Chapter 8

Other reform options

8.1 This chapter evaluates other possible 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 debarring companies or individuals convicted of foreign bribery from public procurement contracts.

8.2 In light of the challenges of investigating and prosecuting foreign bribery claims, and the weak enforcement record in Australia (discussed in Chapter 3), this chapter 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.

Expansion of the register of beneficial ownership

8.3 Company structures can be used to disguise the identity of those involved in illicit activities, including bribery. This is achieved through mechanisms such as the use of: shell companies; complex ownership and control structures; bearer shares and share warrants; and nominee shareholders where the nominator is not disclosed.[1] Such actions have the potential to endanger confidence in the tax system and undermine the perceived legitimacy and validity of business and company regulatory processes and requirements.[2]

8.4 The importance of improving the collection and utilisation of beneficial ownership information has been recognised by the government and a consultation process has been undertaken by the Treasury with a view to considering what action may be needed in this area.[3] However, the consultation paper was silent on whether

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1 Australian Government, The Treasury, *Increasing transparency of the beneficial ownership of companies: Consultation Paper*, February 2017, p. 1, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 12 January 2018).

2 Australian Government, The Treasury, *Increasing transparency of the beneficial ownership of companies: Consultation Paper*, February 2017, p. 1, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 12 January 2018).

3 Department of Prime Minister and Cabinet, *1.2—Beneficial ownership transparency*, https://ogpau.pmc.gov.au/commitment/12-beneficial-ownership-transparency (accessed 27 November 2017).

any potential register of beneficial ownership information should be publicly available.[4]

Delays and shortcomings

8.5 Submissions to the Treasury consultation on a register of beneficial ownership closed in March 2017, and the Open Government Partnership webpage notes the implementation is 'delayed'.[5] Aside from silence on the issue of public access, the consultation explicitly excludes the inclusion of trusts on the register. The Financial Action Task Force found the Australian regime to be 'completely non-compliant' in regard to trusts.[6] This is confirmed by Treasury documents prepared for the government, available through Freedom of information.[7] There is little publically available evidence to demonstrate progress of the beneficial ownership register, let alone the possibility of an expansion.

Support for a centralised public, free and open register

8.6 Many stakeholders who contributed to this inquiry supported a centralised, public, free and open data register and brought to the committee's attention the numerous benefits such a register would provide.

8.7 In offering his support for a public register of beneficial ownership of companies, Dr Mark Zirnsak, Director of the Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, stressed that a public register would 'help remove intermediaries where shell companies are used to hide who is actually paying the bribe'.[8]

8.8 Dr Zirnsak went on to explain that the advantage of having a public register, as opposed to a register that only law enforcement authorities can see, was that it would allow companies to look at whom they are dealing with:

> …the advantage of having a public register for entities that have a reporting obligation under the anti-money-laundering laws is that it makes their due diligence efforts much easier to pursue…I think the benefits of a public register, with the ability to apply for an exemption, far outweigh any

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4 Chartered Accountants Australia and New Zealand, Submission to the Treasury consultation on Increasing Transparency of the Beneficial Ownership of Companies, March 2017, p. 7, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 26 February 2018).

5 Australian Government, Department of the Prime Minister and Cabinet, *Open Government Partnership Australia: 1.2—Beneficial ownership transparency*, https://ogpau.pmc.gov.au/commitment/12-beneficial-ownership-transparency (accessed 22 March 2018).

6 Australian Government, The Treasury, FOI 2075—Documents, pp. 26–27, https://static.treasury.gov.au/uploads/sites/1/2017/06/FOI_2075_Document_3.pdf (accessed 22 March 2018).

7 Australian Government, The Treasury, *FOI 2075—Documents*, https://static.treasury.gov.au/uploads/sites/1/2017/06/FOI_2075_Document_3.pdf (accessed 22 March 2018).

8 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 1.

> disadvantage to the public register, compared to keeping it for law enforcement authorities.[9]

8.9 In evidence before the committee, Mr Nick McKenzie emphasised the 'need for more transparency around beneficial ownership', and suggested that a public register of beneficial ownership of companies would be 'a terrific thing to happen'. Mr McKenzie considered that:

> …the reasons for secrecy are far outweighed by the reasons for transparency. And if we had that, it would serve as a deterrent to financial crime, to taxation and to all sorts of crime types that include foreign bribery, and it should be looked at very, very seriously.[10]

8.10 The majority of submissions to the Treasury consultation process also argued for any register of beneficial ownership to be publicly available and free to access.[11] For example, Action Aid commented that:

> …transparency of beneficial ownership has significant benefits not just for Australia, but also for lower-income countries where increased public revenue will allow governments to better meet their development objectives. However these benefits will only be realised if Australia ensures beneficial ownership information is centrally maintained and publicly accessible, automatically exchanged between authorities, and collected from trusts as well as companies.
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> …
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> Adequate accessibility by non-government stakeholders requires that information is easily available to the public and access to this information is not prohibitively expensive. ActionAid therefore recommends that a central register is maintained by the government, and information held on the register can be accessed free of charge.[12]

8.11 Publish What You Pay Australia also raised concerns about the approach being taken by the government:

> The movement towards beneficial ownership registries is towards open and accessible information. A closed registry demonstrates a lack of leadership by Australia in the region, puts us out of step with the global community,

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9 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 5.

10 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, p. 11.

11 See, for example, the following submissions to the Treasury consultation on Increasing Transparency of the Beneficial Ownership of Companies: Transparency International Australia, Tax Justice Network Australia, Nook Studios, Dr Madeleine Roberts, and Institute of Public Accountants, March 2017 https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 26 February 2018).

12 Action Aid, Submission to the Treasury consultation on Increasing Transparency of the Beneficial Ownership of Companies, March 2017, p. 2, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 26 February 2018).

> and threatens the success and sustainability of the numerous global initiatives Australia has committed itself to.[13]

8.12 The B Team highlighted numerous benefits for business of a centralised, public, free and open data register, including:

- enabling business to efficiently access and use information on who they are doing business with, reducing the costs and complexity of due diligence and risk management;[14] and
- facilitating broad scrutiny of information to identify discrepancies and fraud, providing businesses with additional ways to identify false information.[15]

8.13 In a submission to the Treasury consultation, Associate Professor David Chaikin, a Barrister and Chair of the Discipline of Business Law at the University of Sydney Business School, argued that charging fees to access the central register would undermine the basic goal of transparency:

> If Australia continues to charge fees for accessing corporate information, the potential benefits of a central registry will be more limited than is the case, say in the United Kingdom, which permits the entire PSC [UK Register of People with Significant Control] data set to be downloaded by the public at no cost.[16]

The UK Register of People with Signification Control

8.14 The Register of People with Significant Control (PSC) requires UK companies and limited liability partnerships (LLPs) to maintain a mandatory statutory register of certain people with significant control (who are generally individuals). Companies and LLPs must keep their PSC registers publicly accessible. Anyone (an individual or organisation with a proper purpose) may have access to a company's register free of charge. They must make a request which sets out their name and their address. If they are an organisation they must include a name and address of an individual responsible for making the request on the organisation's behalf and their

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13 Publish What You Pay Australia, Submission to the Treasury consultation on Increasing Transparency of the Beneficial Ownership of Companies, March 2017, p. 8, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 26 February 2018).

14 The B Team, Submission to the Treasury consultation on Increasing Transparency of the Beneficial Ownership of Companies, March 2017, p. 1, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 26 February 2018).

15 The B Team, Submission to the Treasury consultation on Increasing Transparency of the Beneficial Ownership of Companies, March 2017, p. 2, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 26 February 2018).

16 Dr David Chaikin, Submission to the Treasury consultation on Increasing Transparency of the Beneficial Ownership of Companies, March 2017, p. 4, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 26 February 2018).

purpose in seeking the information. A company must respond to the request within five working days.[17]

8.15 Transparency International Australia (TIA) also drew the committee's attention to the UK's PSC, commenting that:

> Very few companies have objected at all, and the ones that did object seem to have shell company issues, with finding out who's behind those. Who owns what in this country? We have made no progress towards an initiative about that. It seems to me that the funding of ASIC [Australian Securities and Investment Commission] would be essential to enable that to happen.[18]

ASIC's role

8.16 The consultation paper on increasing the transparency of beneficial ownership of Australian companies questioned who would be best placed to operate and maintain such a register. It stated:

> Such a register could be operated by ASIC in addition to or as part of the register of company information which it already operates and maintains. It could also be operated by a different government entity which is already involved in maintaining registers of information, such as the Australian Business Register. Alternatively, such a register could be privately operated.[19]

8.17 In considering which agency should have responsibility for maintaining a public register of beneficial ownership in Australia, Dr Zirnsak suggested to the committee that:

> At this stage, it seems to make most sense to have it with ASIC, given ASIC has the current corporate register. From an Australian point of view, it's an expansion of the existing corporate register. We currently have on the [public] record directors' names and their home addresses, which need to be on the register. I'm unaware of any real evidence that it's created any problems. [20]

8.18 TIA agreed, stating that:

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17 United Kingdom Government, *PSC requirements for companies and limited liability partnerships*, https://www.gov.uk/government/publications/guidance-to-the-people-with-significant-control-requirements-for-companies-and-limited-liability-partnerships (accessed 15 January 2018).

18 Mr Michael Ahrens, Director, Transparency International Australia, *Committee Hansard*, 7 August 2017, p. 25.

19 Australian Government, The Treasury, *Increasing transparency of the beneficial ownership of companies: Consultation Paper*, February 2017, p. 15, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 12 January 2018).

20 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 5.

> ASIC ought to be funded with a system which enables the determination of source of funds and who are the ultimate beneficial owners…[21]

8.19 Indeed, a number of submitters to the consultation also suggested that the central register would best be operated by ASIC given their role in maintaining the existing register of company information.[22]

Committee view

8.20 Evidence presented to the committee established that there is a need for more transparency around beneficial ownership, and the committee believes that a centralised, public and open mandatory register will serve as a deterrent to all sorts of crime types, including foreign bribery.

8.21 The committee is of the view that the benefits of a publicly accessible central register of beneficial ownership for companies and other corporate structures will be an invaluable resource for businesses interacting with each other. In particular, the committee considers that the transparency of a public register will make due diligence activities by companies easier and help to identify who the intermediaries are, where shell companies may be being used to hide who is actually involved in paying a bribe. Identifying a company's intermediaries—which could be third party agents, such as local sales and marketing agents, distributors and brokers; or corporate vehicles, such as subsidiary companies, local consulting firms, companies located in offshore financial centres or tax havens—is important to ensuring companies know exactly who they are dealing with, and whether they have a history of bribery and corruption.

8.22 The committee believes that a publicly accessible central register of beneficial ownership for companies will also benefit journalists, academics, advocacy groups and other interested parties to identify links between companies.

8.23 Given ASIC has responsibility for the current corporate register, the committee considers that it is best placed to establish and maintain this information and to ensure it is publicly available.

Recommendation 19

8.24 The committee recommends that Australian Securities and Investment Commission expand the register of beneficial ownership to require companies, trusts and other corporate structures to disclose information regarding their beneficial ownership; and that this information be maintained in a central register.

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21 Mr Michael Ahrens, Director, Transparency International Australia, *Committee Hansard*, 7 August 2017, p. 25.

22 See, for example, submissions to the Treasury consultation on a register of beneficial ownership by Tax Justice Network Australia and The Law Council of Australia, March 2017, https://treasury.gov.au/consultation/increasing-transparency-of-the-beneficial-ownership-of-companies/ (accessed 26 February 2018).

Integrity in public procurement

8.25 The Department of Finance (DoF) is responsible for financial accountability in government spending, including grants and procurement policy.[23]

8.26 Procurement by relevant Commonwealth authorities must follow the Commonwealth Procurement Rules (Procurement Rules) issued by DoF. At a high-level, the Procurement Rules govern the way in which relevant Commonwealth authorities undertake their own procurement processes,[24] while also allowing such authorities the discretion to:

> …use Accountable Authority Instructions to set out entity-specific operational rules to ensure compliance with the rules of the procurement framework.[25]

8.27 With respect to ethical behaviour, the current Procurement Rules provide that:

> Relevant entities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe. This includes not entering into contracts with tenderers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order. Officials should seek declarations from all tenderers confirming that they have no such unsettled orders against them.[26]

8.28 However, while it is true that under the current Procurement Rules, relevant authorities have the discretion to debar [preclude] companies convicted of domestic or foreign bribery from public procurement contracts, this is not clearly stated.

8.29 Ms Kelly Williams of the Attorney-General's Department (AGD) confirmed that 'there aren't any specific debarment policies for procurement by the Australian Government'.[27] Mr Tom Sharp of AGD went on to confirm that:

> The advice from Finance is that there is no change at this point to the current policy position around the Commonwealth procurement framework and there is no intention to introduce the debarment policy…[28]

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23 Australian Government, Department of Finance, Policy and Legislation, *Matters dealt with by the Department*, https://www.finance.gov.au/policy-legislation.html (accessed 22 January 2018).

24 Australian Government, Department of Finance, *Commonwealth Procurement Rules: Achieving value for money*, 1 January 2018, https://www.finance.gov.au/sites/default/files/commonwealth-procurement-rules-1-jan-18.pdf (accessed 22 January 2018).

25 Australian Government, Department of Finance, *Commonwealth Procurement Rules: Achieving value for money*, 1 January 2018, p. 6, https://www.finance.gov.au/sites/default/files/commonwealth-procurement-rules-1-jan-18.pdf (accessed 22 January 2018).

26 Australian Government, Department of Finance, Commonwealth Procurement Rules: Achieving value for money, 1 January 2018, p. 15, https://www.finance.gov.au/sites/default/files/commonwealth-procurement-rules-1-jan-18.pdf (accessed 22 January 2018).

27 Ms Kelly Williams, Assistant Secretary, Criminal Law Reform Section, Attorney-General's Department, *Committee Hansard*, 31 October 2017, p. 49.

28 Mr Tom Sharp, Senior Legal Officer, Criminal Law Reform Section, Attorney-General's Department, *Committee Hansard*, 31 October 2017, pp. 49–50.

Government failure to implement OECD public procurement recommendation

8.30 The 2012 Phase 3 OECD Report expressed concern about the lack of transparent policies and guidelines for the debarment of persons convicted of foreign bribery from public procurement contracts. In particular, the report noted:

> …that the absence of government-wide guidelines may lead agencies to overlook foreign bribery in exercising their discretion to debar. Without guidelines, agencies also may not verify whether a multilateral development bank (MDB) has debarred a potential contractor.[29]

8.31 Recommendation 16(a) of the 2012 Phase 3 OECD Report went on to reiterate the 2006 Phase 2 OECD Report Recommendation 6(b), that:

> Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals that have been convicted of foreign bribery.[30]

8.32 Indeed, one of the areas identified in the 2015 Phase 3 OECD Follow-Up Report for further work was the introduction of transparent debarment processes for government procurement agencies.[31] However, the December 2017 Phase 4 OECD Report noted:

> Australia states that, since Phase 3, it has not taken any specific steps to implement recommendation 16a. Regarding procurement contracts in relation to ODA [official development assistance], the evaluation team notes that in 2016, following Australia's Phase 3 review, the OECD adopted the Recommendation of OECD Council for Development Cooperation Actors on Managing the Risk of Corruption which states that Member countries should "put in place a sanctioning regime that is effective, proportionate and dissuasive" that includes "clear and impartial processes and criteria for sanctioning, with checks and balances in decision making to reduce the possibility of bias".[32]

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29 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 46, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 1 December 2017).

30 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia, October 2012*, p. 46, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 1 December 2017).

31 OECD Working Group on Bribery, A*ustralia: Follow up to the Phase 3 Report & Recommendations*, April 2015, p. 35, www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf (accessed 28 February 2018).

32 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p.46, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 1 January 2018).

8.33 The December 2017 Phase 4 OECD report found that the 2012 Phase 3 OECD Report Recommendation 16(a)[33] remained unimplemented and reiterated their recommendation that Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals convicted of foreign bribery.[34]

Support for a debarment framework

8.34 Commentaries on the OECD Convention and the government's failure to implement the Working Group's recommendations aside, submitters to the inquiry also offered their support for companies found guilty of breaches under foreign bribery laws being barred from entering into government contracts.[35]

8.35 Following the lead of a number of countries, including the UK, the US, Canada, and in connection with World Bank developments, Mr Neville Tiffen called on the government to introduce a system which debars organisations which have been guilty of integrity offences, including foreign bribery, from being able to bid for government work. Arguing that the introduction of a formal debarment system in Australia need not be codified in legislation, Mr Tiffen suggested that:

> The debarment prohibition should last for 10 years – this is the debarment period adopted by Canada and by the World Bank. The period could be pared back if the organisation enters into, and adheres to, some form of DPA [deferred prosecution agreement] or if the organisation self reports and fully cooperates with the regulators…The debarment provisions may need to have a very limited exception for public interest, as per the Canadian policy.[36]

8.36 TIA also supported debarment of companies from government work for breach of integrity offences, including foreign bribery. However, TIA also suggested that:

> Debarment provisions may need to have a very limited exception for public interest, for selfreported breaches but require subsequent full cooperation with the ensuing regulatory investigation.[37]

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33 Which reiterates the 2006 OECD Phase 2 Recommendation 6(b) See OECD Working Group on Bribery, *Australia: Phase 2 Report on the application of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 1997 Recommendation on Combatting Bribery in International Business Transactions*, 4 January 2006, http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/35937659.pdf (accessed 20 March 2018).

34 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 46, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 1 January 2018).

35 See, for example, Mr Neville Tiffen, *Submission 16*, p. 3; Associate Professor Cindy Davids, *Submission 34*, pp. 8–9.

36 Mr Neville Tiffen, *Submission 46*, p. 6.

37 Transparency International Australia, *Submission 31*, p. 8.

8.37 Mr Tiffen emphasised that such a debarment framework would act as a major deterrent:

> …a lot of companies fear debarment far more than the monetary penalties, because they're being cut out of future work and future earnings, and so in a lot of ways it's a much bigger incentive to avoid the crime in the first place.[38]

8.38 This opinion was shared by the International Bar Association Anti-Corruption Committee, who commented:

> In the Committee's experience, debarment is likely to have a far greater impact on corporations than a fine (or conviction assuming a company is ever criminally prosecuted).[39]

8.39 Mr Kane Preston-Stanley, a former lead legal and policy officer on Australia's anti-corruption program, also supported the idea of debarment. However, Mr Preston-Stanley emphasised the need for Commonwealth authorities to retain discretion as to whether a particular finding should preclude the tenderer from being awarded the contract.[40]

8.40 In firm contrast, Dr Zirnsak, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, was of the view that 'if a company has engaged in foreign bribery, they should be denied access to government contracts' and 'all government assistance…to act as a strong deterrent'.[41]

8.41 TIA also took a strong stance, arguing that that companies who engaged in foreign bribery 'should be debarred from obtaining incentives, subsidies, grants or loans from government agencies'. TIA recommend that:

> …it be a requirement for any organisation seeking government contracts or to be included in government programs, to set out its anti-bribery program, and this must be given effect in contractual provisions.[42]

8.42 Other submitters to the inquiry commented that even if a debarment system was not formally instituted in Australia, Commonwealth authorities could 'blacklist' offenders on the basis of other well-established foreign debarment systems, such as those used in the US or by the World Bank.

8.43 In the US, federal agencies operate under a common regulatory framework set out in the Federal Acquisition Regulation *48 CFR Part 9* (FAR) which specifies causes for debarment. While FAR provides for agencies to use discretion in deciding whether to debar contractors for specific conduct, it specifically provides that: a

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38 Mr Neville Tiffen, Private capacity, *Committee Hansard*, 31 October 2017, p. 3.

39 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 25.

40 Mr Kane Preston-Stanley, *Submission 40*, pp. 7–8.

41 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 4.

42 Transparency International Australia, *Submission 31*, p. 8.

conviction or civil judgment for foreign bribery; or 'any other offense indicating a lack of business integrity' are legitimate grounds for debarment.[43] However, the existence of a cause for debarment will not require that the contractor be debarred. Instead, the agency will look at the seriousness of the contractor's acts or omissions and any remedial measures or mitigating factors. Importantly, this includes an assessment of the suppliers 'present responsibility' (for example, does the supplier have effective internal controls in place, have they self-reported or cooperated with the government, or taken disciplinary actions against individuals involved in the act which caused the grounds for debarment, or implemented additional controls and compliance measures).[44]

8.44 Under the World Bank's sanctions system, companies who are found through an Integrity Vice Presidency investigation to have engaged in fraudulent, corrupt, collusive, coercive or obstructive practices are excluded from receiving World Bank-financed contracts, either permanently or for a designated period of time.[45] The World Bank Group reports that it's sanctions system:

> …places emphasis on debarred parties meeting certain integrity compliance conditions before they can once again participate in World Bank Group-financed projects. These conditions encourage debarred parties to focus on rehabilitating their business practices.[46]

8.45 The World Bank's website lists the firms and individuals ineligible to be awarded a World Bank-financed contract because they have been sanctioned under the World Bank's fraud and corruption policy as set forth in the Procurement Guidelines or the Consultant Guidelines. This list is freely accessible to the public and search friendly.[47]

8.46 Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania submitted that:

> Although generally governments are not bound by other governments' or institutions' debarment decisions, governments may "take note, and make informal enquiries, when another government or institution takes action against a contractor." Cross-debarment has the potential to increase anti-corruption efforts with minimal effort by allowing Australian authorities to exclude offenders from public-sector procurement contracts.[48]

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43 Federal Acquisition Regulation *48 CFR Part 9* § 9.406-2.

44 Federal Acquisition Regulation *48 CFR Part 9* § 9.406-1.

45 The World Bank, *Sanctions & Compliance*, http://www.worldbank.org/en/about/unit/integrity-vice-presidency/sanctions-compliance (accessed 22 January 2018).

46 The World Bank, *Sanctions & Compliance*, http://www.worldbank.org/en/about/unit/integrity-vice-presidency/sanctions-compliance (accessed 22 January 2018).

47 The World Bank, *World Bank Listing of Ineligible Firms & Individuals*, http://web.worldbank.org/external/default/main?theSitePK=84266&contentMDK=64069844&menuPK=116730&pagePK=64148989&piPK=64148984 (accessed 23 January 2018).

48 Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 17*, p. 24.

8.47 Indeed the 2006 Phase 2 OECD Report on Australia indicated that the Export Finance and Insurance Corporation (Efic) may also withhold or withdraw support for a contract where there is evidence, or even a suspicion, of bribery. The report stated:

> Although they do not maintain a [blacklist], EFIC representatives indicated that they do check the World Bank List of Debarred Firms, and that any application for official export credit support from one of the organisations listed therein would trigger particular scrutiny on the part of EFIC. There is however no formal requirement that support must automatically be refused or withdrawn where there has been a conviction for foreign bribery, whether in an Australian or a foreign jurisdiction. EFIC retains discretion to accept or refuse support, and each request is examined on a case-by-case basis. To date, the EFIC has not had any practical experience dealing with applicants or contractors convicted of foreign bribery.[49]

8.48 Mr McKenzie alleged that 'Australian Governments have been known to continue to award lucrative Commonwealth contracts to entities debarred from World Bank projects', and argued that:

> 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.[50]

Committee view

8.49 The committee notes that since 2006 the OECD has continuously raised the consideration of a debarment framework in Australia as an important issue. The committee also notes that the December 2017 Phase 4 OECD Report found that the 2012 Phase 3 OECD Report Recommendation 16a (2006 Phase 2 OECD Report Recommendation 6(b)) remained unimplemented, and reiterated their recommendation that Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals convicted of foreign bribery.

8.50 The committee believes that the government has been remiss in failing to adequately explore the notion of a foreign bribery debarment system for corporations in Australia.

8.51 The committee considers that the government has failed to implement the OECD recommendation that Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals that have been convicted of foreign bribery.

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49 OECD Working Group on Bribery, *Australia: Phase 2: Report on the application of the convention on combatting corporate bribery of foreign public officials in international business transaction and the 1997 recommendations on combatting crime in international business transactions*, January 2006, p. 53, http://www.oecd.org/corruption/anti-bribery/anti-briberyconvention/35937659.pdf (accessed 26 February 2018).

50 Mr Nick McKenzie, *Submission 43*, p. 45.

8.52 The committee agrees with submitters that authorities should be able to preclude companies found guilty of breaches of foreign bribery laws from entering into government contracts. The committee is of the view that government agencies conducting procurement processes should require disclosure of findings of liability for foreign bribery, after which the relevant agency would have the discretion to preclude the tenderer from being awarded the contract.

8.53 The committee suggests that the government consider the ways in which it can utilise the lists of offenders on other well-established foreign debarment systems, such as those used in the US or by the World Bank, and how they would operate in conjunction with the implementation of Australia's own debarment framework.

Recommendation 20

8.54 The committee recommends that the government introduce a debarment framework that would ensure companies are required to disclose if they have been found guilty of foreign bribery offences and give agencies the power to preclude the tenderer from being awarded a contract.

Building a culture of compliance

8.55 As stated in Chapter 4, the committee heard evidence about various international guidance relating to foreign bribery, including the US hallmarks, UK principles and International Standards Organisation Standard ISO 37001—Anti-bribery management systems.

Guidance

8.56 In addition to the guidance that will be required in respect of the new corporate offence of failing to prevent foreign bribery (also discussed in Chapter 4), submitters suggested that more general domestic guidance was needed to assist companies to identify their foreign bribery obligations and create awareness of the risks associated with non-compliance. The 2017 Phase 4 OECD Report also drew attention to the need for Australia to find additional ways to promote and encourage companies to comply with Australia's foreign bribery laws; in particular, small and medium-sized enterprises and those operating in the resource sectors and high-risk jurisdictions.[51]

8.57 Mr Tim Game of the Law Council of Australia told the committee that:

> At a practical level, parties seeking to comply diligently with foreign bribery obligations face significant hurdles in seeking to identify their legal obligations and appropriately document their compliance with these obligations.[52]

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51 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 55, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 11 January 2018).

52 Mr Tim Game SC, Co-Chair, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 7 August 2017, p. 44.

8.58 Mr Tiffen agreed with Mr Game that 'one of the issues facing companies is the different laws in different countries', and what different 'regulators expect from companies and whether they can be consistent'. Mr Tiffen pointed out that:

> It's all very well for every country to have their own guidance and laws. What we want is some internationally accepted regime as to what we think is a good compliance program…[53]

8.59 Mr Tiffen went on to suggest to the committee that together with strengthening our foreign bribery laws, the government needs to:

> …give clear guidance to companies to do the right thing and about what benefit there will be for them in doing those things…Australian regulators need to set out clear guidance as to what we mean when we use terms such as 'culture of compliance', and we need to encourage companies to self-report.[54]

8.60 Mrs Rebecca Davies of TIA reflected on the lack of awareness around foreign bribery in corporate Australia, and reminded the committee that 'we can't take it for granted that people are massively concerned about' foreign bribery. Mrs Davies suggested that the government needed to have guidance which focuses people's minds on the issue.[55]

8.61 Mr David Lehmann of KordaMetha Forensic observed that the key issue for corporations is the level of communication to all employees to create awareness. Mr Lehmann considered that:

> This gets to creating culture, and the key to it is leadership, with communication training being cascaded down throughout the organisation and, of course, leaders setting the example.[56]

8.62 Commander Tim Crozier of the Australian Federal Police (AFP) explained that the Fraud and Anti-Corruption Centre (FAC) and the AGD have material on their websites around foreign bribery.[57] However, the Phase 4 OECD Report stated that Australia itself noted that it could do more to promote its existing guidance material, particularly to small and medium sized enterprises.[58]

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53 Mr Neville Tiffen, Private capacity, *Committee Hansard*, 31 October 2017, p. 6.

54 Mr Neville Tiffen, Private capacity, *Committee Hansard*, 31 October 2017, p. 1.

55 Mrs Rebecca Davies, Director, Transparency International Australia, *Committee Hansard*, 7 August 2018, p. 21.

56 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 18.

57 Commander Tim Crozier, Manager, Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police, *Committee Hansard*, 31 October 2017, pp. 43–44.

58 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 55, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 11 January 2018).

8.63 In this context, the Phase 4 OECD Report found that, despite awareness raising efforts by the government:

> …for the most part, anti-corruption compliance is still driven by the private sector itself, and that there was very little in the way of accessible written guidance for businesses generally. One representative noted that while there has been a substantial shift in corporate culture in recent years, this was mainly due to the fear of enforcement action from other jurisdictions (e.g. the United Kingdom and United States), rather than Australia.[59]

Self-reporting

8.64 In the context of discussing mechanisms to help foster a willingness on the part of companies to self-report in the situation of foreign bribery, ASIC explained that while they do not have a policy which relates specifically to foreign bribery, they do have a published cooperation policy. Mr Chris Savundra explained that the policy sets out ASIC's expectations around cooperation and the benefits to both individuals and corporations from cooperating with ASIC investigations.[60]

8.65 Mr Savundra suggested that by incentivising self-reporting to identify instances of foreign bribery, matters will be identified in a 'much more timely fashion than has been the case so that, rather than emerging five or six years after the event, it's much closer to the event'.[61]

8.66 Mr Shane Kirne of the Commonwealth Director of Public Prosecutions (CDPP) informed the committee at an October 2017 hearing that the CDPP and the AFP had been working together for some time on a self-reporting foreign bribery protocol directed at corporate entities. Mr Kirne suggested that this protocol was 'reasonably close to finalisation', and further explained that:

> The view is that we're conscious the enforcement level is low, and has been. We can try to work on innovative ways to try to incentivise corporations to come forward. That protocol is based largely on a very significant factor—but this is not the only factor: whether the corporation has self-reported the conduct. That would be a major factor we would have regard to in weighing up the public interest and whether to prosecute.[62]

8.67 However, Mr Kirne went on to draw attention to the need for any self-reporting protocol to operate in concert with any implemented deferred prosecution agreement (DPA) scheme. Mr Kirne stated:

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59 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 54, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 11 January 2018).

60 Mr Chris Savundra, Chief Legal Officer, Australian Securities and Investments Commission, *Committee Hansard*, 31 October 2017, p. 25.

61 Mr Chris Savundra, Chief Legal Officer, Australian Securities and Investments Commission, *Committee Hansard*, 31 October 2017, p. 40.

62 Mr Shane Kirne, Deputy Director and Practice Group Leader, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 31 October 2017, p. 28.

> …we don't want the deferred prosecution agreement scheme or even that self-reporting guideline to be a means by which companies just self-report and nothing happens to those who are most culpable. So part of one of the public interest factors would not just be self reporting, it would be willingness to cooperate.[63]

8.68 Mr Kirne considered that any implemented DPA scheme would take 'some time' to be effective and therefore explained that the CDPP 'are looking at some other means to try and incentivise, and work with industry and companies to get companies to self-report'.[64]

December 2017 developments

8.69 The December 2017 Phase 4 OECD Report highlighted the need for Australia to issue guidance on voluntary reporting. The Report stated:

> At the time of Phase 3, three companies had self-reported foreign bribery to AFP. However, AFP did not have clear guidance for dealing with such reports. The WGB [Working Group on Bribery] thus recommended that Australia develop a clear framework to address matters such as the nature and degree of cooperation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company's cooperation; measures to monitor the company's compliance with any resulting plea agreement; and the prosecution of natural persons related to the company (recommendation 9).[65]

8.70 However, the Phase 4 OECD Report also noted that:

> In late 2016, AFP and CDPP released a draft Best Practice Guideline on Self-Reporting of Foreign Bribery and Related Offending by Corporations. This draft Guideline explains the principles and processes that AFP and CDPP will apply where a corporation self-reports conduct involving suspected foreign bribery. The draft Guideline aims to incentivise companies to self-report by giving them greater information about how such a report will be handled by AFP and CDPP. The draft Guideline operates within the framework of the Prosecution Policy of the Commonwealth and does not change existing policy. It describes the public interest factors that CDPP will take into account in deciding whether or not to prosecute a corporation that self-reports suspected foreign bribery; and, if a prosecution is commenced, how the self-report will be taken into account by a court when sentencing the corporation. Australia intends to finalise the

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63 Mr Shane Kirne, Deputy Director and Practice Group Leader, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 31 October 2017, p. 28.

64 Mr Shane Kirne, Deputy Director and Practice Group Leader, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 31 October 2017, p. 40.

65 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 50, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 11 January 2018).

> Guidelines by the end of 2017. However, until it is published and Australia takes steps to raise awareness of it among the private sector, it would appear that Australian companies remain in the same situation as in Phase 3, and do not have a clear framework for voluntary reporting. Phase 3, recommendation 9 is therefore only partially implemented. [66]

8.71 In addition to the continuing absence of clear guidance for companies on the framework for voluntary reporting, the Phase 4 OECD Report also observed that:

> …at the on-site [visit], a major Australian company in the extractives sector stated that more awareness was needed about where to go to make a voluntary report. The same company stated that this kind of awareness is essential to encourage voluntary reporting. AFP provides that there are a number of ways that companies can self-report, including through AFP's Operations Coordination Centre, FACC, or ASIC. Interestingly, five of the 57 cases of foreign bribery that had been the subject of enforcement actions were detected through self-reporting, including one case that was reported to the law enforcement authorities in another country.[67]

8.72 Following the introduction of the Crimes Legislation (Combatting Corporate Crime) Bill 2017 (CCC bill) on 7 December 2017, on 8 December 2017 the AFP and the CDPP issued Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations* (Guidelines for self-reporting).[68]

8.73 DLA Piper suggested that the Guidelines for self-reporting 'appear to be a response to a criticism raised' in this inquiry 'about the absence of such assistance'.[69] DLA Piper commented that:

> Many submissions were critical of the lack of formal guidance available in relation to Australian bribery offences. There is a clear desire for information based guidelines, such as those which have been produced in the UK and United States, which set out how the bribery offences operate

66 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 51, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 11 January 2018).

67 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 51, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 11 January 2018).

68 AFP and CDPP Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations*, 8 December 2017, https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf (accessed 12 February 2018).

69 DLA Piper, *Greater clarity on self-reporting foreign bribery offences: Regulatory Update*, 30 January 2018, https://www.dlapiper.com/en/australia/insights/publications/2018/01/greater-clarity-on-self-reporting-foreign-bribery-offences/ (accessed 26 February 2018).

> and detail what practical steps can be taken to avoid being guilty of an offence.[70]

8.74 Allens Linklaters observed that the Guidelines for self-reporting will encourage more self-reporting and cooperation by corporates, noting that:

> In particular, they (i) clarify that a 'self-report' can be made by a corporation without admitting criminal responsibility; and (ii) specify that self-reporting will be treated as a 'significant' public interest factor against prosecution when applying the second stage of the CDPP Prosecution Policy test (with further guidance around what, specifically, will be taken into account when assessing the public interest in prosecuting a self-reporting and cooperating corporate).[71]

8.75 However, Allens Linklaters also observed that as the CDPP retains its broad discretion to prosecute a corporate that self-reports and cooperates with an AFP investigation, ultimately, the Guidelines for self-reporting:

> …[offer] less certainty to self-reporting corporates than, for example, the ACCC immunity and cooperation policy for cartel conduct (where an offer of immunity is highly likely if the conditions set out in that policy are fulfilled), and contrasts with the position in the US, where the new FCPA enforcement section of the US Attorney's Manual provides a presumption of declination (ie a decision not to prosecute) for self-reporting and cooperating corporates.[72]

8.76 Herbert Smith Freehills explained how the Guidelines for self-reporting may affect sentencing in a matter, where authorities decide to prosecute a company that self-reports, and that company is willing to consider making an early guilty plea:

> Self-reporting and co-operation with an AFP investigation are relevant to sentencing. Section 16A of the *Crimes Act 1914* (Cth) establishes factors which must be taken into account by a court during sentencing. These include the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences.
>
> Significant discounts may be offered where that occurs. By way of example, in *Commonwealth Director of Public Prosecutions v Nippon Yusen Kabushiki Kaisha* [2017] FCA 876, the defendant received a 40% discount in recognition of their past cooperation, assistance, guilty plea,

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70 DLA Piper, *Foreign Bribery, The inquiry, Briefing paper on the Senate inquiry into Australia's foreign bribery regime*, October 2015, https://connect.dlapiper.com/RS/emsdocuments/Publications/Foreign_Bribery_The_Inquiry_October_2015_LR.pdf (accessed 26 February 2018).

71 Allens Linklaters, International business obligations, *Focus: Best practice guidelines for self-reporting of foreign bribery*, 9 February 2018, https://www.allens.com.au/mobile/page.aspx?page=/pubs/ibo/foibo9feb18.htm (accessed 26 February 2018).

72 Allens Linklaters, International business obligations, *Focus: Best practice guidelines for self-reporting of foreign bribery*, 9 February 2018, https://www.allens.com.au/mobile/page.aspx?page=/pubs/ibo/foibo9feb18.htm (accessed 26 February 2018).

> contribution and remorse, and an additional 10% discount for future cooperation.[73]

8.77 While it is unclear how the Guidelines for self-reporting will interact with the amendments proposed in the CCC bill, especially the anticipated DPA scheme, the Guidelines state that:

> AFP and the CDPP will review the operation of this Guideline within two years or earlier in the event that a Deferred Prosecution Agreement Scheme commences.[74]

Committee view

8.78 For the new foreign bribery framework to succeed, the committee considers that it is extremely important to develop a culture of risk awareness across the corporate sector. The committee is of the view that this involves developing understanding of the need for participation and ongoing cooperation at all levels.

8.79 The committee understands that at a practical level, those seeking to comply with foreign bribery obligations face significant hurdles in seeking to identify their legal obligations. The committee therefore considers that it is essential for the government to issue domestic guidance to provide clarity and direction on the overarching intent of Australia's foreign bribery framework. In order to be effective, the committee believes that it is important that such guidance be practical and accessible.

8.80 While the committee acknowledges that the Guidelines for self-reporting will be updated to accommodate the anticipated DPA scheme, the issuance of such Guidelines ahead of pending legislation to expand Australia's foreign bribery laws means it is unclear how the two will interact.

8.81 Given the challenges of investigating and prosecuting foreign bribery, and the weak enforcement record in Australia, the committee considers it is essential that the government act to encourage self-reporting and cooperation by corporates, as well as the earlier resolution of proceedings. However, the committee is concerned that the government has rushed to issue the long-awaited Guidelines for self-reporting in response to the OECD's feedback in the Phase 4 OECD report.

8.82 The committee understands that the Guidelines for self-reporting foreign bribery and related offending are focussed only on corporations. The committee is concerned that no guidance has been developed for individuals or smaller companies about how and where they should go to make a voluntary report of foreign bribery. The committee is therefore of the view that in addition to the Guidelines for

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73 Herbert Smith Freehills, Legal Briefings, *New Australian Guidelines for self-reporting foreign bribery*,7 February 2018, https://www.herbertsmithfreehills.com/latest-thinking/new-australian-guidelines-for-self-reporting-foreign-bribery (accessed 26 February 2018).

74 AFP and CDPP Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations*, 8 December 2017, p. 2, paragraph 3, https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf (accessed 12 February 2018).

self-reporting by corporations, the government should publish practical information which can be used by individuals or small companies who wish to make a voluntary report of foreign bribery.

Recommendation 21

8.83 The committee recommends that the government provide practical guidance to companies to draw attention to domestic and international guidance relating to foreign bribery, and to increase awareness of the high-risk sectors and regions in which Australian businesses commonly operate.

Recommendation 22

8.84 The committee recommends that clear information be provided in the public domain about how and where an individual or a small company should go to make a voluntary report of foreign bribery.

Senator Chris Ketter

Chair