

Committee Secretary
Senate Economics and Legislative Committee
PO Box 6100
Parliament House
Canberra ACT 2600
Economics.sen@aph.gov.au

Dear Committee Secretary,

**SENATE ECONOMICS REFERENCE COMMITTEE- INQUIRY INTO
FOREIGN BRIBERY**

This report outlines a clear path for reform for Australia in all of the key areas covered by the committee's terms of reference.

This report is the culmination of extensive interviews and meetings with the leading anti-bribery officials in the US and Europe.

Those interviewed include the director of the UK Serious Fraud Office, senior FBI anti-bribery agents, the Securities Exchange Commission's top anti-bribery official, the World Bank's most senior anti-corruption official, as well as senior corruption officials from the OECD, United Nations, National Crime Agency (UK) and City of London Police.

Senior lawyers, academics (including the former UK Law Reform Commissioner and author of the UK Bribery Act 2010) and NGOs were also interviewed or consulted.

I trust this report will be a valuable resource to the committee and senators.

Please don't hesitate to contact me if you have any queries.

I would be delighted to appear before the committee to explain any aspect of this submission.

Kindest Regards,

Nick McKenzie
Churchill Fellow 2015 (examining Foreign Bribery)
Investigative Reporter
Fairfax Media

**SENATE ECONOMICS REFERENCE COMMITTEE- INQUIRY
INTO FOREIGN BRIBERY**

Submission by Nick McKenzie

**WHAT AUSTRALIA CAN LEARN FROM OVERSEAS ANTI-
BRIBERY REGIMES**

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EXECUTIVE SUMMARY

Australia is facing a major corruption problem involving companies and organisations paying bribes to win contracts overseas.

The two dozen or so foreign bribery cases involving Australian companies being investigated by the Australian Federal Police represent just a fraction of the actual bribery occurring.

Equally concerning is the fact that most of the cases under investigation have not produced a prosecution. Put simply, those strongly suspected of corruption by police have so far gotten away with it.

Since 1999, when foreign bribery laws were passed in Australia, there have been only two foreign bribery prosecutions, both of which are still unresolved.

This failure to hold to account corrupt companies and executives is a systemic, whole of government problem, which manifests itself in delayed or ineffective investigations, political inaction and, ultimately, impunity for the corrupt.

Australia's failure to combat foreign bribery has not gone ignored. Former senior US State Department anti-bribery official Mark Bochetti says he was "surprised" by the extent of Australia's failings.

"I had an impression they [Australian agencies] would investigate a [foreign bribery] case until they had a reason to kill it and then they would kill it," he says.

This report is based on interviews with leaders in the anti-corruption field from the US, UK and Europe, including officials from the Federal Bureau of Investigation, the US Securities Exchange Commission, the UK National Crime Agency, the OECD, the World Bank, the United Nations and the Serious Fraud Office.

European and US legal experts, corporate advisors and NGOs have also been consulted, along with the author of the UK Bribery Act, former UK law commissioner Professor Jeremy Horder.

There is consensus inside the world's leading anti-corruption agencies that Australia can - and must - do more.

The solution must go well beyond a mere tweaking of existing laws. Australia must overhaul its anti-bribery regime via a whole of government approach.

The federal government needs to lead this push, introducing a new legal regime and ensuring it is enforced by adequately empowered and resourced agencies.

The Australian Federal Police (AFP), Commonwealth Director of Public Prosecutions (CDPP) and the Australian Securities and Investments Commission (ASIC) must all change their approach to foreign bribery. Similarly, Australia's corporate world also needs to confront the problem and champion reform.

The lessons and experience of the US and UK in the fight against international corruption are invaluable for Australia.

Both nations have comprehensive, anti-foreign bribery frameworks that provide what Australia does not: a regime that gives companies an incentive to self-report corruption and co-operate with authorities, and which makes it easier for authorities to hold the corrupt to account.

Australia also needs to tackle the demand side of the bribery equation and, following the example of the US and UK, seek to seize and return assets stolen by kleptocrats in the Asia Pacific region.

Why should Australians care about corporate corruption and bribery? There is near universal consensus among police, academics, NGOs and business leaders that corruption erodes our society, undermining good governance here and abroad. Corruption promotes anti-competitive business practices and leads to the squandering of foreign aid and stalling of development in countries most in need of it. The consequences of unchecked corruption can be far-reaching. The FBI warns that it can ultimately fuel geo-political instability, extremism and even terrorism.

Reform will cost money, take time and be opposed by some in business. Perhaps this is why so many politicians and bureaucrats have little to offer in the debate about how to combat overseas corruption and bribery by Australian firms.

But the price of this indifference is more corruption, public scandals and impunity for the corrupt here and in our region. And with the Senate Economics Reference Committee now examining ways to improve Australia's anti-foreign-bribery regime, there is a rare window to drive reform on a bipartisan basis.

"Australia has the potential to make a considerable difference," says former UK Serious Fraud Office director, Richard Alderman. "Australia has awareness and legislation. It is a question of making the jump to real action."

Yet Alderman also cautions that major reform will need serious commitment from the government. "It's a big leap. Cases are not only difficult technically but politically."

The US Securities Enforcement Commission's top anti-corruption official, Kara Brockmeyer, believes Australia is ready to make this leap. "I really want to see Australia change," she says.

RECOMMENDATIONS

Recommendation 1.

There must be a broad acknowledgement that Australia's anti-foreign bribery regime is not working and needs to be overhauled in order to create a regime of liability and deterrence, in which those who pay bribes are detected and punished.

Recommendation 2.

Australia must acknowledge that combating foreign bribery by Australian nationals and companies is not only a vital part of the Australian government's anti-corruption stance, but is firmly linked to national and regional security, improved overseas development, the prevention of the abuse of foreign aid and the promotion of free and fair business competition.

Recommendation 3.

If Australia is to have an effective anti-bribery regime, we must create far stronger incentives to encourage companies to disclose corruption and co-operate with authorities. To do this, and in light of the difficulty faced gathering evidence of corruption from overseas jurisdictions, Australia must make it easier for authorities to hold a company or individual liable for corrupt acts. The recent amendment to Australian bribery laws (to remove the requirement for prosecutors to identify who was paid the bribe) is welcome, but is only a small step.

Recommendation 4.

Australia should introduce new laws that, in line with section 7 of the UK Bribery act, hold a company criminally liable for acts of bribery conducted by a staff member unless the company can show it had an adequate compliance regime in place at the time of the offences. If such a law is introduced, a significant education campaign should be introduced to ensure companies are given clear direction about what an adequate compliance program can be created.

Recommendation 5.

A new anti-bribery regime in Australia needs to outlaw the bribery of both public officials and private persons, in line with the UK scheme. The regime needs to have appropriate jurisdictional reach so as to apply to Australians who seek to sub-contract out their bribery to offshore third parties in order to avoid detection in Australia. The UK Bribery Act (2010) has a suitable model of jurisdictional reach that could be mirrored in Australia.

Recommendation 6.

There should be consideration of a national ICAC type body to ensure that Australia is able to deal not only with bribery overseas, by bribery and corruption inside its own borders.

Recommendation 7.

Australia should introduce a DPA scheme to encourage self-reporting (by companies and individuals) and the scheme should be similar to the UK statutory scheme. DPAs need to be signed off by a court and subject to strict guidelines. However, given the intent of such a scheme is to encourage disclosure and co-operation, such guidelines should not be so onerous as to prevent the scheme meeting its goals. There should also be a review of Australia's new DPA scheme five years after it is introduced to measure its effectiveness.

The DPA scheme should include a requirement for Australian authorities to consult with their overseas counterparts to win support for any DPA to avoid the scenario where an Australian company given a DPA is subject to prosecution overseas.

Recommendation 8.

The AFP should form a dedicated taskforce with bribery as its sole priority. This taskforce should be staffed by people with a range of skills, including forensic accounting. There must also be an acknowledgement that many police do not want to investigate financial crime, but prefer to work in other areas, such as drugs or counter-terrorism. Added incentives must be given to investigators who seek to specialise in financial crime, including career credits for skilfully handling long investigations. (Given that a case may take four years, or even more, to investigate.) The AFP should create a clear and attractive career path for investigators who specialise in financial crime and corruption.

Recommendation 9.

ASIC needs to be given a clear mandate (including in any new anti-bribery legislative regime) and appropriate resourcing, to investigate Corporations Act and relevant corporate law breaches that flow from foreign bribery transactions. ASIC needs to co-ordinate closely in foreign bribery investigations, with a view to ensuring civil remedies are brought in the event that criminal investigations stall.

Recommendation 10.

The CDPP similarly needs to ramp up its role in the fight against foreign bribery, ensuring it has appropriate resourcing and a role during investigations. Consideration should be given to the question of whether Australian courts are able to handle complex foreign bribery matters.

Recommendation 11.

Offences similar to those in the US FCPA books and records and internal control provisions, should form part of a new Australian anti-bribery regime. Investigators

from the AFP and ASIC should focus on pursuing such offences as part of all bribery inquiries.

Money laundering laws and investigations in Australia should be examined and reviewed with a specific focus on how they relate to acts of corporate crime. Too often, policing agencies seek to use the laws only to chase drug traffickers.

Australia must consider expanding the requirement to report suspected suspicious transactions, in line with the UK Proceeds of Crime Act.

Recommendation 12.

Given the significant harm generated by corporate bribery and corruption, the key role insiders can play in exposing such conduct, and the fact that many whistle-blowers face dim prospects of future employment, a statutory incentive scheme should be introduced in Australia (modelled on the US scheme under the *Exchange Act 1934*), which, on a case by case basis and subject to certain requirements (again modelled on the US Whistle-blower Program Rules), offers significant rewards for whistle-blowers.

The DPP and AFP, or an independent panel of experts, should assess applications for compensation to reflect the remuneration a whistle-blower is likely to lose once exposed.

Recommendation 13.

More effort needs to be made to encourage relevant Australian law enforcement agencies to actively gather financial intelligence on foreign bribery and related offences and share with the AFP.

The AFP should also continue to foster relationships with overseas agencies, given the importance of international collaboration in fighting foreign bribery.

Recommendation 14.

Australia should repeal the facilitation payment defence for the sake of legislative, moral and practical clarity. Upon the repeal of the defence, clear guidance needs to be given to companies about how this change may impact upon their overseas activities.

Recommendation 15.

Australia should be following the US lead with an effective communication and guidance program for companies. In Australia, firms working overseas should be given clear and regular updates about how to avoid and detect bribery, as well as regular guidance about how to implement an adequate corporate compliance program. Similarly, Australian authorities need to ensure all foreign bribery investigations are, where appropriate, publicly reported. This will increase awareness and act as a deterrent.

Recommendation 16.

As part of the overhaul of Australia's anti foreign bribery system, consideration must be given to tackling not just the 'supply' side of a bribery transaction, but the 'demand' side.

Australia should consider increasing its support of our regional partners to better combat the bribery of foreign officials in the Asia-Pacific region.

Recommendation 17.

The AFP should follow the FBI and NCA's lead and introduce kleptocracy teams to seize the proceeds of crime invested in Australia and, where possible, repatriate funds to source nations. Proceeds of crime investigations must be considered in every foreign bribery inquiry.

EXPERTS AND OFFICIALS INTERVIEWS/ KEY ACRONYMS

UNITED STATES	UK/EUROPE
<p>FCPA Foreign Corrupt Practices Act</p> <p>FBI Federal Bureau Investigation</p> <p>SEC Securities Exchange Commission</p> <p>DOJ Department of Justice</p> <p>World Bank</p> <p>UN United Nations</p>	<p>OECD Organisation for Economic Co-operation and Development, Paris, France</p> <p>SFO Serious Fraud Office, London</p> <p>NCA National Crime Agency, London</p> <p>CLP City of London Police</p> <p>CAB Criminal Assets Bureau, Ireland</p>
<p>George "Ren" McEachern FBI, Supervisory Special Agent FCPA & Kleptocracy Matters</p> <p>Darryl Wegner, Supervisory Special Agent FBI, FCPA & Kleptocracy Matters</p>	<p>William Loo, OECD senior anti briber analyst.</p> <p>France Chain, OECD senior anti-bribery analysts.</p>
<p>Kara Brockmeyer Chief, SEC FCPA unit</p>	<p>Detective Inspector Roger Cook City of London Police, Bribery Team</p>
<p>Peter Clark Former Deputy Chief of the Fraud Section of the Criminal Division of the Department of Justice. Senior counsel, Caldawater.</p>	<p>David Green QC, Director, SFO</p>
<p>Chuck Duross Former head of the U.S. Justice Department's FCPA unit Adjunct Professor of Law, Michigan Uni Senior partner, Morrison and Foerster</p>	<p>Richard Alderman Former director, SFO</p> <p>Tony Farries Former senior lawyer, SFO</p>
<p>James Koukios Former deputy chief of U.S. Justice Department's FCPA unit</p>	<p>Jon Benton Detective Superintendent, NCA International Corruption Unit</p>

Senior partner, Morrison and Foerster	
Stephen Zimmerman Stephen Zimmermann is the Director of Operations for the World Bank's Integrity Vice Presidency	Eugene Corcoran Chief bureau Officer, Criminal Assets Bureau
Mick Stefanovic Director Investigations, UN Former director investigations, World Bank	Professor Jeremy Horder Former UK law commissioner Professor of Criminal Law, London School Economics
Ed Rial Deloitte, FCPA consulting services Former US Assistant Attorney	Nick Benwell, Simons and Simons, Head of Crime, Fraud & Investigations group
US Government officials (confidential)	Monty Raphael QC, Visiting Professor Law, Kingston University Senior partner, Peters & Peters
<p><i>(Australian agencies)</i></p> <p><i>AFP- Australian Federal Police</i> <i>CDPP- Commonwealth Director of Public Prosecutions</i> <i>ASIC- Australian Securities Investment Commission</i> <i>ACC- Australian Crime Commission</i> <i>AUSTRAC- Australian Transaction Reports and Analysis Centre</i> <i>ATO- Australian Tax Office</i></p>	

Others consulted for this report included several US and Australian lawyers, staff from NGO Transparency International and Global Witness, chief PNG anti-corruption investigator Sam Koim, and multiple Australian officials, who spoke to the author confidentially.

SECTION 1: AUSTRALIA'S FOREIGN BRIBERY PROBLEM

Many Australian companies and nationals are bribing to win deals or gain a political or business advantage overseas. They are bribing foreign officials, their representatives and intermediaries and business executives. Yet as far as the Australian public is concerned, nothing is amiss and our companies are doing a great job selling products and employing Australians.

Australia's leading defence supplier, Tenix, is under AFP investigation for allegedly bribing officials in Asia. Police are also probing how another leading Australian company, Leighton Holdings, allegedly bribed top Iraqi officials with millions of dollars.

In Vietnam, a senior Australian official had suggested to Australian nationals seeking contracts that they hire as a consultant a Vietnamese spy chief with whom this same official was having an intimate relationship.

Our top mining company, BHP Billiton, has been sanctioned by US authorities for spending thousands of dollars wining and dining African mining officials at the Beijing Olympics to get a better "relationship" with its most valuable government clients. The AFP is also investigating allegations that BHP bribed Asian officials.

Anti-corruption authorities are also examining why Football Federation Australia transferred hundreds of thousands of dollars to a football stadium controlled by a notoriously corrupt football chief whose World Cup bid vote was being simultaneously sought by the FFA.

In other cases, a Gold Coast phosphate firm has been accused of bribing senior members of the Nauru government and subsidiaries of Australia's Reserve Bank allegedly bribed officials across the globe to win bank note printing contracts.

Money stolen from government projects in PNG, Malaysia and China via bribery and fraud is also invested with relative ease in Sydney, Melbourne and other key property markets, entrenching Australia's reputation as a safe haven for dirty funds and potentially driving up local property prices.

"I suspect you have more of a problem than you realise," says the UK National Crime Agency's Jon Benton. He believes a large amount of corrupt Chinese money is flowing into our property market.

The cases cited above represent only the tip of the iceberg. The true amount of corruption involving Australian companies, nationals and our property market is likely to be far greater than the cases actually reported to the AFP or uncovered by NGOs or reporters. (This report's author uncovered the case involving subsidiaries of the Reserve Bank - Securrency and Note Printing Australia – which led to an AFP probe and Australia's first prosecution).

In the US, FBI Supervisory Special Agent George "Ren" McEachern estimates that even their more powerful anti-foreign bribery regime detects only six to ten per cent of cases.

Even six per cent may be high as an estimate, cautions McEachern. “There are so many companies, so many transactions.”

The director of operations for the World Bank’s integrity department, Stephen Zimmerman, warns “every Australian company that does business is exposed to corruption. You are naïve to think otherwise. There are big problems with corruption in most countries. The risk for Australia is the same.”

Australia faces an increased threat because of our strong trading ties with nations where corruption is institutionalised. As leading UK QC and corruption expert Monty Rafael puts it: “Your biggest problem is your biggest trading partner ... China - as corruption is so endemic in China.”

Experts also note that more industries are becoming prone to corruption, beyond the sectors where it was traditionally found, such as arms trading and energy.

“In retail, you wouldn’t have seen it five or 6 years ago,” says Ed Rial, a former US assistant attorney and now Deloitte’s senior international FCPA partner. “But now it [corruption] is in [in retail] in a big way. It is across virtually every industry sector we have.”

There is growing consensus that as big multinationals improve their compliance programs, those companies increasingly exposed to bribery are smaller to mid-tier firms.

“The small to medium size companies. These are the guys who will get themselves in trouble,” says the FBI’s McEachern.

Former top US State Department anti bribery official, Mark Bochetti, agrees. “Most big companies really do try to avoid this stuff. They don’t want to be embarrassed. The risk is now with mid-tier companies.”

Of around 25 corruption cases detected and investigated in Australia since 1999, only two have led to prosecutions, both of which are unresolved.

The most significant of these, the Securrency-NPA prosecution, has been beset by problems. The case, which involves a number of former senior company managers facing criminal charges, has been subject to the longest committal proceeding in Victorian history.

The commencement of the Securrency trial has been stalled by legal argument and bedevilled by national suppression orders. So the public is in the dark about it. Meanwhile, key evidence sought by the AFP to bolster its case has never been provided by Vietnam or Malaysia.

Despite compelling evidence that the board of directors of Securrency and NPA (and indeed the Reserve Bank) were or ought to have been responsible for the companies’ failure to prevent bribery, none of these directors appear to have been investigated by

the corporate regulator ASIC or by the AFP. Nor, obviously, have they been charged with the relevant breaches of the Corporations Act or the Criminal Code.

Recently, questions of a cover-up have been raised in connection to the case. A controversial suppression order sought by Australia's Department of Foreign Affairs and Trade, which prevented the naming of overseas politicians in connection with the prosecution, has prompted questions from the OECD about whether accountability and transparency have been trumped by political and diplomatic expediency.

The Securrency-NPA case is only one of several AFP probes that have been dogged by problems.

Many other major AFP bribery investigations have been delayed or hindered due to a lack of co-operation from overseas governments. This is one of many hurdles preventing the AFP from resolving investigations and launching prosecutions within a reasonable time frame.

Unlike regimes in the US and UK, there is almost no incentive for companies to co-operate with authorities in Australia. There is also a lack of resources and will within our key agencies.

The AFP has enhanced its focus on foreign bribery by implementing several initiatives, including efforts to improve the skills of agents and to foster multi-agency co-operation.

But this is yet to make a significant impact. Two prosecutions in 15 years is a dismal record. There are several more prosecutions expected, which is a welcome product of the shift in the AFP and, to a lesser extent, the CDPP.

But the AFP is simply getting by, hamstrung by a lack of resources and support at a legislative, prosecutorial and business level.

Bochetti, while a US state department official, investigated Australia's response to bribery for the OECD. "How can it be that there are almost 39 cases [investigated by the AFP] and almost all have come up dry?" he asks. "Our experience is, in half the cases the US gets, they successfully worked up a case."

The OECD's senior corruption analyst, William Loo, has his own concerns about Australia. "We see a lot of enforcement in the US. But where are the corporate criminal liability cases in Australia?" he asks. "You would expect some more successfully concluded cases by now. There has been an improvement, but the jury is still out." Loo's colleague, senior OECD legal analyst France Chain, agrees that Australia is slowly moving in the right direction, but much more needs to be done.

So what should an effective Australia anti-corporate bribery regime look like? For the World Bank's Stephen Zimmerman, the answer lies in "creating a real deterrent to corruption."

"Deterrence is where prevention begins. You have to have a credible enforcement mechanism.... People have to believe that there is a real chance they will get caught

and if they are caught, something will happen to them. It could be debarment, prosecution, fines ... It's creating a perception that there is a cost is engaging in this conduct."

Recommendation 1:

There must be a broad acknowledgement that Australia's anti-foreign bribery regime is not working and needs to be overhauled in order to create a regime of liability and deterrence, in which those who pay bribes are detected and punished.

SECTION TWO: CREATING POLITICAL WILL

The BAE bribes for arms scandal in the early 2000s was the catalyst for the UK moving to seriously tackle foreign bribery - with dedicated funding and a new legislative framework.

In the United States, it was Watergate. The so-called “father” of the Foreign Corrupt Practices Act in the US is veteran prosecutor turned private lawyer Peter Clark. Clark was a young justice department prosecutor during the Watergate scandal in the 1970s and the subsequent raft of departmental investigations into company slush funds.

“My boss came in screaming and yelling, asking ‘how can a company have one million in cash off the books?’” he recalls. “We thought it would be political donations but it was actually money for foreign officials.”

This realisation led to the creation of the Foreign Corrupt Practices Act [FCPA] in 1977 - the world’s most powerful international corruption weapon.

Australia had no comparable scandal when it introduced foreign bribery laws in 1999. Pressure from the OECD and UN was a factor. But a genuine political catalyst was missing. Even the AWB oil-for-food kickback scandal and royal commission in 2006 did not lead to major reform. Indeed, the AWB scandal produced no criminal bribery charges.

Justice Terence Cole, who headed the royal commission, found that as the kickback payments were made at the probable direction of Iraqi Government officials, they were in all likelihood legal under Iraqi law. This was a defence for conduct that was illegal here but permitted by the law (even unwritten) in another country.

Instead, the allegedly corrupt former AWB executives faced drawn out ASIC civil prosecutions. Although the former Managing Director and Chief Financial Officer did a deal and settled with ASIC for agreed penalties (disqualification from office and a fine), the saga was far from a catalyst for change. The AWB scandal became another example of Australia’s failure to effectively enforce foreign bribery laws and a reminder that simply having laws that prohibit paying bribes does not mean the allegedly corrupt will be detected and punished.

Even in the US, the powerful FCPA regime has, at times, floundered. “There was very little enforcement action between 1977 and 2004,” says former top prosecutor Chuck Duross. “There were years with zero enforcement.”

In other words, a good legal framework does not guarantee success. “I have seen countries with the most awesome laws but no action,” says the World Bank’s Steven Zimmerman. “It [success] takes a concerted effort of good legislation, investigators with tools that are used and prosecutors who take cases forward.”

In the UK, the Bribery Act (2010) became active in mid-2011. When this occurred, investigators finally had, according to the NCA’s Jon Benton, “clarity and a proper legislative tool.”

Benton believes success lies in having police tackle financial crime as they would drug trafficking and other high profile crimes. But the first step to achieving this change lies in generating political will.

Unless Australian politicians and agency leaders champion the fighting of foreign bribery, change will not occur.

In the US, McEachern says the FBI prioritises its FCPA enforcement by drawing the “parallels between national security and foreign bribery enforcement.”

For instance, he observes that the Arab Spring was “mostly about corruption”. “Corruption leads to failed states, which leads to terrorism which leads to national security,” he says. For the FBI, foreign bribery investigations are “one tool of leverage we think is a powerful way” of driving reform and fighting corruption and therefore terrorism.

“It’s not just about fair markets. It’s much bigger,” he says. “Where does the bribe money go? It goes to terrorism and human rights abuses.”

The historical Australian parallel is hard to miss. The AWB was the biggest bribe payer to Saddam Hussein’s regime. Currently, Australian police are trying to track what happened to the \$40 million or so in suspected bribes paid by another Australian company, Leighton Holdings, to Iraqi officials in 2010 and 2011.

And in February 2015, the AFP arrested a relative of a notorious ISIS fighter, and others, in connection to money laundering and bribery offences in the Middle East.

Roger Cook of the City of London Police agrees that the fight against foreign bribery should be viewed as a national security issue.

“Overseas, corruption is a tool that terrorism uses. It causes terrorism. Afghanistan is a classic example. The US was dumping millions and millions of dollars there,” says Cook.

Even in the absence of any link to national security, Australians must face the inescapable reality that foreign bribery hurts the most vulnerable while enriching the corrupt.

Papua New Guinea’s top anti-corruption fighter, Sam Koim, believes large amounts of Australian aid dollars are being siphoned off by bribery and fraud in the Pacific. “This is mostly going on without any detection or law enforcement,” says Koim, who urges Australia to ramp up its anti-bribery efforts in the region.

The World Bank’s Zimmerman says effective bribery detection is also about “making sure every development dollar finds its way to the poor people in the world”.

Zimmerman also highlights the moral imperative of fighting companies who pay bribes to win projects in developing nations. “Not only are they stealing from the [foreign] government, they are stealing from the poor. It is wealthy people paying bribes to wealthy people and sticking it to the poor. It’s doubly bad.”

Recommendation 2.

Australia must acknowledge that combating foreign bribery by Australian nationals and companies is not only a vital part of the Australian government's anti-corruption stance, but is firmly linked to national and regional security, improved overseas development, the prevention of the abuse of foreign aid and the promotion of free and fair business competition.

SECTION THREE: CHALLENGES FACED IN RESOLVING FOREIGN BRIBERY CASES

Any reform of Australia's foreign bribery enforcement regime must begin with the acknowledgement that such cases are among the most difficult to investigate and prove in court.

Even in the US, making cases is very difficult. "Knowledge and intent are crucial to prove but to do this, you need an insider or a whistle-blower to prove what those emails and contracts and paperwork are all about," says former top prosecutor Chuck Duross.

The FBI's McEachern agrees that the "the biggest challenge is detection. It usually happens with just two people in a room, without the use of phones and involving cash".

In the US, most cases take many months, or even years, to resolve. "There is a massive amount of documents, talking with witnesses, tracing money. It takes a long time," says the SEC's Brockmeyer.

Once the evidence is gathered, presenting it to a jury presents another hurdle. "It is very hard to pinpoint or identify individuals [involved in international bribery] and to explain complex transactions to a jury," says Ed Rial, who helped prosecute several major cases in the US.

Even with its resources and global reach, US agencies struggle to get vital evidence in some jurisdictions, including China and Russia.

The FBI's McEachern says there are some countries from which the US "will never get co-operation".

The difficulties faced by investigators in gathering evidence underscores why it is vital to encourage companies whose staff have committed bribery to co-operate with authorities, disclosing suspect transactions and using company resources to find and hand over evidence to investigators.

"Self-reporting [by companies] gives us this information of corruption [we can't get overseas]," says McEachern.

However, it must be recognised that the first instinct of some company staff will be to deal with a problem in-house, rather than to contact police.

The director of the UK's Serious Fraud Office, David Green QC, says: "Companies will not self report if they think they will get away with it." So how should Australia encourage companies to come forward and disclose suspicions of bribery and corruption?

Both the UK and the US have created legislative mechanisms to confront this challenge. Crucially, a businessperson or company must be encouraged to believe that

if they do not report corruption, there is a chance it will still be discovered and they will be successfully prosecuted.

The US¹ and UK² have sought to make it easier for prosecutors to prove a company is liable for corruption even in the absence of evidence that lies overseas, out of reach from investigators. There is coupled with measures to encourage or incentivise a company or its staff to come forward and provide information to authorities.

Recommendation 3.

If Australia is to have an effective anti-bribery regime, we must create far stronger incentives to encourage companies to disclose corruption and cooperate with authorities. To do this, and in light of the difficulty faced gathering evidence of corruption from overseas jurisdictions, Australia must make it easier for authorities to hold a company or individual liable for corrupt acts. The recent amendment to Australian bribery laws (to remove the requirement for prosecutors to identify who was paid the bribe) is welcome, but is only a small step.

¹ The US system allows for the DOJ as the criminal prosecutor to offer deferred prosecution agreements or non-prosecution agreements to companies who proactively come forward and who report suspected illegal conduct.

² The UK introduced a deferred prosecution scheme under the Schedule 17 of the *Crime and Courts Act 2013*.

SECTION FOUR: HOLDING CORRUPT COMPANIES TO ACCOUNT

In the US, among the most powerful tools to hold companies to account is the regime of vicarious liability. If an employee engages in bribery, then the company itself can be held responsible, regardless of the level of seniority of the employee. As a senior US anti-corruption official (speaking on the condition of anonymity) states, this “gets the companies through the gate” and into the grasp of the justice department.

Under the unique US FCPA regime and justice system, with its reliance on plea-bargaining and, more recently, deferred and non-prosecution agreements (more on these agreements below), the US has prosecuted or threatened to prosecute dozens of companies, recouping huge fines and admissions of wrongdoing.

In contrast to the US, to hold companies liable in Australia, prosecutors must prove company knowledge or egregious recklessness. Given the difficulty gathering evidence in foreign bribery cases, this creates a major challenge.

Until the UK overhauled its anti-bribery regime in 2010, British prosecutors faced a similar situation to those here. Green, the SFO director, says it was very difficult for them to prove knowledge of corruption within the senior levels of a company. “The emails normally dry up, the higher it [corruption] goes.”

Should evidence be found that implicates a senior executive or director in a bribery scheme, convincing a jury beyond reasonable doubt that the company as a whole supported corruption creates another challenge for prosecutors.

Barrister Monty Raphael QC says it is almost “impossible... to convince a jury that a man or a woman is the controlling mind behind a multinational company’s activity.”

To overcome this burden, UK legislators created section 7 of the UK Bribery Act (2010). This section makes a company criminally liable for an act of bribery by all “associated persons” of it, including its staff, agents, subsidiaries, consultants and other parties. The company is held liable unless it can prove it had sufficient anti-corruption controls in place at the time of the act of bribery.

The man who designed the UK Bribery Act, now former UK law commissioner, Professor Jeremy Horder, says section 7 was designed to “get over DPP reluctance to prosecute companies by making the evidence threshold quite low.”

“All you have to prove is the payment of the bribe. This then shows the failure of the company to prevent it. We are telling companies that the burden will fall very quickly on to them to then show they had a proper compliance program in place or be held criminally liable.”

Horder explains that section 7 was also intended to change corporate behaviour. “We wanted a criminal law that provided a very strong incentive for self regulation.”

Nick Benwell, a senior partner at one of the UK’s leading corporate law firms and an anti-corruption specialist, says section 7’s effect has been to focus companies’ attention on introducing proper systems and controls.

Benwell believes the impact on corporate behaviour may well be profound. “If you can achieve changes in corporations to prevent the bribery from occurring in the first place, what else can you hope for?”

Benwell estimates that his firm alone has advised over a hundred UK companies on how to implement reforms.

“There has been a range of reactions, from those who took it very seriously - largely multi-nationals - to those who didn’t really understand the issues but who were still determined to make changes, to those who wanted to spend the absolute minimum. We had to explain to this last group of firms that they needed a proper policy *and* they actually had to implement it.”

Ed Rial, who is headquartered in New York as Deloitte’s global anti-corruption partner, agrees that the UK scheme has caused multi-nationals around the globe to react. “We see many, many more inquiries regarding best practices and anti-corruption programs.”

But not all are convinced that section 7 will drive deep and lasting change in the corporate sector, given the enduring incentive for companies to bribe in order to win lucrative contracts. Experts also question whether many companies will actually be charged or successfully prosecuted under section 7 (a query that will take several years to answer).

In the US, several top officials are sceptical of the section 7 laws, with one senior prosecutor warning the UK system creates a “a paper compliance defence” involving companies strategizing about the minimum compliance program they need in order to get away with bribery.

The SEC’s Brockmeyer says there is a risk that the section 7 laws may lead some companies to simply have a “check the box” compliance system.

Raphael is also concerned that section 7 will create a paper compliance system without any corresponding change to the ethics of a company. “Compliance is simply a tool,” he says. “You have to start with an ethos.”

Raphael invokes the analogy of a man who carries a bible in his pocket, but has done little else to actually transform his own ethics. “It isn’t the book that is important, it’s the ethos. The same should go for business.”

Raphael’s point is worth pausing to consider. Given the intense pressure on Australian businesses to perform - and to pay bribes in some countries to win contracts - bribery will no doubt continue even in the event that a firm implements a rigorous compliance program. Promoting truly ethical business practices is a vastly more ambitious exercise than introducing a compliance program that will satisfy a prosecutor that a company shouldn’t be blamed for a staff member’s bribery.

“We have put an Elastoplast on a problem,” says Raphael in reference to the section 7 laws.

Jeremy Horder is also not convinced of the transformative effect of section 7 on business ethics.

“Initially, fear drove people to introduce compliance programs. And there is some evidence that companies are warier about investing in problematic countries. But I suspect the heat is off now. I would suspect that compliance programs are now gathering dust. It’s petered out quite a bit.”

Horder is concerned about the lack of section 7 prosecutions in the UK.

“In the end, where are the [section 7] prosecutions?” he asks, while acknowledging that the prosecutorial burden may be higher than many anticipated. “The SFO isn’t being idle. It isn’t easy to hold a company liable, even under section 7.”

The National Crime Agency’s Benton is also uncertain whether the section 7 laws will lead to many prosecutions, noting there is a similar compliance reverse onus law for UK banks engaging in money laundering, “yet we never prosecuted banks for a failed compliance regime”.

The SFO’s Green says it is too early to judge the effectiveness of the section 7 laws. Senior lawyer Benwell agrees: “At the moment, without substantial prosecutions, it is hard to say what effect the new laws have had on UK corporations and to a lesser extent international business.”

However, these cautionary remarks should be read in the context of the now leading judgment of Lord Justice Leveson in the first section 7 Bribery Act prosecution and DPA, in the Standard Bank case³, which was published on 30 November 2015, after the above interviews were conducted. A DPA is a deferred prosecution agreement in which a defendant escapes prosecution in return for co-operating with authorities and other requirements.

Lord Justice Leveson said, in part:

I add only this. It is obviously in the interests of justice that the SFO has been able to investigate the circumstances in which a UK registered bank acquiesced in an arrangement (however unwittingly) which had many hallmarks of bribery on a large scale and which both could and should have been prevented. Neither should it be thought that, in the hope of getting away with it, Standard Bank would have been better served by taking a course which did not involve self-report, investigation and provisional agreement to a DPA with the substantial compliance requirements and financial implications that follow. For my part, I have no doubt that Standard Bank has far better served its shareholders, its customers and its employees (as well as all those with whom it deals) by demonstrating its recognition of its serious failings and its determination in the future to adhere to the highest standards of banking. Such an approach can itself go a long way to repairing and, ultimately, enhancing its reputation and, in consequence, its business. It can also serve to underline the enormous importance which is rightly attached to the culture of compliance with the highest ethical standards that is so essential to banking in this country.

³ *Serious Fraud Office v Standard Bank Plc*, Case No: U20150854 dated 30 November 2015.

Leveson's powerful reasoning provides a telling contrast to the alarming silence in the Inter-Agency Report recently filed by the Attorney General's Department to the Australian Senate Economics Committee on foreign bribery - where nothing was said about the value of DPAs.

While there are worthy notes of caution for Australian law makers and advocates who may be tempted to embrace the UK Act without due consideration, the view of the UK Serious Fraud Office and one of the UK's most senior and experienced Judges is that it is ultimately a no-brainer – unless you incentivise companies to act, the curtain of silence and obfuscation remains.

“[Section 7] is the most significant piece (of law) for us. It is a very good thing for making companies criminally liable,” says Green, who also wants to expand the reverse onus provision to all acts of financial crime, rather than simply bribery.

Recommendation 4.

Australia should introduce new laws that, in line with section 7 of the UK Bribery act, hold a company criminally liable for acts of bribery conducted by a staff member unless the company can show it had an adequate compliance regime in place at the time of the offences. If such a law is introduced, a significant education campaign should be introduced to ensure companies are given clear direction about what an adequate compliance program can be created.

SECTION FIVE: ENSURING AN ANTI-BRIBERY REGIME HAS APPROPRIATE REACH

Australia would be well advised to introduce new laws that prohibit bribing both foreign public officials and private (ie non-official) persons.

In designing the 2010 UK Bribery Act, Professor Horder said he considered what a member of public would consider as a corrupt act worthy of prosecution.

In this so-called “street test”, a bribe is a bribe, regardless to whom it is paid. As Horder explains, “why make some corruption legal and some illegal?”

Under Australia’s current regime, only the bribery of foreign officials is outlawed - rather than the bribery of any foreign person by an Australian entity to obtain an unfair business advantage. Our current laws thus risk creating a defence for bribe payers, who may be able to defend their bribery on the basis that no public officials were involved.

Horder says it is important to note that there are some commercial arrangements, including non-compete payments or success or bonus payments, that some may argue could attract the attention of investigators. However, if these payments are legitimate, there will be evidence to justify them, meaning no prosecution or investigation should arise.

While the US FCPA only relates to the bribery of public officials, US prosecutors can capture improper payments to private foreign persons via a range of other laws, including money laundering, books and records laws (false accounting laws) and mail fraud.

But, as Cook, from the City of London Police, explains, it is surely wiser to explicitly outlaw all forms bribery. “To this extent, the UK Bribery Act is the gold standard,” says Cook. “With the UK act, if you bribe anyone, then you are captured by the law.”

Cook says it is critical that a legal regime that criminalises bribery of both public officials and private persons has appropriate jurisdictional reach.

The law needs to recognise that many bribe payers use offshore third parties to make payments. All parties to such a transaction must be captured by bribery laws.

Horder says a country also needs “sufficient extra-jurisdictional reach so you can charge the customer (who has taken the bribe) as well.” The law also needs to capture foreign nationals who come to a jurisdiction and act corruptly.

Consideration also needs to be given to introducing a dedicated domestic anti-corruption regime in Australia. Australia should not seek to combat those bribing foreign officials without a regime to tackle the bribery of Australian officials and related grand corruption (including the bribery of non-public officials).

The AFP and the ACC have no dedicated focus on domestic bribery and corruption and the Australian Commission for Law Enforcement Integrity (ACLEI) has a anti-corruption jurisdiction limited to policing agencies. And no political party has shown any desire or the political leadership to promote a truly independent Commonwealth anti-corruption commission.

Australians can only conclude that Commonwealth politicians do not want someone truly independent investigating their conduct.

It is nonsensical to espouse the need for a regime that would target a company for bribing an official overseas, but have no dedicated, sufficiently powerful and proactive Commonwealth taskforce or agency with a focus on the same act if it were to involve an Australian official.

But currently in Australia, the corruption of federal politicians and public officials is usually dealt with on a case-by-case basis by existing policing agencies. In other words, there is no dedicated focus on detecting, prosecuting and deterring such crimes.

It is different in the US. As the SEC's Brockmeyer points out, US agencies frequently charge senior officials and politicians with bribery and corruption. "The US is going after their own officials," she says. "You need to be doing this to be taken seriously in the foreign bribery space."

Cook agrees it is vital to have a strong domestic anti-corruption focus, which also currently does not exist in the UK. "Unless you are serious about fighting corruption yourself, how can you preach to other nations?" he asks.

Recommendation 5.

A new anti-bribery regime in Australia needs to outlaw the bribery of both public officials and private persons, in line with the UK scheme. The regime needs to have appropriate jurisdictional reach so as to apply to Australians who seek to sub-contract out their bribery to offshore third parties in order to avoid detection in Australia. The UK Bribery Act (2010) has a suitable model of jurisdictional reach that could be mirrored in Australia.

Recommendation 6.

There should be consideration of a national ICAC type body to ensure that Australia is able to deal not only with bribery overseas, by bribery and corruption inside its own borders.

SECTION SIX: INCREASING INCENTIVES FOR COMPANIES TO DISCLOSE BRIBERY, CO-OPERATE WITH AUTHORITIES AND CLEAN UP THEIR ACT

In the US, companies are offered major incentives, including deferred or non-prosecution agreements (DPAs and NPAs) or declinations (agreeing to halt a case) in return for disclosing bribery and co-operating fully with authorities.

“Bribery is one of the hardest crimes to prosecute so we give tremendous incentives for self-reporting and co-operation. We change the risk calculus for companies when considering whether to come forward,” says a leading US FCPA official.

The SEC’s Brockmeyer says the US has “developed a co-operative culture. If the government comes knocking, you will get a reward for co-operation.”

As well as getting US companies to disclose, the US incentive scheme also helps shift the cost of investigations to firms. An agreement to co-operate will often include a requirement for the company to conduct expensive internal investigations, the results of which are then handed to US authorities.

Former US state department corruption official, Mark Bochetti says: “NPAs and DPAs allow companies to deal with bribery without shooting themselves in the head. You also make the private sector do the investigation and reform work. But they don’t have to take the criminal conviction.”

Recently, the UK has moved - somewhat moderately - to follow the US lead in respect of offering companies the benefit of a DPA in return for securing their co-operation.

In contrast to the UK and US, Australia has no DPA scheme and is able to offer few, if any, incentives to companies to secure their co-operation in bribery investigations.

If the Commonwealth Director of Public Prosecutions decides to prosecute, it will do so. Any issue of cooperation is merely a factor the offender can put to the Court in mitigation at sentencing, once the CDPP secures a conviction⁴.

Many senior Australian investigators say the lack of an incentive scheme is undermining the effectiveness of the nation’s anti-foreign bribery regime.

UN anti-corruption chief investigator Michael Stefanovic, who formerly worked for the Victoria Police and, more recently, as the World Bank’s chief bribery investigator, says: “Australia is held back because we don’t have DPAs.”

“You can’t just be purely adversarial and just offer a single choice to suspects of going to court. You need to have the ability to do some negotiations.”

Former top US prosecutor Peter Clark, who now advises corporates on the FCPA, warns that without incentives including a pathway to avoid conviction or charges,

⁴ Prosecution Policy, paragraph 2.11.

many companies will stay quiet rather than disclose. A criminal charge may destroy a firm's business.

"It is draconian to charge someone who turns themselves in," Clark says. "The possibility of a DPA would be a great incentive for Australian companies to co-operate."

The FBI's McEachern estimates that one third of the FBI's foreign bribery cases come from self-reporting, prompted by a firm's hope of securing a deal with prosecutors.

Indeed, when you look at the overall number of foreign bribery settlements, the OECD's *Foreign Bribery Report* published in November 2014 found that up to 69% of all sanctions were obtained through settlements. In Australia, there are no published records of any settlements or sanctions and no incentive for companies to offer anything.

"The key to that [high level of self-disclosure in the US] is NPAs and DPAs. I can't emphasise how important they are," says McEachern.

Former US prosecutor Duross, who now works for companies considering whether to disclose, is another passionate supporter of the US incentive scheme, saying it drives self-disclosure.

"Not much less than half [the cases that come to the Department of Justice] are self reports. Of the ones that are resolved, a higher percentage is self reports."

Duross says NPAs and DPAs empower prosecutors and provide a level of certainty for co-operating firms. "If you co-operate, it is almost certain you will get a much better outcome. But if you go to trial, the prosecutors will hammer you." He notes that the FIFA corruption case, for instance, has emerged from a deal struck with an allegedly corrupt US FIFA official, Chuck Blazer.

Deloitte's Ed Rial, who advises companies but was formerly a prosecutor, says that NPAs and DPAs are "mechanisms that have made the thought of disclosure more palatable." For Rial, such incentives "are good for society."

Yet they are also subject to increasing debate in the US justice system, with several deals struck between companies and prosecutors overturned by judges who thought the firms got off too lightly.

The belief that judges may be increasingly inclined to overturn a DPA or NPA is reducing the level of certainty prosecutors can provide a company about the sort of reduced penalty deal they can be given.

"Incentivising corruption self-reporting is the biggest challenge now, even in the US, where it is not always clear what the incentive is or what the benefits will be," says Koukios.

Still, there is also strong judicial recognition of the benefit of such deals. In a recent ruling, Judge Emmet Sullivan of the US District Court made it clear that with proper judicial supervision of settlements, they should be made available to both companies and to individuals to promote the reporting of serious crimes⁵.

The critics of the US incentive scheme point to sweetheart deals between companies and prosecutors that lead to fines which, however large, can be easily absorbed and fail to curb corporate misbehaviour.

Raphael warns that the rush to ensure disclosure via DPAs may generate unjust outcomes and send the wrong message. “If the message to the corporate world is, ‘even if you get caught it won’t be too bad’, well what is the point of that?”

Even strong advocates of the US system, such as senior FBI officer McEachern, warn of the risk of lawyers cutting non or deferred prosecution deals without scrutiny. The FBI now ensures one of its agents is at the table when any deal is struck between an offending company and a prosecutor. “The feds are now in the room. We have more skin in the game,” he says.

The longest serving DOJ FCPA prosecutor, Clark, says the pendulum may have shifted too far towards company deal making in the US. “They [the DOJ] have a horrible record now of successfully prosecuting individuals,” he says.

Concern that deal making between companies and prosecutors has led to some individuals escaping criminal sanctions was, in late 2015, raised at the highest levels of the US justice system, with the Deputy Attorney General, Sally Yates, sending a memorandum to prosecutors highlighting the importance of holding individuals to account.

Senior OECD anti-bribery official France Chain says an effective anti-bribery system must have “both corporate and individual liability. If a CEO is at risk of going to jail, it is a huge deterrent,” Chain says.

Still, a senior US prosecutor, who asked for his name not to be used, dismisses the criticism of the widespread use of DPAs, NPAs and declinations in the US.

“The US is very good at effecting change. The ultimate goal is to fight corruption and not necessarily jail people. Do you chase individuals in shitty cases? Or do you go the company? You chase the company. Individuals get jury sympathy. A jury will look at a low level employee in India and say, ‘he can barely speak English, what the f*&% is he doing here?’”

The senior official also points out that the US has prosecuted 58 individuals since 2009. “We *are* holding individuals to account. But the key challenge for the US system at the moment is to properly incentivise for companies to come forward and to hand over really detailed information about individuals. To get a deal now, you have

⁵ *United States v Saena Tech Corporation; United States v Intelligent Decisions, Inc*, Case: 1:14-cr-00066-EGS judgment dated 21 October 2015.

to really give us all the evidence, including the stuff that implicates your senior executives.”

The UK DPA scheme, introduced in 2013, requires a company to meet a set of rigorous prerequisites before being offered one. Even then, a judge has to approve the agreement.

SFO director Green says the UK DPA scheme will improve the detection of bribery, noting that without incentives “some companies will co-operate, but some will fight everything through their ritzy city lawyers.”

“I do think it [the DPA scheme] will lead to an increase in self reporting because companies are always complaining about uncertainty [in terms of what reduced penalty they will receive in return for co-operating].”

“Now we have something to offer companies to avoid collateral damage. [But] I tell companies they need to do three things to get a DPA: co-operate, co-operate, co-operate. To implement a DPA, we still have to convince the court it is in the interests of justice.”

This is of course the statutory threshold required under UK law and the *Standard Bank* case illustrates the benefits to the public interest in resolving a case that without self-reporting would in all probability never come to the attention of the UK authorities.

The OECD, which has traditionally been an advocate of prosecuting and penalising offenders rather than doing deals, is also softening its approach to DPAs.

Chief OECD foreign bribery analyst Loo says: “These are extremely expensive cases to prosecute and Australia may not have the resources to do it properly. So you have to consider settlements. But then how do you do them properly?”

Prior to the UK’s new DPA scheme, former SFO chief Richard Alderman attracted intense criticism for seeking to cut deals with companies that would see them pay large fines but avoid prosecution.

Current SFO chief Green says that Alderman “tried the US methods with no statutory basis. So he wasn’t prosecuting but doing deals with companies. It was absurd. You can’t do it! Our judiciary hated it.” In some cases, judges told the SFO that it could not legally agree to any sentence or settlement as only courts could impose punishment in a criminal case⁶. That is the position under Australian criminal law⁷.

City of London anti-corruption chief Roger Cook is also critical of sweetheart deals that allow offenders to escape jail.

“When prosecution lawyers engage with company lawyers, it can become very pally. You have barristers cutting a deal with barristers they know.”

⁶ *R v Immospec* [2010] EW Misc 7 dated 18 March 2010 at [26] per Lord Justice Thomas.

⁷ *Barbaro v The Queen; Zirilli v The Queen* (2014) 253 CLR 58, [2014] HCA 2.

But Cook still supports DPAs, saying they are “a good thing,” as long as they are carefully handled.

Indeed, the new UK DPA guidelines include such a strict set of requirements for a company to meet in order to be eligible that senior UK lawyer Nick Benwell says the scheme may not actually work as intended.

“It is too early to form a view of the likely impact of DPAs. The SFO is setting a very high, and some would say impossibly high, bar. So the jury is still out on their usefulness for providing an incentive for companies to self-report,” says Benwell (whose comments were made prior to the first UK DPA being approved in the Standard Bank case).

Former SFO chief Richard Alderman, who championed a US-style of deal-making to encourage co-operation, says the new UK DPA system may lack flexibility.

“If you want to adopt a negotiated settlement, you need to adopt a different mindset. But now the emphasis is all about prosecution.”

Any future Australian DPA scheme should reflect that adopted in the UK, given the similar nature and culture of the Australian and British criminal justice system. The changes should be made by Parliament and a statutory power be given to the CDPP to negotiate a DPA with offenders. Offenders should not be limited to companies but should also include individuals (which extends the UK system).

If Australia does follow the existing UK route, it would be a gradual, but welcome improvement on the current system.

A further issue that must be weighed before introducing such a scheme in Australia is the potential for a company given a DPA in one jurisdiction to still be prosecuted in another.

Says Alderman: “Once a company has admitted to guilt, their defence elsewhere [in another jurisdiction] is gone. They may also open themselves up to shareholder litigation. Self-reporting has become much harder for big companies that face exposure in several countries.”

Alderman believes that global settlements, in which several countries co-operate to bring a case to resolution, “are the way forward.”

Horder, author of the UK Bribery Act, says in complex investigations, where a company shows it is willing to reform, DPAs are “good to have in the tool box”

However, DPAs are complicated by multi-jurisdictional prosecutions. A company granted a DPA in one country may still be prosecuted by another.

Upon agreeing to a DPA, prosecutors and a court need to consider what sort of settlement is appropriate.

US officials are expert at extracting fines totalling hundreds of millions of dollars from companies when the conduct alleged is egregious. They also tend to seek to apply the maximum penalty on defendants who elect to defend a prosecution, ensuring most companies never defend a case and instead seek to settle.

In Australian cases involving systemic bribery, consideration should be given to increasing the amount a company can be fined, either by consent or by court order, to reflect the seriousness of the conduct and the ability of a large company to easily absorb even a large multi-million dollar fine.

As Duross explains: “It’s not all about going to jail. It’s about sending a policy message. When you are talking about a \$500 million fine, it’s a big deal. So it’s about changing [corporate] behaviours.”

Still, Horder warns that even massive financial penalties can be absorbed by some companies. “You may be fined, but if you are that big, you can absorb it. Companies can sit back and ride the wave. This demonstrates that punishment is not the be all and end all. You have to convince companies to be clean.”

Horder’s point highlights the challenge of achieving genuine and lasting corporate change, in which bribery is culturally abhorred rather than being seen as simply the cost of doing business in certain jurisdictions. Such cultural change must be an aim - however lofty - of any Australian reforms.

Large fines and jail terms for offenders may not be enough to drive such cultural change. Monty Raphael QC queries whether large fines or a jail term are actually a genuinely and lasting industry deterrent.

“You have to attack the ethics of the bribe payer first.”

“The US model of extracting large pay-outs via settlements from offenders is horrible. Apart from raising huge amounts of revenue by fines... it has set a price on iniquity. If you are very naughty, you have to pay a billion dollars. We don’t know if [the system of fining companies] works in the US because there is so little jurisprudence. Everything gets settled.”

While these deeper policy questions are certainly worthy of consideration, the consensus of US and European experts is that an enforcement regime that includes tangible outcomes - prosecutions, large fines and jail terms - forms a vital part of any anti-bribery strategy. Without these measures, other policy tools to achieve corporate change will fall flat.

Recommendation 7.

Australia should introduce a DPA scheme to encourage self-reporting (by companies and individuals) and the scheme should be similar to the UK statutory scheme. DPAs need to be signed off by a court and subject to strict guidelines. However, given the intent of such a scheme is to encourage disclosure and co-operation, such guidelines should not be so onerous as to prevent the scheme meeting its goals. There should also be a review of Australia’s new DPA scheme five years after it is introduced to measure its effectiveness.

The DPA scheme should include a requirement for Australian authorities to consult with their overseas counterparts to win support for any DPA to avoid the scenario where an Australian company given a DPA is subject to prosecution overseas.

SECTION SEVEN: THE AUSTRALIAN LAW ENFORCEMENT SETTING.

Top anti-corruption officials spoken to for this report acknowledge that the AFP has improved its approach to foreign bribery, largely through the impressive leadership of Commander Linda Champion (a highly respected official recently promoted to the AFP's senior Europe officer). Many overseas anti-corruption officials said Champion had done a great deal to improve the AFP's anti-bribery activities.

Yet many senior anti-bribery officials, while full of praise for Champion, also queried whether her onerous workload (she managed several other investigative portfolios in addition to the bribery portfolio) detracted from the agency's ability to focus on detecting and investigating foreign bribery.

The SEC's Brockmeyer queried why Champion had "so many priorities," while the UN's Michael Stefanovic says: "Linda had eight different crime types. That is a problem. If you want to do this stuff, you must specialise in it. When I heard Linda had so many different priorities, I thought, this is crazy. You must maintain your focus."

The AFP is not a niche financial crime specialist, such as the ATO. Foreign bribery is just one of the agency's many priorities, including counter-terrorism and investigating cyber-crime and drug trafficking.

There are unquestionably several talented investigators tackling foreign bribery at the AFP. But they are too few in number and lack adequate resourcing and other tools to do their job effectively.

Extensive interviews with Australian and overseas officials indicate that bribery appears to be a moderate priority for the AFP. This is perhaps an understandable position for some, given the resourcing challenges posed by counter-terrorism, drug trafficking and other high profile crimes. But it means the corrupt are getting away with their crimes.

There has been some solid progress within the AFP since 2012. Several initiatives have aimed to improve investigation outcomes. A panel of AFP experts has been introduced to assess cases (ensuring important ones are not poorly handled). Investigators have also been embedded within a dedicated National Fraud and Anti-Corruption Centre (FACC), which includes representatives from ASIC, the ATO, ACC and multi-disciplinary staff.

However, the FACC's priorities are many, including money laundering, tax evasion and Commonwealth fraud.

Investigators still lack the expertise, time, resourcing and legislative tools to effectively investigate foreign bribery cases and bring them to resolution within a reasonable time frame.

The AFP, as Australia's lead agency tackling foreign bribery, could make significant further improvements with appropriate support from government. Until this occurs, it will lag behind US and UK agencies in the fight against foreign bribery.

It must be stressed that even with better resourcing and focus, the AFP can only do so much. Without the proper legislative and policy framework and whole of government support, especially from the CDPP, the agency will continue to be hamstrung.

Critical to the success of any investigation is recruiting the right investigators and staff, including lawyers and accountants. These staff must be well resourced. Foreign bribery investigations are expensive and time consuming.

Every overseas official interviewed as part of this report nominated appropriate resourcing as among the prerequisites of any sufficient anti-bribery regime, while several submitted that the under-resourcing was to blame for the AFP's failure to resolve many cases.

"Resources are a really big issue," says the OECD's Loo. "And it leads to a big question mark. How on earth will they [the AFP] do all these cases they have opened? I mean, the Secrecy prosecution is still ongoing! Whether they [AFP agents] have the resources is a big question mark."

The US only started achieving major results with a significant increase in the number of investigators and specialist staff. McEachern's team at the FBI has 23 dedicated federal agents and a total taskforce of 36 staff, including lawyers and accountants. The DOJ and SEC have their own large teams working in the FCPA space.

During Duross' tenure at the DOJ, the number of FCPA prosecutors increased from three to 25. "We went to the IRS, Customs, to get the best agents," he recalls. "They understood the case is in the paper chase, not in banging down the door. The best agents know this. They can be down in a room for weeks examining documents. If it is not staffed properly - which means staffing it long term- then it is not going to work. The international stuff takes years. You can't have four or five agents rotating through. You need continuity with investigations and prosecutions."

At the Serious Fraud Office, Green can request "blockbuster" funding from the government to ensure major cases, such as the Rolls Royce bribery probe, are funded. The risk [of this approach] is we look like we are going cap in hand. But how would it look if they [the government] blocked it? I wouldn't hesitate to speak out."

The office has 100 lawyers, 100 support staff, 100 investigators, 50 backroom people, and numerous accountants working on major corporate corruption cases.

At the UK National Crime Agency, Benton's team has grown from 6 to 50 since 2009.

The City of London Police's Cook says resourcing is "critical". His agency has a separate, guaranteed funding stream from the UK's foreign aid budget. "This is the *only* reason we are doing this work- because of the separate funding stream," he says.

Having an effective anti-foreign bribery regime will deter companies plundering overseas projects that are funded with foreign aid. Accordingly, fighting corruption and improving corporate governance in developing nations (such as PNG) where Australia is a major aid donor will help ensure Australian aid dollars are not stolen as bribes and kickbacks.

The World Bank requires any country that seeks funding to also agree to allow the bank to audit any project funded by the bank.

“Our biggest tool [against corruption] was our audit clause,” says the UN’s Stefanovic, who was formerly the World Bank’s chief bribery investigator. “It was a search warrant that allowed us to look at companies’ hard drives.”

Recommendation 8.

The Australian government must increase and quarantine funding for the AFP to investigate foreign bribery. Consideration should be given to “blockbuster” funding for major cases and other funding streams.

Given the alignment between Australia’s overseas aid program and fighting international corruption, Australia should also consider partly funding foreign bribery probes via the foreign aid and development budget, as occurs in the UK.

SECTION EIGHT: AN EFFECTIVE INVESTIGATIVE APPROACH

To fight foreign bribery, “you need devoted taskforces,” says Cook. “You need people with the right mindset and who want to go looking for it. You need a set of people building up contacts and expertise. You have to tease cases out. There is no victim crying out, so many of these cases don’t attract the same momentum.”

The SEC’s Brockmeyer agrees. “You need a discrete unit. That’s why you see the big spike [in cases in the US].”

In Australia’s case, the UN’s Stefanovic (who previously worked for Victoria Police) warns that locating the AFP’s top anti-bribery managers in Canberra may not be ideal. “It [the AFP] is so Canberra-centric. But business is done in Melbourne and Sydney.” Stefanovic says the AFP’s bribery teams “need to be more accessible,” far better resourced and “have a clear anti-corruption brand.” Stefanovic says that it’s also worth considering a dedicated bribery and financial crime hotline.

There have been some calls in Australia for a dedicated fraud agency to be created, similar to the Serious Fraud Office in the UK. According to Green, British lawmakers set up the office because they recognised that existing policing and prosecution agencies were not capable of investigating major financial crime and corruption cases. The SFO’s sole focus is to both investigate and prosecute such cases. “We have a single priority: top level fraud and bribery.”

Still, the creation of a new agency in Australia may be too expensive and risk duplicating existing infrastructure and bureaucracy. Indeed, the OECD’s Loo doesn’t believe a specialist agency is needed. “You simply need the right resources and legislation to do it right.”

The UK has recently shifted responsibility for foreign bribery from the SFO and City of London Police to the SFO and the National Crime Authority. Such a major structural shift (done for partly political reasons that are beyond the scope of this report) has, according to some UK officials, led to a loss of momentum and expertise. Creating a new agency in Australia, rather than empowering the existing structure, might create similar problems.

Officials agree that concerted efforts must be made to attract and train highly-skilled agents and to ensure they work alongside accountants, analysts and lawyers. Green says the SFO gives its staff extensive training, providing them with an anti-corruption and financial crime career path. “We grow our own investigators. We spend a lot on training.”

The UK NCA’s Benton states: “You need to recognise that anti-corruption is a specialist area and it needs to be a career path.”

In the US, to get FBI agents to become committed FCPA investigators, the Department of Justice worked with the FBI to give career credits to agents who agreed to commit to a long term posting with the FCPA.

Duross says that a decade ago, FBI agents did not want to work on FCPA cases. “They didn’t get to kick down doors ... It was hard to attract talented agents; given it was years and years of work for just one case. So we worked with the FBI to find a way they would be awarded for their work. They now get ‘headquarter time’ (a form of credit for agents that helps them gain promotion).”

An esprit de corps must also be created with investigation teams. At the DOJ and the FBI, staff proudly wear FCPA t-shirts. The FBI and DOJ’s FCPA units are now sought after places, filled with investigators and prosecutors able to get results.

Recommendation 8.

The AFP should form a dedicated taskforce with bribery as its sole priority. This taskforce should be staffed by people with a range of skills, including forensic accounting. There must also be an acknowledgement that many police do not want to investigate financial crime, but prefer to work in other areas, such as drugs or counter-terrorism. Added incentives must be given to investigators who seek to specialise in financial crime, including career credits for skilfully handling long investigations. (Given that a case may take four years, or even more, to investigate.) The AFP should create a clear and attractive career path for investigators who specialise in financial crime and corruption.

SECTION NINE: THE ROLE OF ASIC, THE CDDP AND THE COURTS

The failure of Australia's corporate watchdog, ASIC, to play a meaningful role in the fight against foreign bribery was heavily criticised by several overseas officials.

The OECD's Loo observes that ASIC is "well placed to do more, but they keep saying that 'we don't have the mandate'. We were surprised at how adamant they were. Given they are so well placed to do it, why wouldn't they get involved?"

There was consensus that ASIC should greatly increase its role in the fight against foreign bribery, lending its expertise and ability to investigate a range of corporate offences that are by-products of foreign bribery. To this end, a reformed anti-bribery strategy in Australia should include an explicit role for ASIC⁸.

In the US, the SEC plays a major role in policing the FCPA as it relates to listed companies and corporate offences under the Exchange Act.

ASIC should have a similar role that compliments the AFP's place as the primary enforcer of criminal bribery breaches. For instance, ASIC should examine whether directors have breached their obligations by failing to prevent foreign bribery (as appeared to be the case in the Securrency-NPA scandal) and other Corporations Act breaches that flow from foreign bribery transactions.

Furthermore, ASIC's expertise could benefit the AFP. The SEC's Brockmeyer says that in FCPA probes, the SEC are viewed as experts. "The police and the DOJ leverage off our corporate expertise," she says. "One thing that makes the SEC so effective is we don't view ourselves as a back-seat player. We are the experts and we police the FCPA and other areas."

Having a police force enforcing foreign bribery offences *and* a corporate watchdog enforcing corporate law breaches (as is the case in the US), can be very effective. Brockmeyer explains that "if the criminal authorities fall away, the SEC has to get in fast. Our investigations often run in parallel, but we don't penalise the company multiple times."

In the UK, the corporate watchdog has a lower threshold to begin an investigation than the SFO. This can be very useful in complementing the SFO's work, says Green.

This dual system is not without its challenges. "We need some sort of mechanism to decide at the earliest stage whether it [a case] goes down regulatory/civil path or the criminal route," says Green.

One top US official explained how the SEC can investigate foreign bribery cases not deemed serious enough by the DOJ, but which nevertheless involve serious breaches.

⁸ In the Attorney General's Inter-Agency Submission to the Senate Review, it highlighted the internal role that ASIC is said to be performing in the FACC and being part of foreign bribery investigation teams with seconded staff working with the AFP, yet many public statements by ASIC suggest otherwise and a lack of any desire to get involved in any independent role in investigating foreign bribery as improper conduct by companies, directors and officers.

“An example may be in China, where a company has low level employees bribing. The DOJ may not prosecute but the SEC will still hold the company to account under books and records and internal controls provisions of the FCPA,” says the senior US official.

The books and records laws allow the SEC to prosecute companies engaging in false accounting (see more on this below). “The two tiered system holds them [companies engaging in bribery] to account. It’s a great thing, a 2 tiered system.” No such system appears to exist in Australia.

In Australia, there has also been very little public discussion about the role of the CDPP in prosecuting foreign bribery cases.

However, the consensus among senior investigators confidentially interviewed for this report is that the CDPP could improve its handling of foreign bribery cases. Some investigators raised concerns that the CDPP has prioritised saving money and backing only cases deemed certain winners⁹. The CDPP appears to be both underfunded and risk adverse, fuelling a reluctance to prosecute foreign bribery cases.

The UK had an identical problem prior to the introduction of the SFO. Says Green: “Our answer was to set up the SFO because the traditional system was not dealing with the top level of bribery and fraud.”

Green also says it is critical that prosecutors play a major part in any investigation. “It makes for very effective decision making from the very beginning.” He also dismisses the view that prosecutors will lose their independence if they are embedded in an investigation team. “That is bollocks.”

Senior Australian CDPP officials justifiably point to weaknesses in Australia’s legislative and policy regime (as detailed in this report) in rejecting criticism of their office. But the CDPP also needs to ensure it has skilled, passionate and dedicated prosecutors who work closely with investigators.

A key attribute of successful foreign anti-bribery regimes is ensuring prosecutors have “skin in the game” from the outset of any investigation, helping the investigating agency to steer it to a successful outcome. In Australia, too often the AFP simply dumps a criminal brief with the DPP near the conclusion of an inquiry, beginning a delayed process of to-and-fro brief handballing from the DPP to the AFP and back again.

In the US, the FBI must get an opinion from the DOJ before beginning a major inquiry. “We have to be joined at the hip at the very beginning,” says McEachern.

Senior lawyer James Koukios notes: “One of the biggest challenges was aligning the interests of agents with prosecutors. Getting a great agent and a great prosecutor is absolutely crucial. Otherwise we are wasting our time.”

⁹ The CDPP has rejected this view in an open letter to the Senate Economics Committee dated 30 September 2015 in reply to criticism of the role of the CDPP in a number of other Senate submissions.

A key issue raised by investigators overseas and in Australia is the role of judges (and the court system) in handling foreign bribery and corporate crime cases. In the UK, financial crime and proceeds of crime cases are sometimes sent to specially trained judges, expert in the relevant legislation.

While it is not within the scope of this report to delve deeply into judicial training or the allocation of specialised judges, it should be noted that Australia's major foreign bribery prosecution (the Securrency and NPA case) has been beset by delay in the Victorian court system for many years. Consideration should be given to the question of whether Australian courts are able to handle complex foreign bribery matters and the allocation of such cases to experienced judges.

"Such cases do need to go to judges who understand the intricacies of these matters," says the City of London Police's Roger Cook.

Recommendation 9.

ASIC needs to be given a clear mandate (including in any new anti-bribery legislative regime) and appropriate resourcing, to investigate Corporations Act and relevant corporate law breaches that flow from foreign bribery transactions. ASIC needs to co-ordinate closely in foreign bribery investigations, with a view to ensuring civil remedies are brought in the event that criminal investigations stall.

Recommendation 10.

The CDPP similarly needs to ramp up its role in the fight against foreign bribery, ensuring it has appropriate resourcing and a role during investigations. Consideration should be given to the question of whether Australian courts are able to handle complex foreign bribery matters.

SECTION TEN: PURSUING MULTIPLE OFFENCES WHEN INVESTIGATING BRIBERY; CREATING A RECORDS AND BOOKS AND INTERNAL CONTROLS OFFENCE; TOUGHENING MONEY LAUNDERING DISCLOSURE REQUIREMENTS

Every official interviewed stressed that bribery will almost always involve a range of criminal offences, including false accounting, fraud, and money laundering.

Experienced investigators and prosecutors should recognise that the actual act of bribery may be too difficult to prove in court, in contrast to the associated offences of money laundering or false accounting.

Some of these laws already exist in Australia, but they are not always investigated during a foreign bribery probe. Ensuring all these offences are thoroughly investigated is partly a cultural phenomenon.

The US FCPA scheme sets the world's leading example of how to use a variety of legislative tools and internal controls provisions to pursue bribery. The FCPA's books and records and internal controls provisions create serious offences around a company's internal book-keeping and accounting in the event that it fails to explicitly record and report third party payments and suspicious movements of money (acts that suggest bribery).

As well as allowing prosecutors to pursue companies in cases where the evidence falls short of sustaining an actual bribery charge, the books and records act encourages companies to ensure their subsidiaries and offshore entities maintain appropriate corporate controls. Critically in the US, while the DOJ will pursue criminal offences where bribery can be proved, the SEC will use its civil powers to seek civil remedies and substantial penalties for breaches of the FCPA's books and records and internal controls provisions.

Former top State Department anti-bribery official Bochetti says that "if US investigators can't get it one way, they'll go another way. They don't give up on cases if they smell something. This is cultural. 70 to 80 per cent of cases go like this."

Duross recalls his time as a US prosecutor in the following terms. "If you can't go for foreign bribery, you go tax, or mail fraud. You are looking for an Achilles heel. The FCPA accounting provisions - the books and records and internal controls laws - are very powerful weapons because sometimes you can't join the dots to prove that actual bribery has occurred."

The SEC's Brockmeyer says the FCPA's "accounting provisions are unbelievably important". "We can use them if we can't bring a bribery case or if we don't have jurisdiction because the conduct involves an offshore subsidiary. Under the books and records and internal controls provisions, you need to know what your subsidiary is doing."

Brockmeyer says the SEC rigorously enforces these laws in bribery cases.

“The purpose of doing so is also to protect investors and to ensure companies keep accurate books. We require firms to ensure internal auditors are going behind the paperwork to see what is *really* happening and to ask if commission agents or sub-contractors are actually performing the service for which they are paid.”

In Australia, the federal government recently moved to strengthen false accounting offences linked to foreign bribery. These changes fall short of the US laws as they do not address any civil liability issues and rely on the CDPP being satisfied that any individual or company has the relevant intent or acted recklessly. It remains uncertain if the amended Australian laws will be vigorously and proactively enforced by ASIC or the AFP. (Only one person has been charged with false accounting as part of Australia’s two foreign bribery prosecutions in 15 years¹⁰.)

The UN’s Stefanovic warns that Australian investigators are currently taking far too narrow an approach to their bribery probes.

“Books and records is a crucial tool. Australia relies too much on [gathering prima facie evidence of bribery]. The books and records allows a different approach.”

The UK appears to be adopting a similar mentality. Green says his agency will use any charges to pursue bribery.

The National Crime Agency’s Benton is reforming the way it investigates bribery by seeking to lay money laundering charges, rather than only bribery charges. He is also directing his investigators to be far more pro-active.

“We used to be reliant on a victim coming forward to help us. It was very frustrating. So what I have done is change the way we work to target those laundering billions of pounds. We are now using covert, proactive methods [covert investigative techniques used in organised crime probes],” says Benton.

“The critical bit is that we are saying we are no longer reliant on an overseas jurisdiction handing us evidence or reliant on finding a witness. It changes the investigative approach.”

Stefanovic endorses this approach, and believes the Australian Crime Commission, which has the ability to coercively question corruption suspects and facilitators, should be used far more in Australia to gather intelligence about corporate bribery and financial crime.

“Stop thinking of it as white collar crime. It is organised crime, facilitated by accountants, protected by lawyers. Corruption is being facilitated by a host of professionals,” says Stefanovic.

Indeed, global money laundering agency, the Financial Action Task Force, recently called on Australia to do more to investigate facilitators of financial crime, including real estate agents and lawyers.

¹⁰ *The Queen v Ellery* [2012] VSC 349.

One of the most potentially powerful legal tools in the UK is legislation requiring any person who believes they have dealt in the proceeds of crime to report this to the NCA.

In Australia, only specific entities, such as banks and remitters, are required to report suspected money laundering and suspicious transactions to AUSTRAC.

In contrast, the UK money laundering and proceeds of crime laws go a step further. They make it illegal for any person to deal with the proceeds of crime, including funds used to pay a bribe or funds earned by a company after a bribe is paid. The only defence to this conduct is reporting it to the NCA in order to seek consent to handle the funds in question.

Under these UK laws, a company figure (an auditor, accountant or director) who suspects their firm has paid a bribe to win a contract (from which the profits become the proceeds of crime) must report the transaction to the NCA.

As lawyer Nick Benwell explains, “UK money laundering laws are just as powerful if not more powerful [than the Bribery Act] in combating corruption.”

“If you deal in proceeds of crime, you are committing an offence. So, if you pay a bribe and receive the income, you are committing money laundering. The only defence is to go to the NCA and seek consent to deal with the proceeds. In other words, self-reporting is mandated by these laws. As soon as directors are aware of suspected bribery, then they are on notice under the money laundering laws and must report it.”

Recommendation 11.

Offences similar to those in the US FCPA books and records and internal control provisions, should form part of a new Australian anti-bribery regime. Investigators from the AFP and ASIC should focus on pursuing such offences as part of all bribery inquiries.

Money laundering laws and investigations in Australia should be examined and reviewed with a specific focus on how they relate to acts of corporate crime. Too often, policing agencies seek to use the laws only to chase drug traffickers.

Australia must consider expanding the requirement to report suspected suspicious transactions, in line with the UK Proceeds of Crime Act.

SECTION ELEVEN: DEBARMENT: DOES IT WORK?

In the US, Canada and the EU - and in connection to any World Bank or development bank project - a company may be barred from winning government or bank funded projects if they have engaged in bribery. In the EU, this debarment process is mandatory. In the US, a debarment authority assesses a case in determining if debarment is appropriate.

In Australia there is no debarment regime. The Commonwealth Procurement Rules 2014 are silent on any debarment sanction and hardly focus on the consequences of bribery and corruption. Indeed, Australian Governments have been known to continue to award lucrative Commonwealth contracts to entities debarred from World Bank projects!

Implemented carefully, a debarment regime can give authorities a powerful tool in the fight against bribery, providing an incentive for companies to reform and ensuring a firm that is a repeat or egregious offender is effectively punished.

Still, all the experts interviewed for this report cautioned against a mandatory debarment scheme. As Bochetti warns, “debarment is playing with fire. If a company thinks it will lose all of its contracts, they will fight you to the end and you may not win. You need a pragmatic policy.”

Former SFO director Alderman agrees that mandatory debarment is “disproportionate” and the aim of authorities “should not be to put the company out of business.”

Unsurprisingly, debarment is rarely used in the US. As Deloitte’s Rial notes: “Debarment is an impediment to disclosure if it is a business killer. There has to be flexibility on the terms of debarment.”

US corporate legal advisor Clark says: “In the US, the principle of debarment encompasses the idea of redemption. You do not get debarred unless it is shown the conditions that allowed bribery to occur are still in place. But in Europe, once you are guilty, a company is sent to the guillotine. Why should the whole company go out of business because of the unapproved conduct of an employee in Dubai?”

There is consensus among those interviewed for this report that debarment should only be used for companies that refuse to co-operate with authorities or to take appropriate steps to prevent a repeat act of bribery occurring.

As the World Bank’s Zimmerman notes, an appropriate debarment regime should “lead a company to improve itself.” It can also prompt companies to co-operate.

Stefanovic says his investigators used the threat of debarment to aid their investigations. “Debarment was our only leverage. The World Bank starting point [for non-cooperative companies found to have engaged in bribery] was three years of debarment. This meant we got the company working for us. We used it as an incentive scheme.”

“To avoid debarment, they admit they did the wrong thing. They put in a compliance program. They spill the beans. And they agree to do internal investigations if there is any further smoke. We wanted to keep co-operative companies in the game [and not debar them].”

Stefanovic says an Australian debarment regime would also protect against the abuse of Australian foreign aid projects. “At the moment, DFAT has no mechanism to do it. But there needs to be something like that [the World Bank debarment regime], with public guidelines.”

Recommendation 12.

An overhaul of Australia’s anti-bribery regime should include a mechanism to enable authorities to debar from winning government funded work a company that engages in repeat bribery and non-compliance. This Australian debarment scheme should not be mandatory but subject to careful checks and balances.

SECTION TWELVE: CULTIVATING WHISTLEBLOWERS AND OTHER INFORMATION SOURCES

Most of the anti-corruption and policing officials in Australia interviewed for this report conceded that legislative protection for corporate whistle-blowers here is weak, as are incentives to encourage whistleblowing. This is despite the fact that whistle-blowers are crucial players in exposing foreign bribery.

ASIC chief Greg Medcraft recently added his voice to those in Australia calling for whistle-blowers to be rewarded for information. In the US, whistle-blowers are able to apply for significant payments under the SEC Whistle-blower Program for implicating companies in FCPA breaches¹¹.

In contrast, the UK does not pay whistle-blowers for information. Most senior UK officials feel comfortable with the efficacy of this approach.

Australia needs to improve protections for corporate whistle-blowers to dissuade employers from targeting them. But the question of paying whistle-blowers for their co-operation is more complex.

The chair of the SEC, Mary Jo White has described the advent of the Whistle-blower Program as a “game changer”, forcing companies to address internal complaints and to respect the integrity of whistle-blowers.

The FBI’s top FCPA official, McEachern, says the lucrative payment scheme has led to “a whistle-blower industry. His colleague, Darryl Wegner, says that the program leads to a “a lot of people looking for money.”

Both Wegner and McEachern believe the payment scheme does encourage more tip-offs, of a better quality. But they caution that the impact of the scheme in terms of encouraging disclosure should not be overstated.

Serving and former officials from the DOJ, FBI and SEC all said that the US reward regime had generated a better standard of whistle-blowing rather than a major increase in numbers. (The scheme encourages lawyers to assist whistle-blowers to make a disclosure to authorities.) Critically, it also served as an incentive for companies to disclose bribery.

“Companies now know there is someone in the company who might speak out,” says Wegner.

Koukios says he too has “had concerns about the credibility” of money hungry whistle-blowers, “but it [the US scheme] mostly works.”

A top US official who also cautioned about overstating the impact of the US scheme nevertheless believes “it scares the shit out of companies”.

¹¹ The US whistle-blower program is authorised by section 21F of the *Exchange Act 1934* and the rules surrounding the Program can be found at <https://www.sec.gov/about/offices/owb/reg-21f.pdf>.

The SEC's Brockmeyer says US whistle-blowing numbers are "still small."
"But we have got some very good whistle-blowers to come in. There are cases in the pipeline that we wouldn't have without whistle-blowers. They are not motivated by money but want to see the right thing. Many of them report internally and get frustrated."

Brockmeyer, and other officials, stress a major benefit of the US whistle-blower scheme is that it enables people to retain their confidentiality and channel their information through lawyers, who become the contact point for authorities.

"The confidentially provisions are really important," she says.

The attitude in the UK to the US scheme is far more reserved. This reflects the significant cultural difference in the two nations.

The SFO's Green believes the US whistle-blower scheme "goes a bit too far."
"In this country and most of the Commonwealth, it is the citizens' duty [to blow the whistle]. To incentivize it seems slightly distasteful," he says, while also acknowledging that "whistle-blowers are more and more important as a source for information for us."

In Australia, there is no duty, let alone a legal obligation to blow the whistle, save for a provision in NSW, which appears to be rarely used. (Section 316(1) Crimes Act 1900 (NSW)).

Former SFO director Alderman cautions that Commonwealth courts may be wary of paid whistle-blowers, or those who are seen to be motivated by personal benefit. He refers to one case in which a UK court jailed a key witness, even though the SFO believed his assistance should have meant he was given only a suspended sentence.

"UK has decided that big rewards aren't the way to go. It is a cultural thing. We think it is about morality. It is very high minded," says Alderman. "But I guess the true test is whether we are seeing people in the UK come forward as whistle-blowers without incentives. I'm not sure that we are."

To suggest only whistle-blowers gain a personal benefit seems overly simplistic. Many witnesses who give evidence for the prosecution do so partly to benefit themselves as they may have been involved in the offence.

But what should a whistle-blower be remunerated for? Blowing the whistle? Or, as ASIC's Medcraft has suggested, properly compensating them for what may be a serious loss of income and work opportunities as a result of their speaking out.

Whistle-blowers are, of course, just one source of information. US and UK agencies involved in the anti-bribery fight also stress the critical role of financial intelligence agencies dedicated to monitoring the movement of funds in and out of Australia. The City of London Police's Cook rates the financial intelligence generated by the flagging of suspicious transactions as "the best source for us."

Australian officials who spoke confidentially to this report's author say there is no dedicated anti-bribery focus inside AUSTRAC (Australia's financial intelligence

agency), the Australian Crime Commission or the ATO. All agencies are likely to be capable of generating far more financial transaction intelligence about suspected foreign bribery involving Australian companies and nationals.

State police forces may also be capable of generating such intelligence. For instance, a NSW police investigation into organised crime recently generated information that led to a major foreign bribery inquiry by the AFP (and Australia's second foreign bribery prosecution).

The AFP also needs to continue to build ties with overseas agencies tasked with investigating foreign bribery.

This requires resources: investigators need to travel to overseas workshops, and conferences and meet representatives of other agencies. It also requires the AFP to continually encourage its network of overseas liaison officers to proactively search for foreign bribery information.

Bochetti says, "police need travel and resources. Our guys [in the FBI and DOJ] travel a lot. It makes sense. That international co-operation with overseas agencies makes it a lot easier to get things done. A lot is done informally. You can share quite easily if you have informal overseas networks."

These informal law enforcement networks are gradually formalising. The AFP has helped create the world's first international anti-foreign bribery police liaison group.

The future of international corruption investigations, according to Deloitte's Rial, is likely to involve "cross border funding of international taskforces." Australia should be a driver of this international co-operation.

Other important sources of information on foreign bribery include the media and NGOs. In Australia, there is a cultural reluctance in policing to seek assistance from the media or NGOs.

This is not unique. According to Bochetti, "for some investigators, working with the media is like dipping your hand in the shitter. But if you are reading it in the media and it is credible, why don't you have a look at it?"

Given NGOs and the media are likely to have people on the ground in corruption-prone countries, such caution may lead to important information being missed.

The UK and US regimes appear more open to working with journalists and NGOs to gather information. This is again indicative of the proactive, even aggressive approach of both countries in seeking out bribery cases to investigate where they involve US or UK related interests. For instance, Benton of the NCA meets with key NGOs on a quarterly basis. "They are pretty important. We work with NGOs quite well," he says.

Recommendation 12.

Given the significant harm generated by corporate bribery and corruption, the key role insiders can play in exposing such conduct, and the fact that many whistle-blowers face dim prospects of future employment, a statutory incentive scheme should be introduced in Australia (modelled on the US scheme under the Exchange Act 1934), which, on a case by case basis and subject to certain requirements (again modelled on the US Whistle-blower Program Rules), offers significant rewards for whistle-blowers.

The DPP and AFP, or an independent panel of experts, should assess applications for compensation to reflect the remuneration a whistle-blower is likely to lose once exposed.

Recommendation 13.

More effort needs to be made to encourage relevant law enforcement agencies to actively gather financial intelligence on foreign bribery and related offences and share with the AFP.

The AFP should also continue to foster relationships with overseas agencies, given the importance of international collaboration in fighting foreign bribery.

SECTION THIRTEEN: THE FACILITATION DEFENCE AND EDUCATING INDUSTRY

The debate about whether Australia should repeal its facilitation payment defence is ongoing. A facilitation payment is a minor benefit paid to secure the performance of a routine government action.

Several European and US experts believe the issue attracts disproportionate attention. The OECD's top anti-bribery analysts Loo and Chain say debating whether or not to repeal the defence may distract from a far more pressing issue—why so many cases of major foreign bribery are not being detected, let alone prosecuted, by Australia and other states.

Observes Chain: “We are so far away from having effective enforcement of real bribery, it [facilitation payments] is not the real issue right now.”

Nevertheless, the OECD supports the banning of facilitation payments.

Lawyer Peter Clark is among those who also believe the issue is not a pressing one. “I don't care one way or the other. The rationale in the US passing the FCPA but retaining a facilitation payment defence is that we were trying to put a stop to grand corruption or significant corruption, not minor payments. People should not be bribing at all. But governments have limited resources. And if you want to equate a \$1 bribe to a \$50 million bribe, you will have lots of people charged for chicken-shit bribes, or, you will have something on your [legislative] books that will never actually be prosecuted,” says Clark.

“Who awards big contracts for small bribes? If there is some American who can't get across the border because you don't have a yellow fever card unless you pay one dollar... I will never prosecute that.”

Another former prosecutor turned corporate advisor, Deloitte's Rial, offers this assessment: “If you criminalise it [small, facilitation payments], it will never be enforced. So what is the point of criminalising it?”

However, the consensus view of those interviewed for this report is that, on balance, Australia should remove the facilitation payment defence.

“I don't support the facilitation defence. It was put in place in the US to get the FCPA passed,” says the SEC's Brockmeyer. Furthermore, she says that as the defence is so difficult to sustain, it has very little utility.

“It is a very narrow defence. It has to be a low level payment. You need to book it [the payment] into your records as a facilitation payment to rely on it as a defence. I think it would be simpler without the facilitation defence and businesses are told: ‘you can't bribe at all.’ Otherwise, it is too confusing. So just get rid of it.”

Senior UK lawyer Nick Benwell also points out that a facilitation payment “will almost always be a bribe under local laws.”

Adds Raphael: “It is wrong at \$5 and it is wrong at \$5 million.”

Australia should repeal the act for the sake of legislative, moral and practical clarity. If it is repealed, a clear guidance needs to be issued to companies spelling out the reform and providing suggestions about how to alter any practices that may lead to small bribe payments being made.

“What should a company do if a facilitation payment defence is removed? If this occurs, you need to give companies advice on how to push back [on bribe requests],” says Benwell.

One key area that is over-looked in the corporate bribery debate is the need to educate companies and their staff about the problem

The DOJ publishes a comprehensive, public FCPA Resources Guide that gives all business, executives and advisors clear guidance about how to avoid bribery, how to detect it, what to expect if they become a suspect and what shape prosecutions are likely to take.

There is no such guide in Australia. To make matters worse, the Attorney General’s Inter-Agency submission to the Senate Economics Committee actively discouraged publishing any such guide, saying that it was up to business to seek specific advice, rather than Governments to take the lead.

The US takes a different view. At the moment, some US officials say that the government needs to do more to educate small to mid-tier firms, with fewer compliance resources.

Duross says that “we need to tell small and mid tier enterprises what the law is”. Brockmeyer believes “we need to get better at telling companies how to implement good compliance programs.”

The SEC also publishes and releases to the media relatively detailed reports about its settlements with companies.

“We want to tell the story [of corporate misconduct or bribery], even if you settle. In every case, you will read the [bribery] complaint,” says Brockmeyer. Such publicity, she observes, generates fresh tip-offs and promotes better practices. “You have to go out and tell the industry about what the SEC is doing. That is how you reform an industry.”

Recommendation 14.

Australia should repeal the facilitation payment defence for the sake of legislative, moral and practical clarity. Upon the repeal of the defence, clear guidance needs to be given to companies about how this change may impact upon their overseas activities.

Recommendation 15.

Australia should be following the US lead with an effective communication and guidance program for companies. In Australia, firms working overseas should be given clear and regular updates about how to avoid and detect bribery, as well as regular guidance about how to implement an adequate corporate compliance program.

Similarly, Australian authorities need to ensure all foreign bribery investigations are, where appropriate, publicly reported. This will increase awareness and act as a deterrent.

SECTION FOURTEEN: TACKLING DEMAND - THE OTHER END OF THE EQUATION.

This report mostly deals with how Australia can better combat bribe payers. But what about the bribe takers? What role should Australia have in tackling the demand side of the equation?

If Australia's goal is to reduce domestic and international corruption, Australia must have a two-pronged strategy confronting the givers and the takers.

Australia could do far more to train and support corruption authorities in our region. PNG, Vanuatu and Indonesia are three potential countries where Australia could work to target bribery and corruption.

World Bank integrity chief Zimmerman observes that:

Australia is in a unique position and has not fully taken on board its opportunities. Australia is the leading economy and the most developed government structure in the region. There is enormous opportunity there. Australia has more influence than anyone else out there. It is not enough to give away the money. You have to give away the expertise. I'd love to see Australia really step it up in the Asia Pacific region.

Former SFO director Alderman says Australia "should be building the capacity of foreign countries to take on the bribe takers." This approach should include pro-active law enforcement. "We should be doing far more to freeze and return their assets."

The FBI's Wegner oversees a dedicated kleptocracy team - a proceeds of crime asset seizure squad targeting foreign officials. It has seized some considerable US assets belonging to corrupt foreign officials. Australia should follow this lead.

The NCA's Benton believes there is plenty to be done in Australia, given it is likely a considerable amount of bribery-related proceeds of crime money is flowing from Asia into Australian real estate.

The funds seized by police kleptocracy teams can be mostly returned to the source nation, with a small percentage used to fund police operations, observes Benton. "If these buggers are ripping apart their [country's] own wealth, you are having a huge impact taking them out and returning funds. So the money starts going back into schools and health."

The AFP and ACC are increasingly becoming world leaders when it comes to identifying and seizing the proceeds of crime linked to drug trafficking. More can be done to apply the same methodologies to corporate criminals, bribe payers and receivers.

Proceeds of crime investigations and prosecutions are not cheap and require significant expertise. However, under the *Proceeds of Crime Act 2002* (Cth), the AFP can move to commence civil proceedings – rather than a costly and complex criminal prosecution - where they have evidence that justifies a "reasonable suspicion" of a

domestic or foreign offence and the use of proceeds of crime or instruments of crime. Once assets are restrained, the act permits those funds to be forfeited to the Crown unless someone proves a legitimate interest in the assets.

In Ireland, a dedicated agency, the Criminal Assets Bureau, has been set up to focus almost entirely on identifying and seizing the assets of organised criminals.

The bureau has a dedicated funding stream, expert staff and is underpinned by specially created legislation. Without this support, the agency would flounder.

“When we freeze assets, we get everything thrown at us legally,” says the bureau’s Eugene Corcoran. “If we get it wrong, we are liable for costs.”

Recommendation 16.

As part of the overhaul of Australia’s anti foreign bribery system, consideration must be given to tackling not just the ‘supply’ side of a bribery transaction, but the ‘demand’ side.

Australia should consider increasing its support of our regional partners to better combat the bribery of foreign officials in the Asia-Pacific region.

Recommendation 17.

The AFP should follow the FBI and NCA’s lead and introduce kleptocracy teams to seize the proceeds of crime invested in Australia and, where possible, repatriate funds to source nations. Proceeds of crime investigations must be considered in every foreign bribery inquiry.

CONCLUSION: TIME FOR ACTION

The cost of failing to improve Australia's anti-foreign bribery regime will be impunity for the corrupt, wasted aid dollars and poor development outcomes in our region, the continuance of an uneven business playing field and the erosion of national security aims.

The compelling case for reform is outlined clearly in this report. As stated in the executive summary, reforms must go well beyond a mere tweaking of existing laws.

Australia must overhaul its anti-bribery regime via a whole of government approach.

Reform is never easy. It is often expensive and politically challenging. But in this case, the path for reform is clearly set out. Australia is able to look to the US and the UK to adopt the best of each regime as we improve our own system.

A successful regime in Australia must lead to meaningful outcomes, including prosecutions or deferred prosecutions agreements, for companies and individuals who pay bribes to win contracts. This will ensure a level of accountability for the corrupt and help deter future crimes. It will also prompt businesses to reassess the cost of paying bribes and begin to rethink a culture in which bribe paying is often viewed as simply the cost of doing business.

Australia need not wait for another corporate corruption scandal to act, although if that is what it takes to prompt reform, readers of this report can be certain such scandals are coming down the track- and fast.