

## Chapter 2

### Australia's anti-foreign bribery framework

2.1 Australia has signed and ratified the Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), as well as the United Nations Convention Against Corruption (UNCAC). The principles enshrined in these conventions are embodied in Australia's criminal law—including through explicit anti-bribery provisions in the federal *Criminal Code Act 1995* (Criminal Code). Despite this commitment Australia's record in investigating and prosecuting foreign bribery matters is poor and, as a result, Australia has been criticised on its implementation of the conventions, particularly the OECD Convention.

2.2 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 foreign bribery framework.

#### International obligations

##### *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention)*

2.3 The OECD Convention was adopted by the OECD on 21 November 1997. It entered into force on 15 February 1999 and has been ratified by all 34 OECD member countries, as well as Argentina, Brazil, Bulgaria and South Africa.<sup>1</sup> Australia signed the OECD Convention on 7 December 1998 and it was ratified in Parliament on 18 October 1999.<sup>2</sup>

2.4 The preamble to the OECD Convention states that:

...bribery is a widespread phenomenon in international business transactions, including trade and investment, which raises serious moral and political concerns, undermines good governance and economic development, and distorts international competitive conditions...all

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1 Catherine Barker, *Australia's implementation of the OECD Anti-Bribery Convention*, Background Note, 7 February 2012, p. 1, [http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1403446/upload\\_binary/1403446.pdf;fileType=application/pdf#search=%222010s%20background%20note%20\(parliamentary%20library,%20australia\)%22](http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1403446/upload_binary/1403446.pdf;fileType=application/pdf#search=%222010s%20background%20note%20(parliamentary%20library,%20australia)%22) (accessed 1 December 2017).

2 OECD Working Group on Bribery, *Australia: Review of Implementation of the Convention and 1997 Recommendation*, 1999, p. 1, <http://www.oecd.org/daf/anti-bribery/anti-briberyconvention/2378916.pdf> (accessed 1 December 2017).

countries share a responsibility to combat bribery in international business transactions...<sup>3</sup>

2.5 Article 1 of the OECD Convention requires that signatories criminalise the bribery of foreign public officials:

Each Party shall take such measures as may be necessary to establish that it is a criminal offence under its law for any person intentionally to offer, promise or give any undue pecuniary or other advantage, whether directly or 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>4</sup>

2.6 Article 1 also requires that signatories criminalise the incitement, aiding and abetting, and authorisation of bribery of foreign public officials.<sup>5</sup>

2.7 The OECD Convention also contains provisions relating to sanctions, jurisdiction, enforcement, mutual legal assistance and extradition.<sup>6</sup>

### ***United Nations Convention against Corruption (UNCAC)***

2.8 UNCAC entered into force on 14 December 2005, and has 140 signatories and 178 parties. It was signed by Australia on 9 December 2003 and ratified by the Parliament on 7 December 2005.

2.9 Article 1 sets out the purposes of the UNCAC:

- (a) To promote and strengthen measures to prevent and combat corruption more efficiently and effectively;
- (b) To promote, facilitate and support international cooperation and technical assistance in the prevention of and fight against corruption, including in asset recovery;

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3 Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997, p. 6, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) (accessed 1 December 2017).

4 Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997, p. 6, article 1.1, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) (accessed 1 December 2017).

5 Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997, p. 6, article 1.2, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) (accessed 1 December 2017).

6 Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, 21 November 1997, p. 6, articles 3, 4, 5, 9–10, [http://www.oecd.org/daf/anti-bribery/ConvCombatBribery\\_ENG.pdf](http://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf) (accessed 1 December 2017).

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- (c) To promote integrity, accountability and proper management of public affairs and public property.<sup>7</sup>

2.10 Chapter III of UNCAC deals with criminalisation and law enforcement. In particular, article 16 provides:

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.
2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.<sup>8</sup>

2.11 Chapter IV of UNCAC deals with international cooperation, making provision for extradition, transfer of sentenced persons, mutual legal assistance, transfer of criminal proceedings, law enforcement cooperation, joint investigations and special investigative techniques.<sup>9</sup>

## **Domestic implementation of international obligations**

### ***Current legislative framework***

#### *The foreign bribery offence*

2.12 Division 70 of the Criminal Code embodies Australia's ratification of the OECD Convention. Division 70 was inserted in the Criminal Code by the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999*. It was designed to:

- prohibit providing or offering a benefit which is not legitimately due to another person with the intention of influencing a foreign public official in the exercise of his or her duties in order to obtain or retain business or obtain or retain a business advantage that is not legitimately due to the recipient or intended recipient;

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7 United Nations Office on Drugs and Crime, *United Nations Convention against Corruption*, New York, 2004, article 1, p. 7.

8 United Nations Office on Drugs and Crime, *United Nations Convention against Corruption*, New York, 2004, article 16, p. 17.

9 United Nations Office on Drugs and Crime, *United Nations Convention against Corruption*, New York, 2004, Chapter IV, pp. 30–41.

- apply the prohibition to conduct within and outside Australia, so long as, where the conduct occurs wholly outside Australia, the person is an Australian citizen or the company is a company incorporated in Australia;
- ensure that the ancillary offences of attempt, complicity, incitement and conspiracy which occur within and outside Australia apply where they relate to conduct included in the primary offence (clause 70.2); and
- ensure Australia complies with the key feature of the OECD Convention.<sup>10</sup>

2.13 Subsection 70.2(1) of the Criminal Code, as amended, provides that:

- (1) A person is guilty of an offence if:
  - (a) the person:
    - (i) provides a benefit to another person; or
    - (ii) causes a benefit to be provided to another person; or
    - (iii) offers to provide, or promises to provide, a benefit to another person; or
    - (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
  - (b) the benefit is not legitimately due to the other person; and
  - (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:
    - (i) obtain or retain business; or
    - (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

2.14 This liability can also attach to a body corporate:

- (1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part, and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.
- (2) A body corporate may be found guilty of any offence, including one punishable by imprisonment.<sup>11</sup>

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10 Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999, explanatory memorandum p. 2.

11 *Criminal Code Act 1995*, s. 12.1.

2.15 Prosecutions of foreign bribery by Australian corporations are not necessarily pursued under the Criminal Code and, depending on the type of offence, may be prosecuted under other Commonwealth or state legislation.<sup>12</sup>

2.16 The Criminal Code also provides for an Australian company to be held criminally liable for the acts of an employee, agent or officer acting within the actual or apparent scope of his or her employment.<sup>13</sup> In some circumstances this will mean that the current foreign bribery offence will apply to foreign subsidiaries of Australian companies. Section 12.3 of the Criminal Code outlines how the fault element of an offence can be attributed to the company, including by:

- a) proving that the body corporate's board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence, or
- b) proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence, or
- c) proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or
- d) proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.<sup>14</sup>

2.17 Therefore, dependent on the specific circumstances of a case, it may be possible to show that an individual in a foreign subsidiary is acting as an agent of the parent Australian company; and 'if one of the means of attributing liability above can be established, the Australian parent company would be liable for the acts of that individual'.<sup>15</sup>

### *Penalties*

2.18 Australia's foreign bribery legislation carries severe penalties through the Criminal Code. These were strengthened substantially in 2012. The applicable penalties currently are:

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12 See, for example, the discussion of the NPA and Securrency case in Appendix 1, where penalties for NPA and Securrency were ordered under the *Proceeds of Crime Act 2002*; and a former Chief Financial Officer of Securrency, Mr David Ellery, was sentenced under the *Crimes Act 1958* (Vic) for a false accounting offence case. See, *R v Ellery* [2012] VSC 349, [http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2012/349.html?stem=0&synonyms=0&query=title\(R%20and%20Ellery%20](http://www.austlii.edu.au/cgi-bin/sinodisp/au/cases/vic/VSC/2012/349.html?stem=0&synonyms=0&query=title(R%20and%20Ellery%20) (accessed 1 March 2018).

13 *Criminal Code Act 1995*, Division 12.

14 *Criminal Code Act 1995*, ss. 12.3(2). See also Attorney-General's Department, answers to questions on notice, 31 October 2017 (received on 17 November 2017), p. 4.

15 Attorney-General's Department, answers to questions on notice, 31 October 2017 (received on 17 November 2017), p. 4.

- for an individual:
  - imprisonment of up to 10 years; and/or
  - a fine of up to 10,000 penalty units, that is, \$2.1 million.<sup>16</sup>
- for a corporation, not more than the greatest of the following:
  - a fine of up to 100,000 penalty units (or a maximum amount of \$21 million);
  - if the court can determine the value of the benefit, the value of the benefit obtained directly or indirectly and which is reasonably attributable to the offending conduct, three times the value of the benefit; or
  - if the court cannot determine the value of the benefit, then 10 per cent of the annual turnover of the corporation during the 12 months ending at the end of the month in which the offending conduct occurred.<sup>17</sup>

### *Defences*

2.19 The two defences to the foreign bribery offence are that:

- the conduct concerned was permitted or required by a written law in the foreign public official's country (lawful conduct defence);<sup>18</sup> or
- the conduct amounted to payment of a facilitation payment.<sup>19</sup>

2.20 In order for the lawful conduct defence to be made out, it must be shown that the conduct of the foreign public official was lawful in the foreign public official's country, subject to a written law in force in that foreign country or in the part of the foreign country as the case may be. The source of applicable law will differ according to the nature of the connection of the officer with the foreign government or public international organisation.<sup>20</sup>

2.21 In order for the facilitation payment defence to be made out: the value of the payment must be minor; the payment must be made for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and as soon as practicable after the conduct occurred, the payer must make and keep a signed record of the payment setting out its value, date, the identity of the foreign public official and any other person directly involved in the payment, and

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16 Pursuant to *Crimes Act 1914*, ss. 4AA(1), a penalty unit is currently \$210.

17 *Criminal Code Act 1995*, ss. 70.2(4) and (5).

18 *Criminal Code Act 1995*, s. 70.3.

19 *Criminal Code Act 1995*, s. 70.4.

20 As a result of the outcome of the Australian Wheat Board Case, discussed in more detail in Appendix 1, the Criminal Code was amended to clarify that the benefit offered must be required or permitted in the *written* law of the place or country. The various sources of applicable law are set out in the table in ss. 70.3(1) of the Criminal Code.

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particulars of the relevant routine government action. The facilitation payment defence is discussed in more detail in Chapter 7.

#### *Territorial and nationality requirements*

2.22 Section 70.5 of the Criminal Code outlines the territorial and nationality requirements of the foreign bribery offence. Specifically, it applies where the conduct constituting the offence:

- occurs in Australia, or on board an Australian aircraft or an Australian ship; or
- outside Australia, where at the time of the alleged offence, the person who is alleged to have committed it is: an Australian citizen; a resident of Australia, or a body corporate incorporated by or under a law of the Commonwealth or of a state or territory.<sup>21</sup>

2.23 As such, if a company or its subsidiary is not incorporated under Australian law, then it is not covered by Australia's foreign bribery offence unless the relevant conduct occurred in Australia or on board an Australian aircraft or an Australian ship.

#### *Time for commencement of prosecutions*

2.24 The time period for commencing a prosecution under any of the above provisions is the same as for all criminal offences—which pursuant to section 15B of the *Crimes Act 1914* means that a prosecution may be commenced against an individual at any time if the maximum penalty is a term of imprisonment of more than six months in the case of a first conviction. Likewise, a prosecution of a body corporate may be commenced at any time if the maximum penalty is a fine of more than 150 penalty units in the case of a first conviction.

2.25 Therefore, as the offence carries a maximum term of imprisonment of 10 years for an individual and a maximum fine of 100 000 penalty units for a body corporate, a criminal prosecution for the offence of foreign bribery can be commenced at any time.

#### *False accounting provisions*

2.26 In 2016 the Criminal Code was amended to insert new false accounting provisions. This was, in part, in response to recommendations by the OECD Working Group on Bribery in 2012 that Australia tailor existing false accounting offences to address foreign bribery as well as increase the maximum sanctions against legal persons for false accounting.<sup>22</sup>

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21 Attorney-General's Department, answers to questions on notice, 31 October 2017 (received on 17 November 2017), p. 3.

22 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 17, <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf> (accessed 1 December 2017).

2.27 The new false accounting laws created a criminal offence, punishable by significant penalties, of intentionally or recklessly falsifying accounting documents.<sup>23</sup> Specifically, Division 490.1 of the *Corporations Act 2001* (Corporations Act) creates an offence for intentional false dealing with accounting documents; and Division 490.2 creates an offence for reckless dealing with accounting documents. Penalties for individuals are 10 years imprisonment and/or 10 000 penalty units; and for corporate offenders 100 000 penalty units or three times the value of the benefit if established; or 10 per cent of 12 month turnover if value cannot be established. Offences apply to any Australian resident, citizen or corporation as well as any employees or persons engaged to do work for the corporation, in and outside Australia. The accounting documents themselves need not be in Australia, and can apply to accounting documents that are kept under Commonwealth law, or kept to record the receipt or use of Australian currency.<sup>24</sup>

### ***Recent developments***

2.28 This part of the chapter is separated by the subject matter of recent developments in anti-foreign bribery legislation and is not in chronological order.

#### *Amendments to the foreign bribery offence*

2.29 In April 2017, the Attorney-General's Department (AGD) released draft legislation and a public consultation paper outlining proposed amendments to the foreign bribery offence in the Criminal Code (2017 consultation paper). In summarising the need for change, the 2017 consultation paper noted:

The Government is exploring possible amendment to this offence to improve its effectiveness in addressing foreign bribery, and to remove possible impediments to a successful prosecution...

The offence in its current form poses challenges for typical cases of foreign bribery, which may involve the use of third party agents or intermediaries, instances of wilful blindness by senior management to activities occurring within their companies and a lack of readily available written evidence.<sup>25</sup>

2.30 The 2017 consultation paper outlined the following proposed amendments to the foreign bribery offence:

- extend the definition of foreign public official to include candidates for office;

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23 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 1.

24 Pre-existing concealment and falsification of company books and provision of false information offences contained in s. 1307 and 1309 of the *Corporations Act 2001* remain. However, it is important to note that in relation to civil penalty proceedings under the *Corporations Act 2001*, proceedings must be commenced within six years (s. 1317K).

25 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 1.



- remove the requirements that the benefit/business advantage must be 'not legitimately due' and replace it with the concept of 'improperly influence' a public official;
- extend the offence to cover bribery to obtain a personal advantage;
- create a new foreign bribery offence based on the fault element of recklessness;
- create a new corporate offence of failing to prevent foreign bribery;
- remove the requirement of influencing a foreign public official in the exercise of their official capacity; and
- clarify that the offence does not require the accused to have a specific business advantage in mind, that business or an advantage can be obtained for someone else.<sup>26</sup>

2.31 A detailed analysis of these proposals is contained in Chapter 4 of this report.

*A proposed Deferred Prosecution Agreement (DPA) scheme*

2.32 In March 2016, AGD released a public consultation paper on a possible scheme for DPAs (2016 discussion paper);<sup>27</sup> and in March 2017, a second public consultation paper on a proposed model for a DPA scheme in Australia for serious corporate crime (2017 DPA model).

2.33 A DPA is a voluntary, negotiated settlement between a prosecutor and a defendant.<sup>28</sup> With respect to the consultation paper on the 2017 DPA model, the AGD noted:

The Australian Government is considering options to facilitate a more efficient and effective response to corporate crime by encouraging greater self-reporting by companies. A key focus of this consideration is a possible DPA scheme.<sup>29</sup>

2.34 Under a DPA scheme, where a company or company officer has engaged in a serious corporate crime, prosecutors have the option to invite the company to negotiate an agreement to comply with a range of specified conditions. These conditions typically require the company to cooperate with any investigation, admit to

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26 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 4.

27 AGD, *Deferred prosecution agreements—public consultation*, 2016, <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx> (accessed 4 January 2018).

28 Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia*, Public Consultation Paper, March 2017, p. 1.

29 Attorney-General's Department, *Deferred Prosecution Agreements – public consultation*, <https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx> (accessed 3 January 2018).

agreed facts, pay a financial penalty, and implement a program to improve future compliance. A company will not be prosecuted in relation to the matters that were the subject of the DPA where the company fulfils its obligations under the agreement.<sup>30</sup>

2.35 A breach of the terms of a DPA may result in the prosecuting agency commencing prosecution or renegotiating the terms of the DPA with the company.<sup>31</sup>

2.36 A detailed analysis of this proposal is contained in Chapter 5 of this report.

*Proposed reforms to corporate and tax whistleblower provisions*

2.37 The government committed under the Open Government National Action plan to harmonise corporate sector whistleblower provisions with those existing in the public sector and to introduce legislation for this, together with tax whistleblower provisions, by December 2017.<sup>32</sup>

2.38 In December 2016, the Treasury released a public consultation paper on corporate and tax whistleblowing, which concluded in February 2017.<sup>33</sup>

2.39 In October 2017, the government released an exposure draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017 and supporting explanatory material for consultation. The proposed reforms to the Corporations Act included:

- expanding the protections to a broader class of people;
- expanding the types of disclosures that will be protected under the framework;
- allowing disclosures to parliamentarians and the media in certain circumstances, if preconditions are satisfied;
- imposing new stringent obligations to maintain the confidentiality of a whistleblower's identity;
- making it significantly easier for a whistleblower to bring a claim for compensation where he or she has been victimised;
- creating a new civil penalty offence so that law enforcement agencies will be able to take action against companies where the civil standard of proof can be met; and

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30 Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia*, Public Consultation Paper, March 2017, p. 1.

31 Attorney-General's Department, *Improving enforcement options for serious corporate crime: A proposed model for a Deferred Prosecution Agreement scheme in Australia*, Public Consultation Paper, March 2017, p. 1.

32 Australian Government, The Treasury, Treasury Laws Amendment (Whistleblowers) Bill 2017 - Exposure Draft, <https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/> (accessed 3 January 2018).

33 Australian Government, The Treasury, Review of tax and corporate whistleblower protections in Australia, *Review of tax and corporate whistleblower protections in Australia*, 21 December 2016–10 February 2017, <https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/> (accessed 19 March 2018).

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- requiring all large companies to have a whistleblower policy in place, with penalties for failing to do so.<sup>34</sup>

*Amendments currently before Parliament*

2.40 Following the above consultations on proposed reforms, in December 2017 the government introduced the:

- Crimes Legislation (Combatting Corporate Crime) Bill 2017 (CCC bill) which implements, in part, the above proposals to amend the foreign bribery offence and introduce a DPA scheme; and
- Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (EWP bill) which implements, in part, the above proposals to reform corporate and tax whistleblower provisions.

2.41 The CCC bill proposes a number of amendments to the existing foreign bribery offence, including:

- extending the definition of 'foreign public official' to include candidates for office;
- removing the requirement that the benefit and business advantage be 'not legitimately due' and replacing it with the concept of 'improperly influencing' a foreign public official;
- clarifying that the offence does not require the accused to have a specific business advantage in mind;
- clarifying that the business advantage can be obtained for someone else;
- extending the offence to cover bribery to obtain a personal advantage; and
- removing the requirement that the bribe influences the foreign public official 'in the exercise of their official capacity'.

2.42 The CCC bill also seeks to introduce a new corporate offence of failing to prevent foreign bribery and a DPA scheme, which would apply to foreign bribery and other specified serious corporate offences.

2.43 The EWP bill proposes to consolidate, strengthen and broaden the existing whistleblower protections and remedies for corporate and financial sector whistleblowers. The proposed amendments include:

- introducing a single concept of 'regulated entity', 'eligible whistleblower' 'disclosable conduct' and 'eligible recipient';
- providing for an 'emergency disclosure' to a member of Parliament or a journalist in specified circumstances; and

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34 Australian Government, The Treasury, Treasury Laws Amendment (Whistleblowers) Bill 2017—Exposure Draft, <https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/> (accessed 3 January 2018).

- expressly allowing for disclosures to lawyers for the purposes of obtaining legal advice.

2.44 The CCC bill and the EWP bill are discussed further in Chapters 4, 5 and 6 of this report.

### **Assessment of Australia's implementation of international obligations**

2.45 The organisations that facilitate the international conventions provide ongoing assessments of member countries' implementation of the obligations. In general, these bodies have concluded that Australia's implementation, though improving over time, remains incomplete. The result is that Australia is seen on the international stage as failing to adequately tackle the problem of foreign bribery.

#### ***Effectiveness of Australia's implementation of the OECD Convention***

2.46 There are a number of reports on Australia's implementation of the OECD Convention which have made recommendations to improve the effectiveness of Australia's anti-foreign bribery laws. The OECD has published the following monitoring reports relating to the implementation of the convention in Australia:

- 1999 – Phase 1 Report;
- 2006 – Phase 2 Report;
- 2008 – Follow-up to Phase 2 Report;
- 2012 – Phase 3 Report;
- 2015 – Follow-up to Phase 3 Report; and
- 2017 – Phase 4 Report.<sup>35</sup>

2.47 The Phase 3 OECD Report and follow-up report, as well as the Phase 4 OECD report are discussed below.

2.48 In the 2012 Phase 3 OECD Report, the OECD noted that:

The foreign bribery offence is becoming a priority for the Australian government. Australia's first National Anti-Corruption Plan aims to create a 'whole-of-government approach' to corruption; it is expected to be adopted by December 2012. In February 2012, Australia concluded a proactive public consultation on the facilitation payment defence. Guidance has been amended to clarify that the facilitation payment defence is restricted to payments of a minor value, and to eliminate certain examples that had caused concerns. The maximum fine against legal persons for foreign bribery was substantially raised in 2010. The sharing of tax information was

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35 Phase 1 evaluates the adequacy of a country's legislation to implement the Convention. Phase 2 assesses whether a country is applying its legislation effectively. Phase 3 focuses on enforcement of the laws implementing the Convention and associated instruments. Phase 4 focuses on key group-wide cross-cutting issues; the progress made on weaknesses identified in previous evaluations; enforcement efforts and results; and any issues raised by changes in the domestic legislation or institutional framework.

enhanced with the ratification in August 2012 of the Convention on Mutual Administrative Assistance in Tax Matters and the amending Protocol.<sup>36</sup>

2.49 However, the OECD felt that Australia had not done enough to criminalise, prosecute and penalise instances of foreign bribery:

While the Working Group on Bribery welcomes Australia's recent efforts, it has serious concerns that overall enforcement of the foreign bribery offence to date has been extremely low. Only one foreign bribery case has led to prosecutions. These prosecutions were commenced in 2011 and are ongoing. Out of 28 foreign bribery referrals that have been received by the Australian Federal Police (AFP), 21 have been concluded without charges.<sup>37</sup>

2.50 In the 2015 Phase 3 Follow-up Report, the OECD declared that Australia had made good progress on addressing a number of important recommendations. It cited:

- improvements to the Australian Federal Police's (AFP) policy and operations;
- the establishment of the Fraud and Anti-Corruption Centre (FAC);
- the signing of a memorandum of understanding between the AFP and the Australian Prudential Regulation Authority (APRA);
- the establishment of an AFP Foreign Bribery Panel of Experts;
- engagement by the AFP with state-level law enforcement to establish guidelines on reporting foreign bribery and to raise awareness of the foreign bribery offence;
- restructuring of the Commonwealth Director of Public Prosecutions (CDPP) operating model to ensure sufficient resources are available to prosecute foreign bribery; and
- development by the AGD of a whole-of-government approach to awareness-raising.<sup>38</sup>

2.51 The OECD noted that Australia had fully implemented 16 of its previous recommendations but nine remained partially implemented and eight not implemented

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36 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, 12 October 2012, p. 5, <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf> (accessed 1 December 2017).

37 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, 12 October 2012, p. 5, <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf> (accessed 1 December 2017). The committee notes that there is some debate about the number of prosecutions arising out of Australia's foreign bribery legislation.

38 OECD Working Group on Bribery, *Follow-up to the Phase 3 Report & Recommendations*, 3 April 2015, pp. 4–5, <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf> (accessed 1 December 2017).

at all.<sup>39</sup> The OECD observed that increased enforcement is required to determine whether the use of Australia's corporate liability provisions has been enhanced, and whether false accounting is being vigorously pursued.<sup>40</sup> It also remarked that more could be done with respect to enforcement.<sup>41</sup>

2.52 The Phase 4 OECD Report was released in December 2017.<sup>42</sup> It noted that Australia has stepped up its enforcement of foreign bribery since 2012, when the OECD Working Group on Bribery last evaluated Australia's implementation of the OECD Convention, with seven convictions in two cases and 19 ongoing investigations. However, in view of the level of exports and outward investment by Australian companies in jurisdictions and sectors at high risk for corruption, the report found that Australia must continue to increase its level of enforcement.<sup>43</sup>

2.53 In addition to highlighting recent reforms to the AFP and the CDPP to increase foreign bribery enforcement, the report identifies several other achievements and good practices, including:

- strengthened whistle-blower protections in the public sector;
- amendments to the foreign bribery offence to address previously identified weaknesses; and
- the creation of new false accounting offences in the Criminal Code.<sup>44</sup>

2.54 The report further makes a number of recommendations to Australia aimed at strengthening its foreign bribery enforcement. Key recommendations highlight the need for Australia to:

- address the risk that the real-estate sector could be used to launder the proceeds of foreign bribery;

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39 OECD Working Group on Bribery, *Follow-up to Phase 3 Report*, April 2015, p. 4, <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf> (accessed 1 December 2017).

40 OECD Working Group on Bribery, *Follow-up to Phase 3 Report*, April 2015, p. 4, <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf> (accessed 1 December 2017), see in particular recommendations 3 and 4b.

41 OECD Working Group on Bribery, *Follow-up to Phase 3 Report*, April 2015, p. 4, <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf> (accessed 15 February 2018), see in particular recommendation 10b.

42 OECD Working Group on Bribery, *Monitoring Schedule December 2016—June 2024*, <http://www.oecd.org/daf/anti-bribery/Phase-4-Evaluation-Schedule-2016-2024.pdf> (accessed 1 December 2017).

43 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, <https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf> (accessed 4 January 2018).

44 OECD, *Bribery and corruption, 19 December 2017, Australia takes major steps to combat foreign bribery, but OECD wants to see more enforcement*, <http://www.oecd.org/corruption/australia-takes-major-steps-to-combat-foreign-bribery-but-oecd-wants-to-see-more-enforcement.htm> (accessed 3 January 2018).

- ensure that authorities have adequate resources to effectively enforce the foreign bribery offence;
- proactively pursue criminal charges against companies for foreign bribery; and
- enhance its whistleblower protections in the private sector.<sup>45</sup>

### *Effectiveness of Australia's implementation of UNCAC*

2.55 Article 63 of UNCAC set up a Conference of the States Parties to the UNCAC. The Conference was tasked with improving the capacity of and cooperation between States Parties to achieve UNCAC's objectives, and promoting and reviewing its implementation. In turn, the Conference established an Implementation Review Group of the UNCAC.<sup>46</sup> Since 2010, the Implementation Review Group has typically met twice a year in Vienna.

2.56 States that are parties to UNCAC are required to undergo a review of their implementation of key chapters of the UNCAC every five years.<sup>47</sup> Australia's implementation of Chapters III (Criminalisation & Law Enforcement) and IV (International Cooperation) of UNCAC was reviewed in 2012 and found to be fully compliant.<sup>48</sup>

2.57 In relation to criminalisation and law enforcement, Australia was commended on the following:

- The broad jurisdiction of the foreign bribery offence, applying both to conduct within Australia, and to conduct by citizens, residents and companies overseas.
- The definition of 'foreign public official,' which extended to officials designated by law or custom.
- The money-laundering offences, which incorporate elements of intent, recklessness and negligence, and which go beyond the minimum standards in article 23.

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45 OECD, Bribery and corruption, 19 December 2017, *Australia takes major steps to combat foreign bribery, but OECD wants to see more enforcement*, <http://www.oecd.org/corruption/australia-takes-major-steps-to-combat-foreign-bribery-but-oecd-wants-to-see-more-enforcement.htm>, (accessed 3 January 2018).

46 United Nations Office on Drugs and Crime, *Mechanism for the Review of Implementation of the United Nations Convention against Corruption—Basic Documents*, p. 11, 'IV. Review process', [http://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism for the Review of Implementation - Basic Documents - E.pdf](http://www.unodc.org/documents/treaties/UNCAC/Publications/ReviewMechanism-BasicDocuments/Mechanism%20for%20the%20Review%20of%20Implementation%20-%20Basic%20Documents%20-%20E.pdf) (accessed 1 December 2017).

47 Conference of the States Parties to the United Nations Convention against Corruption, *Resolution 3/1*, 9–13 November 2009, p. iii, item 3, <https://www.unodc.org/documents/treaties/UNCAC/COSP/session3/V1051985e.pdf> (accessed 1 December 2017).

48 Attorney-General's Department, *Global leadership in combating corruption*, <https://www.ag.gov.au/CrimeAndCorruption/AntiCorruption/Pages/Globalleadershipincombatingcorruption.aspx> (accessed 1 December 2017).

- Australia's position that no individual is immune from prosecution for corruption cases, including parliamentarians.
- The development and expansion of the federal non-conviction-based forfeiture regime in Australia.
- Australia's positive efforts to ensure severe consequences for public officials who engage in corruption, including the possible forfeiture of the public sector contribution to the convicted official's pension fund.<sup>49</sup>

2.58 However, the following measures were identified to further strengthen existing anti-corruption measures:

- Continue to periodically review policies and approach on facilitation payments in order to effectively combat the phenomenon and continue to encourage companies to prohibit or discourage the use of such payments, including in internal company controls, ethics and compliance programs or measures.
- Consider adopting a written policy on parole that sets forth the factors for consideration.
- The adoption and implementation of legislation currently under review for the establishment of a comprehensive scheme for public sector whistle-blower protection and to expedite access to existing protections for private sector whistle-blowers.
- Continue the consultative process for the development of a comprehensive national anti-corruption action plan, which will include an examination of how to make anti-corruption systems more effective.<sup>50</sup>

2.59 In relation to international cooperation, the following successes and good practices were identified:

- The AFP's impressive cooperation measures at both the domestic and international levels, and their experience and expertise in detecting and investigating corruption, which could further assist foreign law enforcement counterparts.
- The existence of a comprehensive range of investigative tools for fighting corruption in Australia.
- The high quality of databases to track extradition and mutual legal assistance matters.<sup>51</sup>

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49 Implementation Review Group, *Review of implementation of the United Nations Convention against Corruption*, 18–22 June 2012, p. 9, <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1253616e.pdf> (accessed 1 December 2017).

50 Implementation Review Group, *Review of implementation of the United Nations Convention against Corruption*, 18–22 June 2012, p. 9, <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1253616e.pdf> (accessed 1 December 2017).



2.60 Additionally, it was recommended that Australia:

Continue to periodically review policies and legal mechanisms to provide the widest measure of mutual legal assistance, including taking statements of suspects or accused persons, in investigations, prosecutions and judicial proceedings.<sup>52</sup>

2.61 In February 2015, the Australian government submitted to the United Nations Office on Drugs and Crime that since the completion of the 2012 peer review, it had made significant progress in responding to two recommendations identified in the final peer review report.<sup>53</sup> The first, the adoption and implementation of legislation establishing a comprehensive scheme for public sector whistle-blower protection via the *Public Interest Disclosure Act 2013*; and the second, the review of policies and legal mechanisms to provide the widest measure of mutual legal assistance via the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012* and the *Cybercrime Legislation Amendment Act 2012*. In addition, the government drew attention to the AGD's commitment to initiate a review the operation of amendments to the Australian mutual legal assistance framework introduced with the *Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Act 2012*.<sup>54</sup>

2.62 The second cycle of the independent review by the Implementation Review Group of Australia's implementation of key chapters II (Preventative measures) and V (Asset recovery) of UNCAC is not yet complete. However, the reviewing countries and governmental experts list appear to have been decided.<sup>55</sup>

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51 Implementation Review Group, *Review of implementation of the United Nations Convention against Corruption*, 18–22 June 2012, p. 12, <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1253616e.pdf> (accessed 1 December 2017).

52 Implementation Review Group, *Review of implementation of the United Nations Convention against Corruption*, 18–22 June 2012, p. 12, <https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/18-22June2012/V1253616e.pdf> (accessed 1 December 2017).

53 United Nations Office on Drugs and Crime, Note CU 2015/46/DTA/CEB/CSS – Response from the Australian Government, p. 1, <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/14-16November2016/GoodPractices/2015.46/Australia.pdf> (accessed 13 February 2018).

54 United Nations Office on Drugs and Crime, Note CU 2015/46/DTA/CEB/CSS – Response from the Australian Government, pp. 1–2, <http://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/ImplementationReviewGroup/14-16November2016/GoodPractices/2015.46/Australia.pdf> (accessed 13 February 2018).

55 United Nations Office on Drugs and Crime, Country profiles, Australia, <http://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=AUS> (accessed 13 February 2018).

### **Committee view**

2.63 The committee welcomes the release of the Phase 4 OECD report and suggests that the government prioritise the consideration and implementation of the recommendations in that report.

2.64 The committee notes that Australia has received generally positive feedback regarding its implementation of the OECD Convention and UNCAC in its domestic law. The committee emphasises that both the OECD Working Group on Bribery and the UNCAC Implementation Review Group have made a number of recommendations that would improve Australia's foreign bribery regime which have yet to be fully implemented.

2.65 The committee notes recent initiatives to close loopholes in the legislative regime, introduce false accounting provisions and efforts to address challenges in prosecution and investigation. However, the committee is of the view that more needs to be done to enhance the effectiveness of Australia's implementation of the OECD Convention and UNCAC.

### **Recommendation 1**

**2.66 The committee recommends that the Australian Government prioritise the consideration and implementation of the recommendations in the Phase 4 OECD report, and ensure that proposed legislative changes to the foreign bribery offence and related measures to strengthen Australia's foreign bribery regime are implemented or enacted consistent with the Phase 4 OECD report.**