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International Bar Association
Anti-Corruption Committee

Amended Submission to Australian Senate Economics Reference Committee on Australia's Foreign Bribery Laws

24 AUGUST 2015

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1 Introduction

1.1 International Bar Association

(a) The International Bar Association (**IBA**) is the global voice of the legal profession and includes over 45,000 of the world's top lawyers and 197 Bar Associations and Law Societies worldwide as its members.

(b) The IBA has had a long standing interest in, and advocacy of, issues concerning transparency and probity in the public and private sector and steps that countries around the world can take to combat foreign bribery and corruption.

(c) The President of the IBA has launched a Judicial Corruption Initiative that seeks to create a body of knowledge dealing with corruption in and affecting the judiciary and proposals to help national judiciaries overcome corruption within and affecting the judiciary. This initiative reflects the critical importance the IBA places on supporting legal and policy reforms which focus on combating foreign bribery, fraud and corruption in all forms, domestic and foreign, in all countries.

1.2 The IBA Anti-Corruption Committee

(a) The IBA's Anti-Corruption Committee (the **Committee**) draws its members from around the world, made up of anti-corruption lawyers (in private practice and in the public sector), academics, prosecutors, investigators, judges and forensic accountants. This membership gives the Committee a unique opportunity to comment upon important policy initiatives that affect anti-bribery and anti-corruption laws policies and how they are implemented around the world and in particular countries.

(b) The Committee has formed a working group (the **Group**) in relation to the matters the subject of this review. The Committee is pleased to take this opportunity to make a submission to the Senate of the Australian Parliament on the state of Australia's foreign bribery laws.

(c) The Group members are made up of experienced practitioners practising in the areas of foreign bribery and anti-corruption compliance, investigation, prosecution and defence work. The spread of the Group covers experience in both the common law and civil law jurisdictions. The names of the working group members are listed at the end of this submission (in **Annexure A**).

1.3 Scope of this Submission

(a) The scope of this submission considers more broadly the state of the law as it applies in Australia and, in particular, in relation to Commonwealth legislation the subject of the review rather than descending into detail about how particular statutory provisions may or may not be amended.

(b) This submission also reviews the fundamental principles which the Committee considers could be considered by the Senate in its deliberations under review.

(c) What are corruption and the problems that we are here to address?

(d) Corruption can take many forms, direct and indirect, obvious or subtle, financial or non-financial. In relation to public officials, it invariably involves the abuse or misuse of a public office or position for personal gain (directly or to benefit associates).

(e) Why does corruption occur?[1]

> Corruption is as old as sin, and as multifaceted. Sin is as old as humanity. Our mythology has it that sin commenced with Adam and Eve, when Eve placed before Adam a little temptation. The entrepreneurial expertise of this couple is to be acknowledged, if not applauded, for this man and woman, standing naked in a garden, with working capital of one apple, have created a thriving industry of corruption. The reason why they have been so successful is because of the growth hormone called temptation. Whilst ever there are human beings there will be temptation. The reason temptation is so irresistible is because people recognise that aspects of life regarded as desirable, particularly wealth and influence, may, through corruption, be acquired without the strain, the effort, the dedication, and the work required if such desirables were to be acquired by legitimate means.

1.4 The Current Australian Enforcement and Regulatory Landscape

(a) The position in Australia is very mixed and one which the Committee believes can be substantially improved over many areas. Foreign bribery laws were introduced in 1999. The first criminal prosecution was commenced in July 2011 (and is subject to wide-ranging suppression orders) and the second prosecution was commenced in March 2015. The Australian Federal Police (**AFP**) has at least 15 current investigations[2], although some of these are believed within legal circles to have been in existence for some years.

(b) The Organisation for Economic Cooperation and Development (**OECD**) and Transparency International Australia (**TIA**) have been consistently critical of Australia's compliance with its obligations under the OECD Convention since 1999. In the OECD's most recent Report (see section 3.3(c) below), the OECD was more supportive of the progress that had been achieved between 2012 and 2015.

(c) However, in the Committee's opinion, there remain some fundamental structural issues that should be addressed.

(i) Are Australia's laws effective? – For the reasons set out in this submission, the Committee believes that the answer is no.

(ii) What is the prevailing prosecution attitude? – This is hard to tell and the impression amongst the legal community in Australia is that the Commonwealth Director of Public Prosecutions (**CDPP**) as the statutory officer responsible for conducting prosecutions for breaches of Commonwealth laws is very risk averse and is unlikely to commence any complex financial crime prosecution arising out of foreign bribery unless it is almost certain of a successful result. At one level that is commendable as the powers of the State should only, in the Committee's opinion, be invoked against a defendant where it is clear a reasonable case exists to secure a conviction[3]. But for those involved in foreign bribery (whether corporations or individuals) in light of the numerous official investigations, the question arises: why have more matters not been prosecuted[4]? The laws exist and do not seem to have been amended because of procedural or technical difficulties, which is the first thing regulators will seek from governments when

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[1] The Hon TRH Cole AO RFD AC *Corruption, Its Consequences, Risks and Management*, 25 March 2014, page 1.

[2] OECD *Australia: Follow-up to the Phase 3 Report and Recommendations*, April 2015, page 4.

[3] The Prosecution Policy of the Commonwealth Guidelines for the Making of Decisions in the Prosecution Process (**CDPP Prosecution Policy**) specifically states that a "*prosecution should not proceed if there is no reasonable prospect of a conviction being secured*": paragraph 2.5.

[4] OECD, *Phase 3 Report on Implementing the OCED Anti-Bribery Convention in Australia*, Oct 2012, pages 5 and 19. Out of 28 referrals to the AFP as at 2012, 21 had been closed with no action.

problems arise[5]. In addition, regulators and enforcement agencies have extremely wide powers to gather information of potential offences yet still, there is almost no enforcement action in Australia. The attitude of the Australian Taxation Office (**ATO**) in aggressively pursuing taxpayers for revenue fraud and money laundering stands in stark contrast to the pursuit of foreign bribery offences. What needs to be explained by the AFP and the CDPP is what is causing this – is it deficiencies in the law? Or are there complexities in obtaining foreign evidence? Or a lack of training and expertise within investigators used to traditional crime and now being introduced to complex financial economic crime operating across boundaries with no respect for local laws or customs?

(iii) Who should enforce Australia's foreign bribery laws? – While the Australian Securities and Investments Commission (**ASIC**) appears better skilled in knowledge about corporate governance and how corporations operate in domestic and international financial markets, ASIC eschews anything to do with enforcing foreign bribery offences (although it is part of the AFP-hosted National Fraud and Anti-Corruption Centre). While the AFP has coordinated its activities in a more streamlined manner[6], experience on the ground leads the Committee to question the AFP's knowledge and skills, at a personal investigator level, on international finance, corporate governance and the way international corporations do business[7]. In the Committee's opinion, Australia needs one dedicated agency to have primary responsibility for all complex financial crime cases (including foreign bribery) in all its aspects, criminal and civil. One example is the Project Wickenby model used by the ATO to pursue entities for false, fraudulent or otherwise improper tax declarations. There is no doubt that each of the ATO, ASIC and the AFP has a broad range of necessary skills that complement each other in investigating serious financial crime. The question is how they can and should best be coordinated after years where little action has occurred in relation to foreign bribery. The jury is out on whether the AFP or ASIC (with its traditional role in better understanding governance and commercial practice) would be the best agency to take the lead. At present, it is the AFP and whether that is the right call, remains to be seen. The Committee regards it as essential for the Government to review the current structure to ensure not only that it works but that it is seen to work. If nothing is done to address the structure and attitude of investigating and prosecuting foreign bribery cases, the existing fractured approach will continue and the public perception that nothing is being done to police corporate criminal conduct by weak regulators will persist to Australia's overall detriment.

(iv) Is there political leadership to target foreign bribery? – This question tends to both a yes and no answer. At the one level, Australia is active in regional forums, in enacting laws criminalising foreign bribery and all associated money-laundering and tax evasion practices. Australia took a commendable lead in the 2014 G20 meeting, leading to the G20 Anti-Corruption Implementation Plan. Yet, on the other hand, Australia does not legislate as

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[5] On 28 August 2009, the AFP announced it was ceasing any criminal investigation into the AWB Ltd Oil-For – Food wheat contract sales to Iraq. As reported in The Australia (29 April 2009), the decision to drop the investigation was made after a review of the evidence by Peter Hastings QC, who declared the prospect of convictions was limited and "not in the public interest". As for ASIC's AWB Oil-For-Food civil prosecutions against directors and officers, two plea deals were secured (with one being roundly criticised by the Victorian Court of Appeal for downplaying the conduct of the former CFO), other cases have been discontinued with only 2 still to run in late 2015. Nothing has been raised publicly as to deficiencies in the law that caused these results.

[6] See the Media Release dated 31 July 2014 from the Australian Minister of Justice on the creation of the AFP-hosted Fraud & Anti-Corruption Centre, where serious and complex fraud and corruption cases will be managed and which will be resourced by within the AFP and the AFP will coordinate a multi-agency approach to investigating and prosecuting serious crime.

[7] This attitude existed in the UK before the Bribery Act came into effect on 1 July 2011. Many UK lawyers saw there as being a lack of confidence in the UK Serious Fraud Office to secure convictions under old laws designed to catch individuals where the world of modern international business moved on faster than the law or the prosecutors' understanding of it.

to facilitation payments, it has not produced a national anti-corruption plan and it resists any Federal anti-corruption commission. There appears to have been a failing in enforcement: there have been 2 criminal cases in over 15 years, no civil penalty cases, no corporate prosecutions (save for the suppressed Securency matter) and an apparent absence of regulators requesting Government to improve the laws to make their life easier (save for the current limited amendments to the foreign bribery offence currently before Parliament, see section 2.1(g) below). The only conclusion the Committee can draw is that Australia remains a reactive country, sensitive to external criticism and forced to budget better resources only when it must. This does not, in the Committee's opinion, bode well for the future. Political leadership is required and commensurate resources given to the AFP, ASIC and the CDPP to investigate and prosecute matters.

(v) The *Director of Public Prosecutions Act 1983* (Cth) (**CDPP Act**) established an independent prosecutor. The CDPP Act also ensured there was a separation of the investigative and prosecutorial function in the Commonwealth judicial system. Whilst that position is proper, it must be remembered that the CDPP can only make the decision whether to prosecute or not, when a matter is referred for that purpose. In the Committee's opinion, there is a very strong public interest in having all foreign bribery cases tested before the courts where there is a reasonable prospect of success. There does not need to be certainty of success, as that can never exist. It is for judges and juries, in a contested matter, to determine, as a matter of law and fact, if an alleged offence occurred.

(vi) Is there management and board leadership to target foreign bribery? – The answer is increasingly yes in the larger, more sophisticated corporations which have the resources to devote to proactive compliance and ethical standards. In addition, experienced corporations working offshore and exposed to different jurisdictions are far more conscious of their foreign bribery risk profile and response, particularly in light of the extra-territorial jurisdiction asserted by the US and UK authorities. The real challenge is to persuade all corporations with offshore operations, particularly the small to medium business enterprises, that it is in their financial interests to proactively address foreign bribery risks, for example, to mitigate legal liability risk, to better position themselves in the eyes of employees, customers and clients, or the improve their corporate social responsibility[8]. The UK *Bribery Act 2010* (**UK Bribery Act**) attempted to achieve this by section 7 of the Act, in effect to shift responsibility on businesses to self-regulate[9]. At present, it is the Committee's experience in Australia that many corporations see the cost of compliance as too high (therefore they lobby for less regulation or compliance rules), the risks of prosecution as minimal to low and the return of profit (on securing that one contract deal) as too large to ignore. Corporate criminal liability for foreign bribery offences, despite the *Criminal Code Act 1995* (Cth) (**Criminal Code**) expanding how liability can be attributed to a corporation[10], seems elusive as ever (as there have been no prosecutions under these provisions for any foreign bribery offence since they were enacted). Until this cycle is broken, the Committee is concerned that things will not change.

(d) This submission seeks to explore these issues in more detail and to encourage and promote real, meaningful reform backed up with the political leadership from the Government (and Parliament) to properly fund change. In the Committee's view and

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[8] The Deloitte *Bribery and Corruption Survey 2015 Australia and New Zealand: separate the wheat from the chaff*, concluded, at page 25, of organisations with offshore operations, 23% said they were not concerned with risks arising from non-compliance with anti-corruption legislation, yet 77% have never conducted a bribery and corruption risk assessment.

[9] In effect, section 7 of the UK Bribery Act deems a corporation guilty of an offence if a person associated with it bribes another person to obtain or retain business or a business advantage. The corporation has a defence if it proves that it had adequate procedures in place to prevent such conduct.

[10] Sections 12.1 to 12.6, Criminal Code.

experience, the Australian public detest dishonesty, improper and illegal commercial practices and even more, governments and regulators who appear more concerned to catch small fry than take substantial corporations and well-connected directors to task for conduct that occurred under their watch. That is the real challenge for this review and on which the Committee is pleased to make this submission.

2 Australian Foreign Bribery Laws

2.1 Section 70 of the Criminal Code 1995

(a) The offence of bribing a foreign public official is contained in Part 4, Section 70 of the Criminal Code (see **Annexure B**).

(b) Section 70.2 states that a person is guilty of the offence of bribing a foreign public official if the person:

(i) provides, or causes to be provided, a benefit to another person; or

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

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

(iv) the benefit is not legitimately due to the other person,

and the person does so with the intention of influencing the foreign public official, in the exercise of the official's duties as a foreign public official to obtain or retain business or obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advance.

(c) The concept of "benefit" is broadly interpreted and may include any advantage. It is not limited to property or money and can be a non-tangible inducement.

(d) The term "foreign public official" is defined widely to capture a range of public officials including those persons officially employed by a foreign government and those persons who perform work for a foreign government body or who hold themselves out to be an authorised intermediary of an official or who are part of a "foreign public enterprise" that acts, (formerly or informally) in accordance with the directions, instructions or wishes of a government of a foreign country.

(e) There are limited defences to the offence of bribing a foreign public official:

(i) the relevant conduct was authorised under the written law of the foreign country (section 70.3);

(ii) the payment constitutes a "facilitation payment" (section 70.4).

(f) The Criminal Code applies liability to individuals and corporations. Part 2.5 of the Criminal Code (sections 12.1 to 12.6) sets out a statutory regime for the imputing of knowledge to the corporation. In summary, these provisions:

(i) set out important definitions of "board of directors", "corporate culture" and "high managerial agent";

(ii) impose criminal liability on a corporation by attributing the knowledge and conduct of a person to the corporation;

(iii) attribute negligence to a corporation by reference to the corporation's conduct as a whole; and

(iv) provide a mistake of fact defence that is of limited application.

(g) In March 2015, the Australian Government announced proposed amendments to section 70 of the Criminal Code[11]. Relevantly, these amendments will cover the following:

(i) The Identity of a Foreign Public Official

(A) The prosecutor is not required to establish an intention on the part of an accused person to influence a "particular" foreign official. This has long been an issue for investigators and prosecutors. Many bribery cases involve payments through intermediaries and third parties. A person paying a bribe will often have not met or know the identity of the bribed foreign official. An inability to identify a specific foreign public official who was the subject of the bribery conduct may partly explain why there are so few prosecutions in Australia. However, the public cannot know whether that is the explanation, as the AFP and the CDPP do not normally give reasons why a prosecution did not eventuate.

(ii) Knowingly Concerned as a Secondary Liability Offence

(A) Section 11.2 of the Criminal Code (which extends corporate criminal responsibility) will be amended to insert "knowingly concerned" as an additional form of secondary liability. This offence used to exist in the *Crimes Act 1914* (Cth) (**Crimes Act**), yet dropped out of the Criminal Code when it was enacted in 1995. A number of criminal appellate judgments have highlighted the vacuum in the criminal law which Australian courts believed Parliament did not intend by the absence of "knowingly concerned" as a ground of secondary criminal liability. This is because the concept of "knowingly concerned" allows a prosecutor to charge a person in broader circumstances than the traditional grounds of assistance to the principal prior to and during the commission of an offence under the Criminal Code; for example, conduct after the conclusion of an offence. Knowingly concerned requires an objective demonstration of connection or involvement in the offending conduct, with knowledge of the essential elements or facts of the offence, which they intentionally and knowingly acquired or involved themselves in.

(B) The proposed amendments will mean that persons who are knowingly and intentionally involved in the commission of an offence against any Commonwealth laws, where the offences traditionally involve other or secondary persons will be liable for the primary offence.

(iii) Other amendments relevant to economic crime offences and investigations include:

(A) increased penalties under the *Proceeds of Crime Act 2002* (Cth) (**POCA**) for failing to comply with a production order or notice, by a penalty of 100 penalty units[12] (currently, AU$17,000) or 2 years imprisonment or both;

(B) other technical amendments to the POCA;

(C) enhancing the investigative powers of the Australian Crime Commission;

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[11] *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* (Cth), the Bill is still before Parliament for debate.

[12] A penalty unit under Commonwealth legislation has been, since 28 December 2012, fixed at $170.

(D) clarifying the scope of foreign serious offences and foreign pecuniary penalty orders in the *Mutual Assistance in Criminal Matters Act 1987* (Cth) so they can be enforced as orders of Australian Courts with charges over tainted property in the name of the Australian Government; and

(E) amending various Australian statutes to permit the Independent Commissioner Against Corruption of South Australia to access information from Australian agencies[13], to be granted defences for certain telecommunication offences (where intercepts are used) and to apply for certain search warrants.

(h) The real difficulty is that while there are no judicial cases considering the application of these laws, as no prosecutions have resulted in any convictions[14], they impose relatively high hurdles of proof on a prosecution through the culpability requirements of the offence, requiring a careful analysis of the physical and fault elements of each part of the foreign bribery offence. While the Criminal Code has codified the fault elements (section 3.1), an offence will only be treated as having no fault element (in other words, having strict or absolute liability) if that is specifically provided for in the offence. If there is no fault element specified in the offence, a default fault element is deemed to apply based on the physical features of the offence.

(i) Under the Criminal Code, the physical element of an offence is either an activity that involves conduct, a result of conduct or a circumstance where conduct or a result of conduct occurs (See section 4.1 of the Code). If a physical element is conduct the default fault element is intention. If the physical element is a circumstance or a result the default fault element is recklessness. The Criminal Code then defines and codifies the meaning of intention and recklessness for these purposes (see sections 5.2 and 5.4 of the Code).

(j) The result of this convoluted process is that a separate assessment of each of the physical and fault elements must be applied to each limb of the foreign bribery offence. In the Committee's opinion, this can give rise to significant enforcement difficulties and may, in part, explain the difficulty that the CDPP has in being satisfied that a criminal prosecution can properly be commenced.

(k) In contrast, the UK (under the UK Bribery Act) and the US (under the Foreign Corrupt Practices Act, **FCPA**[15]) each have a clearer articulation of the physical and fault elements of their respective offences[16].

(i) In the UK, the primary offence is stated to be the giving of a bribe with an intention to both influence the foreign public official in their official capacity and with an intention to obtain business or a business advantage. The physical element is the giving of the bribe while the fault element is the dual intention to both influence and to obtain a business advantage.

(ii) In the US, the primary offence is stated to be the authorisation of the giving of anything of value to a foreign official to induce an act in violation of duty or to secure an improper advantage. While the concept of improper advantage may have its own ambiguity, it does not require an assessment of the legitimacy of the advantage.

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[13] This is because the South Australian Commission has only recently been established and is lacking these statutory powers.

[14] The two companies in the Securency scandal, Securency International Pty Ltd and Note Printing Australia Ltd together with various individuals, have been charged with various offences including conspiring to bribe foreign officials. The reporting of these prosecutions is subject to various suppression or non-publication orders.

[15] 15 U.S.C. 78dd-1 et seq; amended by the *Omnibus Trade and Competitiveness Act 1988* (Pub L No 100-418, 102 Stat 1107) and the *International Anti-Bribery and Fair Competition Act 1998* (Pub L No 105-366, 112 Stat 3302, which picked up the terms of the OECD Convention).

[16] This is well set out in *Corporate & Director Responsibility for Foreign Bribery in Australia*, Greg Golding & David Eliakim, paper for the Law Council of Australia Business Law Section Corporations Committee, August 2015.

(l) The Committee considers that after over 15 years on the statute books and with only two prosecutions, both continuing and the first still running after 3 years of interlocutory disputes and the discharge of certain individual and direct indictments being presented to the Victorian Supreme Court, change is necessary. The Committee believes it is time for a complete review of Australia's foreign bribery offence, how it is drafted, what defences should exist and the threshold requirements of fault in circumstances where foreign evidence of foreign bribery can be challenging to obtain. The risk of doing nothing, as is often the case with reform in Australia, is that the status quo remains and Australia's reputation as a country more interested in "talking the talk" than "walking the walk" will continue and Australian business, and society at large, will be the loser.

3 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 the OECD Convention and UNCAC.

3.1 The US Foreign Corrupt Practice Act

(a) In 1977, the US Congress enacted the FCPA seeking to counter widespread practices of US corporations paying bribes to secure contracts and often complaining about the lack of a level playing field when they failed to win a bid. For many years, the FCPA was policed in a modest way by the US Department of Justice (**DOJ**) and the US Securities and Exchange Commission (**SEC**). It was not until the mid-2000s that the DOJ started to focus more closely on the conduct of US corporations and then foreign entities and US and non-US individuals alleged to be subjected to US jurisdiction as to whether they were engaging in corrupt conduct. Using the draconian penalties available under the US legal system[17], corporations could not defend themselves without the risk of severe financial penalties given the extraordinary level of fines that might be levied on them if they exercised their rights to require the DOJ to prove its case. In contrast, over the last few years, individuals are starting to challenge the DOJ cases brought against them, with various legal rulings starting to emerge, at trial and the appellate level, on the scope of the FCPA offences. In practice, the judicial decisions assessing the DOJ's interpretation of FCPA elements (such as the definition of "foreign official") appear to favour the government, although the DOJ has failed to convict a number of individuals in contested trials.

(b) What has developed over the last decade is an industry known as "FCPA Inc" where the DOJ and SEC commence cases, file indictments with the outline of a case, corporations cannot risk the uncertainty, reputational damage, costs and potential fines associated with a trial and so settlements become the norm, negotiated between the parties and usually, except for a very few cases, accepted by the US courts. It is only over the last few years that the DOJ is being put to proof in cases, often by individuals fighting for their liberty. Some cases, most notoriously the "SHOT Show sting cases" failed spectacularly as the DOJ informant and investigating FBI officers' collective evidence was discredited and all individuals were acquitted[18]. Notwithstanding such setbacks, the US authorities continue to lead the world on

[17] The US *Federal Sentencing Guidelines* and the *Alternative Fines Act* impose a sliding scale of penalties depending on a formula which assesses the severity of the offence and the conduct of the defendant. In addition, the SEC can seek civil fines as well as disgorgement of profits resulting from improper payments from issuers, that is, publicly listed corporations.

[18] In July 2012, the Government's key witness in the SHOT Show trial was sentenced to 18 months in prison and 36 months of probation that began when undercover FBI agents posed as officials from Gabon seeking $1.5 million in bribes in exchange for a $15 billion defence contract. Though 22 defendants were initially charged, the prosecution fell apart when the first two trials failed to result in any convictions, leading the DOJ to voluntarily dismiss the remaining indictments in March 2012, see http://www.governmentcontractslawblog.com/2012/10/articles/fcpa/fcpa-and-anti-corruption-enforcement-update-april-september-2012/.

foreign bribery enforcement even if their jurisdictional reach is, in some cases, seen as over-reaching by non-US countries and entities.

3.2 The OECD Convention

(a) In 1999, the OECD Convention was published. That year, Australia enacted amendments to the Criminal Code to criminalise the bribery of foreign public officials (see section 70 of the Criminal Code as referred to above). In addition, provisions concerning corporate criminal responsibility were enacted in the Criminal Code and companies in Australia were given a 5 year grace period to, effectively, "get their house in order" before those provisions took effect as a matter of law.

(b) While not repeating the contents of the OECD Convention, there are important Articles of the OECD Convention which should be noted. These articles require, in substance, that a State signatory to the OECD Convention shall:

(i) take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or indirectly or through intermediaries, to a foreign public official[19] in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain the business or other improper advantage in the conduct of international business (**Article 1, Clause 1**);

(ii) take any measures necessary to establish that complicity in, including incitement, aiding and abetting, or authorisation of an act or bribery of a foreign public official shall be a criminal offence (**Article 1, Clause 2**);

(iii) take such measures to establish the liability of legal persons for the bribery of a foreign public official (**Article 2**);

(iv) take steps to make the bribery of a foreign public official punishable by effect, proportionate and dissuasive criminal penalties, and in the case of natural persons, shall include deprivation of liberties sufficient to enable effective mutual legal assistance and extradition (**Article 3, Clauses 1 and 2**);

(v) take such measures to provide that the bribe and the proceeds of the bribery of a foreign public official, or property, the value of which corresponds to such proceeds, are subject to seizure and confiscation (**Article 3, Clause 3**);

(vi) take such steps to ensure its jurisdiction is effective against the bribery of foreign public officials (**Article 4, Clause 1**) and

(vii) take steps to ensure the investigation and prosecution of bribery of a foreign public official shall not be influenced by considerations of commercial and economic interests, the potential effect upon relations with another state or the identity of the natural or legal persons involved (**Article 5**)[20].

(c) Compliance with the OECD Convention is monitored through an ongoing system of OECD Convention signatory peer reviews which are carried out by members of the OECD's Working Group on Bribery. In relation to Australia, there have been three phases of monitoring which, for each phase, have looked at different items:

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[19] A "foreign public official" is defined very broadly and includes state owned or controlled enterprises. Under the FCPA, the term "instrumentality" (that is, who or what is a foreign official under US law) has been given a broad definition and is, as a matter of law, a question of fact for the jury to determine; see US Court of Appeals for the Eleventh Circuit judgment in *United States v. Esquenazi*, 752 F.3d 912 (11th Cir. 2014).

[20] This Article should be read as covering the "non-investigation and prosecution" cases, as the saga of the UK government's suspension of a formal investigation into BAE defence contracts with the government of Saudi Arabia, who threatened economic retaliation if its government officials were subjected to any investigation, so well-illustrated.

(i) Phase 1 - evaluate the adequacy of a country's legislation to implement the OECD Convention;

(ii) Phase 2 – assess whether a country is applying the legislation effectively; and

(iii) Phase 3 – focus on the enforcement of the laws in implementing the OECD Convention and associated instruments.

(d) The OECD is now planning its Phase 4 evaluations. A number of submissions were made to the OECD in late 2014 in terms of the extent and focus of the Phase 4 review process. There was a consistency in the submissions made to the OECD Convention that there should be a much closer focus on how a country is detecting and enforcing the OECD Convention obligations and to what extent questions of corporate criminal liability are being addressed as a matter of practical enforcement and prosecution.

3.3 The OECD Convention Reviews of Australia

(a) The OECD has subjected Australia to three reports, each more critical than the last. The three reports are as follows:

(i) Phase 1 (Dec 1999) – Australia: Review of Implementation of the Convention and 1997 Recommendation.

(ii) Phase 2 (Jan 2006) – Australia Phase 2 – Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combating Bribery in International Business Transactions.

(iii) Phase 3 (Oct 2012) – Phase 3 Report on Implementing the OECD Anti-bribery Convention in Australia.

(b) The Phase 3 Report was very critical of Australia. The summary of the OECD's findings were that:

(i) it expressed concern that Australia's enforcement of its foreign bribery laws has been extremely low;

(ii) Australia required a properly coordinated and focused body to investigate allegations of foreign bribery including an expert panel to help advise the AFP;

(iii) sufficient inquiries must be made before the AFP rejected an allegation for full investigation, including considering bribery-related charges such as false accounting and money laundering, in circumstances where there may not be sufficient evidence to support a foreign bribery offence;

(iv) the penalties for foreign corruption and financial misreporting should be significantly increased;

(v) despite efforts to raise awareness about the risks associated with facilitation payments, there is still substantial confusion over the scope of this defence and companies should be encouraged to prohibit absolutely or discourage the use of facilitation payments;

(vi) a clear framework is required to ensure transparency and consistency for companies who self-report potential corrupt conduct including the nature and degree of cooperation expected by the AFP or the CDPP and what credit is provided for that cooperation; and

(vii) awareness of foreign bribery risks and the development and implementation of anti-bribery corporate compliance programmes was generally inadequate which is putting many companies who conduct overseas business at risk.

(c) In April 2015, the OECD published a Follow-Up Report on Australia's response to the Phase 3 Report. The OECD highlighted a number of key features where Australia's

performance had substantially improved over the last 3 years[21]. These features include the following:

(i) establishing a Fraud and Anti-Corruption Centre hosted by the AFP, drawing significant resources from the ATO, ASIC, the Australian Crime Commission, the Commonwealth Department of Foreign Affairs and Trade (**DFAT**) and the Customs, Human Services and Defence Departments;

(ii) closer involvement of the AFP Asset Confiscation Taskforce in foreign bribery investigations to target the proceeds of crime;

(iii) a restructuring of the CDPP to allocate more resources to prosecute foreign bribery offences;

(iv) improved public-sector whistleblower protections; and

(v) heightened awareness being promoted by Australia that foreign bribery will not be tolerated and all suspicious conduct will be thoroughly investigated.

(d) There remain a number of areas where the OECD expressed concern as to a lack of action, or inaction and the Committee sees these as key things that the Australian Government should address. These included the following:

(i) clear evidence of enhanced enforcement[22];

(ii) prosecution of companies under Australia's corporate liability provisions;

(iii) a structured form of plea-bargaining for companies and/or individuals taking into account matters related to compliance systems (as a defence)[23];

(iv) enhanced private sector whistleblower protections;

(v) better mutual legal assistance between Australia and other countries to tackle foreign bribery by way of civil or administrative proceedings;

(vi) banning facilitation payments;

(vii) introducing enforceable "record keeping" offences (of which the OECD has seen no action); and

(viii) evidence of transparent debarment policies for all Commonwealth procurement agencies where a tendering party has been convicted for foreign bribery.

*3.4 The United Nations Convention against Corruption (**UNCAC**) Scope of Investigation*

(a) Australia is a signatory to UNCAC as of 7 December 2005 and it was ratified shortly thereafter.

(b) The terms of UNCAC, in relation to addressing the issue of foreign bribery of foreign public officials, largely reflect and indeed reinforce the terms of the OECD Convention.

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[21] Transparency International in its Report *Exporting Corruption* May 2014 (at page 5) described Australia as having achieved a status of "moderate enforcement" of foreign bribery due to a number of new investigations together with major legislative reforms provided a good basis for the drive against corruption.

[22] There still only remain two criminal prosecutions in Australia for foreign bribery despite the numerous investigations. The first case involving Securency, Note Printing Australia and individual executives started in July 2011 and has been shrouded in suppression orders ever since. The second case, involving Lifese Pty Ltd and construction contracts in Iraq, started in late March 2015.

[23] Whether a structural form of plea bargaining is available in Australia is doubtful at the present time. We deal with this issue at section 4.7 below.

(c) There are various features of UNCAC which impact directly upon Australia as a signatory to the Convention (similar to those obligations in the OECD Convention)[24].

(i) Corruption first and foremost requires prevention. UNCAC includes model preventive policies, such as the establishment of anti-corruption bodies and enhanced transparency in the financing of election campaigns and political parties. States must endeavour to ensure that their public services are subject to safeguards that promote efficiency, transparency and recruitment based on merit. Once recruited, public servants should be subject to codes of conduct, requirements for financial and other disclosures, and appropriate disciplinary measures. Transparency and accountability in matters of public finance must also be promoted, and specific requirements be established for the prevention of corruption in the particularly critical areas of the public sector, such as the judiciary and public procurement. Those who use public services must expect a high standard of conduct from their public servants. Preventing public corruption also requires an effort from all members of society at large. Article 5 of the Convention enjoins each State Party to establish and promote effective practices aimed at the prevention of corruption.

(ii) UNCAC requires countries to establish criminal and other offences to cover a wide range of acts of corruption, if these are not already crimes under domestic law. In some cases, States are legally obliged to establish offences; in other cases, in order to take into account differences in domestic law, they are required to consider doing so. The Convention goes beyond previous instruments of this kind, criminalising not only basic forms of corruption such as bribery and the embezzlement of public funds, but also trading in influence and the concealment and laundering of the proceeds of corruption. Offences committed in support of corruption, including money-laundering and obstructing justice, are also dealt with. UNCAC offences also deal with the problematic areas of private-sector corruption.

(iii) Countries agree to cooperate with one another in every aspect of the fight against corruption, including prevention, investigation, and the prosecution of offenders. Countries are bound by the Convention to render specific forms of mutual legal assistance in gathering and transferring evidence for use in court, to extradite offenders. Countries are also required to undertake measures which will support the tracing, freezing, seizure and confiscation of the proceeds of corruption.

(iv) Several provisions specify how cooperation and assistance will be rendered. In particular, in the case of embezzlement of public funds, the confiscated property would be returned to the State requesting it; in the case of proceeds of any other offence covered by UNCAC, the property would be returned providing the proof of ownership or recognition of the damage caused to a requesting State; in all other cases, priority consideration would be given to the return of confiscated property to the requesting State, to the return of such property to the prior legitimate owners or to compensation of the victims.

(v) Asset-recovery is stated explicitly as a fundamental principle of UNCAC. This is a particularly important issue for many developing countries where high-level corruption has plundered the national wealth, and where resources are badly needed for reconstruction and the rehabilitation of societies under new governments. Effective asset-recovery provisions support the efforts of countries to redress the worst effects of corruption while at the same time sending a message to corrupt officials that there will be no place to hide their illicit assets. Article 51 provides for the return of assets to countries of origin as a fundamental principle. Article 43 obliges State parties to extend the widest possible cooperation to each other in the investigation and prosecution of offences. With regard to asset recovery in particular, the Article provides for the following:

[24] See United Nations website at https://www.unodc.org/unodc/en/treaties/CAC/convention-highlights.html

> In matters of international cooperation, whenever dual criminality is considered a requirement, it shall be deemed fulfilled irrespective of whether the laws of the requested State Party place the offence within the same category of offence or denominate the offence by the same terminology as the requesting State Party, if the conduct underlying the offence for which assistance is sought is a criminal offence under the laws of both States Parties.

(d) The most significant failing at the Commonwealth level is that Governments of all persuasion refuse to create a robust, independent anti-corruption commission. UNCAC requires its signatories to establish anti-corruption bodies. It is questionable whether Australia has done this at the Commonwealth level. The Committee has considered this at the end of this submission.

3.5 Australia's treaty and legislative initiatives

(a) The OECD Convention and UNCAC are not the only instruments to which Australia has become a signatory or in which it has been actively involved over the last decade. Examples of such activity include the following:

(i) the United Nations Convention Against Transnational Organised Crime (ratified by Australia on 27 May 2004);

(ii) an active member of the G20 Anti-Corruption Working Group;

(iii) the Asia-Pacific Economic Cooperation Anti-Corruption and Transparency Experts Task Force;

(iv) participating in the Asian Development Bank OECD Anti-Corruption Initiative for the Asia Pacific;

(v) ongoing work with the Financial Action Task Force on Money Laundering and regular amendments to the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (Cth)[25];

(vi) the Commonwealth Secretariat on anti-money laundering measures;

(vii) the creation of an online training module on foreign bribery in December 2014[26];

(viii) an increased activity and focus within the AFP in investigating and prosecuting foreign bribery with the CDPP (dealt with in more detail in this submission);

(ix) the use of the *Proceeds of Crime Act 2002* (Cth) to target, restrain and forfeit assets and property acquired from the proceeds of financial crime of by use of any instrument of crime[27]; and

(x) as President of the G20 in 2014, securing the agreement of all G20 States to the Anti-Corruption Implementation Plan.

(b) One important initiative to note is the enhanced role of the AFP Asset Confiscation Taskforce in taking action to restrain and recover the proceeds of crime and corruptly obtained assets. The media reports that the AFP, the New Zealand authorities and the Chinese Police are working together in various operations, termed Operation Foxhunt and Operation Skynet. These operations illustrate the work that can be achieved in identifying corruptly obtained assets, countries working together to target them and authorities in each country taking action on behalf of the victim country (or organisation) to repatriate stolen assets.

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[25] For example, on 10 June 2015, AUSTRAC issued proposed amendments to Chapter 4 of the *Anti-Money Laundering and Counter-Terrorism Financing Rules*. These changes deal with the customer due diligence obligations on reporting entities, focusing on beneficial owners and politically exposed persons.

[26] See www.ag.gov.au/foreignbribery.

[27] The AFP Asset Confiscation Taskforce now has authority independently of the CDPP to run proceeds of crime applications from the CDPP, and is strongly targeting economic crime cases and working with international law enforcement agencies, most notably the Chinese police in tracing corruptly stolen assets from China that are located in Australia.

3.6 The Senate Review

(a) The question under review is posed as follows:

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 the OECD Convention and UNCAC

(b) This raises complex questions as to the extent to which Australia's adoption of the OECD Convention and UNCAC has been effective in responding to foreign bribery, as those obligations concern:

(i) Australian corporations;

(ii) entities;

(iii) organisations;

(iv) individuals; and

(v) government and related parties;

(c) While many developed and developing nations have introduced domestic and, to a lesser extent, foreign bribery laws, their enforcement remains a serious issue, even in Australia. Foreign bribery and corruption is not merely a third world or developing nation problem. The OCED *Foreign Bribery Report* published in 2014 made it crystal clear that foreign bribery is predominantly a western, developed nation problem, caused and fed primarily by corporations wanting to do deals paying bribes, often amounting to millions of dollars, with senior management of companies, up to the CEO, involved in, or condoning, such conduct. The OECD Report said the following[28]:

> In the majority of cases, corporate management (41%) or even the CEO (12%) was aware of and endorsed the bribery; debunking the "rogue employee" myth and demonstrating the need for a clear "tone from the top" in implementing corporate anti-bribery policies, as referred to in the OECD Good Practice Guidance on Internal Controls, Ethics and Compliance.

(d) The Committee has no reason to believe that Australian companies are not equally vulnerable to corruption and the temptation of foreign bribery in the hope of securing that big deal, of not being found out and simply rationalising their conduct in the relevant market place.

4 In relation to the OECD Convention and UNCAC, consider the effectiveness of, and any possible improvements to, existing Commonwealth legislation governing foreign bribery.

4.1 Commonwealth treaties, agreements, jurisdictional reach, and other measures for gathering information and evidence

(a) There are various legislative and other mechanisms by which information and evidence is secured by an Australian authority (relevantly, the AFP) in order to investigate foreign bribery:

(vi) *Mutual Assistance in Criminal Matters Act 1987* (Cth);

(vii) *Foreign Evidence Act 1994* (Cth);

(viii) inter-agency memoranda of understandings between Australian and foreign agencies; and

[28] OECD *Foreign Bribery Report 2014*, page 22.

(ix) inter-agency memoranda of understandings as between Australian agencies.

(b) It is the Committee's understanding in speaking to senior members of the NSW and Victorian Criminal Bars that the implementation of these laws, particularly in relation to evidence sought to be admitted pursuant to the Foreign Evidence Act, is highly technical and can easily result in significant amounts of evidence being ruled inadmissible on the grounds of technical non-compliance with the Act.

(c) As to the effectiveness of mutual legal assistance requests between Australia and other foreign countries, the Committee believes the same applies – that is, such requests take many months to process, the response varies depending upon the political and legal framework in the receiving country and the sensitivity of the request. Where possible, the process of mutual legal assistance must be streamlined to facilitate the exchange of information, whether that is by way of statutory amendments to existing law or more focused memoranda of understandings as between agencies in Australia and as between Australian agencies and external (foreign) agencies. This can only facilitate the early exchange of information in circumstances where those investigating certain conduct may be unaware of what, in fact, they need to ask for or find out.

4.2 The resourcing, effectiveness and structure of Commonwealth agencies and statutory bodies to investigate and, where appropriate, prosecute under the legislation, including cooperation between bodies

(a) The primary body that investigates foreign bribery offences is the AFP, charged as it is with enforcing Commonwealth law. The AFP works closely with the CDPP in the prosecution process. Any prosecution of a foreign bribery offence is conducted by the CDPP.

(b) ASIC is a corporate regulator although it also has enforcement powers, primarily in the civil area with some rights to bring criminal cases (such as for insider trading and breach of directors' duties where a director might have acted dishonestly).

(c) ASIC has publicly stated that as foreign bribery is a criminal offence, it is for the AFP to investigate it, that ASIC's concerns are with the Corporations legislation while at the same time stating that it liaises with the AFP and will if necessary act to commence any claim it might have should exceptional circumstances warrant it (such as limitation time bars applying to ASIC's statutory rights)[29]. ASIC sees its strategic priorities as:

(i) confident and informed investors and financial consumers;

(ii) fair and efficient financial markets; and

(iii) efficient registration and licensing.

There is no mention of enforcement or regulation, one critical area (in the Committee's opinion) where ASIC appears, at least according to the media reporting on various financial scandals, to have been found wanting. This is in contrast to the views expressed by the US SEC Chair where it is clear that "*comprehensive and relentless enforcement of our securities laws is a cornerstone of investor protection*"[30]

(d) The Committee is concerned that the apparent attitude of ASIC appears (at least as publicised in the media and in part reflected by ASIC's own statements) to regard

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[29] *Setting the record straight: ASIC, bribery and enforcement action*, speech by ASIC Chairman Greg Medcraft, 11 October 2013. The Committee is not aware of ASIC taking any civil enforcement action arising out of any foreign bribery investigation.

[30] *Perspectives on Strengthening Enforcement*, US SEC Chair Mary Jo White, Annual Forum of ASIC, 24 March 2014, reinforced in a later speech, *Three Key Pressure Points in the Current Enforcement Environment*, to the NYC Bar Association's 3rd Annual White Collar Crime Institute, 19 May 2014 which highlighted that the SEC charges individuals in most of its cases, focusing on those closest to the wrongdoing and that corporations should be held accountable, noting that no company or institution is too big to suffer a criminal indictment.

foreign bribery as too complex, too difficult and criminal, so leaving it to the AFP to focus on. In the Committee's opinion, this leaves the potential for a fractured enforcement arena where potential civil or administrative offences get lost in the complexity of criminal investigations (conducted by the AFP). Indeed, the Committee regards it as extremely disappointing that, if the media reports are to be believed, none of the senior directors of the Reserve Bank or its subsidiaries involved in the Securency banknote printing scandal has ever been thoroughly investigated[31]. The Reserve Bank has been consistently defensive in what it knew about the scandal and when it knew it. The Governor of the Reserve Bank gave what the media described as a less than convincing answer to a question why the Bank did not call in the AFP when it learned about the corruption scandal[32]. The media paint a picture of ASIC that it appears unwilling or unable to investigate well-placed directors and that some individuals are, in effect, "above the law". Whether that is true, only ASIC can say. However, in the opinion of the Committee, it creates a very disappointing picture of a fractured enforcement landscape in Australia. Additionally, the regulators and enforcement agencies appear to be hamstrung by seeking to investigate complex financial transactions with the very limited resources that Australian governments provide them.

(e) The AFP has borne the brunt of many criticisms from the OECD and TIA as to Australia's poor record on foreign bribery enforcement. While past criticisms had some validity, acknowledged by the AFP, the current position has improved considerably. Since 2012, the resources within the AFP have been reorganised to focus on foreign bribery[33]. A dedicated team now exists, drawing skills from within the AFP and other agencies to target complex financial crime (of which foreign bribery is but a part). The AFP's Asset Confiscation Taskforce is taking a more robust view of the Australian proceeds of crime regime and is starting to focus on economic crime cases. The AFP now has an Expert Panel of senior officers reviewing all foreign bribery cases to determine the progress of each case.

(f) While the financial resources and technical expertise of the AFP's Expert Panel is becoming more apparent, the financial resources available to it on an ongoing basis ought to be, in the Committee's opinion, maintained by all Governments at a commensurate level to target serious financial crime including foreign bribery and to ensure that the AFP and agencies working within the area of foreign bribery and their investigators are suitably experienced in international tax, finance and business transactions.

(g) It is possible to bring clarity and order to the landscape of overlapping agencies with enforcement responsibilities, for example, by way of clear, facilitative and public Memoranda of Understanding between agencies. In New Zealand (with an economy/population similar to the State of Queensland), the NZ Serious Fraud Office is a dedicated agency with highly specialised staff and responsibility for complex or serious fraud investigations and prosecutions. While small and, in the opinion of many, suffering from under-resourcing (a perennial problem as the Committee has already noted), it is able to co-operate with and rely upon the resources of other agencies while still taking clear, primary responsibility for bribery and corruption investigations. It has established Memoranda of Understanding with the main financial regulator (the NZ Financial Markets Authority, equivalent to ASIC), the NZ Police, and NZ Customs Service, which establish and publicise that the NZ Serious Fraud Office has primary responsibility for the detection, investigation and prosecution of offences that constitute serious or complex fraud or involve matters of bribery and corruption. This has several benefits, including that:

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[31] The report prepared by Cameron Ralph for the Reserve Bank of Australia in March 2012 observed rather blandly (at page 37) that "*With the benefit of hindsight, it is evident that the full array of risks were not initially recognised, however, it is clear to us that the Bank understood that the entities were vital to one of the Bank's core functions (e.g. the provision of sufficient, secure notes) and important from a reputational point of view. We also note that the conceptions of risk management were much less developed at the time in question*."

[32] Hansard House of Representatives, Standing Committee on Economics, Monday 8 October 2012 at page 38.

[33] The OECD Phase 3 Follow Up Report noted these matters including the work of the AFP's Expert Panel and an Information Sharing Protocol agreed to between the AFP and the Australian Dept of Foreign Affairs & Trade in June 2014.

(i) the general public, government, and law enforcement staff are in no doubt about which is the lead agency, including for public relations purposes to advise and help victims or tell them who to complain to;

(ii) the agencies can still co-operate and share resources on such enforcement activities, without compromising their own independence or area of statutory function;

(iii) bribery and corruption is appropriately placed alongside serious and complex fraud, elevating it above a role in general policing work; and

(iv) the accountability for low levels of enforcement, or poor enforcement, outcomes is clear.

(h) If the preferable and recommended solution of a single dedicated agency is not to be proceeded with, then the Committee considers that such an approach as adopted in New Zealand may at least represent a significant improvement in the meantime, where multiple agencies will remain involved. However, an important caveat is that the chosen 'lead agency' must, in the Committee's opinion, be appropriately resourced with investigators experienced in international financial and business practices and supported to properly fulfil its functions.

4.3 Standards of admissible evidence

(a) Foreign bribery is a criminal offence.

(b) Under Australian criminal law, it is for the prosecutor to prove, beyond reasonable doubt, that an offender committed an offence. A criminal trial by indictment for a Commonwealth offence will be before a judge and jury[34] with unanimity in the jury ruling required for a conviction[35].

(c) An offender, a corporation or an individual, is under no obligation to prove its, his or her innocence. While some Australian States have sought to make inroads into an offender's right to silence (for example, in New South Wales, where permitted limited negative inferences may be drawn if an offender does not in certain circumstances, state evidence that might contradict the Crown's case), the golden thread of English criminal law has survived – an offender is innocent until proved guilty and need say nothing for or against the case put by the Crown and the Crown must prove its case beyond reasonable doubt.

(d) The Committee sees no reason to depart from these fundamental principles for individuals. As for corporations, there are, in the Committee's opinion, good grounds to look at changing the law, introducing liability provisions similar to the UK Bribery Act. This is covered in section 4.15 of this submission.

4.4 The range of penalties available to the courts, including debarment from government contracts and programs

(a) Under Australian criminal law (reflecting our English common law heritage), the court has a duty to impose penalties appropriate to the serious level of criminality that are characteristic of an offence. The Criminal Code and, in relation to Commonwealth offences, the Crimes Act set out a range of characteristics or categories that must be considered by a court in exercising its sentencing discretion once an offender has been convicted of an offence[36].

(b) There have been interesting observations made by a number of senior judges in courts in the United Kingdom and in Australia in terms of how, and to what extent, the range of penalties for economic crime (and foreign bribery) offences should reflect the

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[34] Section 80, *Commonwealth of Australia Constitution Act*.

[35] See *Cheatle v R* (1993) 177 CLR 541; [1993] HCA 44 at [7].

[36] Section 16A Crimes Act.

seriousness of the criminality underlying the conduct. The New Zealand Parliament, which is presently considering a bill to increase the size and range of penalties, has adopted the OECD Working Group's recommendation that specified fines be available in addition to imprisonment "on the basis that monetary sanctions are a fundamental deterrent for economic offences"[37].

(c) In *R v Innospec Limited*[38], Lord Justice Thomas issued a sentencing judgement in respect of the conduct of Innospec Limited which had pleaded guilty to conspiracy to corrupt contrary to the *Criminal Law Act* 1977 (UK) and the *Prevention of Corruption Act* 1906 (UK) in relation to payments made to secure contracts from the Government of Indonesia for the supply of certain chemical products. Lord Justice Thomas said as follows[39]:

> The courts have a duty to impose penalties appropriate to the serious level of criminality that are characteristic of this offence. For example, one of its many effects is to distort competition; the level of fines in cartel cases is now very substantial and measured in tens of millions. It is self-evident that corruption is much more serious in terms of both culpability and harm caused… As is well known and evident from the facts of this case, fines in the US are substantial… although there may be reasons to differentiate the custodial penalties imposed for corruption between the US and England and Wales, no-one was able to suggest any reason for differentiating in financial penalties. Indeed there is every reason for States to adopt a uniform approach to financial penalties for corruption of foreign government officials so that the penalties in each country do not discriminate either favourably or unfavourably against a company in a particular state. If the penalties in one State are lower than in another, business in the State with lower penalties will not be deterred so effectively from engaging in corruption in foreign States, whilst businesses in States where the penalties are higher may complain that they are disadvantaged in foreign States… As fines in cases of corruption of foreign government officials must be effective, proportionate and be dissuasive in the sense of having a deterrent element, I approach sentencing on the basis in this case that a fine comparable to that imposed in the US would have been the starting point, such a fine being quite separate from and in addition to depriving Innospec Limited of the benefits it had obtained through its criminality.

(d) These comments, in terms of the overall approach that the court should adopt in imposing penalties for corruption and foreign bribery were accepted without comment by the United Kingdom Court of Appeal (Criminal Division) in *R v Dougall*[40].

(e) In Australia, the more severe penalties of imprisonment and substantial fines have been reserved for physical, traditional criminal offences and the most serious drug offences. The challenge for parliaments and the courts is to reflect the seriousness of the offending in sentences to be imposed for "white collar" or financial crime which, in the view of many, have or are victimless or are of such complexity that it is often difficult to point to an immediate victim who has been harmed (aside from society generally).[41]

(f) In a recent insider trading case, the Supreme Court of Victoria observed[42]:

> General deterrence has a central role to play in white collar crime offending such as this. One important reason for that relates to the difficulty in detecting and investigating white collar crime, particularly insider trading. Courts have often remarked that a stern approach should be taken to those people who receive price sensitive information and use it in breach of trust for personal profit.

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[37] Law and Order Select Committee, Report to Parliament of New Zealand on the *Organised Crime and Anti-Corruption Legislation Bill,* 4 May 2015.

[38] [2010] EW Misc 7 dated 18 March 2010.

[39] *R v Innospec* at [31] to [32].

[40] [2010] EWCA Crim 1048

[41] An interesting discussion of penalties for white collar crime is contained in *Fraud and Corruption in Government Seminar: White Collar Crime – Perpetrators and Penalties* by the Hon Justice Peter McLellan, Chief Judge at Common Law, Supreme Court of New South Wales dated 24 November 2011.

[42] CDPP v Hill & Kamay [2015] VSC 86 at [92] to [93] per Hollingworth J.

> Other judges have commented on the need for actual custodial sentences in some cases of white collar crime, so that general deterrence has some real bite. I do not accept the submission by Mr Kamay's counsel that the mere fact of a custodial sentence is sufficient deterrence; it is self-evident that the longer the sentence, the harder the bite.

(g) In *R v Ellery*[43], the former Chief Financial Officer of Securency was sentenced on one count of false accounting contrary to section 83(1)(a) of the *Crimes Act 1958* (Vic). In passing sentence, the Court made the following important observations, in the context of Mr Ellery's circumstances[44]:

> Unlike most cases of false accounting, you did not offend for the personal financial gain of yourself or a closely-related person or company….and the primary motive behind your offending was to assist your employer in its commercial activities, by assisting it to gain the benefit of future contracts…I also accept that you were acting within the culture which seems to have developed within Securency, whereby staff were discouraged from examining too closely the use of, and payment arrangements for, overseas agents. Secrecy, and a denial of responsibility for wrongdoing, also seems to have been a part of the corporate culture at Securency at that time.
>
> The fact remains that you were Securency's chief financial officer, responsible for authorising and making payments. You were also a company secretary. You occupied positions of importance within a subsidiary of Australia's central bank. Your offending involved a serious and dishonest breach of trust. It was done in order to disguise the true nature of the transaction from the board and the owners of Securency. Notwithstanding the lack of personal financial gain, and the relatively modest amount involved[45], I assess your offending as being in the mid-range of false-accounting offences.

(h) In *ASIC v Paul John Ingleby*, the Victorian Court of Appeal was highly critical of the contents of an agreed set of facts put to the Court (by ASIC and the defendant) in order to determine a penalty for Mr Ingleby's breach of duty as a director (in the Australian Wheat Board scandal) which downplayed his role. The Court of Appeal said that as AWB's former Chief Financial Officer, he was "*hardly that of a minor functionary…he was at the very centre of its operations*." In considering the obligations on busy executives, the Court of Appeal clearly put executives on notice[46]:

> Senior counsel for Mr Ingleby submitted, in the hearing below, that his client's failure to see what he ought to have seen was a consequence of the demand placed upon him by his job; demands which did not allow for a sufficiently careful reading of correspondence or attention to the detail which would, if known, have led to the truth. I am unimpressed with this argument. It is essential that those who accept the rewards of important offices also accept the responsibilities which go with them. Proper corporate and professional behaviour depends upon that acceptance, and must be supplemented by the knowledge that the court will play their part in the maintenance of appropriate standards.

(i) The current penalties for a foreign bribery offence are reasonably substantial. They are[47]:

(i) for an individual:

(A) imprisonment of up to 10 years;

(B) a fine of up to 10,000 penalty units, making a maximum amount of $1.7 million;

(ii) for a corporation, the greatest of the following:

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[43] *The Queen v David John Ellery* [2012] VSC 349.

[44] *The Queen v David John Ellery* at [27] to [29] per Hollingworth J.

[45] The amount of the invoice forming the basis of the charge of false accounting was $79,502.

[46] *ASIC v Paul John Ingleby* [2013] VSCA 49 at [95] per Harper JA.

[47] For offences committed after 28 December 2012. Offences committed earlier in time attract reduced penalties.

(A) a fine of up to 100,000 penalty units (or a maximum amount of $17 million);

(B) if the court can determine the value of the benefit obtained directly or indirectly and which is reasonably attributable to the offending conduct, three times the value of the benefit; or

(C) if the court cannot determine the value of the benefit, then 10 per cent of the annual turnover of the corporation during the 12 months ending at the end of the month in which the offending conduct occurred (which is described in the Criminal Code as the "turnover period").

(j) Since 2012, the value of an offence per penalty unit has not increased. In the Committee's opinion, serious consideration should be given to increasing the fines for foreign bribery, either specifically for that offence, or by uplifting the value of a penalty unit to apply more generally to Commonwealth offences.

(k) In 2014, ASIC prepared a comprehensive summary of applicable penalties for corporate wrongdoing[48]. ASIC looked at the position in Australia and overseas (particularly Canada, Hong Kong, the United States and the United Kingdom). ASIC concluded that while the maximum terms of imprisonment and fines available in Australia were broadly consistent with those surveyed in the identified overseas jurisdictions, non-criminal monetary penalties – including administrative penalties and disgorgement – are not as widely available and are lower in Australia when compared to overseas[49].

(l) There is one significant failing in Australia's laws in relation to foreign bribery – there are no comparable books and records and internal controls offences in Australia as there is under the FCPA, as enforced with great success by the US SEC.

(m) In summary, the FCPA requires issuers (those listed entities or other entities trading in US-listed shares subjected to the FCPA) to make and keep books, records and accounts which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the entity's assets. In addition, issuers must devise and maintain a system of internal accounting controls that assures that transactions are executed and assets are accessed only in accordance with management's authorisation; are periodically reconciled and recorded so that the entity's financial statements conform to nominated standards. Critically, issuers are *strictly liable* for the failure of any of their owned or controlled foreign affiliates to meet the books and records and internal control standards.

(n) Under the Corporations Act, a corporation is already required to keep written financial records that correctly record and explain its transactions, financial position and performance and which would enable true and fair financial statements to be prepared[50]. Conduct in contravention of this provision is an offence of strict liability but the penalty is nominal[51]. A director is liable to a civil penalty if he or she fails to take all reasonable steps to comply or to secure compliance with the record-keeping provisions[52].

(o) The Committee is strongly of the opinion that an amended books and records and internal controls offence for foreign bribery must be created and the penalties must be as severe as the underlying primary foreign bribery offence (in section 70.2 of the Criminal Code). The Committee believes that careful consideration should be given

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[48] Report 387, *Penalties for Corporate Wrongdoing*, March 2014.

[49] Report 387 at page15.

[50] Corporations Act, Section 286(1).

[51] Corporations Act, Section 286(3) and see sections 1311(1) and (1A) creating the offence, with the relevant penalty arising by virtue of section 1311(2) and Schedule 3, being 25 penalty units (up to $4,250) or imprisonment for 6 months.

[52] Corporations Act, section 344(1) while section 344(2) covers dishonest conduct by a director.

to whether these offences are included in the Corporations Act (to be enforced by ASIC) or in the Criminal Code (to be prosecuted by the CDPP).

(p) The Criminal Code makes no allowance for the debarment of any entity from securing publicly funded contracts.

(q) The Australian Government appears lukewarm to the notion of debarment for corporations who admit liability for foreign bribery or who are convicted of a foreign bribery offence. This has been raised by the OECD as an important issue since 2006, on more than one occasion, and which has still not been addressed by Australia in any meaningful manner[53].

(r) In the US, there exists an Interagency Suspension & Debarment Committee (**US ISDC**). The latest annual report from the US ISDC to the US Congress reveals that the number of suspension and debarment actions undertaken by US agencies has increased steadily over the last six years[54]. The US ISDC has a broad visibility into government-wide trends in suspension and debarment activities. Indeed, the US ISDC is required by law to prepare annual reports to the US Congress on the suspension and debarment activities of executive agencies. The recent increase in suspension and debarment activity has helped to promote best practices, and increase coordination between government institutions to help identify and mitigate the risks of doing business with non-responsible contractors.

(s) The US system of debarment operates in summary as follows[55].

(i) The defining characteristic of the suspension and debarment system in the US is "present responsibility." As stated in the Federal Acquisition Regulation (**FAR**), which sets forth uniform public procurement policies and procedures applicable to all executive agencies, "*Agencies shall solicit offers from, award contracts to, and consent to subcontracts with responsible contractors only*." The US government will therefore refuse to award procurement contracts to suppliers unless they are "presently responsible".

(ii) The Supreme Court of the United States explained the underlying justification for this practice as early as 1940[56]: "*Like private individuals and businesses, the Government enjoys unrestricted power to produce its own supplies, to determine those with whom it will deal, and fix the terms and conditions upon which it will make needed purchases*."

(iii) Every US executive agency may suspend or debar any supplier that:

(A) has been convicted of a crime or civil fraud;

(B) was in serious breach of other requirements (including poor contract performance); or

(C) for "*any other cause of so serious or compelling a nature that it affects the present responsibility of the contractor*."

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[53] OECD, *Australia: Phase 2 Report on the Application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, January 2006, pages 52 to 54; OECD Working Group on Bribery *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions,* Nov 2009, section XI "Public Advantages, including Public Procurement".

[54] Interagency Suspension & Debarment Committee Report to Congress for FY 2014 (Mar. 31, 2015), available at https://isdc.sites.usa.gov/files/2015/04/873report2014.pdf. The ISDC consists of representatives from the 24 executive agencies covered by the Chief Financial Officers Act. An additional 18 independent agencies and government corporations also participate. The current Chair of the ISDC is David Sims, the Debarment Program Manager for the U.S. Department of Interior.

[55] "*Suspension & Debarment on the Rise: A Popular Enforcement Tool in the United States*" by P Dubois, CD Swan and NE Castellano, to be published in IBA Anti-Corruption Committee Newsletter, August 2015.

[56] *Perkins v. Lukens Steel Co.,* 310 U.S. 113, 127 (1940).

Debarments in the United States generally "should not exceed 3 years" and any period of temporary suspension preceding debarment should be considered. Debarment is designed to mitigate risk, not to punish a supplier for past behaviour—even if that behaviour amounts to fraud or corruption. Indeed, the FAR explicitly cautions that the "*serious nature of debarment and suspension requires that these sanctions be imposed only in the public interest for the Government's protection and not for purposes of punishment*."[57]

(iv) The primary officials in the US suspension and debarment system are each agency's designated Suspending and Debarring Official (**SDO**). These SDOs have the exclusive discretionary authority to suspend and debar contractors pursuant to the procedures outlined in the FAR. These procedures shall be "*as informal as is practicable, consistent with principles of fundamental fairness*" and must afford the contractor an opportunity to respond to any proposed debarment. Perhaps most importantly, the FAR provides that the existence of a cause for debarment "does not necessarily require that the contractor be debarred" and requires the SDO to consider "*the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors*"[58]

(v) The SDOs in the US suspension and debarment system are not investigative officers and often rely on evidence obtained from parallel judicial proceedings, other administrative actions, agency investigations, or non-governmental sources, such as competitors. Agencies are required to have effective and prompt reporting, investigation, and referral procedures to ensure that all relevant information is provided to the SDO in a timely manner. Upon receipt of adequate evidence, the SDO may decide to temporarily suspend a contractor "*pending the completion of investigation or legal proceedings."* These suspensions are generally limited to 12 to 18 months in length. To help close the gap between the supplier's current condition and what is necessary to be presently responsible, agencies and suppliers may also enter into administrative agreements, whereby the agency foregoes debarment on the condition that the supplier implements various institutional changes, internal controls, and other compliance mechanisms.

(t) In Australia, there are procurement policies for the Commonwealth and each State Government. Some of these policies have been in a state of review for some time. The *Commonwealth Procurement Rules 2014* deal primarily with the process of securing and issuing procurement contracts. It is silent on any sanctions save to note that non-compliance with the "*resources management framework, including in relation to procurement*" may attract criminal, civil or administrative remedies under the *Public Service Act 1999* (Cth) and the *Crimes Act 1914* (Cth).

(u) The Public Service Act will apply to discipline any current or former public servant. Whether or not a criminal offence has occurred will depend upon whether the conduct of a public servant or a tendering party contravenes the Criminal Code or the Crimes Act.

(v) These laws do not deal expressly with debarment or provide for any debarring sanction where a contracting party has been charged or convicted with foreign bribery. Indeed, the Australian media has been very critical of the Australian Government's refusal or lack of interest in implementing an effective debarment regime even awarding contracts to entities banned by the World Bank[59]. In the Committee's experience, debarment is likely to have a far greater impact on

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[57] US Federal Acquisitions Regulations 48 C.F.R. § 9.402(b).

[58] Id. § 9.406-1(a); see also id. § 9.407-1(b).

[59] "*Australia's slide into corruption must be stopped*", Neville Tiffen, The Age 5 December 2014; "*Banned firm won federal contracts",* Madeleine Heffernan, The Sydney Morning Herald, 3 August 2013; "*Case grows for corrupt companies to be barred from government work*", Prof Louis de Koker, Deakin University at The Conversation.com

corporations than a fine (or conviction assuming a company is ever criminally prosecuted).

(w) There are, in the Committee's experience, a number of options open to the Australian Government on debarment.

(i) Formal sanction on a corporation upon its conviction for a bribery offence in Australia or anywhere in the world where it conducts business.

(ii) Administrative sanction by a Commonwealth agency upon the issue of a "show cause" notice to a corporation where allegations of bribery are made against the corporation. The corporation has to satisfy the agency that it did not engage in the offending conduct.

(iii) Automatic debarment from all Australian Commonwealth contracts for a specified period when any Australian corporation is sanctioned by the World Bank or any other multilateral development bank for engaging in bribery or corruption on a bank funded project. The corporation may have a right to appeal subject to satisfying a onus to prove that it did not engage in the offending conduct.

(iv) Pre-contract integrity clauses in every Commonwealth tender. These clauses permit an agency to disqualify a corporation from a tender, or to terminate once any tender is awarded, in circumstances where it is found out that the corporation did contravene anti-corruption laws in any country which was not disclosed to the agency in the tender. These have been used in Germany and India in public procurement contracts where government agencies have contractual rights which are enforced.

(x) The Committee considers that with the proper rules and resources, suspension and debarment can be an effective tool for governments to promote integrity in public procurements, reduce performance risk, and mitigate the likelihood that procurements will be marred by fraud and corruption. Without such a regime in Australia, the country is increasingly isolated from the extensive debarment procedures operating by the US, the World Bank and many other multi-lateral lending and financing agencies.

(y) The Committee is of the opinion that Australia needs to enact laws which:

(i) substantially amend any existing Corporations Act offences dealing with false or misleading accounts;

(ii) make a books and records and internal controls offence a stand-alone offence (without relying upon or having to prove the primary foreign bribery offence) by amendments to the Corporations Act or the Criminal Code;

(iii) impose monetary penalties at least equal to the primary foreign bribery offence penalties;

(iv) impose strict liability on corporations for a contravention of the books and records and internal controls offence; and

(v) implement an effective debarment regime applying to all Commonwealth agencies and contracts for all and any public procurement works, with meaningful sanctions.

4.5 The statute of limitations

(a) Prosecutions for offences against Commonwealth laws generally may be commenced as follows[60]:

[60] Section 15B, Crimes Act 1914.

(i) for an individual:

(A) no time limit where the maximum term of imprisonment for a first offence exceeds 6 months;

(B) one year if the maximum term of imprisonment is 6 months or less; and

(C) one year where the punishment is a pecuniary penalty and no imprisonment;

(ii) for a corporation:

(A) no time limit where the maximum penalty is or includes a fine of more than 150 penalty units in the case of a first conviction;

(B) within one year in any other case.

(b) These laws reflect the legal maxim *nullum tempus occurrit regi* or "time does not run against the Crown". There is no time limit for the bringing of a prosecution for foreign bribery or any serious offences (of which see section 4.6 below).

(c) The CDPP Prosecution Policy includes, as a factor to be taken into account in determining whether the public interest requires a prosecution, the following[61] – *the passage of time since the alleged offence when taken into account with the circumstances of the alleged offence and when the offence was discovered*.

(d) While there are arguments as a matter of policy of whether there should be any time limit on serious offences, the Committee is of the opinion that given the serious nature of foreign corruption, the complexity and time necessary to secure foreign evidence and the high public interest in ensuring that corporate criminal conduct does not go unpunished, there should remain no time limit for foreign bribery offences. There is always the discretionary factor for the AFP, the CDPP (and ultimately the Court) to evaluate if the evidence they have, due to the passage of time, is sufficiently reliable such as to question whether there is a reasonable prospect of securing a conviction. If that occurs, then the Committee considers, as with all foreign bribery cases, that if the CDPP declines to prosecute, it should say so publicly and with reasons.

4.6 The range of offences, for example:

(a) The range of offences (for conduct that involves bribery of a foreign public official) that a corporation or individual might face are presently considerable. They include:

(i) foreign bribery;

(ii) conspiracy (which has an extra-territorial reach[62]);

(iii) false accounting under State-based criminal statutes;

(iv) fraud and fraud-related State-based offences;

(v) fraud and deception-related Commonwealth offences;

(vi) tax-related offences;

(vii) money-laundering offences; and

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[61] Prosecution Policy section 2.10(e), page 5.

[62] Section 70.5 of the Criminal Code provides for extra-territorial application of the foreign bribery offence. The same extra-territorial application will apply to a conspiracy to commit foreign bribery pursuant to section 11(5) of the Criminal Code by reason of section 11(6)(2) of the Code.

(viii) accessorial or secondary liability for individuals who have sufficient knowledge of the offence to be potentially liable for a penalty of the primary offence[63].

(b) The penalties for each offence range from terms of imprisonment to monetary fines. The monetary penalties for foreign bribery were increased in December 2012 by the Commonwealth simply increasing the value of a penalty unit. The penalties for money laundering offences range from imprisonment for 5 years to 25 years depending on the amount of money the subject of the underlying charge.

(c) There has been no recorded prosecution or conviction of a company for a foreign bribery offence based on it failing to create a culture of compliance. While section 12.1 of the Criminal Code provides a company can commit an offence and section 12.2 to 12.6 sets out how liability is to be determined, it appears they have never been used[64]. Why that is so is probably not hard to explain. The AFP and the CDPP have, in all likelihood, found it difficult to find evidence to be satisfied that there were reasonable prospects to secure a conviction. This is all the more reason to look seriously, in the Committee's opinion, in changing the law and deeming corporations liable for offences if the corporation cannot demonstrate it adopted or took adequate steps to instil and maintain a culture of compliance[65].

(d) In the context of corporate criminal liability, it is invariably the case that no one or possible group of individuals possessed the necessary knowledge and thus, a corporation did not have the necessary knowledge. In *Krakowski v Eurolnyx Properties Pty Ltd*[66] the High Court of Australia held that you accumulate the knowledge of all "attributable" persons of the corporation to ascertain the knowledge of the company. To focus simply on the knowledge of one person as being the knowledge of a corporation is artificial and does not reflect to combined knowledge of a range of individuals within a corporation. The Committee recommends that the corporate criminal liability provisions be amended to ensure that the liability of a corporation is determined by the combined knowledge of its properly regarded relevant officers.

(e) There is, unlike in the US, no liability on parent companies for the conduct of subsidiaries of intermediaries absent conspiracy (as between individuals). Under Australia's criminal law, only those entities (individual or incorporated) are liable for an offence if they engaged in the offending conduct. There is no deemed liability for the conduct of a third parties[67].

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[63] Accessorial liability for Commonwealth offences is now governed by sections 11(2), (2A), (3) and (4) of the Criminal Code.

[64] These provisions largely reflect the common law position, reflected in *Director of Public Prosecutions Reference No 1 of 1996* (1998) 3 VR 352 where the Court of Appeal accepted the analysis of the Privy Council in *Meridian Global Funds Management Asia Ltd v Securities Commission* [1995] 2 AC 500, to the effect that the relevant question is whose acts or omissions or state of mind are taken to be the acts or omissions or state of mind of the corporation itself for the purpose under consideration. The Court noted, at page 355, that sometimes "*only the board of directors acting as such or a person at or near the top of a corporation's organisation will be identified as the corporation itself. On other occasions, someone lower, and perhaps much lower, in the hierarchy, will suffice."*

[65] Corporations can act to instil a culture of compliance and by doing so and maintaining a record of those activities, it can defeat a potential criminal prosecution, see the well-known case in the US of *SEC v Garth Peterson* in April 2012. The DOJ alleged that a Morgan Stanley compliance officer specifically informed Peterson in 2004 that employees of Yongye, a Chinese state-owned entity, were government officials for purposes of the FCPA. Peterson also received at least 35 FCPA compliance reminders from Morgan Stanley, but nonetheless committed the FCPA violations. The DOJ declined to prosecute Morgan Stanley and was satisfied its conduct in proactively creating and maintaining a culture of compliance was enough to avoid a prosecution (see http://www.justice.gov/opa/pr/former-morgan-stanley-managing-director-pleads-guilty-role-evading-internal-controls-required).

[66] (1995) 183 CLR 563; [1995] HCA 68 at [38].

[67] The OECD Working Group on Bribery *Recommendations of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions,* Nov 2009, Annex I provides a useful framework which on its face is reflected in sections 12.1 to 12.6 of the Criminal Code, enacted but never used.

(f) The Committee considers that if the current law on corporate criminal liability is too hard for the prosecution agencies to establish, then serious consideration ought to be given to amending the law to create a form of deemed vicarious liability on the parent entity for the conduct of its subsidiaries (particularly for any books and records and internal controls offences). At the very least, such laws will instil into parent entities the critical importance of proactively addressing anti-corruption compliance practices throughout a corporate group. This is, in the Committee's experience, occurring in the better run international corporate groups but it remains a challenge for small to medium sized business entities.

4.7 Measures to encourage self-reporting, including but not limited to, civil resolutions, settlements, negotiations, plea bargains, enforceable undertakings and deferred prosecution agreements

(a) Australia's criminal law has, and still to a very significant degree, focused on the individual wrongdoer. Where an individual is investigated and charged with an offence, he or she can seek to negotiate a plea deal with the prosecutor. How and the extent to which this can be taken into account by an Australian Court is now, since 2014, not clear. The position for a company the subject of an investigation and potential prosecution is even less clear in terms of how and the extent to which it can negotiate a settlement[68].

(b) The starting point is the High Court of Australia's judgment in *Barbaro v The Queen; Zirilli v The Queen*[69]. The High Court limited the prosecutor's role in terms of recommendations as to the sentencing of an offender, in these terms[70]:

> Even in a case where the judge does give some preliminary indication of the proposed sentence, the role and duty of the prosecution remains the duty which has been indicated earlier in these reasons: to draw to the attention of the judge what are submitted to be the facts that should be found, the relevant principles that should be applied and what has been done in other (more or less) comparable cases. It is neither the role nor the duty of the prosecution to proffer some statement of the specific result which counsel then appearing for the prosecution (or the Director of Public Prosecutions or the Office of Public Prosecutions) considers should be reached or a statement of the bounds within which that result should fall.

(c) The High Court has made it clear, as have other appellate Courts, that the sentencing task remains that of the sentencing Judge and that Judge alone[71]. A prosecutor can do no more than opine on sentencing principles, not on what a sentence or a range of sentences should be. This is hardly, in the Committee's opinion and experience, conducive to encouraging corporations to self-report a potentially serious criminal offence with the result that it, in effect, flips a coin and leaves its unknown and uncertain fate in the hands of firstly the AFP, secondly the CDPP and ultimately, the Court. Certainty, or at least a clearly structured and transparent procedure, is likely to be a great incentive for corporations to voluntarily self-report potential offences.

(d) In *Director, Fair Work Building Inspectorate v CFMEU*[72], the Full Court of the Federal Court of Australia applied *Barbaro* and concluded a court should have no regard to penalties agreed between the parties. This judgment is subject to a special leave to appeal application to the High Court of Australia. It remains to be seen how the High Court rules on this question. Legislative intervention may or may not provide a solution as any solution needs to reflect the separation of powers – so that Parliament in any new legislation does not usurp the judicial power.

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[68] An excellent summary of the law can be found in "*Developing Australia's framework for corporate prosecutions*", Luke Hastings and Grant Marjoribanks, 1 August 2015 for Law Council of Australia Business Law Section, Corporations Committee.

[69] (2014) 253 CLR 58; [2014] HCA 2.

[70] Ibid at [39].

[71] *Wong v The Queen* (2001) 207 CLR 584 at 611; [2001] HCA 64 at [75]; *Barbaro* at [41]; *R v MacNeil-Brown* (2008) 20 VR 677 at 711 [1320] per Buchanan JA, 716 [147] per Kellam JA; CMB v Attorney General for NSW (2015) 89 ALJR 407 where the prosecution may submit that an identified sentence (by the Trial Judge) is manifestly inadequate, so avoiding appealable error by the Trial Judge.

[72] [2015] FCAFC 59.

(e) What then is the current position in Australia in relation to corporate criminal prosecutions for foreign bribery? The short answer is we do not know, absent the publication of the sentences imposed on the Securency companies, the details of which are suppressed. Aside from an internal, ethical view about how a corporation should behave, there is no real or material legal incentive for a corporation to report any potential criminal offence[73]. Indeed, there is often a direct incentive not to do so.

(f) The positions in the US and the UK are different.

(g) In the US, the DOJ and the SEC regularly use settlement agreements with corporations to secure significant plea deals in foreign bribery cases. These include deferred prosecution agreements or DPAs (where an indictment is unsealed, filed and served and then held in abeyance subject to the corporation complying with its terms), non-prosecution agreements or NPAs (similar to DPAs but where an indictment is not filed and no prosecution is commenced) and declinations (where the authorities investigate and inform the corporation under investigation that they decline to prosecute[74]). While the US system has been criticised by some commentators as allowing the criminal justice system to be conducted by administrative fiat by enforcement agencies, with limited judicial supervision, it has been remarkably effective in securing settlements that are ultimately transparent, put to a court, approved by a court and then publicised.

(h) In the UK, there was resistance to adopting the US model. Hence, in 2013, the UK enacted a statutory scheme for DPAs, to apply to corporations, not individuals[75].

(i) The UK system of DPAs together with the Guidance issued by the Serious Fraud Office[76], yet to be tested in any public judgments of the courts, has the following key features:

(i) a DPA is a discretionary tool and a prosecutor may invite a "person"[77] to enter into negotiations for a DPA upon:

(A) being satisfied that the threshold evidentiary test for the offence has been satisfied or if not, is likely to be on further investigation; and

(B) the public interest is properly served by not prosecuting but instead entering into a DPA;

(ii) in making a decision to invite a person to negotiate a DPA, a number of factors must be considered such as the seriousness of the crime, the level of cooperation, the history of the person in similar conduct, the risk of harm to the public, the value of the gain or loss and the impact on financial markets and on other countries;

(iii) the negotiation process is subject to written confidentiality undertakings by the prosecutor and the person concerning how information and documents exchanged between them may be used or not used by a party in any subsequent prosecution;

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[73] The only Australian State where there is an obligation to report a serious offence, is NSW, pursuant to section 316 *Crimes Act 1900* (NSW) and that obligation sets a particularly high threshold which on many cases, the Committee suspects, cannot or will not be satisfied.

[74] Some corporations in the US may report a declination in their SEC filings.

[75] *Courts and Crimes Act 2013* (UK).

[76] *Deferred Prosecution Agreements Code of Practice* issued by the Director of the SFO and the DPP; to be read with the *Guidance on Corporate Prosecutions* (as at Oct 2009) issued by the SFO, the DPP and the Director of Revenue and Customs Prosecution Office.

[77] The Code makes it clear that the SFP and the DPP are "*first and foremost prosecutors*" and a person "*has no right to be invited to negotiate a DPA."* The "person" is the entity whom the prosecutor is considering prosecuting for an offence, defined as the "alleged offence".

(iv) while the statutory disclosure obligations on a prosecutor are not engaged, the prosecutor must fairly state the strength of the case and not mislead the person invited to negotiate the agreement;

(v) the application to the court, if a DPA is agreed to, must set out identified details of the alleged offence, particulars of the conduct and other material to enable the court to assess the DPA;

(vi) a DPA may include a variety of terms as to fines, penalties and the appointment of a monitor;

(vii) the court may convene preliminary hearings in order to address any outstanding issues and then list a final hearing in open court for approval of the DPA with published reasons; and

(viii) any breach of the DPA will entitle the prosecutor to re-list the deferred indictment against the person and move to trial.

(j) The Committee considers there are a number of important principles to state up front:

(i) there is no reason in principle why corporations should not be subject to criminal sanctions as they are not, and must not be placed, above the law;

(ii) while critics of this view suggest that innocent shareholders and employees bear the burden of fines and sanctions, they forget that shareholders and employees take the benefit of corruptly secured contracts to drive up profit, shareholder dividends and individual bonuses; and

(iii) in order to promote positive corporate behaviour, the Committee considers that there must be a structured, transparent and predictable process[78] for corporations to report offences and then, if appropriate, for the company to self-report offences, to cooperate with enforcement agencies and to know what sanction, if any, will be applied to it[79].

(k) There are features of the CDPP's Prosecution Policy which, unlike those policies in the US and the UK, militate against any proactive corporate cooperation with enforcement agencies:

(i) the Prosecution Policy is generic with no specific mention or analysis of the position of a corporation faced with a criminal charge;

(ii) factors relevant to the prosecution of a corporation are not set out and a corporation is treated the same as an individual;

(iii) the basis of criminal liability for a corporation should, in the Committee's opinion, be clearly stated and a principle made clear – a corporation is a legal person and should receive no more favourable treatment than an individual; and

[78] The ACCC Immunity Policy for Cartel Conduct is an example of a published policy between an Australian regulator (on competition matters) and the CDPP (see www.accc.gov.au/publications for a copy).

[79] The need for transparency has been reflected in a number of the OECD Peer Review reports issued for various OECD member countries. For example, in the Denmark Phase 3 Evaluation, paragraphs 77-81 and subsequent commentary referring to the use of out-of-court settlements in Denmark, the OECD stated that "*settlements in foreign bribery cases must be sufficiently transparent so as to instil public and judicial confidence*" and "*regardless of whether a settlement is discussed or reached with a corporate defendant, SØIK (Danish law enforcement authority) should also prosecute the responsible natural persons in the same case where appropriate*". Again, in the Switzerland Phase 3 Evaluation, paragraphs 38-42 and subsequent commentary on the use of 'special procedures' by Swiss prosecutors, the OECD highlighted the need to ensure the transparency and predictability of such procedures by making the outcome public.

(iv) the role of a corporation's cooperation must, in the Committee's opinion, be clearly set out together with the relevance of real, robust compliance practices.

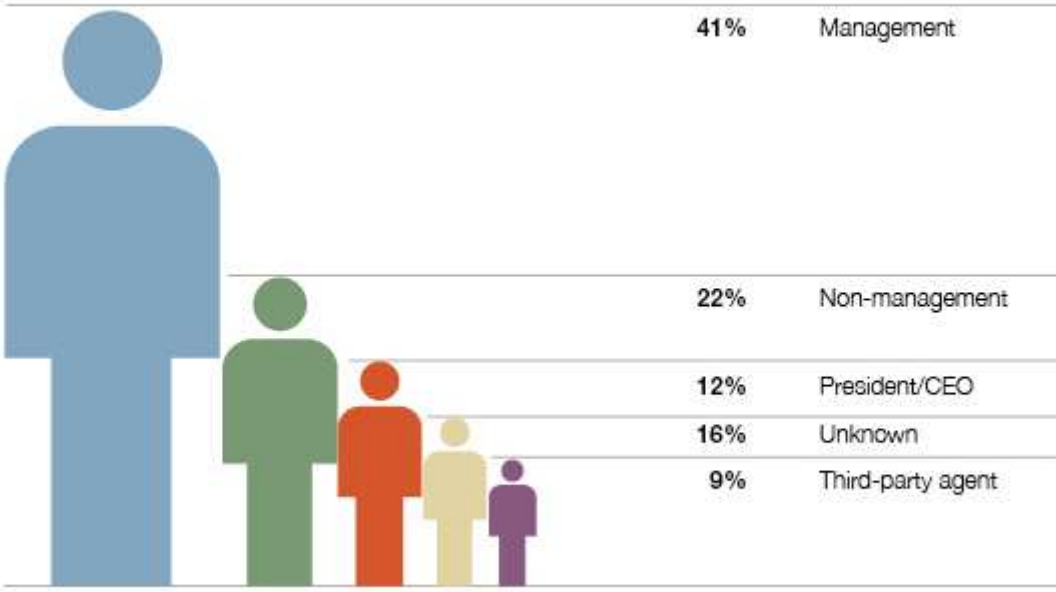
(l) The Committee strongly recommends that a form of structured settlement agreements be introduced as statutory amendments to Australia's criminal law. These agreements should be directed towards corporations, modelled more on the UK process with open judicial scrutiny. One important question is whether the "offer to negotiate" a DPA should be a discretion residing only with the prosecutors. In the Committee's experience, leaving the DPA solely in the discretion of the prosecutor is a real disincentive for corporations to volunteer information, records and evidence, merely to be told, sorry, no deal. The Committee considers that a corporation ought to be entitled to request a DPA and subject to satisfying clearly articulated criteria, then seek to negotiate on that basis. This can only promote transparency and certainty for prosecutors and corporations, establishing a clear set of criteria to negotiate a DPA and to remove the unsatisfactory, opaque process that currently prevails.

4.8 Official guidance to corporations and others as to what is a culture of compliance and a good anti-bribery compliance program

(a) A culture of compliance or standards of ethical commercial behaviour in Australia and in the Committee's experience, in many parts of the world, seems to remain as elusive as ever. Australian corporations profess to be upstanding corporate citizens with zero tolerance of improper and illegal conduct, yet the real business world suggests something different.

(b) To what extent are directors and management involved in foreign bribery? The OECD Foreign Bribery Report 2014 discloses a less than satisfactory picture of executive involvement in foreign bribery and corruption. Such conduct is not the conduct of rogue agents, intermediaries or employees. It is usually conduct undertaken by and on behalf of the company by a range of mid-level to senior management, including Chief Executive Officers (see Table 10 from the Report below).

Figure 10. Senior management was involved in over 50% of cases



Source: OECD analysis of foreign bribery cases concluded between 15/02/1999 and 01/06/2014

(c) In 2006, a Royal Commission was held and inquired into the wheat sales to Iraq by AWB Limited to try to determine what had happened and more importantly, why it had happened. The Commission's findings were summarised as follows[80]:

> The conduct of AWB and its officers was due to a failure in corporate culture. The question posed within AWB was:
>
> > What must be done to maintain sales to Iraq?
>
> The answer given was:
>
> > Do whatever is necessary to retain the trade. Pay the money to Iraq. It will cost AWB nothing because the extra costs will be added into the wheat price and recovered from the UN escrow account. But hide the making of those payments for they are in breach of sanctions.
>
> No one asked, "What is the right thing to do?" Instead, much time and money was spent trying to determine if arrangements could be formulated in such a way as to avoid breaching the law or sanctions, whether conduct could be protected, by various subterfuges, from discovery or scrutiny, and whether actions were legal or illegal. There was a lack of openness and frankness in AWB's dealings with the Australian Government and the United Nations. At no time did AWB tell the Australian Government or the United Nations of its true arrangements with Iraq. And when inquiries were mounted into its activities it took all available measures to restrict and minimise disclosure of what had occurred. Necessarily, one asks, "Why?"
>
> The answer is a closed culture of superiority and impregnability, of dominance and self-importance. Legislation cannot destroy such a culture or create a satisfactory one. That is the task of boards and the management of companies. The starting point is an ethical base. At AWB the Board and management failed to create, instil or maintain a culture of ethical dealing.

(d) In 2011, the Australian Council of Superannuation Investors published a report into the exposure to corruption and bribery across the S&P/ASX 200 top companies[81]. The findings make for some depressing reading:

(i) 59% of ASX 200 companies prohibit bribery;

(ii) 16% of ASX 100 companies prohibit facilitation payments and only half restrict or control them;

(iii) pressure for companies to prevent bribery and corruption comes from overseas, not from within Australia; and

(iv) of over 50% of ASX 200 companies that operate in the UK or the US, 35% have no stated policy that prohibits bribery of facilitation payments and 43% have inadequate management systems to implement company policy.

(e) In 2014, the PwC Global Economic Crime Survey found that[82]:

(i) the global focus on offshore bribery and money laundering, one of the highest risks seen by Australian companies, is arguably more intensive than in Australia;

(ii) bribery and corruption can, if it occurs, taint not only the individuals but an entire organisation for many years; and

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[80] Report *of the Inquiry into Certain Australian Companies in Relation to the UN Oil-For-Food Programme*, The Hon Terence RH Cole AO RFD QC, Vol 1, page xii, November 2006.

[81] *Anti-Corruption and Bribery Practices in Corporate Australia*, Research Paper, Australian Council of Superannuation Investors, October 2011.

[82] *Global Economic Crime Survey 2014: The Australian Story*, PwC, 2014, pages 15 and 16.

(iii) almost 32% of Australian organisations operate in high risk jurisdictions and 6% have lost over $1 million in relation to bribery and corruption.

(f) In 2015, the Deloitte Bribery and Corruption Survey found that[83]:

(i) 23% of organisations have experienced one or more instance of domestic corruption;

(ii) 23% of organisations with offshore operations are not concerned about risks arising from non-compliance with bribery laws and 77% have never conducted a bribery and corruption risk assessment; and

(iii) 40% of organisations with offshore operations do not have (or it is not known if they have) a formal compliance policy to manage corruption risk.

(g) In 2015, the Ernst & Young Asia-Pacific Fraud Survey highlighted the following[84]:

(i) 1 in 4 companies do not have anti-bribery or anti-corruption policies;

(ii) 40% of companies do not provide anti-bribery or anti-corruption policy training;

(iii) 78% of individuals said they would not want to work in an organisation where bribery and corruption occurred; and

(iv) 2 in 3 respondents see a commercial advantage in having a strong reputation for ethical conduct.

(h) These reports and reviews over the last decade illustrate a constant message – while parts of corporate Australia get the message about the importance of dealing with bribery and corruption, many companies appear not to do so. There is no "official" guidance issued by the Australian Government on how companies should conduct themselves – as the AWB Report noted, the prevailing view is that is for individual boards and management teams[85].

(i) It should be plain to any business operating outside Australia that there are several powerful drivers changing commercial attitudes to bribery and corruption[86]:

(i) the US is consistently tough on foreign bribery, it seeks to assert extra-territorial jurisdiction and individuals guilty of foreign bribery and prosecuted by the US end up imprisoned;

(ii) other industrialised economies are toughening up on enforcement, with China the most obvious example;

(iii) emerging markets are joining in, becoming members of the OECD Convention and working with industrialised economies to recover losses and hold corrupt officials and business to account; and

(iv) as a flow-on effect, even if Australian companies are not themselves caught by those overseas laws, when they seek to deal with companies in those jurisdictions, such companies are increasingly scrutinising and demanding a higher level of probity and compliance from their contractual counterparty.

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[83] Brib*ery & Corruption Survey 2015 Australia and New Zealand: Separate the wheat from the chaff*, Deloitte, 2015.

[84] *Fraud and Corruption – Driving away talent*, Asia-Pacific Fraud Survey 2015, Ernst & Young.

[85] The Australian Government Attorney General's Department website has links to various treaties, laws and initiatives progress of the G20 Anti-Corruption Implementation Plan at http://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Pages/Globalleadershipincombatingcorruption.aspx. In addition, there is an online training module, at www.ag.gov.au/foreignbribery.

[86] *International Business Attitudes to Corruption*, Control Risks Survey 2014/2015 page 7.

(j) There are numerous publications by the OECD, Transparency International, the United Kingdom Ministry of Justice and the DOJ and SEC into how commercial entities should behave[87].

(k) It appears from reports and statements made by the DOJ in late July 2015 that it is seeking to create a position of "compliance counsel"[88]. It seems this position will have a specific role within the DOJ, based upon private industry experience, whether a corporation has a real, effective compliance program or merely a sham or paper program. This is a clear signal by the DOJ that corporations need to really focus on having a proactive compliance plan and its implementation within the corporation will be carefully reviewed in order to determine whether the plan was effective and the conduct of "rogue employees" caused the improper or illegal conduct or whether such conduct was that of the corporation's, having as it did a sham compliance plan. Such a position, staffed by an compliance expert with experience in Australia and overseas, would bring to ASIC and the AFP considerable practical experience in how to assess a corporation's compliance efforts.

(l) When the UK Bribery Act was introduced, the Ministry of Justice issued its Guidance as to procedures companies should implement to prevent persons associated with them from engaging in bribery. While the onus squarely remains on companies to demonstrate that they have adequate procedures in place, the Guidance offers the following guiding principles (which in the Committee's opinion stand the test of time):

(i) *Principle 1* - procedures to prevent bribery should be proportionate to the risks faced given the nature, scale and complexity of a corporation's operational activities, and be clear, practical, accessible and effectively implemented and enforced;

(ii) *Principle 2* - there must be a commitment from the top level of management and the board of directors to prevent bribery and to foster a culture where bribery is never acceptable;

(iii) *Principle 3* - the corporation must undertake periodic, informed and documented risk assessments of the nature and extent of its potential exposure to bribery and corruption;

(iv) *Principle 4* - the corporation must apply due diligence procedures, taking a proportionate risk-based approach, in respect of all persons who perform services for or on behalf of the corporation;

(v) *Principle 5* – the corporation must embed its bribery prevention policies throughout the organisation by communication and training proportionate to its risks; and

(vi) *Principle 6* – the corporation must monitor and review its procedures and to amend them as necessary.

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[87] Example publications include *Good Practice Guidance on Internal Controls, Ethics and Compliance*, OECD February 2010; *Typologies on the Role of Intermediaries in International Business Transactions,* OECD October 2009; *Risk Management and Corporate Governance*, OECD 2014; *Countering Small Bribes: Principles and Good Practice Guidance for Dealing with Small Bribes including Facilitation Payments*, Transparency International UK June 2014; Anti-Corruption Ethics and Compliance Handbook for Business, OECD, UNODC and World Bank, 2013; *Business Principles for Countering Bribery*, Transparency International 2013; *Resources Guide to the US Foreign Corrupt Practices Act*, US Dept of Justice and SEC, Nov 2012 at http://www.justice.gov/criminal-fraud/fcpa-guidance; Bribery Act 2010 Guidance, UK Ministry of Justice, 2011 at https://www.gov.uk/government/publications/bribery-act-2010-guidance and *2014 Anti-Bribery and Corruption Benchmarking Report*, Kroll & Compliance Week.

[88] See Joel Schectman (Chief of the Fraud Section of the DOJ), *Compliance Counsel to Help DOJ Decide Whom to Prosecute*, Wall Street Journal, Jul. 30, 2015, available at http://blogs.wsj.com/riskandcompliance/2015/07/30/compliance-counsel-to-help-doj-decide-whom-to-prosecute/. However, this initiative is not free from criticism, see *The DOJ's Latest Public Relations Move – Compliance Counsel*, FCPA Professor at http://www.fcpaprofessor.com/the-dojs-latest-public-relations-move-compliance-counsel.

(m) The Committee is of the opinion that the Australian Government (coordinated through the office of the Attorney General and involving contributions from the AFP, the CDPP, ASIC, the ATO and legal organisations), should prepare and publish a Foreign Bribery Resources Guide for Australian business. As with the US FCPA Resources Guide, it would not be binding on any agency. Rather, it could provide useful guidance as to what the Government and particular agencies expect corporations to do. The Committee recognises that agencies cannot and ought not to be bound by such a guide. In addition, it is unworkable to try to define with precision the compliance standards that a corporation must meet. However, it is possible to set out the principles of how a corporation ought to behave and then it is a factual inquiry as to whether a corporation has satisfied those principles, as a matter of policy or as a matter of law (if they are incorporated into a statutory defence of "adequate procedures"). This is likely to require a cultural shift in thinking, given Australia's criminal law heritage where governments, police and enforcement agencies rarely if ever offer opinions and certainly say nothing about how people or corporations should behave. It works perfectly well in other countries and the Committee believes it should work in Australia. Large listed organisations with sophisticated compliance and legal teams are, in general, well across ethical and compliance issues, although even the biggest can fail[89]. Where a foreign country penalises an Australian corporation and the Australian regulators appear to do nothing, it makes one question whether the public can in fact have trust in the Australian legal system which seems remarkably silent when foreign countries are so active[90]. The challenge for Australia is to educate all businesses and in particular, small to medium sized businesses, on the importance of proactively tackling bribery and corruption in order to prevent it, not merely reacting to it after the money has bolted.

4.9 Private sector whistleblower protection and other incentives to report foreign bribery

(a) While there are still certain limitations, public sector whistleblower protections have improved considerably since the *Public Interest Disclosure Act 2013* (Cth) was enacted.

(b) Private sector whistleblower protections are far more fragmented and rarely do they operate in a manner to properly protect whistleblowers. While the Corporations Act[91] contains certain statutory protections for an employee who seeks to blow the whistle on activities of their employer, the reality is that the whistleblower is very much left to his or her own devices when faced with how a corporation may react to the individual, even though the law purports to protect the individual. Indeed, ASIC has been criticised in the media for ignoring whistleblower reports and then, even when pressed by Parliament to create a Whistleblower Liaison Officer, its conduct hardly engenders support for individuals. The ASIC Information Sheet makes it clear that[92]:

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[89] On 20 May 2015, BHP Billiton agreed to pay the US SEC a US$25 million penalty (together with no doubt having paid undisclosed professional legal, accounting and advisory fees to investigate and cooperate with the SEC). An SEC investigation found that BHP Billiton failed to devise and maintain sufficient internal controls over its global hospitality program connected to the company's sponsorship of the 2008 Summer Olympic Games in Beijing. BHP Billiton invited 176 government officials and employees of state-owned enterprises to attend the Games at the company's expense, and ultimately paid for 60 such guests as well as some spouses and others who attended along with them. Sponsored guests were primarily from countries in Africa and Asia, and they enjoyed three- and four-day hospitality packages that included event tickets, luxury hotel accommodation, and sightseeing excursions valued at $12,000 to $16,000 per package. As the SEC press release stated, "*BHP Billiton footed the bill for foreign government officials to attend the Olympics while they were in a position to help the company with its business or regulatory endeavours,"* said Andrew Ceresney, Director of the SEC's Division of Enforcement. "*BHP Billiton recognized that inviting government officials to the Olympics created a heightened risk of violating anti-corruption laws, yet the company failed to implement sufficient internal controls to address that heightened risk*". No charges have been, or in the Committee's view, are likely to be laid in Australia and all BHP Billiton said publicly is to consistently state that there was no finding of bribery. True, yet a misconceived view of the facts to which the company agreed.

[90] Peter Utterström & Amanda Wassén "*Are Swedish enforcement authorities capable of handling large and complex cases?* (English translation), Advokaten, Swedish Bar Association, No 5, 2011. This highlights serious questions as to Sweden's enforcement record on foreign bribery offences.

[91] Part 9.4AAA Corporations Act.

[92] ASIC *Whistleblowers and Whistleblower Protection* Information Sheet at www.asic.gov.au

> If you fall within the specific statutory definition of a whistleblower, you are also entitled to certain immunities and protections under the Corporations Act 2001, but you should seek separate legal advice about that. If you are concerned about protection and are unsure if the law can protect you, we recommend that you seek your own advice from a lawyer.

In other words, as far as ASIC is concerned, a whistleblower is largely on his or her own in fending for himself or herself against, what the Committee has seen in the experience of its members to be, vindictive employers and harassing employees who persecute, humiliate and discriminate against the whistleblower. Australia as a member of the G20 agreed to the following – *all G20 countries implement comprehensive and effective protections for whistleblowers in both the public and private sectors, ensuring G20 countries lead by example*.[93] This may in part explain why whistleblowers resort to the media when their employers appear to do nothing or show no serious interest in dealing with the complaint.

(c) For many years, the Australian culture supported the concept that you "do not dob in a mate". Individual employees go along with the herd mentality unless he or she wants to put their head above the parapet and suffer the consequences. Is this right? Does a culture of hostility towards whistleblowers still prevail? While a 2012 survey (referred to more fully in the next paragraph) found very strong support for whistleblowers, the Committee believes the answer to these questions remains unclear given the reluctance of all governments to properly encourage and incentivise employees to blow the whistle and when they do, to properly protect them.

(d) In June 2012, Prof AJ Brown from Griffith University led some pioneering research in Australia on how the Australian public regarded whistleblowers[94]. The Stage 1 findings were as follows:

(i) 50% of all Australians believed too much information is kept secret in organisations;

(ii) 81% of Australians consider it is more important to support whistleblowers for revealing wrongdoing in organisations, even if they reveal inside information, than to punish them for revealing it (9%) and 10% being unable to say;

(iii) 82% consider it fairly to highly acceptable for someone to blow the whistle on people in charge of an organisation; and

(iv) while 56% think the most effective way to stop serious wrongdoing is to report it to people in authority, via official channels, 87% consider the media should be used to draw attention to wrongdoing whether as a first option (41%) or as a last resort (46%).

The Final Report of Prof Brown's study, published in September 2014, highlighted a particular need to introduce laws to better protect employees who work for private companies, including confidentiality guarantees and penalties for people (properly enforced by a robust regulator) who retaliate against corporate whistleblowers[95].

(e) The attitude of the Australian Government, as with many State governments and organisations is to shoot the messenger and avoid the message. Investigations are regularly run to find out who leaked sensitive information rather than dealing with the merits of the issue. The nadir of this was the Australian Government's prosecution of Alan Kessing who was convicted in 2007 of breaching section 70 of the Crimes Act 1914 (Cth) by leaking to *The Australian* long-ignored reports revealing criminality and

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[93] G20 *2015-15 Anti-Corruption Implementation Plan*, Action Area 2(c).

[94] *World Online Whistleblowing Survey, Stage 1 Results Release,* Griffith University and the University of Melbourne, 6 June 2012, at http://newsroom.melbourne.edu/news/n-826

[95] *Whistleblower Protection Laws in G20 Countries*, Prof AJ Brown & Ors, Melb University and Griffith University, September 2014, page 2.

flaws in security at Sydney Airport.[96]. Ultimately, an English knight vindicated all the alleged shortcomings at the airport in his independent review[97]. However, all Governments have refused to acknowledge serious shortcomings in the Kessing case, preferring to blandly state that all public servants are prohibited from disclosing information contrary to law (whatever the consequences are which are the subject of the whistleblowing complaint).

(f) The most comprehensive response to the power of whistleblowers and their increasing importance in the detection and response to serious financial crime is reflected by the US SEC Office of the Whistleblower[98] and the amendments to the US Exchange Act made by the Dodd Frank reforms to the US financial system[99]. While this program not only enshrines statutory protections, it goes one step further and offers rewards to whistleblowers in certain limited circumstances.

(g) Important features of the US SEC Whistleblower Program, aside from the protection and confidentiality of the whistleblower, include the following arrangements to actively reward the whistleblower for speaking out:

(i) the Program provides monetary incentives for individuals to report possible contraventions of US federal securities laws;

(ii) whistleblowers who satisfy certain strict criteria are entitled to an award of between 10% and 30% of the monetary sanctions collected by the SEC and related actions by other regulatory agencies;

(iii) an award is based upon many factors and includes:

(A) the significance of the information;

(B) the extent of assistance;

(C) the interest of the SEC in deterring contraventions of the securities law;

(D) the extent of any personal involvement in contravening conduct; and

(E) any delay in reporting the conduct;

(iv) the information provided by a whistleblower must lead to a successful SEC action in sanctions with a monetary order exceeding US$1 million;

(v) a report can be made first to the employer organisation and then to the SEC or directly to the SEC; and

(vi) during a complaint review process and any action, the identity of the whistleblower will to all extent possible, be kept confidential save for any necessary court appearances.

(h) Since its inception in 2011, the SEC's whistleblower program has paid more than US$50 million to 18 whistleblowers, including a more than $30 million award in 2014 and a more than $14 million award in 2013. All payments are made out of an investor

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[96] *R V Kessing* [2008] NSWCCA 310 and "*Alan Kessing in 'wrongful conviction'*, Chris Merritt, The Australian 4 March 2011.

[97] The report into Australia's airport security by former British MP, Sir John Wheeler, who oversaw a similar inquiry into British airport security, found existing arrangements were at times inadequate and dysfunctional. The report also criticised the lack of co-ordination between state and federal authorities. The then Prime Minister John Howard announced the government's response to the Wheeler report: a $200 million package to boost airport security.

[98] See details at https://www.sec.gov/whistleblower.

[99] The SEC's whistleblower program came into effect on 21 July 2010, when the US President signed into law the *Dodd-Frank Wall Street Reform and Consumer Protection Act*.

protection fund established by Congress that is financed entirely through monetary sanctions paid to the SEC by entities that contravene the US securities laws. No money is taken or withheld from harmed investors to pay whistleblower awards.

(i) The US Whistleblower Program was specifically set up as a consequence of the abuses in the US financial securities system in the late 2000s. Critically, the US Congress made it clear, despite opposition from US business interests, that a whistleblower can report potential contravening conduct directly to the SEC, not the corporation (employer). And, in answer to cautious prosecutors that a payment to a witness compromises his or her integrity, any payment, within the SEC's discretion, occurs after a case has been brought by the SEC and determined.

(j) Lastly, the SEC has made it clear that it will prosecute corporations and employers who seek to victimise employees who report potential offences to the SEC and that such conduct will not be tolerated[100].

(k) The verdict on the SEC's Whistleblower Program can best be reflected in the words of the Chair of the SEC, Ms Mary Jo White[101]:

> The program, while clearly still developing, has proved to be a game changer.
>
> There have always been mixed feelings about whistleblowers and many companies tolerate, at best, their existence because the law requires it. I would urge that, especially in the post-financial crisis era when regulators and right-minded companies are searching for new, more aggressive ways to improve corporate culture and compliance, it is past time to stop wringing our hands about whistleblowers. They provide an invaluable public service, and they should be supported. And, we at the SEC increasingly see ourselves as the whistleblower's advocate.
>
> The bottom line is that responsible companies with strong compliance cultures and programs should not fear bona fide whistleblowers, but embrace them as a constructive part of the process to expose the wrongdoing that can harm a company and its reputation. Gone are the days when corporate wrongdoing can be pushed into the dark corners of an organisation. Fraudsters rarely act alone, unobserved and, these days, the employee who sees or is asked to make the questionable accounting entry or to distribute the false offering materials may refuse to do it or just decide that they are better off telling the SEC. Better yet, either there are no questionable accounting entries or false offering materials to be reported in the first place or companies themselves self-report the unlawful conduct to the SEC.

(l) In the UK, the *Public Interest Disclosure Act 1998* was enacted in order to '*protect individuals who make certain disclosures of information in the public interest; to allow such individuals to bring action in respect of victimisation; and for connected purposes'*. The effect of this Act has sought to protect whistleblowers at the work place from unfair dismissal and adverse treatment. In June 2013, the UK Parliament extended the provisions to introduce vicarious liability into the whistleblowing regulations so that the act of a worker in subjecting a whistleblower to a detriment can be treated as having been done by the employer. Despite this legislation, there still remain no legal or regulatory duties on employers in the UK to have whistleblowing

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[100] KBR Inc, a Houston-based global technology and engineering firm was charged by the SEC with contravening whistleblower protection Rule 21F-17 enacted under the Dodd-Frank Act. KBR required witnesses in certain internal investigations interviews to sign confidentiality statements with language warning that they could face discipline and even be fired if they discussed the matters with outside parties without the prior approval of KBR's legal department. KBR agreed to pay a US$130,000 penalty to settle the SEC's charges and voluntarily amended its confidentiality statement by adding language making clear that employees are free to report possible violations to the SEC and other federal agencies without KBR approval or fear of retaliation. By requiring its employees and former employees to sign confidentiality agreements imposing pre-notification requirements before contacting the SEC, "*KBR potentially discouraged employees from reporting securities violations to us*," said Andrew J. Ceresney, Director of the SEC's Division of Enforcement. "*SEC rules prohibit employers from taking measures through confidentiality, employment, severance, or other type of agreements that may silence potential whistleblowers before they can reach out to the SEC. We will vigorously enforce this provision*."

[101] "*The SEC as the Whistleblower's Advocate*", Mary Jo White, speech to the Corporate & Securities Institute, Northwestern University School of Law Chicago 30 April 2015.

arrangements in place[102] and unlike in the US, whistleblowers are not financially compensated for their information.

(m) It is likely that those contemplating becoming a whistleblower may be deterred from taking action, given the historically poor record that whistleblowers have experienced in Australia (and in the Committee's experience, in other countries, such as New Zealand), the failures of ASIC to respond to them or even to hear and react to their complaints and the traditional hostility of all Governments to public sector employees who blow the whistle (invariably disclosing conduct to the media reflecting poorly on a government's actions or policy), possible misguided fears about old-fashioned criticism of "dobbing someone in" even though the overwhelming weight of current public opinion is that whistleblowers should be properly protected.

(n) The Committee strongly recommends that a formal statutory whistleblower protection program covering *all* the public (to some degree already covered by the *Public Interest Disclosure Act 2013* (Cth)) and private sector be implemented. It should be supported by enabling legislation, substantially amending the existing Corporations Act so that clear statutory powers and protections are accorded to all employees in reporting potential criminal or civil offences (to employers or directly to a regulator properly equipped and resourced to investigate complaints) purportedly undertaken by or in the name of the employer corporation.

(o) In addition, the Committee also believes that modest rewards should be available for whistleblowers, modelled on the SEC Whistleblower Program, although for more modest amounts. While the scale of any award ought in the Committee's opinion, be more modest than compared with the US, the principle is sound and the ethical message it carries forward is vital. It can be justified not as an inducement or bonus to the whistleblower, but rather as a necessary counter-balance to overcome those deterrent factors that might make otherwise honest persons reluctant to come forward. Seen in that light, and because the reporting of potential fraudulent or corrupt commercial conduct is a priority and is in the public interest, those who do that must be encouraged and modestly rewarded.

4.10 Facilitation payment defence

(a) The FCPA allows for the fact that small, routine payments to government officials have to occur and should not be regarded as a bribe or corrupt payment. There is no facilitation defence in UNCAC. Over the years, the "facilitation payments" defence has been increasingly criticised to the point where, in the FCPA Resources Guide, the DOJ and SEC state the following[103]:

> The FCPA's bribery prohibition contains a narrow exception for "facilitating or expediting payments" made in furtherance of routine governmental action.159 The facilitating payments exception applies only when a payment is made to further "routine governmental action" that involves non-discretionary acts.160 Examples of "routine governmental action" include processing visas, providing police protection or mail service, and supplying utilities like phone service, power, and water. Routine government action does not include a decision to award new business or to continue business with a particular party

(b) The Committee understands that the DOJ and the SEC take the position that only the most minor and inconsequential payments can properly be characterised as "facilitating or expediting payments". Indeed, the UK Bribery Act contains no facilitation payment defence and Canada has moved to abolish is facilitation payment defence.

(c) Section 70.4 of the Criminal Code contains a facilitation payment defence. In summary, a person is not guilty of an offence under section 70.2 if:

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[102] The UK Financial Conduct Authority and Prudential Regulation Authority have published a joint consultation paper about formalising whistleblowing procedures in UK banks, building societies, credit unions with over £25 million of assets, PRA investment firms and insurers.

[103] FCPA *Resources Guide* page 25.

(i) the value of the benefit was of a minor nature; and

(ii) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and

(iii) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3) in setting out prescribed details of the payment; and

(iv) any of the following applies:

(A) the person has retained that record at all relevant times;

(B) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;

(C) a prosecution for the offence is instituted more than 7 years after the conduct occurred.

(d) A "*routine government action*" is carefully and quite narrowly defined, as a transaction or conduct of a foreign public official that:

(i) is ordinarily and commonly performed by the official; and

(ii) is covered by any of the following:

(A) granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;

(B) processing government papers such as a visa or work permit;

(C) providing police protection or mail collection or delivery;

(D) scheduling inspections associated with contract performance or related to the transit of goods;

(E) providing telecommunications services, power or water;

(F) loading and unloading cargo;

(G) protecting perishable products, or commodities, from deterioration;

(H) any other action of a similar nature; and

(iii) does not involve a decision about:

(A) whether to award new business; or

(B) whether to continue existing business with a particular person; or

(C) the terms of new business or existing business; and

(iv) does not involve encouraging a decision about:

(A) whether to award new business; or

(B) whether to continue existing business with a particular person; or

(C) the terms of new business or existing business.

(e) The record-keeping provisions are quite specific and require the person undertaking the transaction to sign the relevant record.

(f) In November 2011, the Australian Government issued a Consultation Paper covering, amongst other things, whether the facilitation payment defence should be abolished. The Government only allowed a period of approximately 30 days for submissions – that is until December 2011. Since December 2011, a period of 3 years and almost 8 months, there has been silence from Canberra on this topic.

(g) It is the Committee's experience that many corporations operating out of Australia and a significant number of multi-national corporations with subsidiaries in Australia and many high risk jurisdictions, all ban facilitation payments in their internal codes of conduct and business policies. Putting it another way[104]:

> Once the seed of sin and corruption is planted, and society has determined that it is morally, ethically and legally wrong, the seed must be sought and rooted out. The alternative is to accept corruption, and that our society has determined not to do. Rejecting corruption means rejecting all corruption. One cannot allow just a little bit of ethically or morally wrong conduct because if one does it becomes impossible to draw the bright line which permissible conduct must not cross.
>
> Under our law business is permitted to make what are euphemistically called "facilitation payments" and, worse, are entitled to claim such payments as tax deductions. Only sophistry enables one to distinguish a facilitation payment - which is a small bribe – from the notion of a corrupt payment.
>
> Facilitation payments constitute a departure from the anti-corruption standards which our society has accepted as a basic tenet of our governmental, economic and organisational life. The laws which permit such payments and make them tax deductible blur the bright line between permissible and impermissible conduct.

(h) All allowing facilitation payments does, without clear guidance on what is or is not permissible in any given circumstance, is to create uncertainty and to perpetuate the mindset that paying money to officials to "get business done" is acceptable. It is not, and in the Committee's opinion, it is never acceptable for such conduct to occur. Such payments blur the clear line between a bribe and a facilitation payment to the point where ethical (and indeed legal decisions) come to depend upon an individual view on the amount, scale, frequency and for what service the payment is being made. Facilitation payments are nothing more than small institutionalised bribes and the Committee is strongly of the opinion that the defence in the Criminal Code should be abolished without delay. Such payments should of course be contrasted to genuine and routine payments to a government or government agency as opposed to an individual official.

(i) In New Zealand, policy makers have recently been grappling with the same issue, in that they have historically had a facilitation payments exception which has been open to misinterpretation and possibly abuse. The New Zealand Parliament is presently considering a bill (currently approaching its final reading stage) that would significantly cut back the scope of the defence/exception, and clarify some of its definitions. In the eyes of many expert commentators and practitioners, this does not go far enough, and it would be preferable to abolish the confusion and questionable defence altogether. A Supplementary Order Paper brought by an individual NZ Member of Parliament to amend the bill criticises the defence, saying it exists merely:

> to legalise facilitation or "grease" payments made to foreign public officials to facilitate such activities as the granting of permits or licenses, the provision of utility services, and the loading or unloading of cargo.

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[104] "*Corruption*", an address by The Hon TRH Cole AO RFD QC to the 6th National Investigations Symposium, 2 November 2006, pages 2-3 and 7.

> These "grease" payments are bribes, no matter their size, and help maintain a culture in some overseas jurisdictions where low-level corruption is permitted and accepted as normal practice when working in some overseas jurisdictions.
>
> Internationally, New Zealand is seen as a leader in public sector ethics and transparency. The outlawing of the controversial and unethical practice of facilitation payments will help uphold this international perception.

That is a sentiment which this Committee feels could equally apply to the Australian position.

4.11 Use of suppression orders in prosecutions

(a) The CDPP Prosecution Policy sets out the guiding principles that will apply in the conduct of any Commonwealth prosecution (including any prosecution for foreign bribery). In summary, while not all criminal offences might be subject to a prosecution, a prosecution should not be undertaken "*unless there is admissible, substantial and reliable evidence that a criminal offence known to the law has been committed by the alleged offender*"[105]. The CDPP Prosecution Policy identifies a range of non-exhaustive factors that would indicate whether the public interest requires a prosecution[106]. The CDPP Prosecution Policy is primarily focused towards the prosecution of individuals. We cover separately the position of prosecutions of corporations (see section 4.7 above).

(b) Relevantly for foreign bribery offences, Annexure A to the CDPP Prosecution Policy states that the Director has issued the following statement:

> When deciding whether to prosecute a person for bribing a foreign public official under Division 70 of the Criminal Code, the prosecutor must not be influenced by:
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> considerations of national; economic interest;
>
> the potential effect upon relations with another State; or
>
> the identity of the natural or legal persons involved.

This statement reflected the terms of Article 5 of the OECD Convention. There is however, no law in Australia giving effect to this "obligation".

(c) Australian courts all have statutes or rules that permit the suppression or non-publication of certain facts, information or evidence or the whole or part of a proceeding before the Courts[107].

(d) In June 2014, the Australian Government through DFAT secured suppression orders seeking to protect the identity of various Asian political figures from being named as alleged participants in the Securency bribery scandal in circumstances where those individuals were not charged with any offence[108]. The DFAT notice informing the Court of its application for a suppression order stated that its purpose was "*to prevent damage to Australia's international relations that may be caused by the publication of material that may damage the reputation of specified individuals who are not the subject of charges in these proceedings*."[109] Quite why Australia should be concerned to protect the reputation of primarily Asian-based politicians who can well look after their own reputation (and often do by suing for defamation and using

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[105] Clause 2.4, Prosecution Policy.

[106] Clause 2.10, Prosecution Policy.

[107] For example, Part VAA, sections 37AA to 37AL *Federal Court of Australia Act 1976* (Cth) and, for Victoria, *Open Courts Act 2013* (Vic). The relevant law is usefully summarised in *Commonwealth DPP v Barry Thomas Brady* [2015] VSC 246 at [57] to [64].

[108] The DFAT application was pursuant to the *Open Courts Act 2013* (Vic).

[109] First instance judgment, *Commonwealth CDPP v Barry Thomas Brady* 19 June 2014 (published at www.wikileaks.org on 29 June 2014) and the second judgment discharging the suppression orders, *Commonwealth DPP v Barry Thomas Brady* [2015] VSC 246 at [17].

national sedition laws to silence critics) is not entirely clear from the judgment (as the key evidence is redacted).

(e) In June 2015, the Court revisited its initial orders on the application of the Australian media. After hearing debate, the Court's judgment discharged the initial suppression orders. While the Court was critical of Wikileaks for publishing the June 2014 orders and the media for inaccurate reporting of the effect of those orders, the Court was not persuaded to maintain the suppression orders. The Court characterised DFAT's evidence as "*unsourced or second-hand hearsay*" and was drafted "*at an unsatisfactory high level of vagueness or generality*."[110] The Court made it clear that the strong public interest in the public knowing about the Securency case and what did or did not happen had to be balanced with countervailing public interest considerations concerning protecting the administration of justice and Australia's national security – matters that DFAT bore the onus of establishing, which it failed to do.

(f) Article 5 of the OECD Convention is clear – economic interests or the identity of persons is and should not be a relevant consideration. The Committee is concerned that the Australian Government has appeared to ignore this obligation in favour of seeking to protect Asian politicians for political reasons dressed up as "national security" and, that when pressed, the Government's evidence fell considerably short on that point.

(g) The Committee considers that as and when individuals may be named in any criminal proceeding, it is for the Court and those persons to deal with it – it is not the role of Government to come in and seek to protect friendly politicians in the name of "national security" (whatever that means on any particular day). It is important to remember that to be truly effective foreign bribery offences need to target not only those responsible for paying the bribe but also those who either directly or indirectly – whether at first instance or second instance or even more remotely – benefited from the bribe. Seeking to suppress the name of some individual who allegedly ultimately received some benefit from the illegal conduct does not assist foreign Sovereign States in preventing bribery of their public officials The Committee is strongly of the opinion that the use of suppression orders in circumstances such as these should only be granted in the most exceptional of cases and rarely if ever in foreign bribery cases (given the very high level of public interest in requiring such cases to be public and transparent so justice is not only done but is seen to be done in the eyes of the public and society generally).

4.12 Foreign bribery not involving foreign public officials, for example, company to company or international sporting bodies

(a) Bribery is bribery and corruption is corruption, whatever the circumstances and whoever is involved. All forms of bribery and corruption should, in the Committee's opinion, be criminalised.

(b) The UK Bribery Act has made a corporate body criminally liable for the actions of a person "associated" with it, removing the need to establish that the "controlling mind" of the corporation sanctioned the conduct.

(c) Section 7(1) of the UK Bribery Act reads as follows:

> A relevant commercial organisation ("C") is guilty of an offence under this section if a person ("A") associated with C bribes another person intending:
>
> (a) to obtain or retain business for C; or
>
> (b) to obtain or retain advantage in the conduct of business for C.

(d) Section 7 provides a statutory defence to the corporation, on the balance of probabilities, where it was more probable than not that the corporation had "adequate

[110] *Commonwealth DPP v Barry Thomas Brady* [2015] VSC 246 at [72].

procedures" in place to prevent persons associated with it from undertaking the offending conduct[111].

(e) The UK legal and business community see both benefits and disadvantages to this provision – benefits being an express provision making holding companies accountable for the actions of their agents or "associated" persons, the fault element is limited to the fault of the person A and it provides for a statutory defence so encouraging corporations to proactively manage their business risk. The disadvantages are that the Ministry of Justice Guidance (see section 4.8(l) above) is too vague, it creates an unreasonable burden on business and that UK corporations face more onerous compliance and legal obligations than their non-UK competitors. Given that the UK's position appears very similar to Australia's, limited prosecution resources due to ongoing budgetary cuts, complex financial cases, untested laws and conservative prosecutors, it seems likely, to the Committee that even with the new UK regime in place, corporations may often not be advised to self-report. Rather, corporations are likely to begin to better regulate their internal practices with whatever guidance is published and leave it to the prosecutors to decide if they have a criminal case. This of itself is of great value in turning the cultural tide within corporations and is a reason enough for Australia to give serious consideration into introducing such an offence.

(f) Commercial or private bribery is not an offence under the Criminal Code. Various State criminal laws cover the case of private commercial bribery. The Committee considers there are very good arguments for Commonwealth legislation to cover such conduct to the extent it occurs internationally and outside the jurisdiction of a State or Territory and to ensure conduct that occurs wholly outside Australia by an Australian corporation, citizen or resident is captured.

(g) International sport is not about sport, or more accurately, it is perhaps about sport in the minds of the average spectator. To those involved in sport, it is business, and often very big business. Large corporations use multinational sporting events to market and promote their products and as BHP Billiton has recently demonstrated, despite having layers of internal controls[112], Australian corporations can fail to prevent widespread commercial conduct contravening foreign anti-corruption laws with significant penalties being imposed on them. Those involved in the administration of sport are not immune from conduct that, as the FIFA-related prosecutions have illustrated, involve allegedly systemic racketeering, criminal conspiracy and money laundering[113].

(h) In February 2015, the Australian Institute of Criminology issued a *Trends & Issues Paper, Corruption in Australian Sport.* The AIC report drew the following conclusions:

(i) corruption in Australian sport was at best localised;

(ii) there are increasing opportunities for collusion and improper or illegal conduct, particularly as sport and betting became increasingly intertwined;

(iii) while most Australian sport was clean and perhaps not lucrative enough to involve criminal conduct, its increasing internationalisation may expose it to match fixing as the biggest identified risk; and

(iv) the existing responses to corruption by most sporting codes involved a reasonable degree of accountability, validity and responsibility.

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[111] The offence has been described as "draconian" – as the requirement is not to take all reasonable steps, but to *prevent* corruption, which requires corporations to actively police the conduct of its subsidiaries and agents and third parties acting for or on its behalf, see David Aaronberg and Nichola Higgins, *The Bribery Act 2010: all bark and no bite?* Archbold Review 2010

[112] See DOJ Press Release dated 20 May 20015 at http://www.sec.gov/news/pressrelease/2015-93.html and Administrative Proceeding *In the Matter of BHP Billiton Ltd and BHP Billiton Plc,* File No 3-16546.

[113] DOJ Press Release dated 27 May 2015 (see http://www.justice.gov/opa/pr/nine-fifa-officials-and-five-corporate-executives-indicted-racketeering-conspiracy) and Criminal Indictment, *United States v Jeffrey Webb & Ors* 15 CR 0252 filed US District Court of the Eastern District of New York 20 May 2015

(i) The Committee is of the opinion that it is important for all sporting codes and associations, national or international, to have a clear understanding of the risks they face of corruption and to have proactive policies and procedures in place, known and understood by administrators and players alike, that will make corruption that much harder to exist and/or flourish. In addition, all sporting codes and associations should make it clear that they have zero tolerance for any form of bribery and corruption and any administrator or player involved in such conduct faces exclusion from the sport, perhaps on a definite or indefinite basis (depending upon the conduct and circumstances).

(j) In addition, the Committee considers that serious thought should be given by Australia to amending the definition of "foreign public official" under the Criminal Code to specifically include persons, corporations or any other entities from, engaged by, acting on behalf of or employed or directed by any international sporting association, organisation or federation.

4.13 The economic impact, including compliance and reporting costs, of foreign bribery

(a) The cost of bribery and corruption is hard to quantify, but by most economic indices, the cost runs into the billions if not trillions of dollars. The World Bank estimated in 2005 that the total cost of corruption is around $1 trillion annually. Transparency International estimates that in developing countries alone, corrupt officials receive up to $40 billion in bribes each year, and nearly 40 percent of all business executives report that they have been asked to pay a bribe when dealing with a public institution in the past. Some estimates place the total cost of corruption at more than 5 percent of global GDP each year - this amounts to $2.6 trillion, or 19 times larger than the $134.8 billion spent globally on official development assistance (ODA) in 2013[114].

(b) The OECD in the *CleanGovBiz* initiative in 2014, made the following assessment of the cost of corruption[115]:

> Corruption is one of the main obstacles to sustainable economic, political and social development, for developing, emerging and developed economies alike. Overall, corruption reduces efficiency and increases inequality. Estimates show that the costs of corruption equals more than 5% of global GDP (US$ 2.6 trillion, World Economic Forum) with over US$ 1 trillion paid in bribes each year (World Bank). It is not only a question of ethics; we simply cannot afford such waste.

(c) The OCED *Foreign Bribery Report 2014* published for the first time an analysis of all the foreign bribery enforcement cases since enactment of the OECD Convention. Data was provided from law enforcement agencies in 17 countries that had successfully concluded a foreign bribery case in their jurisdiction. In terms of cost, the Report said this[116]:

> A monetary figure for the value of the bribes that were paid was available in 224 cases. It is important to note that the amount of bribes indicates only those values appearing in official judgments or documents finalising settlements; the total amount of bribes promised or paid in any particular case may be consistently higher than reported. The highest total amount offered in bribes in a single foreign bribery scheme was USD 1.4 billion while the smallest was USD 13.17. The total amount of bribes paid in the 224 cases where this information available is USD 3.1 billion. Given the very complex and concealed nature of corrupt transactions, it is without doubt the mere tip of the iceberg.

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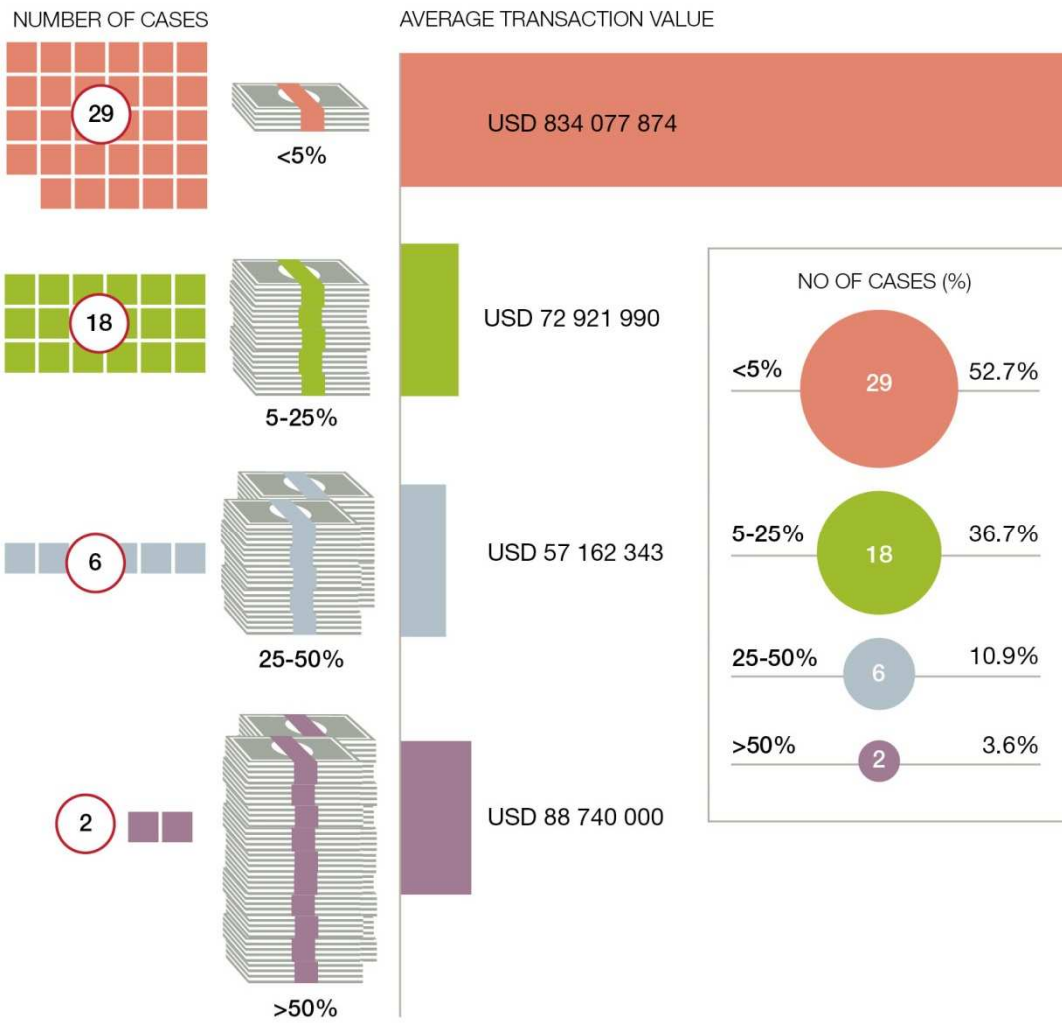
[114] *It's Time To Get Serious About Global Corruption*, http://www.forbes.com/sites/danielrunde/2015/01/22/time-to-get-serious-global-corruption; see also *The Costs of Corruption*, Centre for Strategic & International Studies, Washington February 2014, pages 30-31 where the report found the cost of private sector corruption was approximately US$515 billion or more (based on a limited number of developing countries, which account for about 22% of total GDP in 2012 dollars).

[115] See http://www.oecd.org/cleangovbiz/49693613.pdf.

[116] OECD *Foreign Bribery Report 2014* at pages 25 to 28.

Figure 13. Bribes as a percentage of the transaction value



Source: OECD analysis of foreign bribery cases concluded between 15/02/1999 and 01/06/2014. *Based on the 55 cases which contained information both on the amount paid in bribes and on the transaction value.*

Figure 13 above, taken from the OCED Foreign Bribery Report contemplates the 55 cases which contained information both on the amount paid in bribes and on the transaction value. It shows the distribution of bribes paid as a percentage of the transaction value, tracked against the average transaction value for each category. For most cases, the amount of bribes promised, offered or given is up to 5% of the transaction value. These cases also involve the highest average transaction value (USD 834 million). In 8 out of 57 cases, bribes amounted to more than 25% of the transaction value, although the average transaction value in these cases did not surpass USD 100 million. On average, bribes equalled 10.9% of the transaction value and 34.5% of the profits.

(d) Why fight corruption? There are numerous reasons advanced by the OECD:

(i) corruption increases the cost of doing business, by perhaps up to 10% on average per transaction;

(ii) corruption leads to waste and the inefficient use of public resources (to the benefit of a few);

(iii) corruption excludes poor people from public services and perpetuates poverty; and

(iv) corruption corrodes public trust, undermines the rule of law and ultimately delegitimises the state.

(e) A recent report, *Why Corruption Matters: Understanding Causes, Effects and How to Address Them*[117] suggests a more considered view on quantifying the costs of corruption is needed. Nevertheless, the report echoes the OECD Foreign Bribery Report (above) that corruption has a negative impact on economic growth and development, it has a disproportionate impact on the vulnerable in society and it allows elites to gain and maintain legitimacy.

(f) The costs of compliance and responding to corruption are largely unquantified. Some surveys suggest that, for the US hedge fund industry in 2013, compliance costs were in the order of US$3 billion with industry investing heavily in compliance technology and strategy with fund managers absorbing the costs rather than passing them on to their funds[118]. The Thomson Reuters *Cost of Compliance Survey 2013*[119] noted that 67% of respondents expected their budgets to rise slightly or significantly, indicating that those who make budgetary decisions are increasingly risk aware and appreciate the need to have a well-resourced compliance function to mitigate the myriad risks which firms may face in the coming year (of which one of the greatest challenges was identified as anti-bribery and corruption compliance).

(g) Costs associated with foreign bribery are inevitably expensive. If an incident is detected, substantial direct and indirect costs can arise, including:

(i) management time;

(ii) internal and external legal time and costs;

(iii) internal and external audit and/or forensic accounting costs;

(iv) managing affected customers;

(v) media strategy with consultants; and

(vi) managing reputational issues.

(h) A modest internal investigation into allegations of foreign bribery, involving one or more countries, interviewing various employees and third parties in order to provide legal advice to the corporation can, in the experience of the Committee, cost anywhere between $700,000 and $1.5 million. At the other extreme, between 2007 and 2010, Siemens was prosecuted in the US and Germany over 4,283 payments on 332 projects with bribes amounting to US$1.4 billion. The total fines and disgorgement amounted to US$1.6 billion. It is estimated that the overall costs for Siemens in responding to the scandal and having a monitor review its worldwide businesses for some years, at least equalled the US$1.6 billion fines it incurred. This would probably have sunk many companies, yet Siemens survived and is now considered a yard-stick by which other international companies are judged.

(i) The cost of compliance is, in the Committee's experience, invariably seen by business as a drain on the more productive profit-driven centres of doing business. This is a misguided opinion, particularly where employees are increasingly leaving or refusing to work in a business which tolerates corruption. All anti-corruption guidance from the US and the UK emphasises the need for corporations to adopt risk policies and procedures proportionate to their risk profile[120].

(j) At the end of the day, a consciously compliant business is far more likely to be sustainable over the long term rather than a non-compliant business that goes for

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[117] UK Aid, Dept for International Development, see https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/406346/corruption-evidence-paper-why-corruption-matters.pdf January 2015, pages 42 and 54.

[118] *The Cost of Compliance*, 2013 KPMG/AIMA/MFA Global Hedge Fund Survey, pages 4 to 5.

[119] See Survey at https://risk.thomsonreuters.com/sites/default/files/GRC00186.pdf.

[120] See the US Aid *Practitioners Guide for Anti-Corruption Programming*, January 2015 at page 59 which identifies a Five-Phase approach predicated upon the position of the entity in whatever jurisdiction it operates.

short term growth at the expense of long term compliance. What is required is a clear commitment from management, supported by government guidance, to commit resources to compliance and energised regulators with real resources and experience and real sanctions to impose on those who cannot or do not want to address compliance risks. To look at the analysis from Sweden might ring a bell for many Australian companies having to make hard budget decisions[121]:

> The Swedish system suffers due to a limit on fines of 10m SEK, unclear jurisdictional rules and police, prosecutors and judges that are badly trained as, if not worse than, actors within the private sector. Under such a regime, it is not very difficult to imagine that the whistleblower hotlines, the compliance centres, the tone from the top and, perhaps most importantly of all, the employee training programs, end up on the cutting room floor in the budget discussions – if they were ever even mentioned.

And, as many experienced financial crime criminal defence lawyers will say – "*if you think the cost of compliance is expensive, let me tell you about the cost of non-compliance!"* If an Australian business chooses short term profit and questionable conduct over longer term, sustainable and compliance-driven conduct, it only has itself to blame.

4.14 A National Fraud and Anti-Corruption Plan

(a) Most of the responses to foreign corruption by Australian governments have been, at best, traditionally patchy and reactive to external criticism. The responses over the last 2 to 3 years have reflected an improved commitment to addressing foreign bribery issues. However, there has never existed a whole-of-government approach to targeting corruption, with one notable exception.

(b) In September 2011, the then Australian Labor Government announced the commitment of $700,000 to develop and implement Australia's first National Anti-Corruption Plan. A key objective of the Plan was to strengthen Australia's existing governance arrangements by developing a whole-of-government policy and plan on anti-corruption. The Attorney General's office issued a Discussion Paper in March 2012. Thereafter, the Plan died a quiet, dignified death and the then Labor and the now Coalition Liberal Governments have done nothing (aside from the credible work in establishing the G20 Anti-Corruption Implementation Plan) to resurrect it.

(c) TIA made a submission on the proposed Plan in May 2012[122]. Like many submissions on the proposed Plan, it disappeared, to quietly gather dust in a Canberra filing cabinet.

(d) Yet, as is so often the case, other countries lead where Australia fears to go. In December 2014, the UK Government published its Anti-Corruption Plan[123]. An inter-Ministerial Group was established to oversee the delivery of the Plan's objectives throughout the UK and all arms of government. The themes of the Plan were summarised by the "*Four Ps – Pursue, Prevent, Protect and Prepare*".

(e) In the Committee's opinion, the implementation of a Commonwealth whole-of-government anti-corruption plan is necessary, desirable and will demonstrate real, ethical leadership and an acceptance that transparency and accountability, so often perceived to be lacking in government, are much more real and concrete than an elusive perception. Much of what is contained in the UK Anti-Corruption Plan and the principles advanced by TIA can be adapted to the Commonwealth and indeed, refined with the working assistance of State Governments.

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[121] Peter Utterström, Leif Frykman & Daniel Edman "*Corruption in Sweden – a bad bout of naivety with a bitter cure*", IBA Anti-Corruption Newsletter June 2015.

[122] *A Ten Point Integrity Plan for the Australian Government,* Transparency International Australia, May 2012.

[123] At www.gov.uk.

4.15 A Commonwealth Anti-Corruption Commission

(a) All Australian States have independent anti-corruption commissions based on specific statutory powers[124]. These commissions focus on domestic fraud and corruption concerning the conduct of State and local government public officials.

(b) Neither of the Territories has such a body.

(c) There is no Commonwealth anti-corruption agency and all Commonwealth governments (of either political persuasion) have resisted or refused to introduce one or blandly stated that there is no fraud or corruption significant enough to warrant such a body over the regimes already in existence or that existing oversight bodies (responsible for a limited number of Commonwealth agencies) are adequate.

(d) Leaving aside statements that suggest there is no corruption or fraud in Canberra or within Commonwealth agencies, which is patent nonsense[125], the overall reluctance by Federal politicians of all political persuasion to want a proper independent investigative body is, to the Committee, seriously troubling.

(e) Fraud, including corruption (involving an abuse or misuse of public position), is and continues to be an endemic problem for all governments[126]. The Committee believes there is no reason in principle or practice for the focus on foreign bribery to be at the cost of not addressing national, domestic corruption, however uncomfortable that might be to national politicians and public officials. There are certain key views about fraud in and affecting the Commonwealth government that have recently been publicised in July 2015.

(i) Over the 3 years between 2010 and 2013, there were at least 265,866 incidents of suspected fraud reported by Commonwealth entities.

(ii) Each year, substantially greater numbers of external fraud incidents were detected than suspected internal fraud incidents.

(iii) Fraud involving financial benefits was the most frequently reported category of external fraud.

(iv) Over the 3 years, the number of fraud-related corruption increased substantially from 37 incidents in 2010-2011 to 163 in 2012-2013.

(v) While the cost of this fraud is hard to quantify and figures may vary, a conservative estimate is approximately $530m over 3 years, with increases from $119m in 2010-2011 to $204m in 2011-2012 to $207m in 2012-2013.

(vi) Over the 3 years, external fraud accounted for $521m while internal fraud amounted to $9.1m or 1.7% of the total reported fraud losses.

(vii) In relation to external fraud[127]:

(A) risks arise in connection with the provision of new benefits, the introduction of new taxes, procurement practices, government-funded programs and the use of consultants; and

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[124] *Independent Anti-Corruption Commission Act 1988* NSW); *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic); *Crime and Corruption Act 2001* (Qld); *Independent Commissioner Against Corruption Act 2012* (SA); *Corruption, Crime and Misconduct Act 2003* (WA) and *Integrity Commission Act 2009* (Tas).

[125] Australian Institute of Criminology, *Fraud Against the Commonwealth, 2010-2011 to 2012-2013*, Canberra July 2015.

[126] *Fraud Against the Commonwealth*, pages 2-4.

[127] *Fraud Against the Commonwealth*, page 52.

(B) the relationship between corruption and collusion between external actors and those public servants working within government.

(f) The *Resources Management Guide No 201 Preventing, Detecting and Dealing with Fraud*, reflecting the 2011 Commonwealth Fraud Control Guidelines, require Commonwealth entities to investigate routine or minor instances of fraud. More serious instances are usually referred to the AFP.

(g) Who investigates Government fraud at the Commonwealth level? In the first instance, the relevant entity conducts its own investigation. If the incident is more serious, the AFP is usually called in pursuant to a referral and if charges arise, they are conducted by the CDPP. More broadly, the Commonwealth Integrity Commissioner, supported by the *Australian Commission for Law Enforcement Integrity* (**ACLEI**), is responsible for preventing, detecting and investigating serious and systemic corruption issues in a limited number of prescribed Australian Government law enforcement agencies[128].

(h) The Committee recognises that the Criminal Code contains extensive provisions dealing with offences involving Commonwealth public officials which are separate from the foreign bribery offence. Nevertheless, foreign bribery and corruption (involving public officials and private commercial interests) are but one shade of fraud in a general sense as the public invariably perceive it. To have proactive anti-corruption commissions at the State level, but nothing at the Commonwealth level is, to say the least, very puzzling.

(i) The Committee regards the existing system as lacking proper transparent oversight over the whole of the Commonwealth Government (including all public servants and politicians). The Committee considers there is no excuse, now that all States have anti-corruption commissions[129], for such a body not to exist at the Federal level. The money lost to fraud, over $500m over 3 years, the increasing prevalence of external fraud and the risks associated with government-funded programs and the use of consultants, simply demands better and more clear accountability for the public money lost along the way. While this may be beyond the scope of a review of foreign bribery laws, the Committee considers it is sufficiently important that in any review of corruption laws, the focus should include how Australian corporations and public servants behave and conduct themselves in and out of Australia.

(j) The Committee strongly recommends the creation of a broad, robust and independent anti-corruption commission to cover all aspects of Commonwealth activity, including the conduct of all public servants and politicians[130]. The public loss of confidence in the way politicians appear to want to manage even their own affairs and "entitlements"[131] demands that there be proper and independent accountability

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[128] These agencies are the Australian Border Force; the Australian Crime Commission; the Australian Federal Police (including ACT Policing); the Australian Transaction Reports and Analysis Centre (AUSTRAC); the CrimTrac Agency; prescribed aspects of the Department of Agriculture; the Department of Immigration and Border Protection, and the former National Crime Authority

[129] The Committee notes that there exists serious criticism at the threshold requirements for the Victorian Independent Broad-based Anti-Corruption Commission (IBAC), where IBAC is prevented from fully investigating unless it has facts that, if proved at trial beyond reasonable doubt, would constitute an indictable offence (and this position has been severely criticised by The Hon Stephen Charles QC, see "*Changes to Victoria's anti-corruption commission way short*" The Age 10 October 2014). In addition, the NSW ICAC has been the subject of an independent review. The NSW Government has announced it will accept the recommendations of the review to restrict ICAC's jurisdiction to serious corruption and members of the public engaged in certain commercial conduct touching upon identified government-related activities. Notwithstanding these limitations, the Australian public demands accountability and transparency from public servants and politicians while politicians seem to resist this as long as they can.

[130] This position was cogently advanced by The Hon Stephen Charles QC in "*Wake up and smell the money: The case for a Federal ICAC*" in Victorian Bar News Issue 156 December 2014, pages 31-36 where the author referred to a Griffith University survey which found that the Federal Government now ranks third behind state and local government on the crucial issue of trust.

[131] The Committee has noted the saga involving the alleged misuse of "entitlements" by former Speakers of the House of Representatives, the targeting of political opponents, the shielding of political friends until the

and oversight over how public money is spent and if it is misspent, then an independent investigation without any perception that a review is partisan is critical to maintaining trust and integrity in the political system. Absent this, whole sectors of society become disengaged from politics and each other and society is much the worse for that.

4.16 Opinions on Foreign Bribery

(a) The DOJ administers an Opinion Procedure where the US Attorney General can be requested to give an opinion as to whether specified, prospective conduct conforms to the DOJ's present enforcement policy regarding the FCPA[132]. A sample opinion, No 14-02 published 7 November 2014 is attached as **Annexure C**.

(b) The important features to note of the Opinion Procedure are as follows.

(i) The request for an Opinion must be in writing.

(ii) The entire transaction must be actual and not hypothetical and in most cases should be sought prior to the requesting party committing to the transaction.

(iii) Each request must state fully all relevant and material information, and the requesting party is under a positive obligation to make full and true disclosure. The DOJ may request further information on any issue.

(iv) Within 30 days after the request is made, complying with the procedure, the Attorney General will issue the Opinion stating whether the prospective conduct would, for the purposes of the DOJ's present enforcement policy, contravene the FCPA.

(v) An Opinion shall only bind the DOJ not any other agency.

(vi) When the DOJ publishes an Opinion, it will do so in circumstances that protect the identity of the requesting party and documents or information provided to the DOJ for the purposes of the opinion shall be exempt from disclosure.

(vii) More than one request for an Opinion may be lodged for conduct outside the scope of the first or earlier requests.

(c) In practice, the US Attorney General issues on average between 2 and 3 FCPA Opinions a year. They are all published on the DOJ website.

(d) The Committee considers that the procedure adds a valuable mechanism whereby a corporation can voluntarily disclose prospective conduct to the US Attorney General and in return for doing that, can secure, if appropriate, an opinion that, based on the facts, disclosed, acts as a form of protection from future possible allegations that the conduct contravened the FCPA.

(e) While such a procedure may strike the Australian Attorney General as unusual under Australia's criminal justice system, it deserves serious consideration as it encourages open compliance with the law, promotes transparency and a proactive approach by corporations to their legal obligations and reflects a more proactive approach by the Australian Government to promoting and encouraging awareness of foreign bribery laws and practices. Further, it is noted that for many years, the ATO has provided a binding ruling system based on similar conditions that we have set out above. Such a system has provided taxpayers with certainty and enabled them to arrange their affairs accordingly.

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inevitable and then the system of self-regulation of "entitlements continues. Besides, these "entitlements" appear to involve public servants or politicians spending public money with very little real accountability.

[132] At http://www.justice.gov/criminal-fraud/opinion-procedure-releases.

5 Recommendations

5.1 Section 70 of the Criminal Code

(a) Review the fault elements of the foreign bribery offence in order to simplify the elements of the offence.

(b) Abolish facilitation payments as a defence to a foreign bribery offence.

(c) Enact the proposed changes in the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* (Cth).

(d) Increase the penalties for the foreign bribery offence, both as to monetary fine and the maximum term of imprisonment.

5.2 Corporate Criminal Liability

(a) Review whether the elements of sections 12.1 to 12.6 of the Criminal Code are adequate or whether another formulation is required in order to allow prosecutions to take place against corporations.

(b) Review the existing basis for corporate criminal liability and for foreign bribery and private bribery to create an offence similar to section 7 in the UK Bribery Act, deeming liability unless the corporation can justify it has taken adequate procedures to avoid the offending conduct.

(c) The liability of a corporation should be determined by the combined knowledge of its properly regarded relevant officers.

5.3 Structured Settlement Agreements

(a) Introduce statutory amendments to the Criminal Code to provide for structured settlement agreements as between prosecutors and corporations that:

(i) set clear criteria for corporations to satisfy in order to be eligible to negotiate an agreement (that is, do not follow the UK model which grants a discretion only to the prosecutor to “invite a person” to negotiate an agreement);

(ii) maintain clear and transparent terms as to how the negotiations will be conducted;

(iii) allow for active supervision by the Courts;

(iv) permit prosecutors and a corporation to make agreed submissions on any penalties, with the ultimate discretion on whether or not to approve the proposed agreement lying with the Court; and

(v) Publish Code of Practice or Guidelines similar to the UK model.

5.4 Mutual Legal Assistance

(a) Review existing mutual legal assistance legislation.

(b) Amend legislation and supporting legislation to streamline the admissibility of information and documents.

(c) Review and focus on inter-agency memoranda of understandings to facilitate and streamline the exchange of information.

5.5 AFP and ASIC

(a) Ensure the AFP is adequately resourced in terms of funds and experienced personnel to proactively investigate and prosecute foreign bribery offences.

(b) Give serious consideration to the creation a single, focused agency to deal with complex financial crimes (including foreign bribery) or, as a second-best outcome, ensure ASIC, the AFP and the CDPP work together and where appropriate, bring parallel proceedings like the US DOJ and the US SEC in respect of clear criminal and civil offences in circumstances where clear, public memoranda exists concerning responsibilities and accountabilities to secure better more focused enforcement of foreign bribery offences in Australia.

5.6 Books and records and internal controls offence

(a) Introduce a substantial books and records and internal controls offence as a stand-alone offence, in the Criminal Code or in the Corporations Act (on the basis that the nominated enforcement agency (the AFP or ASIC) proactively enforces the laws).

(b) Impose monetary penalties at least equal to the primary foreign bribery offence.

(c) Make the offence one of strict liability (on the US model) with an appropriate "adequate procedures" defence.

(d) Ensure the nominated enforcement agency is properly resourced to both investigate and prosecute such cases.

5.7 Australian Government Foreign Bribery Guidance

(a) Prepare and publish an Australian Foreign Bribery Resources Guide for Australian business, ensuring that the Guide covers not only business but Australian embassies, trade missions, trade and aid organisations, commercial attachés and all Australian public and private organisations.

(b) In order to promote the importance of compliance, create a position of Anti-Corruption Compliance Officer or Counsel (within ASIC, the AFP or the CDPP), drawing upon experienced compliance experts, to evaluate a corporation's compliance program, as part of any decision to prosecute or to reach a structured settlement.

5.8 Whistleblower Protections

(a) Enact broad statutory protections for all private sector whistleblowers.

(b) Create an Office of the Whistleblower with ASIC based on the US model (with reporting complaints either to the corporation or directly to the authorities).

(c) Ensure ASIC is properly resourced to both investigate and prosecute cases where whistleblowers are mistreated or corporations act in such a way as to limit employees' rights.

(d) Allow for a fund to be established to pay modest rewards to whistleblowers where information has resulted in a conviction against the corporation, again based on the US model.

5.9 Corruption in business and sporting bodies

(a) Enact laws to criminalise private, business to business bribery to cover conduct not presently caught by the State-based criminal law.

(b) Ensure all Australian sporting bodies and associations have clear, understood and enforced codes of code dealing with corruption (particularly any sporting body that receives Commonwealth funding).

(c) Consider amending the definition of “foreign public official” under the Criminal Code to specifically include persons, corporations or any other entities from, engaged by, acting on behalf of or employed or directed by any international sporting association, organisation or federation.

5.10 National Anti-Corruption Plan

(a) Publish a Consultation Paper for the establishment and creation of a national anti-corruption plan.

(b) Subject to the consultation process, publish a whole of government anti-corruption plan.

5.11 Commonwealth Anti-Corruption Commission

(a) Enact laws to establish an independent, properly resourced and staffed Commonwealth anti-corruption commission that covers all aspects of Commonwealth government activity and the conduct of all public servants employed by any Commonwealth entity and all politicians.

5.12 Attorney General Opinion Procedure

(a) Consider establishing a form of foreign bribery opinion procedure based on the US model.

ANNEXURE A
MEMBERS OF IBA ANTI-CORRRUPTION COMMITTEE
WORKING GROUP ON SENATE SUBMISSION

NAME	POSITION & EMPLOYMENT	EXPERIENCE
Mr Robert R Wyld	Co-Chair Anti-Corruption Committee Partner, Johnson Winter & Slattery, Sydney, Australia	Practised in economic crime across Asia Pacific for 25 years Author of numerous texts on Australia's foreign bribery laws
Mr James Tillen	Co-Chair Anti-Corruption Committee Member, Miller & Chevalier, Washington, USA	Over 15 years' experience advising clients on FCPA issues and representing clients before the DOJ and the SEC
Ms Nancy Boswell	Adjunct Professor & Director, US and International Anti-Corruption Law Program American University Washington College of Law Washington, USA	Formerly CEO of Transparency International US
Mr Peter Utterström	Peter Utterström Advokat AB Stockholm, Sweden	Corporate Counsel Goodyear Nordic and Swedish Bar Association Over 40 years' experience in anti-corruption practice
Mr Sherbir Panag	MZM Legal Mumbai, India	Head of the firm's criminal compliance practice
Ms Cindy Dorrington	Bivonas Law London, United Kingdom	Partner specialising in economic crime and regulatory investigations, litigation and prosecutions
Mr Gary Hughes	Wilson Harle Auckland, New Zealand	Partner in dispute resolution and regulatory investigations, with experience in AML, fraud and financial crime.
Mr Brind Zichy-Woinarski QC	Barrister, Victorian Bar Melbourne, Australia	Barrister with over 40 years' experience in economic crime cases, former Chairman of the Criminal Bar Association of Victoria and Consultant Editor to *Criminal Law, Investigation and Procedure Victoria*
Ms Susan Doherty	Johnson Winter & Slattery Sydney, Australia	Special Counsel and former prosecutor with the Office of the Commonwealth Director of Public Prosecutions office