Foreword

Foreign bribery impedes economic development, corrodes good governance and undermines the rule of law. Appropriately addressing foreign bribery is essential to cultivating integrity in all areas of government, business and the community.

Australia’s historically poor record in investigating and prosecuting foreign bribery matters has affected its international reputation. International bodies, such as the Organisation for Economic Co-operation and Development (OECD), as well as Australian commentators, have consistently criticised Australia's foreign bribery legislation as being too narrow in scope and inadequately enforced.

This report underlines the critical importance of ensuring Australia has an effective system to combat foreign bribery where individuals and companies are held to account for their actions. It examines Australia's international foreign bribery obligations and the way in which they have been implemented through domestic law. In general, Australia's implementation, though improving over time, remains incomplete.

While the committee endorses the interagency approach which has been adopted in more recent times, and acknowledges the work and role of the Fraud and Anti-Corruption Centre in improving collaboration, specialised interagency training and early engagement across relevant agencies in foreign bribery matters—more needs to be done.

Evidence presented to the committee established that foreign bribery cases are complex, lengthy and resource intensive. In addition to legislative challenges and poor corporate culture, other factors that potentially contribute to the lack of enforcement of foreign bribery cases in Australia include: a deficiency of sufficient expertise, delays, a lack of domestic and international cooperation and limited resources. The committee is of the view that options should be explored to develop a contingency mechanism that explicitly provides for additional one-off funding to appropriate agencies for large and complex investigations of foreign bribery offences to ensure any allegations are thoroughly investigated, and where appropriate, fully prosecuted.

The committee's report recognises the government's earlier consultations on proposed amendments to the foreign bribery offence and the whistleblower protection regime for the corporate and financial sectors, including the subsequent bills which are currently before the Parliament. While supportive of the introduction of a new corporate offence of failing to prevent foreign bribery, the committee is concerned that the details of the 'adequate procedures' defence to this offence will be provided for in ministerial guidance that is not yet available. In this regard, the committee considers it essential that the minister's guidance be principles-based, include the existence of internal corporate whistleblowing systems, and be subject to thorough public consultation.

Under the current legal framework in Australia, there are limited tangible legal incentives for companies to proactively report any potential instances of foreign bribery identified internally, and a lack of certainty as to whether any meaningful benefit will flow from cooperation during a criminal investigation.

Since March 2016, the government has been considering whether to introduce a deferred prosecution agreement (DPA) scheme in Australia and, in December 2017, it introduced legislation which is currently before the Parliament that includes a proposed DPA scheme.

To be successful in engaging corporates and incentivising voluntary reporting in the foreign bribery space, the committee is of the view that any DPA scheme must be supported by robust enforcement of the foreign bribery offence and a suite of government guidance. In addition, the committee considers that in order to enhance the integrity of the DPA process, other than in exceptional circumstances, DPAs should be published together with details on how a company has complied with its terms and conditions. With this in mind, the roles and appointment of independent monitors which are to be set out in the DPA Code of Practice are critically important to ensuring strict compliance. As such, the committee recommends that, as part of the public consultation on the draft DPA Code of Practice, the government publish an exposure draft and allow a period of no less than four weeks for stakeholders to provide comment.

Information about foreign bribery is difficult to source and often relies on 'inside information' and investigative journalism for exposure. Whistleblowers therefore play an important role in exposing foreign bribery and corruption—be it alerting authorities or the general public to potential offences. Australia's whistleblower protection regime in the context of foreign bribery is insufficient, particularly for employees of private companies.

The committee acknowledges the significant work of the Parliamentary Joint Committee on Corporations and Financial Services in delivering a bipartisan report on whistleblowing reform—*Whistleblower Protections*—and endorses the recommendations made in that report. While the committee suggests that these recommendations be implemented, it also believes that the government should work with the expert advisory panel on whistleblower protections to consider whether the scope of Australia's whistleblower protections provides sufficient coverage in foreign bribery cases.

Facilitation payments are one of the more conceptually complex issues arising from Australia's anti-foreign bribery legislation. Despite the lack of legislative action in this area, Australian companies are increasingly taking matters into their own hands by choosing to prohibit such payments in their internal company policies. Many submitters to this inquiry argued for the removal of the facilitation payments defence, emphasising the difficulties faced in drawing a distinction between a bribe and a facilitation payment, and how removing the defence would assist in creating a strong culture of compliance.

The committee is focussed on eradicating corruption and considers that allowing facilitation payments perpetuates a culture of bribery. The committee considers it essential that Australia convey a strong and consistent policy message that corporations should not stimulate markets for bribes, irrespective of their size and whether or not such payments to foreign public officials are considered to be mandatory. Therefore, the committee makes a recommendation to abolish the facilitation payment defence over a transition period, to enable companies and

individuals to adjust their business practices and procedures to comply with the law as amended.

In this report, the committee also evaluates other reform options to strengthen Australia's foreign bribery framework and examines the relevant experience in other jurisdictions. It assesses the need for increased transparency around beneficial ownership and the benefits of introducing a debarment framework in Australia.

Further, in light of the challenges of investigating and prosecuting foreign bribery claims, and the weak enforcement record in Australia, the report also considers ways in which Australia can: develop a corporate culture of awareness and compliance; and foster a willingness on the part of companies and individuals to self-report in the situation of foreign bribery.

Overall, and as highlighted in the strong and resounding messages drawn from the bulk of evidence received, the committee is of the firm view that the time has come for Australia to improve its anti-foreign bribery compliance and enforcement response to match its international comparators by: strengthening its legal framework against foreign bribery; and building a culture of integrity and compliance.