations Act provisions, including those providing protection to corporate whistleblowers. To make a disclosure that qualifies for protection, the informant must have reasonable grounds to suspect that the information they provide indicates a breach of corporations law (such as the Corporations Act and ASIC Act) has occurred or may occur, be acting in good faith and provide their name prior to making the disclosure. Good faith requires the whistleblower not to have any malicious or secondary motivation in making the disclosure.

APRA is responsible for enforcing the whistleblower protections under the Banking Act, Insurance Act, Life Insurance Act and Superannuation Industry (Supervision) Act. To support this role, APRA has put processes in place for handling whistleblower complaints relating to the institutions regulated under those Acts. Information on APRA's policy and process is available on its website.<sup>15</sup>

#### ASIC's Office of the Whistleblower

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. Notably, the Committee recommended that the Government initiate a review of the adequacy of Australia's current framework for protecting corporate whistleblowers, with a view to:

- updating it to make it generally consistent with and complementary to the protections afforded to public sector whistleblowers under the *Public Interest Disclosure Act 2013* (Cth), 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.

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<sup>15</sup> <http://www.apra.gov.au/aboutapra/pages/information-on-being-a-whistleblower.aspx>



The Government has tabled its response to the Committee's report.<sup>16</sup> The Government noted the recommendations relating to whistleblower protections (recommendations 12-16). 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. ASIC has issued Information Sheet 52 which more fully explains ASIC's role in this regard.<sup>17</sup>

#### **x. facilitation payment defence**

Australia maintains a facilitation payment defence to the offence of foreign bribery. The defence is set out in Division 70.4 of the Criminal Code.

This allows a payment of minor value provided in return for a minor, routine government action to be classed a facilitation payment and is a complete defence to a foreign bribery charge.

The OECD Convention does not prevent member countries from allowing a defence for facilitation payments. Under the 2009 *Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions*, member countries are required to periodically review their policies and approach on facilitation payments, and encourage companies to prohibit or discourage the use of facilitation payments in internal company controls or compliance programs.

Australian agencies strongly discourage businesses from making facilitation payments. Such payments, while permissible under Australian law, may still constitute a criminal offence in the jurisdiction they are made.

New Zealand and the USA are the only other OECD countries with a similar defence. Canada passed legislation to repeal its defence in 2013, however the amendment is to take effect when proclaimed (date not specified). The intervening period is intended to allow Canadian companies to implement internal policies and controls to adjust to the change.

#### Previous consultation on the facilitation payment defence

In November 2011, the previous Government launched a public consultation on the possibility of removing the defence. AGD received sixteen submissions from the public and industry.

Nine submissions favoured removing the facilitation payments defence for reasons including that the defence creates uncertainty and that facilitation payments result in long-term detriment to business interests and are no different to bribes.

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<sup>16</sup> A copy of the Government response is available online here:  
<http://www.financeminister.gov.au/media/2014/docs/Austrn-gov-response-senate-economics-references-committee%20report.pdf>.

<sup>17</sup> <http://www.asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/guidance-for-whistleblowers/>

Six submissions favoured retaining the defence for reasons including that such payments are necessary in developing countries to enable public services and to allow business to be conducted, and that prohibiting such payments will not stop them from being made.

**xi. use of suppression orders in prosecutions**

Suppression orders may be sought in particular cases. Whether such orders are granted is a matter for the particular court.

In relation to the ongoing Securrency/Note Printing Australia proceedings, DFAT obtained court orders to suppress limited information on the grounds that its public release would negatively impact Australia's bilateral relationships. The protected information related to foreign individuals who were not the subject of the proceedings or any charges in Australia. The suppression orders did not affect the court's ability to access information. No information relating to the conduct of DFAT officers was suppressed.

DFAT pursued this approach conscious that the orders would have the least disruptive effect on the proceedings, allowing the court full access to information while also protecting Australia's international relations. In light of the subsequent breach of the orders by Wikileaks and revocation of the orders by the court, DFAT will reflect on how to approach similar issues in the future.

Under Article 5 of the Anti-Bribery Convention, investigation and prosecution of foreign bribery 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.

The suppression orders in the Securrency/Note Printing Australia proceeding do not contravene Australia's obligations under Article 5, as they do not impinge the effective prosecution of the matter.

**xii. foreign bribery not involving foreign public officials, for example, company to company or international sporting bodies**

There is no specific offence under Commonwealth law for offshore bribery not involving public officials. It is possible that state or territory laws may apply to such conduct, where there is a geographic nexus, such as section 249B of the *Crimes Act 1900* (NSW). Such conduct is also likely to be an offence in the jurisdiction in which it took place.

When bribery conduct is directed to persons who do not fall under the definition of a foreign public official, the offending conduct may be investigated under the relevant state-based legislation or the Corporations Act, where appropriate.

**xiii. the economic impact, including compliance and reporting costs, of foreign bribery**

As noted above, foreign bribery can have detrimental macro-economic effects. It corrodes good governance and impedes economic development. Foreign bribery can undermine the credibility of

Australian businesses and ultimately shrink the global market for Australian exports and investment.

According to a report prepared by the World Economic Forum in association with the International Chamber of Commerce, the United Nations Global Compact and Transparency International, the cost of corruption is estimated at more than 5% of global GDP (US\$2.6 trillion), with over US\$1 trillion paid in bribes each year. Corruption adds up to 10% to the total cost of doing business globally, and up to 25% to the cost of procurement contracts in developing countries.

The Deloitte Bribery and Corruption Survey 2015 highlighted that while there are encouraging signs pointing to improvement in a comprehensive understanding of relevant bribery laws, many companies are still not recognising this risk. The survey notes that a large percentage of respondents do not have adequate systems in place to identify foreign bribery risks, nor have they carried out foreign bribery and corruption risk assessments.

The OECD Anti-Corruption Division released its OECD Foreign Bribery Report in 2014. The report measures the extent of the crime of transnational corruption, and is based on an analysis of data emerging from all foreign bribery enforcement actions since 1999.

On the release of the report, OECD Secretary-General Angel Gurría noted that ‘the true social cost of corruption cannot be measured by the amount of bribes paid or even the amount of state property stolen. Rather, it is the loss of output due to the misallocation of resources, distortions of incentives and other inefficiencies caused by corruption that represent its real cost to society.’

#### **xiv. any other related matters**

##### **G20 Anti-Corruption Working Group**

As part of Australia’s presidency of the G20 in 2014, Australia (led by AGD) co-chaired the G20 Anti-Corruption Working Group together with Italy. The two co-chair countries led the implementation of residual commitments under the 2013-14 Anti-Corruption Action Plan, and also led the development of a new 2015-16 Anti-Corruption Action Plan. G20 Leaders endorsed the 2015-16 Anti-Corruption Action Plan at the Brisbane Summit in November 2014. The Plan focuses on a range of existing and emerging priority areas for anti-corruption, including combating money laundering and foreign bribery, promoting the transparency of legal entities, and tackling corruption in high risk sectors such as extractives.

During our presidency, Australia prioritised strengthening G20 efforts to combat foreign bribery by leading the development of a comprehensive self-assessment questionnaire for G20 countries to detail their implementation of anti-bribery commitments. These self-assessments were completed by all G20 countries and published on the G20 website. The 2015-16 Anti-Corruption Action Plan continues the G20’s efforts to combat foreign bribery by committing G20 countries to comprehensively and effectively criminalising bribery of domestic and foreign public officials, as well as the solicitation of bribes, establishing the liability of legal persons, and the enforcement of such laws through civil and criminal actions.

### Australia's aid program

Australia's aid program works to support international efforts to tackle corruption and improve transparency and accountability. The aid program does this in three ways: through bilateral programs, supporting international institutions and through control over program funds.

Australia supports partner countries to strengthen their public financial management systems, which is one of the best ways to combat corruption. For example, in the Philippines, Australia is helping the government to reform and modernise its public financial management systems, including through developing a new account code classification structure, allowing the Philippines Government to undertake detailed line-item budgeting for the first time.

The aid program also supports leading international institutions at the forefront of combatting corruption. Australia supports Transparency International in the Asia-Pacific region to fight corruption and help communities to strengthen transparency, accountability and integrity (\$10.7 million from 2011 to 2015).

Australia's support enables Transparency International to:

- strengthen the capacity of its 23 Asia-Pacific national chapters and its regional network
- provide support to victims and witnesses of corruption
- mobilise youth and community groups, and
- conduct anti-corruption research for advocacy and policy development.

In 2014, Australia's funding supported activities including:

- national integrity assessments in Bangladesh, Maldives, Nepal, Pakistan, Sri Lanka and Vanuatu
- the operation of Advocacy and Legal Advice Centres (which provided advice to 3,000 clients and undertook over 1,000 cases), and
- supporting Transparency International national chapters to develop advocacy plans to tackle foreign bribery.

Australia also promotes the operation of the UN Convention against Corruption (UNCAC), by supporting the UN Office on Drugs and Crime (UNODC) and UN Development Program (UNDP) to help countries sign up, implement and review compliance with the Convention (\$26.4 million from 2009 to 2015). In 2014, Australian assistance to a joint UNODC-UNDP Pacific Regional Anti-Corruption Project (UN-PRAC) supported the Cook Islands, the Federated States of Micronesia, Kiribati, Nauru, Palau, the Republic of the Marshall Islands, Solomon Islands and Vanuatu to participate in the UNCAC review process.

Australia assists countries to recover assets stolen through corruption by contributing to the joint World Bank-UNODC Stolen Asset Recovery Initiative (StAR) (\$4.6 million from 2009 to 2013). StAR works with developing countries and financial centres to prevent the laundering of the proceeds of corruption and to expedite the return of stolen assets to developing countries. From 2011 to 2014, StAR trained more than 1,500 officers in asset recovery processes and procedures. In 2014, StAR provided asset recovery assistance to 27 countries.

Australia, through AGD, has bilateral programs in the Indo-Pacific region that seek to strengthen legal frameworks and improve investigation and prosecution capacity on money laundering and

proceeds of crime. AGD also supports regional activities such as the Asset Recovery Interagency Network – Asia Pacific (led by the AFP as current president), the Pacific Islands Law Officers' Network Anti-Corruption and Proceeds of Crime Working Group and the UNODC-USA Regional Asset Forfeiture Conference.

DFAT is fully committed to protecting public money and property from fraud. DFAT has a policy of zero tolerance towards fraudulent activity or behaviour. This applies to departmental staff (including locally engaged staff at overseas posts) and external parties that receive Australian Government funds, including all aid program funds. Accordingly, the policy applies to contractors, third party service providers, non-government organisations and other funding recipients.

The Australian aid program is delivered in challenging environments where fraud and corruption can be commonplace. Aid must be delivered in a way that effectively protects Australian Government funds. DFAT has agreements which clearly set out the requirements for contractors and other aid delivery partners to protect funds from fraud and to refrain from engaging in anything that could be construed as bribery or corruption (such as facilitation payments).

To ensure that staff understand their responsibilities and obligations, DFAT provides all staff with training in conduct and ethics and fraud awareness. This training is aimed at raising staff awareness of what constitutes fraud, how to prevent it and, if it occurs, how to report it using the correct procedures. It also advises of other essential steps DFAT takes such as the prosecution of offenders and/or application of other appropriate sanctions and the recovery of misappropriated funds or assets wherever possible.

#### Extractive Industries Transparency Initiative (EITI)

EITI is a voluntary mechanism which promotes and supports improved governance in resource-rich countries through the full publication and verification of company payments and government revenues from oil, gas, and mining. It is a global standard that promotes revenue transparency and accountability in the extractive sector, and is a global benchmark for natural resource revenue management.

Australia is one of the largest supporters of the EITI, committing \$18.43 million from 2006 to 2015. This has included funding for the EITI Secretariat, as well as the World Bank EITI Multi-Donor Trust Fund, which was established to support developing countries in implementing the EITI.

The EITI helps countries to gain the maximum benefit from their resource endowment by promoting structures aimed at reducing corruption and improving public financial management and the business environment. Countries implementing the EITI publish a report reconciling the monies companies pay to governments with those received by governments. There are currently 48 countries implementing, or in the process of implementing, the EITI standard. Of these, 31 are EITI compliant and 17 are EITI candidates. In the Asia-Pacific, Indonesia and Timor-Leste are EITI compliant, and Burma, Papua New Guinea, Solomon Islands and the Philippines are candidate countries.

The Australian Government announced in 2011 that it would undertake a domestic Pilot of the EITI. The Pilot tested the EITI principles and criteria against Australia's existing financial and governance arrangements to inform a government decision about whether Australia should move to

implement the EITI. The steering committee for the Pilot delivered its recommendations to the Australian Government in July 2014. This remains under consideration by ministers.

#### ATO measures

The ATO is preparing to implement measures (subject to passage of legislation), which will result in more information being made available for data matching and analysis.

In the 2015-16 Budget, the Government announced it will implement new reporting requirements proposed by the OECD, to apply to companies with global revenue of \$1 billion (commonly referred to as country-by-country reporting). These reports include a head office file on global operations, a local file on transactions within Australia (or the local jurisdiction) and a country-by-country file to indicate assets and profits relative to all operating jurisdictions. They will be required to lodge the documents with the ATO within 12 months of their income tax year-end. The reporting requirements will come into effect for the first income tax year beginning on or after 1 January 2016.

In the Mid-year Economic and Fiscal Outlook 2014-15, the Government announced it will implement the OECD Common Reporting Standard for the automatic exchange of financial information from 1 January 2017, with the first exchange of information in 2018.

The Standard will require banks and other financial institutions to collect and report to the ATO financial account information on non-residents. The ATO will exchange this information with the foreign tax authorities of the non-residents. In parallel, the ATO will receive financial account information on Australian residents from other countries' tax authorities. This will help ensure that Australian residents with financial accounts in other countries are complying with Australian tax law and act as a deterrent to tax evasion.

## **Annex 1 – Agencies’ roles in relation to foreign bribery**

- Attorney-General’s Department (AGD)
- Australian Federal Police (AFP)
- Australian Securities and Investments Commission (ASIC)
- Australian Taxation Office (ATO)
- Australian Transaction Reports and Analysis Centre (AUSTRAC)
- Australian Trade Commission (Austrade)
- Commonwealth Director of Public Prosecutions (CDPP)
- Department of Foreign Affairs and Trade (DFAT)
- Export Finance and Insurance Corporation (Efic)

### *Attorney-General’s Department*

AGD has whole-of-government policy responsibility for foreign bribery. Key aspects of this role include maintaining an effective legal and policy regime, undertaking outreach to raise businesses’ awareness of the foreign bribery laws, and leading Australia’s engagement with the OECD Working Group on Bribery on our compliance with the Anti-Bribery Convention.

AGD is the central authority responsible for extradition, international transfer of prisoners and mutual assistance casework and related advice.

AGD also leads Australia’s engagement in a range of regional and international forums and initiatives focussed on combatting corruption, including the G20 Anti-Corruption Working Group (see xiv above), the UNCAC, and the Asia-Pacific Economic Cooperation Anti-Corruption and Transparency Experts Task Force.

### *Australian Federal Police*

The AFP is responsible for investigating offences against Commonwealth law, including the offence of bribing a foreign public official in Division 70.2 of the Criminal Code.

The AFP works closely with other Australian and international law enforcement bodies to enhance safety and security in Australia and to provide a secure regional and global environment. Corruption, including bribery of a foreign public official, is an area of high priority for the AFP.

In 2014, the AFP established the FAC Centre. The Centre enhances the AFP response to foreign bribery and other forms of corruption, and brings together officers from other Commonwealth enforcement agencies, including the Australian Crime Commission, Australian Securities and Investments Commission and the Australian Taxation Office and other agencies.

The AFP has established an internal Foreign Bribery Panel of Experts. This Panel is made up of senior investigators with experience in significant foreign bribery investigations. It provides expert advice on foreign bribery referrals and investigations, and conducts foreign bribery specific training modules and awareness-raising activities.

### *Australian Securities and Investments Commission*

ASIC regulates Australian companies, financial markets, financial services organisations and professionals who deal and advise in financial products and advice, superannuation, insurance, deposit-taking and credit.

As the corporate regulator, ASIC ensures that companies, schemes and related entities meet their obligations under the Corporations Act. ASIC registers and regulates companies at every point from their incorporation through to their winding up, and is responsible for ensuring that company officers comply with their responsibilities to shareholders, creditors and third parties. It also registers and, where necessary, takes disciplinary action against company auditors and liquidators. ASIC monitors public companies' financial reporting and disclosure and fundraising activities

ASIC is responsible for investigating fraudulent, misleading and deceptive conduct in relation to financial services, including some conduct outside Australia. ASIC and the AFP work closely together in the investigation of instances of suspected foreign bribery (noting AFP has primary responsibility for this crime type).

ASIC conducts prosecutions for some summary offences which it has investigated. Indictable offences and other summary offences are referred to the CDPP. There are guidelines between ASIC and the CDPP that deal with the referral of cases for prosecution and arrangements for the conduct of prosecutions.

### *Australian Taxation Office*

The ATO is the Commonwealth Government's principal revenue collection agency. The ATO is a participating agency on the AFP FAC Centre. This allows the ATO to be aware of, and involved as appropriate, in the matters referred to the AFP in relation to serious and complex fraud and corruption matters. This includes foreign bribery.

The ATO's international relationships including Australia's participation with working parties to the OECD, particularly in relation to Automatic Exchange of Information and other transparency measures, allow information and experience to be shared.

The ATO has published guidelines which provide information for understanding and dealing with the bribery of Australian and foreign public officials. These provide tax officers with practical ways to identify how a taxpayer may be concealing bribe transactions to an Australian or foreign public official.<sup>18</sup>

### *Australian Trade Commission (Austrade)*

Austrade advances Australia's international trade, investment, education and tourism interests by providing information, advice and services. Austrade can assist Australian companies by:

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<sup>18</sup> A copy of the Guidelines is available on the ATO website at <https://www.ato.gov.au/About-ATO/About-us/In-detail/How-we-do-things/ATO-guidelines-for-understanding-and-dealing-with-the-bribery-of-Australian-and-foreign-public-officials>.



- providing practical guidance on conducting trade in foreign countries
- identifying or recommending a range of local agents
- helping to resolve an issue if a client company reaches an impasse because it refuses to pay a briber or make a facilitation payment
- providing information on practices that may breach Australian law
- leveraging the 'badge-of-government' to assist Australian exporters in situations where bribery or other illegal payments or inducements impede their operation, and
- raising issues of market access on a government-to-government level where there is evidence of systemic bribery.

The Austrade website provides an anti-bribery training and generic anti-bribery governance materials as well as information on how to access Austrade's services.

#### *Australian Transaction Reports and Analysis Centre*

AUSTRAC is Australia's anti-money laundering regulator and specialist Financial Intelligence Unit and is responsible for ensuring the collection, analysis and dissemination of financial intelligence to its designated law enforcement, national security, revenue collection and social welfare partner agencies.

As part of this role, AUSTRAC allows domestic partner agencies (for example the ATO, ASIC, the ACC and the AFP) on-line access to the AUSTRAC database of financial transaction reports information. AUSTRAC also provides on-site training and analytical assistance to those agencies to assist their efforts in combating crime, revenue evasion, the funding of terrorism and major fraud.

#### *Commonwealth Director of Public Prosecutions*

The primary role of the CDPP is to prosecute offences against Commonwealth law, including the Criminal Code and Corporations Act.

All decisions in the prosecution process are made in accordance with the *Prosecution Policy of the Commonwealth (Attachment G)*. The Policy provides that a prosecution should not proceed unless there are reasonable prospects of conviction and the prosecutor is satisfied that the public interest would be served by a prosecution. The Policy sets out a range of factors to be taken into account when giving consideration to whether a prosecution is in the public interest.

#### *Department of Foreign Affairs and Trade*

DFAT's role is to advance the interests of Australia and Australians internationally. In relation to foreign bribery, DFAT undertakes outreach to ensure that Australian businesses are aware of their obligations under Australian anti-bribery laws.

Any Australian or Australian company operating overseas that encounters corruption is encouraged to contact the relevant Australian diplomatic mission for advice and assistance. The DFAT website provides information about foreign bribery and anti-corruption policy generally, as well as information about facilitation payments.

DFAT's aid program works to support international efforts to tackle corruption and improve transparency and accountability. The aid program does this in three ways: through bilateral programs, supporting international institutions and through control over program funds.

DFAT refers all information concerning allegations of foreign bribery offences committed by Australians and Australian companies to the AFP for evaluation of any potential breach of Australian laws.

#### *Export Finance and Insurance Corporation (Efic)*

Efic is Australia's export credit agency (ECA). Its role is to ensure that Australian businesses with viable export and international business opportunities have the finance to succeed in international markets.

Efic has developed Transactional Anti-Bribery Procedures, which apply to all transactions and potential transactions being considered by Efic, including SMEs, mid-market and project finance transactions.

Standard provisions in Efic's template transaction documents help address the foreign bribery risk. These provisions include initial and repeating representations and warranties from contractual counterparties, which confirm the absence of bribery and corruption. These representations generally constitute a pre-requisite of Efic providing its support.

Efic has an Anti-Corruption Policy which outlines the obligations of its staff in deterring and preventing bribery and corruption. All Efic staff are required to undertake annual anti-corruption compliance training.