

# Chapter 1

## Introduction

1.1 On 24 June 2015, the Senate referred the matter of the measures governing the activities of Australian corporations, entities, organisations, individuals, government and related parties with respect to foreign bribery, to the Economics References Committee for inquiry and report by 1 July 2016.<sup>1</sup> The inquiry lapsed following the double dissolution of the 44<sup>th</sup> Parliament, but was re-referred in the 45<sup>th</sup> Parliament with the same terms of reference and a reporting date of 30 June 2017.<sup>2</sup> The committee has been granted a number of extensions to report,<sup>3</sup> and on 5 February 2018 the Senate agreed for the committee to report by 28 March 2018.<sup>4</sup>

1.2 The terms of reference are as follows:

- (a) the measures governing the activities of Australian corporations, entities, organisations, individuals, government and related parties with respect to foreign bribery, with specific reference to the effectiveness of, and any possible improvements to, Australia's implementation of its obligations under:
  - (i) the OECD [Organisation for Economic Co-operation and Development] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), and
  - (ii) the United Nations Convention against Corruption (UNCAC); and
- (b) as part of, or in addition to, paragraph (a), the effectiveness of, and any possible improvements to, existing Commonwealth legislation governing foreign bribery, including:
  - (i) Commonwealth treaties, agreements, jurisdictional reach, and other measures for gathering information and evidence,
  - (ii) the resourcing, effectiveness and structure of Commonwealth agencies and statutory bodies to investigate and, where appropriate, prosecute under the legislation, including cooperation between bodies,
  - (iii) standards of admissible evidence,
  - (iv) the range of penalties available to the courts, including debarment from government contracts and programs,

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1 *Journals of the Senate*, No. 101, 24 June 2015, pp. 2807–2808.

2 *Journals of the Senate*, No. 9, 11 October 2016, p. 173.

3 On 20 June 2017, the Senate granted the committee an extension to report by 7 December 2017, see *Journals of the Senate*, No. 46, 20 June 2017, p. 1494. On 27 November 2017, the Senate granted the committee a further extension to report by 7 February 2018, see *Journals of the Senate*, No. 72, 27 November 2017, p. 2283.

4 *Journals of the Senate*, No. 80, 5 February 2018, p. 2565.

- (v) the statute of limitations,
- (vi) the range of offences, for example:
  - A. false accounting along the lines of the books and records head in the US Foreign Corrupt Practices Act,
  - B. increased focus on the offence of failure to create a corporate culture of compliance,
  - C. liability of directors and senior managers who do not implement a corporate culture of compliance, and
  - D. liability of parent companies for subsidiaries and intermediaries, including joint ventures,
- (vii) measures to encourage self-reporting, including but not limited to, civil resolutions, settlements, negotiations, plea bargains, enforceable undertakings and deferred prosecution agreements,
- (viii) official guidance to corporations and others as to what is a 'culture of compliance' and a good anti-bribery compliance program,
- (ix) private sector whistleblower protection and other incentives to report foreign bribery,
- (x) facilitation payment defence,
- (xi) use of suppression orders in prosecutions,
- (xii) foreign bribery not involving foreign public officials, for example, company to company or international sporting bodies,
- (xiii) the economic impact, including compliance and reporting costs, of foreign bribery, and
- (xiv) any other related matters.<sup>5</sup>

### **Conduct of inquiry**

1.3 The committee advertised the inquiry on its website and through social media. It also wrote to relevant stakeholders and interested parties inviting submissions. The committee received 46 submissions. Submissions and answers to questions on notice are listed at Appendix 2.

1.4 The committee held three public hearings on the dates and at the locations listed below:

- Sydney—22 April 2016;
- Sydney—7 August 2017; and
- Melbourne—31 October 2017.

1.5 A list of witnesses is at Appendix 3.

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5 *Journals of the Senate*, No. 101, 24 June 2015, p. 2807.

1.6 The committee thanks all those who assisted with the inquiry.

## **Background**

### ***What is foreign bribery?***

1.7 According to the OECD Convention, the offence of foreign bribery is:

...intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or through intermediaries, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, in order to obtain or retain business or other improper advantage in the conduct of international business.<sup>6</sup>

1.8 In Australia, the foreign bribery offence is contained in section 70 of the *Criminal Code Act 1995* (Criminal Code). A person (including a corporation) is guilty of an offence if:

- the person provides a benefit to another person, offers or promises a benefit to another person, or causes a benefit to be provided, offered or promised to another person;
- the benefit is not legitimately due to the other person; and
- there was the intention of influencing a foreign public official (who may or may not be the other person) in the exercise of the official's duties as a foreign public official in order to obtain or retain business, or obtain or retain a business advantage which is not legitimately due.<sup>7</sup>

1.9 Corporations may also be liable for the actions of their employees and agents. Provisions covering imputing of knowledge to corporations are set out in Part 2.5 of the Criminal Code.<sup>8</sup>

### ***The significant impacts of foreign bribery***

1.10 Foreign bribery impedes economic development, corrodes good governance and undermines the rule of law. The Attorney-General's Department considers that:

Foreign bribery and other types of corruption can impede economic development by skewing competition and causing inefficient allocation of resources. It corrodes good governance and undermines the rule of law. In terms of the effect on business, foreign bribery by Australians and

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6 OECD Working Group on Bribery, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, article 1, p. 7, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) (accessed 26 February 2018).

7 Attorney-General's Department, *Factsheet—The foreign bribery offence*, <https://www.ag.gov.au/CrimeAndCorruption/Foreignbribery/Documents/Factsheet-Theforeignbriberyoffence.pdf> (accessed 26 February 2018).

8 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 7.

Australian businesses can damage our international standing and shrink the global market for Australian exports and investment.<sup>9</sup>

1.11 Similarly, Engineers Australia contended that:

...bribery is a widespread phenomenon, raising serious moral and political concerns, undermining good governance, hindering economic development, and distorting competition. It jeopardises loyalties, erodes justice, undermines human rights, is an obstacle to the relief of poverty, destroys trust in institutions and interferes with the fair and efficient operation of markets.<sup>10</sup>

1.12 Investigative journalist, Mr Nick McKenzie, argued that Australians should care about corporate corruption and bribery because:

There is near universal consensus among police, academics, NGOs [Non-governmental organisations] 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.<sup>11</sup>

1.13 Appropriately addressing foreign bribery is essential to cultivating integrity in all areas of government, business and the community. International cooperation to fight bribery is equally important.

#### ***Australia's efforts against foreign bribery***

1.14 The scourge of foreign bribery and corruption continues to affect Australia's international reputation. Over the last few decades, a number of Australian businesses and organisations have been regularly accused of engaging in foreign bribery. The cases of the Australian Wheat Board, and Securrency and Note Printing Australia, were among the first to test Australia's foreign bribery legislation.

1.15 Other allegations against Leighton Holdings Limited (now CIMIC Group), the Football Federation of Australia, BHP Billiton, Getax, Sundance, Tabcorp and the Snowy Mountains Engineering Company also appear to indicate that foreign bribery remains an issue across a variety of industry sectors, particularly mining and construction.

1.16 Despite these cases being widely reported, there have been only a limited number of prosecutions for foreign bribery in Australia. This has been the subject of concern for international bodies, such as the OECD, as well as Australian commentators, who have consistently criticised Australia's foreign bribery legislation as being too narrow in scope and inadequately enforced.

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9 Attorney-General's Department, *Submission 32*, p. 2.

10 Engineers Australia, *Submission 3*, p. 2.

11 Mr Nick McKenzie, *Submission 43*, p. 5.

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## Scope and structure of the report

1.17 This inquiry into foreign bribery examines the legislative and policy measures which shape the behaviour of Australian corporations, entities, organisations, individuals, government and related parties, and the effectiveness of Commonwealth legislation in identifying and prosecuting foreign bribery.

1.18 Since this inquiry was referred, the government has:

- proposed amendments to Australia's foreign bribery offence;<sup>12</sup>
- introduced to Parliament a proposed model for a deferred prosecution agreement (DPA) scheme;<sup>13</sup> and
- proposed amendments to the whistleblower protection regime for the corporate and financial sectors.<sup>14</sup>

1.19 In addition to evaluating these proposals, this report examines Australia's poor record of effective investigation and prosecution of possible foreign bribery offences, and explores other reform measures to strengthen Australia's foreign bribery framework.

1.20 The report is divided into three parts and an Appendix.

### *Part 1—Overview*

1.21 Part 1 consists of three chapters which provide an overview of Australia's anti-foreign bribery framework and where Australia is placed in relation to its international obligations. It explains how Australia investigates foreign bribery allegations and discusses the shortcomings of Australia's enforcement record in this area. The part then examines the adequacy of the government's recent initiatives to address the problem.

#### *Chapter 1—Introduction*

#### *Chapter 2—Australia's anti-foreign bribery framework*

1.22 This chapter examines Australia's international foreign bribery obligations and the way in which they have been implemented through domestic law. It then outlines recent developments in anti-foreign bribery legislation before looking at relevant reports examining the effectiveness of Australia's anti-foreign bribery framework.

#### *Chapter 3—Investigation and enforcement*

1.23 This chapter discusses the different roles of government departments and agencies in identifying and investigating instances of foreign bribery. It also examines the evidence relating to the enforcement of anti-foreign bribery legislation, before exploring some of the criticisms raised by stakeholders about what is perceived to be a

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12 Crimes Legislation (Combatting Corporate Crime) Bill 2017, Schedule 1.

13 Crimes Legislation (Combatting Corporate Crime) Bill 2017, Schedule 2.

14 Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017.

lack of enforcement in this area, and the relevant government initiatives taken since the establishment of this inquiry.

### ***Part 2—Strengthening Australia's legal framework against foreign bribery***

1.24 Part 2 consists of three chapters which concentrate on what legislative reforms are required to overcome the current challenges of establishing criminal liability for companies for the offence of foreign bribery; identifying instances of foreign bribery; and protecting whistleblowers who disclose foreign bribery. It assesses the current bills before Parliament—the Crimes Legislation (Combating Corporate Crime) Bill 2017 and the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017)—what they seek to address and what they overlook.

#### *Chapter 4—Reforming the foreign bribery offence*

1.25 In this chapter the committee evaluates the government's proposed legislative amendments to the foreign bribery offence and how they correlate with the government's earlier public consultation. It also considers how the proposed reforms to the foreign bribery offence may assist Australia to combat the bribery of foreign public officials and ensure individuals and companies are held to account.

#### *Chapter 5—Encouraging self-reporting—A proposed deferred prosecution agreement scheme*

1.26 In this chapter the committee evaluates the government's proposed model for a DPA scheme in Australia and how it correlates with the government's earlier public consultations. It also considers the evidence received by the committee in relation to the introduction of a DPA scheme in Australia, including the use of such agreements internationally.

#### *Chapter 6—Protecting whistleblowers who expose foreign bribery*

1.27 This chapter examines Australia's current whistleblower protections and considers how they can be improved. It also considers the government's proposed amendments to the whistleblower protection regime for the corporate and financial sectors.

### ***Part 3—Building a culture of integrity and compliance***

1.28 Part 3 consists of two chapters that identify further changes that could be enacted to bring Australia up to date with systems in comparative countries and, in doing so, signal that Australia is serious about combatting foreign bribery (and other forms of corruption). It assesses the adequacy of the government's proposed initiatives and what more needs to be done in light of what has been examined and recommended in evidence to the inquiry and other consultations, including the Phase 4 OECD Report. In particular, it looks at ways that Australia can create a corporate culture of integrity and compliance.

#### *Chapter 7—The facilitation payment defence*

1.29 This chapter considers the facilitation payment defence in Australia, scrutinises its prevalence internationally, and examines arguments to retain or abolish the defence within Australia's anti-bribery legislative framework.

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*Chapter 8—Other reform options*

1.30 In this chapter the committee evaluates other possible options to strengthen Australia's foreign bribery framework and the relevant experience in other jurisdictions, including the expansion of the register of beneficial ownership, a debarment model, and development of official guidance relating to compliance with Australia's foreign bribery laws.

*Appendix 1—Examples of foreign bribery*

1.31 To provide some context of the scale and magnitude of foreign bribery, this appendix provides a brief outline of some of the most egregious case examples of foreign bribery involving Australian entities.

**Acknowledgements**

1.32 During the course of the inquiry, the committee has benefitted greatly from the participation of Australian corporations, entities, organisations, individuals, government and related parties. The committee thanks all those who assisted with the inquiry, especially the witnesses who put in extra time and effort to answer written questions on notice and provide valuable feedback to the committee as it gathered evidence.

