The Senate

Economics References Committee

Foreign bribery

March 2018

ISBN 978-1-76010-759-8

Printed by the Senate Printing Unit, Parliament House, Canberra.

Senate Economics References Committee

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Abbreviations and acronyms

AAMEG	Australia-Africa Minerals & Energy Group
AFP	Australian Federal Police
AGD	Attorney-General's Department
AICD	Australian Institute of Company Directors
APEC	Asia Pacific Economic Cooperation
APRA	Australian Prudential Regulation Authority
ASIC	Australian Securities and Investment Commission
ATO	Australian Taxation Office
AUSTRAC	Australian Transaction Reports and Analysis Centre
Austrade	Australia Trade and Investment Commission
CCC bill	Crimes Legislation (Combatting Corporate Crime) Bill 2017
CDPP	Commonwealth Director of Public Prosecutions
Corporations Act	*Corporations Act 2001*
Code of Practice	Deferred prosecution agreement Code of Practice
Criminal Code	*Criminal Code Act 1995*
DFAT	Department of Foreign Affairs and Trade
Director	Director of the Commonwealth Director of Public Prosecutions
DoF	Department of Finance
DOJ	United States Department of Justice
DPA	Deferred prosecution agreement

Efic	Export Finance and Insurance Corporation
EWP bill	Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017
FAC	Fraud and Anti-Corruption Centre
FAR	United States Federal Acquisition Regulation 48 CFR Part 9, Subpart 9.4—Debarment, Suspension and Ineligibility
FBI	United States Federal Bureau of Investigation
FCPA	United States *Foreign Corrupt Practices Act* of 1977
FWRO	*Fair Work (Registered Organisations) Act 2009*
Guidelines for self-reporting	Australian Federal Police and Commonwealth Director of Public Prosecutions Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations*, 8 December 2017
Income Tax	*Income Tax Assessment Act 1997*
IBAACC	International Bar Association's Anti-Corruption Committee
ISO 37001	International Standards Organisation Standard ISO 37001–Anti-bribery management systems
L and C committee	Legal and Constitutional Affairs Legislation Committee
LLPs	Limited liability partnerships
LPP	Legal professional privilege
Moss Review	Phillip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016
New Zealand	NZ
NPA	Non-prosecution agreement
OECD	Organisation for Economic Co-operation and Development

OECD Convention	Convention on Combating Bribery of Foreign Public Officials in International Business Transactions
Phase 2 OECD Report	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
Phase 3 OECD Report	Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia, 12 October 2012
Phase 3 OECD Follow-up Report	Australia: Follow-up to the Phase 3 Report & Recommendations, 3 April 2015
Phase 4 OECD Report	Implementing the OECD Anti-Bribery Convention Phase 4 Report: Australia, 15 December 2017
PID Act	*Public Interest Disclosure Act 2013*
PJC	Parliamentary Joint Committee on Corporations and Financial Services
Procurement Rules	Australian Government, Department of Finance, *Commonwealth Procurement Rules: Achieving value for money*, 1 January 2018
Prosecution Policy	Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*
PSC	United Kingdom Register of People with Significant Control
SEC	United States Securities and Exchange Commission
SFCT	Serious Financial Crime Taskforce
SFO	United Kingdom Serious Fraud Office
TIA	Transparency International Australia
UK	United Kingdom

UK principles	United Kingdom Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*, pp. 20–31,
UNCAC	United Nations Convention against Corruption
UNODC	United Nations Office on Drugs and Crime
US	United States
US hallmarks	Criminal Division of the United States Department of Justice and the Enforcement Division of the United States Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp. 57–60
Whistleblower protections	Report of the Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower protections*, September 2017
2016 discussion paper	Attorney-General's Department, *Deferred prosecution agreements—public consultation*, March 2016
2017 consultation paper	Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017
2017 DPA model	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

Foreword

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

Recommendations

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.

Recommendation 2

3.105 The committee recommends that the Australian Federal Police's (AFP) annual report incorporate specific information about the Fraud and Anti-Corruption Centre (FAC), including de-identified data regarding the number of referrals received, the number of matters allocated to the AFP foreign bribery or FAC team, the number of investigations completed, the resources devoted to these activities, and the number of investigations which led to criminal/civil actions and the timeliness of such enforcement actions.

Recommendation 3

3.106 The committee recommends that consideration be given to developing a contingency mechanism that explicitly provides for additional one-off funding to appropriate agencies (Australian Federal Police, Australian Securities and Investment Commission, Commonwealth Director of Public Prosecutions) for large and complex investigation of foreign bribery offences to ensure any allegations are thoroughly investigated, and where appropriate, fully prosecuted.

Recommendation 4

3.107 The committee recommends that in considering the report of the review of the enforcement regime of Australian Securities and Investment Commission (ASIC), the government have regard to how any proposed changes will help improve the enforcement of penalties by ASIC for foreign bribery related offences.

Recommendation 5

4.15 The committee recommends that the definition of 'foreign public official' in section 70.1 of the Criminal Code Act 1995 be amended to include candidates for office.

Recommendation 6

4.39 The committee recommends that the foreign bribery offence apply in circumstances where the bribe of a foreign public official was to obtain or retain a personal advantage.

Recommendation 7

4.102 The committee recommends that the Criminal Code Act 1995 be amended to include a new corporate offence of failing to prevent foreign bribery, and that principles-based guidance be published as to the steps companies need to take in order to establish and implement adequate procedures in relation to the new failing to prevent foreign bribery offence.

Recommendation 8

4.103 The committee recommends that as part of the public consultation on the minister's guidance on adequate procedures in relation to the new failing to prevent foreign bribery offence, the government publish an exposure draft of the guidance and allow a period of no less than four weeks for stakeholders to provide comment.

Recommendation 9

4.104 The committee recommends that the minister finalise and publish the guidance on adequate procedures with sufficient time before the commencement of the new failing to prevent foreign bribery offence to allow companies to implement the necessary compliance measures.

Recommendation 10

4.118 The committee recommends that the foreign bribery offence be amended to clarify that:

- **a person is prohibited from bribing a foreign public official to obtain a business advantage for someone else; and**
- **the payer of a bribe does not need to intend to obtain or retain any specific business or business advantage to be guilty of the foreign bribery offence.**

Recommendation 11

5.72 The committee recommends that the government introduce a deferred prosecution agreement scheme for corporations, supported by a strong legislative framework which requires strict compliance and allows for adequate responses in the event of a breach.

Recommendation 12

5.73 The committee recommends that, other than in exceptional circumstances, deferred prosecution agreements be published, together with details on how a company has complied with the terms and conditions, and any breach, variation or termination.

Recommendation 13

5.74 The committee recommends that the Code of Practice make provision for the appointment and methodology of independent external monitors at the company's expense to monitor compliance with a deferred prosecution agreement.

Recommendation 14

5.75 The committee recommends that as part of the public consultation on the draft Code of Practice, the government publish an exposure draft and allow a period of no less than four weeks for stakeholders to provide comment.

Recommendation 15

6.85 The committee endorses the Parliamentary Joint Committee on Corporations and Financial Services report on Whistleblower Protections, and urges the government to work with the expert advisory panel to expeditiously implement the committee's outstanding recommendations.

Recommendation 16

6.86 The committee recommends that the government request the expert advisory panel on whistleblowers to consider whether the scope of Australia's whistleblower protections provides sufficient coverage in foreign bribery cases.

Recommendation 17

6.87 The committee recommends that the minister's guidance on adequate procedures in relation to the new failing to prevent foreign bribery offence include the existence of internal corporate whistleblowing systems.

Recommendation 18

7.104 The committee recommends that the facilitation payment defence currently provided for in section 70.4 of the Criminal Code Act 1995 (and the associated subsections 26-52(4) and 26-52(5) of the Income Tax Assessment Act 1997) be abolished over a transition period, to enable companies and individuals to adjust their business practices and procedures to comply with the law as amended.

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.

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.

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.

PART I

Overview

Part I

This part of the report consists of three chapters.

Chapter 1 provides general information about the conduct of the inquiry, its background, and the scope and structure of the report.

Chapter 2 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.

Chapter 3 discusses the different roles of government departments and agencies in identifying and investigating instances of foreign bribery. It also considers the shortcomings of Australia's enforcement record in this area, and examines the adequacy of some of the government's recent initiatives to address the problem.

Chapter 1

Introduction

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

1.2 The terms of reference are as follows:

(a) the measures governing the activities of Australian corporations, entities, organisations, individuals, government and related parties with respect to foreign bribery, with specific reference to the effectiveness of, and any possible improvements to, Australia's implementation of its obligations under:

  (i) the OECD [Organisation for Economic Co-operation and Development] Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention), and

  (ii) the United Nations Convention against Corruption (UNCAC); and

(b) as part of, or in addition to, paragraph (a), the effectiveness of, and any possible improvements to, existing Commonwealth legislation governing foreign bribery, including:

  (i) Commonwealth treaties, agreements, jurisdictional reach, and other measures for gathering information and evidence,

  (ii) the resourcing, effectiveness and structure of Commonwealth agencies and statutory bodies to investigate and, where appropriate, prosecute under the legislation, including cooperation between bodies,

  (iii) standards of admissible evidence,

  (iv) the range of penalties available to the courts, including debarment from government contracts and programs,

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

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

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

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

(v) the statute of limitations,

(vi) the range of offences, for example:

A. false accounting along the lines of the books and records head in the US Foreign Corrupt Practices Act,

B. increased focus on the offence of failure to create a corporate culture of compliance,

C. liability of directors and senior managers who do not implement a corporate culture of compliance, and

D. liability of parent companies for subsidiaries and intermediaries, including joint ventures,

(vii) measures to encourage self-reporting, including but not limited to, civil resolutions, settlements, negotiations, plea bargains, enforceable undertakings and deferred prosecution agreements,

(viii) official guidance to corporations and others as to what is a 'culture of compliance' and a good anti-bribery compliance program,

(ix) private sector whistleblower protection and other incentives to report foreign bribery,

(x) facilitation payment defence,

(xi) use of suppression orders in prosecutions,

(xii) foreign bribery not involving foreign public officials, for example, company to company or international sporting bodies,

(xiii) the economic impact, including compliance and reporting costs, of foreign bribery, and

(xiv) any other related matters.[5]

Conduct of inquiry

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

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

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

1.5 A list of witnesses is at Appendix 3.

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

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

Background

What is foreign bribery?

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

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

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

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

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

The significant impacts of foreign bribery

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

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

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

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

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

> Australian businesses can damage our international standing and shrink the global market for Australian exports and investment.[9]

1.11 Similarly, Engineers Australia contended that:

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

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

> There is near universal consensus among police, academics, NGOs [Non-governmental organisations] and business leaders that corruption erodes our society, undermining good governance here and abroad. Corruption promotes anti-competitive business practices and leads to the squandering of foreign aid and stalling of development in countries most in need of it.[11]

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

Australia's efforts against foreign bribery

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

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

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

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

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

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

Scope and structure of the report

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

1.18 Since this inquiry was referred, the government has:

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

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

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

Part 1—Overview

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

Chapter 1—Introduction

Chapter 2—Australia's anti-foreign bribery framework

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

Chapter 3—Investigation and enforcement

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

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

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

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

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

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

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

Chapter 4—Reforming the foreign bribery offence

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

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

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

Chapter 6—Protecting whistleblowers who expose foreign bribery

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

Part 3—Building a culture of integrity and compliance

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

Chapter 7—The facilitation payment defence

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

Chapter 8—Other reform options

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

Appendix 1—Examples of foreign bribery

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

Acknowledgements

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

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.[1] Australia signed the OECD Convention on 7 December 1998 and it was ratified in Parliament on 18 October 1999.[2]

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

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 (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…[3]

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.[4]

2.6 Article 1 also requires that signatories criminalise the incitement, aiding and abetting, and authorisation of bribery of foreign public officials.[5]

2.7 The OECD Convention also contains provisions relating to sanctions, jurisdiction, enforcement, mutual legal assistance and extradition.[6]

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 (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 (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 (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 (accessed 1 December 2017).

(c) To promote integrity, accountability and proper management of public affairs and public property.[7]

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.[8]

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.[9]

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.[10]

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.[11]

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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.[12]

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.[13] 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.[14]

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'.[15]

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 Securency case in Appendix 1, where penalties for NPA and Securency were ordered under the *Proceeds of Crime Act 2002*; and a former Chief Financial Officer of Securency, 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/cgibin/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.[16]
- 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.[17]

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);[18] or
- the conduct amounted to payment of a facilitation payment.[19]

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.[20]

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

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.

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.[21]

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.[22]

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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.[23] 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.[24]

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.[25]

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.[26]

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);[27] 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.[28] 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.[29]

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.[30]

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.[31]

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.[32]

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

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).

- requiring all large companies to have a whistleblower policy in place, with penalties for failing to do so.[34]

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 whisteblower' 'disclosable conduct' and 'eligible recipient';
- providing for an 'emergency disclosure' to a member of Parliament of a journalist in specified circumstances; and

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.[35]

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

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.[36]

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 on-going. Out of 28 foreign bribery referrals that have been received by the Australian Federal Police (AFP), 21 have been concluded without charges.[37]

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.[38]

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.[39] 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.[40] It also remarked that more could be done with respect to enforcement.[41]

2.52 The Phase 4 OECD Report was released in December 2017.[42] 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.[43]

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.[44]

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.[45]

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.[46] 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.[47] 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.[48]

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 (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.[49]

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.[50]

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.[51]

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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.[52]

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.[53] 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*.[54]

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.[55]

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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.

Chapter 3

Investigation and enforcement

3.1 Despite the framework of laws and policies designed to criminalise foreign bribery, as discussed in Chapter 2, Australia's prosecution record suggests that foreign bribery offences are not adequately enforced. However, in this context, it is necessary to recognise that: the lack of visibility of the work of government departments and agencies in identifying, investigating and enforcing allegations of foreign bribery is, in part, due to confidentiality issues. Additionally, since this inquiry commenced in 2015, a number of significant changes have been made to strengthen Australia's response to foreign bribery. Indeed, as noted in the December 2017 Phase 4 OECD Report, since the inception of the Fraud and Anti-Corruption Centre (FAC), Australia is able to report the successful prosecution of seven offenders across two cases.[1]

3.2 This chapter discusses the different roles of government departments and agencies in identifying and investigating instances of foreign bribery. It also examines the evidence relating to the enforcement of foreign bribery legislation, before exploring some of the criticisms raised by stakeholders about what is perceived to be a lack of enforcement in this area, and the relevant government initiatives taken since the establishment of this inquiry.

Government departments and agencies

3.3 Australia has a multi-agency approach to identifying and investigating foreign bribery. The Attorney-General's Department (AGD) has principal policy responsibility for foreign bribery issues and leads Australia's engagement with the Organisation for Economic Co-operation and Development (OECD) Working Group on Bribery.[2]

3.4 The Australian Federal Police (AFP) has responsibility for investigating offences of bribing a foreign public official in Division 70 of the *Criminal Code Act 1995* (Criminal Code); and the Australian Securities and Investments Commission (ASIC) has responsibility for investigating fraudulent, misleading and deceptive conduct in relation to corporations, including some conduct outside Australia.

3.5 The Commonwealth Director of Public Prosecutions (CDPP) has no investigative powers or functions; however, it provides prosecution services for all foreign bribery offences.

3.6 Other departments and agencies also assist with foreign bribery related offences by: identifying practices that may breach Australia's foreign bribery regime

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1 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), pp. 15–16.

2 Ms Kelly Williams, Assistant Secretary, Criminal Law Policy Branch, Attorney-General's Department, *Committee Hansard*, 31 October 2017, p. 45.

which can lead to an investigation; and providing information to assist with investigations of alleged foreign bribery.[3] These include the:

- Australian Taxation Office (ATO);
- Australia Trade and Investment Commission (Austrade);
- Australian Transaction Reports and Analysis Centre (AUSTRAC);
- Department of Foreign Affairs and Trade (DFAT); and
- Export Finance and Insurance Corporation (Efic).

3.7 When considering the enforcement of foreign bribery legislation in Australia, it is important to remember that the CDPP does not make a decision to prosecute a case until after the matter is referred to it for that purpose.[4] The CDPP therefore 'depends upon the Australian Federal Police (AFP) [and other departments and organisations] to investigate alleged foreign bribery offences and to prepare briefs of evidence to support prosecution action'.[5] That said, the CDPP is increasingly involved in the early stages of foreign bribery investigations (see below).

Fraud and Anti-Corruption Centre (FAC)

3.8 In July 2014, the AFP established the FAC to bring together officers from the Commonwealth agencies identified above, as well as others,[6] to work collectively 'to prevent, detect and investigate fraud and corruption against the Commonwealth',[7] including offences of foreign bribery.

3.9 The FAC is focussed on 'providing a coordinated approach to prioritising the Commonwealth operational response for matters requiring a joint agency approach'.[8] Indeed, where the referring agency has sought AFP investigation and assistance and the allegation relates to an offence of foreign bribery, the FAC will prioritise, triage and evaluate it. It does this this in consultation with the AFP Foreign Bribery Panel of Experts which was established in 2012:[9]

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3 Attorney-General's Department, *Submission 32*, Annex 1, pp. 31–34.

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

5 Commonwealth Director of Public Prosecutions, *Submission 39*, p. 1.

6 Participating agencies in the FAC include: AFP, ATO, Australian Crime Commission, Department of Human Services, Australian Border Force, ASIC, DFAT, Department of Defence, AUSTRAC, AGD and CDPP.

7 Attorney-General's Department, *Submission 32*, p. 12.

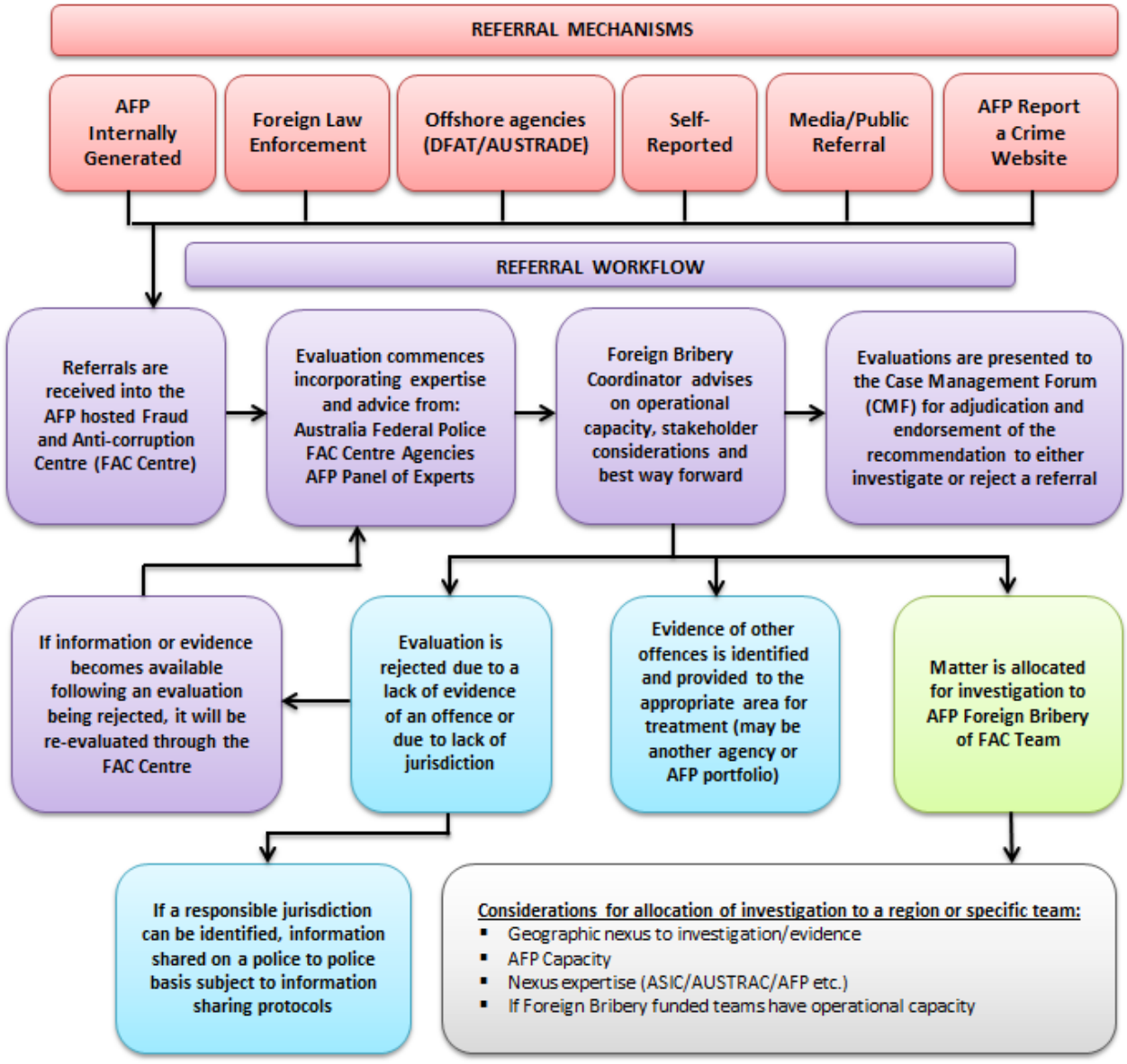
8 Australia Federal Police, *Fraud and Anti-Corruption Centre Fact-sheet*, https://www.afp.gov.au/sites/default/files/PDF/fac-centre-fact-sheet.pdf https://www.afp.gov.au/sites/default/files/PDF/fac-centre-fact-sheet.pdf (accessed 7 November 2017).

9 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 23, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 1 December 2017).

This Panel is made up of senior investigators with experience in significant foreign bribery investigations. It provides expert advice on foreign bribery referrals and investigations, and conducts foreign bribery specific training modules and awareness-raising activities.[10]

3.10 The below flowchart details the FAC referral process.

Figure 3.1— FAC Referral Flowchart



Source: OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 67.[11]

10 Australian Government, Attorney-General's Department, Foreign bribery, *Agency roles and responsibilities*, April 2017, p. 1, https://www.ag.gov.au/.../Foreignbriberyagencyrolesandresponsibilities.DOCX (accessed 9 January 2018).

11 Note the Flowchart is presented in a format that is different from the original source.

Criticisms of Australia's enforcement of foreign bribery legislation

3.11 Overall, submitters to the inquiry, and in particular those made in the 44th Parliament, were highly critical of Australia's legislative scheme and enforcement record in combatting foreign bribery.[12] The Australia Institute and The Jubilee Australia Research Centre commented in their joint submission:

> Australia has a poor record on enforcing foreign bribery and corruption laws, despite major scandals such those around the AWB in Iraq, Securency in Asia and BHP in China. It is important that laws and corporate governance arrangements are enforced to minimise the occurrence of corruption and improve Australia's record of prosecution.[13]

3.12 The Governance Institute of Australia argued that Australia's reputation is 'suffering from the perception of the rigour of its anti-bribery laws and the appetite of its regulators to enforce those laws'.[14]

3.13 The International Bar Association's Anti-Corruption Committee (IBAACC) expressed the view that it was:

> …essential for the Government to review the current structure to ensure not only that it works but that it is seen to work. If nothing is done to address the structure and attitude of investigating and prosecuting foreign bribery cases, the existing fractured approach will continue and the public perception that nothing is being done to police corporate criminal conduct by weak regulators will persist to Australia's overall detriment.[15]

3.14 Investigative journalist, Mr Nick McKenzie, took a systemic view of the lack of enforcement in Australia, noting that the small number of cases actually investigated by the AFP represent just a fraction of the actual bribery occurring. It is equally concerning, he pointed out, that 'most of the cases under investigation have not produced a prosecution. Put simply, those strongly suspected of corruption by police have so far gotten away with it'.[16] Mr McKenzie stated:

> This failure to hold to account corrupt companies and executives is a systemic, whole of government problem, which manifests itself in delayed or ineffective investigations, political inaction and, ultimately, impunity for the corrupt.[17]

3.15 In evidence before the committee in the 45th Parliament, Mr McKenzie maintained this position, and opined that: 'unless there are successful charges and

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12 See, for example, Governance Institute of Australia, *Submission 14*.

13 The Australia Institute and The Jubilee Australia Research Centre, *Submission 15*, p. 3.

14 Governance Institute of Australia, *Submission 14*, p. 1.

15 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 5.

16 Mr Nick McKenzie, *Submission 43*, p. 4.

17 Mr Nick McKenzie, *Submission 43*, p. 4.

prosecutions, we are failing. It's as simple as that. The regime in this country at the moment is an absolute failure'.[18]

3.16 Similarly, Dr Mark Zirnsak, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, explained that 'one of the issues around Australia has obviously been a lack of cases that have been prosecuted on foreign bribery'.[19]

Factors contributing to a lack of enforcement

3.17 Submitters to the inquiry drew to the committee's attention a number of factors that potentially contribute to the lack of enforcement of foreign bribery cases involving Australian companies, including the complex nature of the cases, a deficiency of sufficient expertise, delays, a lack of cooperation and limited resources.

Complexity

3.18 The sheer complexity involved in investigating and prosecuting foreign bribery cases can be associated with the lack of enforcement. Mr Robert Wyld, Co-Chair of the IBAACC, considered that:

> …the real problem with a lack of prosecutions is the sheer complexity, now, of international finance, international commerce and the way transactions are conducted in an opaque way—at one level under legal systems, tax systems and corporate structures that are perfectly legal, but are then used, in effect, for another purpose. That is part of the problem to address.[20]

3.19 A number of submitters also argued that the legislative complexity of Australia's foreign bribery offence was unnecessary and contributing to the lack of prosecutions. Indeed, in discussing Division 70 of the Criminal Code, the Law Council of Australia highlighted what they believe to be key drafting deficiencies of the Division. These were identified as follows:

> The application of the fault and default fault requirements of the Criminal Code to Division 70 is likely to involve practical difficulties with prosecutions through the complexity of those requirements when applied to the three limbs of conduct that constitute the offence. The legislation would benefit from more simply expressed fault requirements.
>
> The requirements that a benefit not be legitimately due to the bribe taker and bribe giver creates unnecessary complexity to the offence. The UK Bribery Act deliberately removed these requirements from that legislation.
>
> Corporate culpability is too complex.

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18 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, p. 8.

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

20 Mr Robert Wyld, Co-Chair, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, pp. 20–21.

> Liability for acts of agents involves ambiguity.[21]

3.20 Similarly, the Young Lawyers International Law Committee of the Law Society of New South Wales drew to attention the fact that the difficulty involved in identifying a 'foreign public official' lies in the complexity of ascertaining the degree of government control over corporations, emphasising that:

> In countries such as China, this may be obscured by extensive commercial monopolisation or by the existence of private entities that have become government-funded after the Global Financial Crisis.[22]

3.21 Ms Sophie McMurray, a lawyer who specialises in anti-corruption compliance, agreed, suggesting that:

> …there is a need for a more modern, innovative approach to corporate liability...given the increasing complexity of multinational corporations and globalisation, placing more Australian companies in countries where corruption was prevalent.[23]

3.22 Dr Zirnsak, argued that lowering the legal bar to make prosecutions easier would:

> …encourage a great will to engage in prosecution. Once the law enforcement authorities know that they've got a better chance of getting a prosecution, hopefully that will increase their willingness to pursue and put resources into these kinds of cases.[24]

Expertise

3.23 A number of submitters to the inquiry took the view that the AFP, as the body with primary responsibility for enforcing foreign bribery laws, lacked the necessary expertise to conduct foreign bribery investigations.

3.24 The Law Council of Australia expressed a view that traditionally the AFP did not have the expertise to investigate foreign bribery offences, which invariably occur within a corporate environment:

> The AFP has traditionally lacked a good understanding of corporate governance structures deployed within a commercial enterprise (operating within and outside Australia) and how corporations delegate functions to lower levels of management for execution through foreign agents or other intermediaries.[25]

3.25 Similarly, the IBAACC concluded that:

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21 Law Council of Australia, *Submission 10*, p. 2.

22 The Law Society of New South Wales Young Lawyers, International Law Committee, *Submission 25*, pp. 10–11.

23 McMurray + Associates, *Submission 33*, p. 4.

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

25 Law Council of Australia, *Submission 10*, p. 3.

> While the AFP has coordinated its activities in a more streamlined manner, experience on the ground leads the Committee to question the AFP's knowledge and skills, at a personal investigator level, on international finance, corporate governance and the way international corporations do business.[26]

3.26 Mr Wyld, Co-Chair of the IBAACC, remarked that:

> Historically, the experience of some of the investigators has, in my experience…been less than knowledgeable of what they are looking into. Effectively, you are, in a sense, educating the investigator.[27]

3.27 Mr Stephen Sasse, a former executive of Leighton Holdings Limited (now CIMIC Group), one of Australia's biggest construction companies that has been implicated in a number of instances of foreign bribery, gave a similarly critical view of AFP investigators' expertise when it comes to corporations:

> I think, in the case of the AFP, they have not the slightest understanding, in my experience, of how corporations work. I think, to be able to investigate and identify [foreign bribery]…Based solely on my four-hour interview with them in 2012 and the nature of the questions—what was asked and what was not asked—my primary conclusion was that these guys are playing in an area that they do not really know much about, which is hardly surprising. Your average AFP officer does not have experience in corporate Australia.[28]

3.28 Mr Sasse was asked if he believed people with good corporate knowledge is an area which is missing within the AFP, to which he replied:

> Yes. Not just a corporate knowledge that is learnt from sitting in law school learning a corps act, but knowledge that comes from working and living in those environments.[29]

3.29 Other submitters reflected on the lack of incentives for investigators to seek to specialise in financial crime and advance their careers. Mr McKenzie recommended that the AFP 'create a clear and attractive career path for investigators who specialise in financial crime and corruption'.[30] In evidence before the committee, he elaborated on this point, explaining that:

> At the moment, the place to make your career in the AFP is not in financial crime, and that really should change. That's a big cultural change. It requires an immense amount of training. It requires recruiting the right sorts of people. In the UK Serious Fraud Office and at the DOJ [United States Department of Justice] and FBI [United Stated Federal Bureau of

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26 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 5.

27 Mr Robert Wyld, Co-Chair, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, pp. 20–21.

28 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 5.

29 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 5.

30 Mr Nick McKenzie, *Submission 43*, p. 7.

> Investigation] in the US, they have lawyers, accountants and forensic specialists all embedded in these teams and they can make a career at an agency. There's some of that at the AFP, but I think there could be far more. At the moment, this area of the AFP is a diversion from a career. It should be a career in itself; we need specialists in this area.[31]

3.30 Mr McKenzie went on to describe the FBI as a 'great place to be', where agents want to 'make' and 'take on' foreign bribery cases, and where agents can advance their careers. In contrast, he noted that:

> At the AFP it's still regarded as a bit of a backwater. Agents don't want to take on these cases. They don't want to join the FAC, where the foreign corruption team lies…[32]

Delay

3.31 The considerable duration of foreign bribery investigations was noted by some witnesses as a barrier to enforcement of foreign bribery cases. However, it is important to note, as Mr Ian McCartney, Acting Deputy Commissioner of the AFP did, that: 'The issue of long, protracted investigations on foreign bribery is not just isolated in Australia'. Mr McCartney went on to explain:

> If you look at the OECD reporting, the common term of an investigation, from investigation to prosecution, is between five and 7½ years, so this is an issue that is identified around the world.[33]

3.32 In 2014 the OECD also observed that the average number of years between last criminal act and sanction for foreign bribery has been increasing over time, rising particularly quickly from 4.3 years in 2011 to 7.3 years in 2013. This analysis indicates that almost half of all cases took between 5 and 10 years to bring to a conclusion.[34]

3.33 Mr Wyld also emphasised the length of time over which an investigation of the commission of a foreign bribery offence may be conducted:

> The OECD has certainly recognised now that these sorts of investigations can take up to seven years—and these are ones that have settled, let alone been prosecuted…A lot of processes and procedures partly explain why, for example, it can take 18 months or two years before witness A has one interview and another interview. It is a significant process, and one that I do

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31 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, pp. 9–10.

32 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, p. 9.

33 Mr Ian McCartney, Acting Deputy Commissioner Operations, Australian Federal Police, *Committee Hansard*, 22 April 2016, p. 25.

34 OECD, *OECD Foreign Bribery Report: An Analysis of the Crime of Bribery of Foreign Public Officials*, 2014, p. 14, http://www.oecd-ilibrary.org/governance/oecd-foreign-bribery-report_9789264226616-en (accessed 7 December 2016).

> not think any of us should underestimate. I know that from working on cases across the world over 20 years.[35]

3.34 Some stakeholders also reflected on the delay between the referral of an instance of alleged foreign bribery and the commencement of an investigation, in addition to delays in the investigation process itself.

3.35 Mr McKenzie argued that investigators lack the tools to effectively investigate foreign bribery cases and bring them to a resolution within a reasonable timeframe.[36] He asserted that:

> Sometimes it takes six to eight months for a case assessment to be made, and that's before an investigation even starts. By that stage evidence is drying up; the witnesses are forgetting things.[37]

3.36 Mr Sasse also recounted his experiences as a whistleblower at Leighton Holdings (now CIMIC Group), and described his interactions with ASIC during the investigation process. In this respect, the committee heard that Mr Sasse had one formal interview with ASIC in November 2014, and then some 16 months later he had a further discussion with ASIC in March 2016 to finalise an affidavit.[38]

3.37 Mr Sasse recounted a similar delay in the context of the AFP's investigation. He told the committee that he was interviewed by the AFP in May or June 2012 but had not heard from the AFP since, that is, some four years later as at the time of hearing.[39]

3.38 Mr Sasse suggested to the committee that 'a good investigation starts quickly and finishes quickly'.[40] Emphasising the importance of a speedy investigation, Mr Sasse suggested that delays see the evidence available to investigators degrade:

> In any investigation…you need to get the investigation underway and completed as soon as you possibly can. The longer it takes, the more it is delayed—people lose things, they forget things and they create cover stories. This stuff has to be acted on, more or less, immediately…it seems to me that the AFP and, to an extent, the regulator [ASIC] just do not act with the alacrity that one needs for these kinds of issues.[41]

3.39 The AGD also reflected on the challenges posed in obtaining timely evidence in foreign bribery matters due to the use of legal professional privilege (LPP) claims by those under investigation and other third parties. In their cross-agency submission

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35 Mr Robert Wyld, Co-Chair, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, p. 21.

36 Mr Nick McKenzie, *Submission 43*, p. 34.

37 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, p. 9.

38 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 10.

39 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, pp. 4–5.

40 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 10.

41 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 5.

to this inquiry, the AGD indicated the AFP had encountered this issue in a number of investigations where it had taken a significant period of time for the AFP and the defence to resolve LPP claims, adding to the difficulties faced in obtaining timely evidence to support prosecutions.[42]

Domestic and international cooperation

Domestic cooperation

3.40 Some stakeholders raised concerns about the manner in which government departments and agencies have traditionally operated in the foreign bribery space, with an emphasis on the lack of cooperation. For example, Mr McKenzie described the AFP, CDPP and ASIC as entities that operate as silos.[43]

3.41 Indeed, this historical lack of domestic cooperation was cited by Mr Ian McCartney of the AFP as a reason for the low number of prosecutions. However, Mr McCartney argued that cooperation has since increased, particularly with the advent of certain interagency projects:

> ...a number of years ago there was a silo approach between agencies, but now, with the work through Wickenby and the work through the Serious Financial Crime Taskforce, in fact it is very much a joined-up approach. In terms of expertise, we bring agencies such as ASIC to the table who have significant expertise in relation to corporate crime, and everything we do in this space is joint. In terms of legislation, obviously that is an issue for the Attorney-General's Department, but we have provided significant input and we have seen positive development.[44]

3.42 The interagency work Mr McCartney referred to, former Project Wickenby and the Serious Financial Crime Taskforce (SFCT), are multi-agency taskforces of which the AFP was and is a member. Project Wickenby played a role in the Australian Government's fight against tax evasion, tax avoidance and crime. It was established in 2006 to protect the integrity of Australia's financial and regulatory systems by preventing people from promoting or participating in the abusive use of secrecy jurisdictions.[45] Project Wickenby finished on 30 June 2015 when the SFCT began operating. [46]

3.43 The SFCT was established to bring together the knowledge, resources and experiences of federal law enforcement and regulatory agencies to identify and

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42 Attorney-General's Department, *Submission 32*, p. 13

43 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, pp. 10 and 12.

44 Mr Ian McCartney, Acting Deputy Commissioner Operations, Australian Federal Police, *Committee Hansard*, 22 April 2016, p. 25.

45 Australian Taxation Office, *Project Wickenby task force*, https://www.ato.gov.au/General/The-fight-against-tax-crime/Our-focus/Project-Wickenby-task-force/ (accessed 14 February 2018).

46 Australian Taxation Office, *Project Wickenby has delivered*, https://www.ato.gov.au/general/the-fight-against-tax-crime/news-and-results/project-wickenby-has-delivered/ (accessed 14 February 2018).

address serious and complex financial crimes.[47] The SFCT is one aspect of the AFP-led FAC. Indeed, a number of submitters observed a marked improvement in cooperation between agencies since the establishment of the FAC. This is discussed later in this chapter.

3.44 However, improvements on the level of domestic cooperation aside, some submitters raised the possibility of a dedicated Serious Fraud Office (SFO), similar to those established in the UK and NZ, as a way forward for Australia.

3.45 Reflecting on the differences between Australia's mutli-agency approach to foreign bribery, and the NZ and UK SFOs, Mr McKenzie told the committee:

> The key thing they [the NZ SFO] have that we don't have is that dedicated focus—a singular agency dedicated to financial crime, bribery and corruption. You have that esprit de corps being formed very quickly amongst these multifaceted investigators and people with expertise who are there to make cases in this crime type. Having that dedicated mind set and that task force mentality is extremely valuable. I saw that in the US with the FBI's foreign bribery teams. Obviously, the Serious Fraud Office in the UK is the best example of an entire agency with 220-odd staff and millions of dollars in funding all dedicated to tackling these financial crime grand corruption type cases. We don't have that in Australia at the moment.[48]

3.46 Considering the benefits of a dedicated SFO body in Australia, Mr Mark Pulvirentu, Partner at Control Risks, observed that:

> …you do need a variety of skill sets in an investigation, from the capturing of evidence—electronic evidence in particular—from forensic specialists through to forensic accountants and seasoned investigators. It's not necessarily one size fits all. You're going to need a cross-section of expertise in that dedicated centre.[49]

3.47 Having practiced in the foreign bribery area in Australia and internationally over many years, Mr Wyld in his capacity as the immediate past Co-Chair of the IBAACC and partner at Johnson, Winter & Slattery, submitted that:

> I think the real issue about regulators, their culture and how they behave is that there is no one agency responsible for it in this country. That is a topic that seems to be neglected. You've got skills within the AFP, ASIC, the tax office and AUSTRAC, but you don't have a stable, standard, dedicated agency or body of people who look at this and this alone. You do in a number of other countries, particularly the United Kingdom and New Zealand. They have their serious fraud officers, who are trained as lawyers, prosecutors and investigators, and they're dedicated to that task, rather than coming in and out of cases. What I have seen over many years is change in personnel because of the demands. Demands are natural in an organisation

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47 Australian Federal Police, *Serious Financial Crime Taskforce*, https://www.afp.gov.au/what-we-do/crime-types/fraud/serious-financial-crime-taskforce (accessed 16 February 2018).

48 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, p. 12.

49 Mr Mark Pulvirenti, Partner, Control Risks, *Committee Hansard*, 7 August 2017, p. 29.

> like the AFP and ASIC and the ATO. People come and go, priorities come and go, and the focus comes and goes, depending upon what is happening in the real world and what the politics of the day demand. But what that means is that you do not have a body of knowledge and skill that remains.[50]

3.48 Mr Wyld went on to suggest that the continued absence of a dedicated agency in Australia, such as a SFO, would:

> …certainly help contribute to an impression that we don't treat it seriously and we perhaps treat other things more seriously, and therefore people will continue to look at Australia in a way that they traditionally have done.[51]

3.49 In contrast, the Law Council of Australia highlighted the importance of the AFP's investigative powers and concerns around giving such powers to another body:

> …the AFP have investigative powers under part IB of the Crimes Act [*Crimes Act 1914*], which put them in a quite different position to other investigative agencies. I don't know that it would necessarily be a desirable thing to arm another agency with those powers simply for the purposes of them being able to investigate this kind of conduct—if you can do it through that which you've got, which is the body that is given those investigative powers. They are investigative powers that can be exercised in a particular way, because they can be utilised in a particular way, which is for the purposes of obtaining evidence, not for the purposes of obtaining information.[52]

International cooperation

3.50 Evidence provided to the committee also suggested that there is difficulty in obtaining evidence from other countries due to the inefficiency of international cooperation. Mr McCartney of the AFP suggested that:

> …part of the problem is some of the delays. To obtain that evidence we simply cannot go to that country and ask for that evidence and bring it back; we have to obtain that evidence under a mutual assistance request. That process can be lengthy, depending on the country we are dealing with….[53]

3.51 The AGD explained that:

> Mutual legal assistance is a formal government-to-government process for obtaining assistance in a criminal investigation or prosecution, or to recover the proceeds of crime. It is different but often complementary to

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50 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 40.

51 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 43.

52 Mr Tim Game SC, Co-Chair, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 7 August 2017, p. 47.

53 Mr Ian McCartney, Acting Deputy Commissioner Operations, Australian Federal Police, *Committee Hansard*, 22 April 2016, pp. 26–27.

> agency-to-agency assistance which is informal assistance that may be provided by one agency to its foreign counterpart.[54]

3.52 While Australia has a comprehensive framework for dealing with incoming and outgoing mutual assistance requests,[55] the committee heard evidence about the difficulties in securing prosecutions where there are delays in processing mutual assistance requests. For example, in discussing the issue of international engagement, Commander Tim Crozier of the AFP observed that:

> We've seen with mutual legal assistance requests that they are a challenge and they can be time-consuming.[56]

3.53 Mr Shane Kirne of the CDPP agreed that getting evidence from foreign jurisdictions in foreign bribery cases can be challenging and explained that:

> …in the limited number of matters that we've run, I think the cases have largely been proved by way of evidence that was Australian-based.[57]

3.54 Other stakeholders also reflected on the complex processes for admitting evidence provided by another country. For example, Mr Wyld pointed out that the process of admitting the evidence obtained from a mutual assistance request is problematic:

> The way countries interact with each other, the mutual legal assistance scheme and the processes for admitting evidence from one country into Australia under the Foreign Evidence Act is technical, is convoluted and is rife with the process that all good defence lawyers… will strike out, or attempt to strike out, whatever they can because it does not comply with quite strict procedures when you are involving a criminal trial.[58]

Lack of resources

3.55 The Phase 3 OECD Report on implementing the OECD Anti-Bribery Convention in Australia noted that the AFPs flexible resourcing model raised concerns about the sufficiency of resourcing and recommended that:

> Steps should be taken to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases.[59]

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54 Attorney-General's Department, *Submission 32*, p. 7.

55 Australia's mutual assistance regime is set out in the *Mutual Assistance in Criminal Matters Act 1987*.

56 Commander Peter Crozier, Manager, Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police, *Committee Hansard*, 31 October 2017, p. 18.

57 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. 29.

58 Mr Robert Wyld, Co-Chair, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, p. 21.

59 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, pp. 5 and 30, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 1 December 2017).

3.56 The committee also heard evidence from submitters that the lack of enforcement of foreign bribery offences in Australia may be linked to insufficient resources.

3.57 Submitters observed that foreign bribery is only one of the AFPs many priorities, which include counter terrorism and drug law enforcement. Mr McKenzie argued that the resourcing of the AFP's foreign bribery team was 'manifestly inadequate'.[60] However, he went on to remark that:

> At the moment the AFP—though they may say something different here—is, unfortunately, extremely resource stretched. Resources aren't going into this area like they should. That's why we're seeing cases not being made or not being dealt with in a quick and effective fashion. Sometimes it takes six to eight months for a case assessment to be made, and that's before an investigation even starts. By that stage evidence is drying up; the witnesses are forgetting things. So, again, creating a greater sense of priority inside the AFP and ensuring the AFP has the money to do what's required is critical.[61]

3.58 KordaMentha also thought the AFP was under-resourced, noting:

> …it appears that largely due to the historical lack of focus on enforcing foreign bribery, these agencies may not be adequately resourced to enforce foreign bribery legislation.[62]

3.59 In addition to recent specific funding received by the AFP (discussed in more detail below), the AFP informed the committee that:

> The organisation has also received significant funding in relation to its specialist capabilities, which all parts of the organisation draw upon to undertake investigations at the high end. That has certainly been beneficial to the organisation, because it covers myriad specialist capabilities, a lot of which foreign bribery will use. We've made mention about how we use some of those higher end techniques that are supported by that really high-end technical capability. There's no question that investigations such as these are resource intensive. We've had a number of matters of high profile, including in the serious taxation space. It's not hard to recognise the amount of resources that go in, not just to a specific investigations team but to all those capabilities that the organisation has to assist and move through to a prosecution phase. We do recognise those issues and are aware of them, but it's drawn out of our normal business.[63]

3.60 CDPP explained to the committee that funding of foreign bribery matters comes out of their general budget and that they have no specific tied or unique funding to handle such matters. Mr Kirne of CDPP told the committee:

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

61 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017 p. 9.

62 KordaMentha, *Submission 22*, p. 12.

63 Commander Peter Crozier, Manager, Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police, *Committee Hansard*, 31 October 2017, p. 42.

> We have specific funding sometimes for other types of matters, such as GST fraud prosecutions. In terms of foreign bribery, which we are finding already incredibly resource and financially intensive for us, they are coming out of our general budget, so it does create challenges. If there was some blockbuster funding or a pool of money, that would obviously be something that we would be appreciative of. It would make our lives a bit easier, because we have to draw on the existing funding that we have and the budget is already quite constrained.[64]

3.61 In contrast, since October 2012, in addition to a core budget, the UK SFO has been supplemented as necessary by additional funding agreed with the UK Treasury. This includes 'blockbuster' funding, which enables the UK SFO to take on very big cases where the annual expenditure is expected to exceed an agreed percentage of their core budget.[65]

3.62 Mr Kirne explained that in the past, CDPP has encountered problems when tied funding is allocated as it has a specified timeframe. He advised:

> There is a huge lag, sometimes, between the investigation phase and ultimately the commencement and, particularly, the conclusion of the litigation, which can drag on for many years past the time frame that the tied funding is effectively exhausted. One attraction in my mind for the blockbuster funding would be an as-needs-at-time fund that one could go to, not just for foreign bribery matters but for other very complex, expensive litigation.[66]

3.63 ASIC explained that they have their own version of 'blockbuster' funding in the form of an enforcement special account which is 'effectively a fighting fund… that goes up and down based on the ASIC major cases'.[67] However, Mr Chris Savunrdra of ASIC cautioned the committee that:

> In order to get access to the enforcement special account we have to first spend $750,000 of our general funding before we can get in. Given the competition over those resources, it takes some time through staff allocation for any given matter to get to $750,000. That $750,000 upfront is a bit of a barrier to entry. It's not like we can say from the get-go: 'This is a

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. 41.

65 UK Government, Serious Fraud Office, *About us*, https://www.sfo.gov.uk/about-us/ (accessed 1 December 2017).

66 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. 42.

67 Mr Chris Savundra, Chief Legal Officer, Australian Securities and Investment Commission, *Committee Hansard*, 31 October 2017, p. 42.

> blockbuster foreign bribery matter,' and reach straight into that pool. We first have to spend $750,000 of our own money before we do that.[68]

3.64 Mr Savundra went on to recognise that the $750,000 threshold presents a barrier which ought to be looked at:

> …to see whether there could be better criteria by which we ascertain whether you can reach straight into that blockbuster funding rather than having to spend $750,000 of your own money out of a very limited resource pool before you get access to that blockbuster funding.[69]

Recent initiatives to improve enforcement

Targeted funding

3.65 The Hon Prime Minister Malcolm Turnbull announced on 23 April 2016 that the government would dedicate $15 million to strengthening Australia's foreign bribery enforcement. Prime Minister Turnbull said in a press release:

> We are investing a further $15 million over three years to strengthen the capacity of the Australian Federal Police and specialist agencies to trace corrupt money flows, seize tainted proceeds and engage the best lawyers to prosecute perpetrators.[70]

3.66 Prime Minister Turnbull stated that the funds would be sourced from confiscated proceeds of crime and used 'to expand and enhance the foreign bribery investigation teams of the Fraud and Anti-Corruption Centre [FAC]'. Specifically, 26 new positions within the AFP would be funded, making up three new investigative teams—which will include the recruitment of investigators, forensic accountants and proceeds of crime litigators.[71]

3.67 Commander Crozier of the AFP explained that provision of these specific resources to deal with foreign bribery as an organisation 'is indicative of the seriousness not only [in] the way the AFP takes it but also the way the government is looking at these issues'.[72] The AGD confirmed that this funding allowed the:

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68 Mr Chris Savundra, Chief Legal Officer, Australian Securities and Investment Commission, *Committee Hansard*, 31 October 2017, p. 42.

69 Mr Chris Savundra, Chief Legal Officer, Australian Securities and Investment Commission, *Committee Hansard*, 31 October 2017, p. 42.

70 Prime Minister Malcolm Turnbull MP, *Boosting efforts to tackle foreign bribery*, 23 April 2016, http://www.malcolmturnbull.com.au/media/boosting-efforts-to-tackle-foreign-bribery (accessed 1 December 2017).

71 Prime Minister Malcolm Turnbull MP, *Boosting efforts to tackle foreign bribery*, 23 April 2016, http://www.malcolmturnbull.com.au/media/boosting-efforts-to-tackle-foreign-bribery (accessed 1 December 2017).

72 Commander Peter Crozier, Manager, Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police, *Committee Hansard*, 31 October 2017, p. 41.

> AFP-led FAC centre to develop dedicated specialist teams in Perth, Sydney and Melbourne to identify and investigate instances of foreign bribery.[73]

3.68 Commander Crozier also commented that, in addition to this specific funding received by the AFP in relation to the establishment of foreign bribery teams in Sydney, Melbourne and Perth, significant funding had been received in relation to the AFPs specialist capabilities, which all parts of the organisation draw on to undertake investigations. Commander Crozier explained that this funding had been beneficial:

> …because it covers myriad specialist capabilities, a lot of which foreign bribery will use. We've made mention about how we use some of those higher end techniques that are supported by that really high-end technical capability. There's no question that investigations such as these are resource intensive. We've had a number of matters of high profile, including in the serious taxation space. It's not hard to recognise the amount of resources that go in, not just to a specific investigations team but to all those capabilities that the organisation has to assist and move through to a prosecution phase. We do recognise those issues and are aware of them, but it's drawn out of our normal business.[74]

3.69 While acknowledging the gains that have been made in recent years, some submitters called for the devotion of further resources to the area of foreign bribery. For example, the Law Council of Australia stated:

> The gains that have been made in recent years, I think, are quite profound—the additional funding, the centre of excellence within the Australian Federal Police, the devotion of further resources.[75]

3.70 The IBAACC also noted the increase in financial resources, but recommended that such resources be made available on an ongoing basis. Specifically, they called for the additional funding to be:

> …maintained by all Governments at a commensurate level to target serious financial crime including foreign bribery and to ensure that the AFP and agencies working within the area of foreign bribery and their investigators are suitably experienced in international tax, finance and business transactions.[76]

3.71 The CDPP also reminded the committee that:

> Current experience demonstrates that foreign bribery matters will be some of the most complex and resource intensive matters prosecuted in this

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73 Ms Kelly Williams, Assistant Secretary, Criminal Law Policy Branch, Attorney-General's Department, *Committee Hansard*, 31 October 2017, p. 45.

74 Commander Peter Crozier, Manager, Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police, *Committee Hansard*, 31 October 2017 p. 42.

75 Mr Greg Golding, Chair, Foreign Corrupt Practices Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 7 August 2017, p. 47.

76 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 18.

> country. The resource challenges may be magnified by the fact that defendants may be very well resourced and backed by insurance.[77]

Interagency cooperation

3.72 As previously stated, submitters to the inquiry indicated that since the establishment of the FAC in July 2014, cooperation on foreign bribery matters between the relevant Commonwealth departments and agencies, as well as their state and territory counterparts had improved. For example, Mr Wyld noted that since the FAC was established:

> …there is a much better level of coordination, cooperation and secondment between officers of the Commonwealth entities that are part of that centre, including Tax, Customs, Immigration, AUSTRAC, the AFP, ASIC and APRA.[78]

3.73 Indeed, in its submission to the inquiry, the AGD explained that since the establishment of the FAC:

> …the AFP has strengthened its engagement with state and territory counterparts in relation to foreign bribery and corruption and fraud offences. This engagement has resulted in intelligence from a state police force that led to an allegation of foreign bribery being referred to the AFP FAC Centre.[79]

3.74 Mr Wyld agreed, remarking that things have substantially changed over the more recent years. Mr Wyld told the committee:

> …I think a lot of credit has to go partly to the government's initiative in getting the AFP to focus on this sort of work, and, in turn, the AFP themselves in reorganising their internal affairs to dedicate time and people to develop that experience—which takes a long time.[80]

3.75 The committee heard evidence from a panel of representatives from the AFP, ASIC and the CDPP who reflected on improved collaboration, specialised interagency training and the benefits of early engagement across their agencies in foreign bribery matters. Further, the panel suggested that through the implementation of both internal changes, as well as the FAC, Australia had enhanced its capabilities to handle foreign bribery investigations.[81]

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77 Commonwealth Director of Public Prosecutions, *Submission 39*, p. 2.

78 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 38.

79 Attorney-General's Department, *Submission 32*, p. 12.

80 Mr Robert Wyld, Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 22 April 2016, p. 20.

81 See *Committee Hansard*, 31 October 2017, pp. 33–44.

3.76 ASIC brought the committee's attention to action it had taken in response to recommendations of the Phase 3 OECD Report that ASIC and the AFP more closely engage and share expertise. ASIC explained:

> We have seconded a staff member into the AFP, in the FAC Centre, to bring knowledge and expertise of ASIC matters to the AFP. We have been actively involved in training, and I think the advanced foreign bribery training course was mentioned. ASIC staff attend that training but also participate in that training. I've presented at that training myself. Certainly the sharing of expertise has occurred; the sharing of resources has occurred. The expertise, both on the part of the AFP and ASIC, has been enhanced as a result.[82]

3.77 In recognition of the very specialised nature of foreign bribery matters, Mr Kirne of the CDPP advised that in October 2015, it established a specialist national focus group. Mr Kirne informed the committee that the CDPP's specialist national focus group is:

> …a forum that meets every five to six weeks and is designed to discuss foreign bribery related matters and to share knowledge and learnings of issues and also is a means to ensure a consistent national approach. As noted in the cross-agency submission, due to the complexity and volume of foreign bribery matters, the CDPP provides early and ongoing legal advice to investigative agencies during the course of investigations. For example, there is a case officer appointed for each foreign bribery investigation that the office has been advised of.[83]

3.78 Ms Jeldee Robertson of the CDPP also commented on the benefits of increased prebrief engagement with the AFP:

> …the ability to assess the briefs more quickly has certainly increased in the last few years because of that very, very early engagement. I think that's been a real improvement.[84]

3.79 Mr Kirne added that the CDPP has also:

> …moved more towards a team based approach to assessing the litigation rather than having a single lawyer working on a matter, which of course makes it susceptible, when the person retires or resigns or takes leave et cetera, to the matter stopping in its assessment phase. So, we're teaming lawyers—pairing them to work on these more complex matters. In some particularly complex matters, at times we've had up to half a dozen lawyers,

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82 Mr Chris Savundra, Chief Legal Officer, Australian Securities and Investment Commission, *Committee Hansard*, 31 October 2017, p. 36.

83 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. 26.

84 Ms Jeldee Roberston, Principal Federal Prosecutor, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 31 October 2017, p. 32.

> I think, working on one matter—not all the time, obviously, and not for huge periods of time, but at various times in the assessment stage.[85]

3.80 With respect to delays caused by LPP, the Phase 4 OECD report noted that the AFP had recently created a LPP Practice Group, to ensure that all AFP investigations at risk of LPP claims are able to manage these effectively. The report explained that:

> …the Group runs an internal training programme for all investigators who may face LPP issues, ensuring that they can manage these through comprehensive strategies and well informed negotiations. A member of the Group also acts an 'LPP coordinator' as required throughout an investigation.[86]

3.81 In this regard, Mr Kirne of the CDPP offered his views on the potential for LPP to 'get in the way—or be misused' in foreign bribery cases:

> LPP is one of those issues that we know, in most of the investigations, when you're actually working in this complex space that we're working with corporations and the like, and financial crime is always a potential issue that you're going to have to deal with. What we have to do, as an agency and working with our partners, again, is start to look at strategies to try and lessen the impact of LPP and work with our own internal agencies in developing frameworks, including what we have as an LPP practice group, within our organisation which assist us to build some strategies for a potential claim. It also ensures that the negotiations that are occurring with a person who is making a claim are well understood. There are good frameworks around them, and it ensures that, as much as we can, there's some sort of timely response into that process rather than the potential for a matter to linger for an extended period of time in which neither party really benefits.[87]

3.82 Commander Crozier also noted that the AFP will continue to look for ways to improve Australia's enforcement of foreign bribery laws, and emphasised that this may see involvement from agencies, other than ASIC and CDPP. He told the committee that:

> …we will continue to expand our relationships, ensuring that early engagement is happening not just with the CDPP but across agencies for the

85 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. 32.

86 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).

87 Mr Shane Kirne, Deputy Director and Practice Group Leader, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 31 October 2017, pp. 34–35.

> contributions or expertise that they might be able to provide, and considering what other agencies may be able to contribute and assist.[88]

3.83 Mr Kirne also explained that the CDPP now provides relevant training and partakes in the AFP advanced foreign bribery training program.[89]

3.84 In addition, Commander Crozier advised the committee that the AFP, in conjunction with their partners across the FAC Centre, is undertaking a review that is due in 2018 to ensure that it's delivering what was intended. Commander Crozier indicated that the FAC is:

> …not just around having people in the centre doing their work; it's about changing mindsets around what we might be able to do and how we deal with issues from a broader range of treatments. To ensure that what was set up in the philosophy of establishing it back in 2014 is still current, we're doing that review to get an understanding and making sure the other agencies contributing to the FAC Centre are getting out of it what they intended so we can meet those requirements.[90]

ASIC enforcement review

3.85 With reference to their abilities to investigate foreign bribery related offences, ASIC commented that the powers at their disposal 'were not designed with foreign bribery in mind'.[91] Mr Savundra of ASIC went on to explain:

> An example of that would be section 286 [of the *Corporations Act 2001*], which is about ensuring that financial accounts are true and fair. It'll be very rarely the case that a foreign bribery is material such that the misreporting of a bribe in the accounts is unlikely to impact that financial position being true or fair. Section 286 will, I anticipate, unless the foreign bribery is material, be limited in its use.[92]

3.86 On 19 October 2016, the Minister for Revenue and Financial Services, the Hon Kelly O'Dwyer MP, announced a taskforce to review the enforcement regime of ASIC.[93]

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88 Commander Peter Crozier, Manager, Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police, *Committee Hansard*, 31 October 2017, p. 38.

89 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. 26.

90 Commander Peter Crozier Manager, Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police, *Committee Hansard*, 31 October 2017, p. 39.

91 Mr Chris Savundra, Chief Legal Officer, Australian Securities and Investment Commission, *Committee Hansard*, 31 October 2017, p. 20.

92 Mr Chris Savundra, Chief Legal Officer, Australian Securities and Investment Commission, *Committee Hansard*, 31 October 2017, p. 20.

93 The Hon. Kelly O'Dwyer MP, Minister for Revenue and Financial Services, Media release, *ASIC Enforcement Review Taskforce*, 19 October 2016, http://kmo.ministers.treasury.gov.au/media-release/095-2016/ (accessed 1 December 2017).

3.87 The Enforcement Review Taskforce is led by a Panel chaired by Treasury, and includes senior representatives from ASIC, AGD, and CDPP, with support from an Expert Group drawn from academia and legal experts recognised for their expertise in corporations, consumer, financial and credit law. The Expert Group will provide ongoing advice and feedback to the Panel in preparing its report and recommendations.

3.88 The Enforcement Review Taskforce was due to report to the government in 2017 and invited submissions from the public on proposed policy responses, including on Strengthening Penalties for Corporate and Financial Sector Misconduct.

3.89 Mr Savundra explained that the work of the Enforcement Review Taskforce will be critical to improving ASIC's enforcement record. He told the committee that:

> The Enforcement Review Taskforce is looking at search warrants, telephone intercepts—a number of issues which would enhance ASICs toolkit.[94]

3.90 In terms of penalties, Mr Kirne of CDPP told the committee that the Enforcement Review Taskforce is:

> …looking at penalties for offences across the board, both for individuals involved in financial crimes and for corporate entities.[95]

3.91 Ms Kate Mills from the Treasury informed the committee that there is a position paper on penalties from ASIC to the Enforcement Review Taskforce. In the context of criminal penalties, Ms Mills stated:

> The principal provision that ASIC would rely upon in this regard is section 184 of the Corporations Act [*Corporations Act 2001*], which criminalises the behaviour of directors and officers of the company if they engage in the requisite conduct intentionally or recklessly…What the task force is currently proposing as a preliminary position is that section 184, from a criminal perspective, be increased up to 10 years. That will bring it into line with equivalent state legislation outcomes for fraud or like offences. It will also potentially eliminate the difficulty that ASIC has at the moment in having to bring prosecutions with the DPP under both the state and Commonwealth law. It could bring it all under state law and get the benefit of the maximum terms, but then it is not able to use a lot of its investigative and other powers, because it's not investigating a Commonwealth offence. The proposal put forward by the task force will eliminate that particular difficulty. Of course, it ultimately has to be accepted by government; but that is the current position, and we are consulting on that.[96]

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94 Mr Chris Savundra, Chief Legal Officer, Australian Securities and Investment Commission, *Committee Hansard*, 31 October 2017, p. 37.

95 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. 38.

96 Ms Kate Mills, Principal Adviser, Financial System Division, Treasury, *Committee Hansard*, 31 October 2017, p. 24.

3.92 With respect to civil penalties under the *Corporations Act 2001*, Ms Mills informed the committee:

> Section 1317E of the act gives you a list of all the civil penalties. For an individual, the maximum fine is $200,000. In the case of a corporation, the maximum fine is $1 million. The task force recognises—and has put a position out in relation to this—that those penalties need to be amended. In the case of individuals, they are looking at a fine of up to $540,000-odd. In the case of a corporation, that will certainly increase—in some cases to $2 million and in other cases much more significantly than that. In addition, it adds a couple of other options to the menu, if you like. One is that the company can be required to disgorge the benefit. It can be a multiple of three times the benefit, so it can be very substantial. In addition, there may be ability to impose up to 10 per cent of turnover of the organisation. So, even though the fine ordinarily might be relatively low, the court, in appropriate circumstances, may be able to impose a much more significant financial penalty than would otherwise normally be the case.
>
> Likewise, in relation to penalties on the criminal side, the proposal is that they be increased and brought up to roughly the same level as exists currently for market misconduct, which is around $9.45 million, plus the disgorging option, plus the three times benefit option, plus the 10 per cent turnover option.[97]

3.93 Indeed, Ms Mills confirmed that the Enforcement Taskforce Review expected to make recommendations to the government on these issues by the end of 2017.[98]

Proposed amendments to the foreign bribery offence and related measures

3.94 In evidence before the committee in October 2017, AGD noted that:

> The government has consulted on a number of significant reforms to improve the response to corporate crime and to help ensure foreign bribery is detected, investigated and prosecuted. These include possible changes to the foreign bribery offence to address operational barriers…[99]

3.95 As mentioned in Chapter 2, as a result of these consultations in December 2017, the government introduced the Crimes Legislation (Combatting Corporate Crime) Bill 2017 (CCC bill) which implements, in part, the proposals to amend the foreign bribery offence and introduce a deferred prosecution agreement (DPA) scheme.

3.96 These proposals are discussed in more detail in Chapters 4 and 5.

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97 Ms Kate Mills, Principal Adviser, Financial System Division, Treasury, *Committee Hansard*, 31 October 2017, p. 24.

98 Ms Kate Mills, Principal Adviser, Financial System Division, Treasury, *Committee Hansard*, 31 October 2017, p. 24.

99 Ms Kelly Williams, Assistant Secretary, Criminal Law Policy Branch, Attorney-General's Department, *Committee Hansard*, 31 October 2017, p. 45.

Phase 4 OECD Report

3.97 In its Phase 4 OECD Report the OECD evaluation team was impressed by the substantial steps Australia had taken since Phase 3 to enhance its capacity to investigate foreign bribery cases. In particular, the report noted the creation of FAC, the enhanced role of the Panel of Experts, the establishment of three dedicated foreign bribery investigative teams, and ongoing training provided to all investigators with AFP's FAC. The examiners stated they are:

> …confident that AFP now has the systems in place to effectively evaluate and investigate foreign bribery referrals and recommends that the government continue to resource AFP effectively to ensure it can continue its foreign bribery enforcement efforts.[100]

3.98 With respect to the CDPP, while impressed by recent efforts to increase expertise and dedication toward combatting foreign bribery, the Phase 4 OECD Report suggested:

> …that the current level of resources for foreign bribery prosecutions, whilst adequate for the CDPP's current workload, will need to be carefully monitored, particularly if the level of referrals continues to increase.[101]

3.99 In this light, the Phase 4 OECD Report recommended, among other things, that Australia continue to resource the CDPP so it can effectively prosecute foreign bribery cases at the rate that they are expected to be generated by AFP.[102]

Committee view

3.100 The committee notes the criticisms of stakeholders about Australia's legislative scheme and enforcement record in combatting foreign bribery. Indeed, the committee considers that a deficiency of sufficient expertise, delays in investigation and prosecution, and a lack of cooperation and limited resources may have contributed to the scarce enforcement of foreign bribery involving Australian companies and individuals.

3.101 The committee is cognisant that establishing a legitimate system to tackle instances of foreign bribery is not straightforward and needs to efficiently and effectively utilise existing resources. The committee endorses an interagency approach in this area, and acknowledges the work and role of the Fraud and Anti-Corruption Centre (FAC) in addressing matters of foreign bribery.

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100 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 42, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

101 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p.44, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

102 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 44, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018), (accessed 1 January 2018).

3.102 Noting that the FAC was only established in 2014 and the average duration of a foreign bribery case is between five and seven and a half years, the committee considers that more time is needed to assess the effectiveness of the FAC in investigating and prosecuting foreign bribery. In this context, the committee also recognises that it is difficult to assess the impact of the additional funding of $15 million for foreign bribery enforcement which was provided in 2016.

3.103 Evidence presented to the committee established that foreign bribery cases are complex, lengthy and resource intensive. The committee is therefore of the opinion that given the serious nature of foreign bribery, the complexity and time necessary to secure evidence, and the high public interest in ensuring that corporate criminal conduct does not go unpunished, there should remain no time limit for foreign bribery offences (see statute of limitation discussion in Chapter 2). However, the committee considers it essential that the government establish a permanent funding mechanism to ensure agencies are equipped to thoroughly investigate all foreign bribery allegations, and to support any necessary prosecutorial action.

3.104 With regard to ASIC's enforcement powers, the committee notes that the Enforcement Taskforce Review was expected to make recommendations to the government by the end of 2017. While this review is a welcome and important start, the committee believes that any proposed changes should be considered in the context of ASIC's ability to enforce penalties for foreign bribery related offences.

Recommendation 2

3.105 The committee recommends that the Australian Federal Police's (AFP) annual report incorporate specific information about the Fraud and Anti-Corruption Centre (FAC), including de-identified data regarding the number of referrals received, the number of matters allocated to the AFP foreign bribery or FAC team, the number of investigations completed, the resources devoted to these activities, and the number of investigations which led to criminal/civil actions and the timeliness of such enforcement actions.

Recommendation 3

3.106 The committee recommends that consideration be given to developing a contingency mechanism that explicitly provides for additional one-off funding to appropriate agencies (Australian Federal Police, Australian Securities and Investment Commission, Commonwealth Director of Public Prosecutions) for large and complex investigation of foreign bribery offences to ensure any allegations are thoroughly investigated, and where appropriate, fully prosecuted.

Recommendation 4

3.107 The committee recommends that in considering the report of the review of the enforcement regime of Australian Securities and Investment Commission (ASIC), the government have regard to how any proposed changes will help improve the enforcement of penalties by ASIC for foreign bribery related offences.

PART II

Strengthening Australia's legal framework against foreign bribery

Overview of Part II

This part concentrates on what legislative reforms are required to overcome the current challenges of:

- establishing criminal liability for companies for the offence of foreign bribery;
- identifying instances of foreign bribery; and
- protecting whistleblowers who disclose foreign bribery.

It assesses the current bills before Parliament—the Crimes Legislation (Combatting Corporate Crime) Bill 2017 and the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017)—what they seek to address and what they overlook.

It draws on the evidence received by the committee regarding the government's earlier consultations on proposed amendments to the foreign bribery offence and a model for a deferred prosecution agreement scheme in Australia. In particular, it examines how the proposed legislation correlates to the respective public consultations on these issues. It also considers how Australia's foreign bribery offence can be strengthened, and self-reporting encouraged, to facilitate a more effective and efficient response to foreign bribery.

This part then looks at the role of whistleblowers in identifying instances of foreign bribery. It evaluates Australia's current whistleblower protections and considers how they can be improved, as well as looking at the government's proposed amendments to the whistleblower protection regime for the corporate and financial sectors.

Chapter 4

Reforming the foreign bribery offence

4.1 Currently, for someone to be found guilty of the offence of foreign bribery, the prosecution must prove that the accused engaged in the relevant conduct (the offering of an illegitimate benefit) with a *guilty intention* of influencing a foreign public official in order to gain or retain business or a business advantage that *is not legitimately due*.[1]

4.2 The committee heard from stakeholders that, as there is often a lack of written evidence available in foreign bribery cases, establishing the relevant guilty intention by the accused is inherently problematic. Evidence received by the committee suggested that, as bribes are often concealed by corporations as legitimate payments, it is also difficult for the prosecution to show 'beyond reasonable doubt' that both the benefit offered or provided, and the business advantage sought, were not legitimately due. The Australian experience also demonstrates the challenges of establishing criminal liability for companies for the offence of foreign bribery within the current federal statutory framework.

4.3 As discussed in Chapter 2, 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 (2017 consultation paper).[2] Then in December 2017, the government introduced the Crimes Legislation (Combatting Corporate Crime) Bill 2017 (CCC bill) which included some of the amendments proposed in the April 2017 consultation. This bill is currently before the Parliament and subject to inquiry by the Legal and Constitutional Affairs Legislation Committee (L and C committee).[3]

4.4 This chapter examines the amendments proposed in the 2017 consultation paper and the CCC bill. In so doing, it considers how the proposed reforms to the foreign bribery offence may assist Australia to combat the bribery of foreign public officials and ensure individuals and companies are held to account.

Including candidates for office in the definition of foreign public official

4.5 The current definition of 'foreign public official' in section 70.1 of the *Criminal Code Act 1995* (Criminal Code) does not include candidates for office. As such, companies that bribe candidates for public office, with the intent of obtaining

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1 *Criminal Code Act 1995*, Division 70.

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

3 On 6 December 2017 the CCC bill was introduced by the government in the Senate. See *Journals of the Senate*, No. 78, 6 December 2017, p. 2484. On 7 December 2017 the Senate referred the bill to the L and C committee for inquiry and report by 20 April 2018. See *Journals of the Senate*, No. 79, 7 December 2017, pp. 2512–2513.

business advantages once the candidate takes office, are not captured by the current foreign bribery offence.

4.6 In line with the amendments proposed in the 2017 consultation paper, the CCC bill seeks to amend the definition of 'foreign public official' to include a person standing or nominated as a candidate for public office.[4]

4.7 As explained in the 2017 consultation paper, the proposed amendment:

> …would not prevent individuals or companies from making legitimate donations to candidates for office, as the amended offence would still require the prosecution to show that the benefit was provided, offered or promised to improperly influence the candidate to obtain/retain an advantage.[5]

4.8 However, the new offence would criminalise individuals or companies where they 'seek to bribe candidates for public office, with the intent of obtaining an advantage if the candidate takes office'.[6] In their submission to the L and C committee's inquiry into the CCC bill, the AGD highlighted that:

> It is appropriate to criminalise this conduct given that it has the potential to undermine good governance and free and fair markets and to otherwise cause the same harm as bribery of a public official.[7]

4.9 In their submission to the 2017 consultation, the Australian Institute of Company Directors (AICD) supported the proposed extension of the definition, emphasising that it would remove:

> …a potential 'loophole' for an accused offender to avoid prosecution, should the bribe have occurred before a public official's formal appointment to office.[8]

4.10 Allens Linklaters also highlighted that '[c]andidates for foreign public office are vulnerable to influence in much the same way as foreign public officials'.[9] Allens Linklaters went on to explain that in their experience:

> …many multinational corporations already prohibit their employees from engaging in such conduct and, as such, we do not consider that this

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4 CCC bill, Schedule 1, item 4.

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

6 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 4.

7 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 4.

8 Australian Institute of Company Directors, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

9 Allens Linklaters, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

> amendment would materially, if at all, increase the compliance burden faced by Australian corporations.[10]

4.11 Indeed, in their submission to the 2017 consultation, BHP Billiton supported the amendments and explained that pursuant to their current internal Code Of Business Conduct, they do not contribute funds to any candidate for public office in any country.[11]

Committee view

4.12 The committee considers it essential that Australia's foreign bribery law operate to criminalise individuals and companies who seek to bribe candidates for office, with the intention of obtaining an advantage if the candidate takes office.

4.13 The committee is serious about combatting all types of corruption, including political corruption. In this context, the committee acknowledges that candidates for public office are vulnerable to influence in a similar way to foreign public officials. Therefore, the committee sees no reason why a bribe which occurred before a public official's formal appointment to office should be treated any differently to a bribe received at, or after, such appointment. The committee is concerned that the government has delayed taking action to close this potential loophole.

4.14 The committee acknowledges that the CCC bill that is currently before the Parliament seeks to amend the definition of 'foreign public official' to include a person standing or nominated as a candidate for public office.

Recommendation 5

4.15 The committee recommends that the definition of 'foreign public official' in section 70.1 of the *Criminal Code Act 1995* be amended to include candidates for office.

Clarify offence of 'improperly influencing' a foreign public official

4.16 As noted above, showing that a benefit or business advantage was 'not legitimately due', particularly when payments are disguised as legitimate business transactions, is difficult. Therefore, in line with one of the suggested approaches in the 2017 consultation paper, the CCC bill seeks to amend section 70.2 of the Criminal Code to replace these elements of the offence with the concept of 'improperly influencing' a foreign public official to obtain or retain business or an advantage.[12]

Stakeholder opinion

4.17 While supportive of a move away from the concept of 'not legitimately due', submitters to the inquiry raised concerns about the introduction of the term 'improperly influence'. Indeed, some stakeholders recommended the adoption of one

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10 Allens Linklaters, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

11 BHP Billiton, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 2.

12 CCC bill, Schedule 1, item 6.

of the two alternative approaches considered in the 2017 consultation paper, which would replace the threshold of 'not legitimately due' with the concept of 'dishonesty'.[13]

4.18 Mr Tim Game SC, Co-Chair of the National Criminal Law Committee, Law Council of Australia, raised concerns about the use of the term 'improperly' and informed the committee of the Law Council of Australia's preference for the use of the concept of 'dishonesty'. Mr Game explained:

> When one talks, for example, about improper use of position in the Corporations Act there is usually a fiduciary duty in place against which you can measure the impropriety. There is a real difficulty of measuring, so it would just be left to a jury to decide if that was an impropriety. That is a problem because there is no resting duty with the person that is doing the thing in the first place. That other person, as you know, that could just be their agent and that could be a corrupt agent. There is a problem there that needs to be addressed. Our suggestion is that you use the language of dishonesty.[14]

4.19 While acknowledging merit in the use of both of the concepts 'improperly influence' and 'dishonesty', Mr Robert Wyld, the Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee (IBAACC), told the committee that the IBAACC 'tended to favour the use of the concept of dishonesty, as that is known under Australian criminal law'.[15]

4.20 The AICD agreed, and went so far as to recommend against the introduction of the concept of 'improperly influence', and supported the adoption of a test of dishonesty.[16] AICD explained:

> One of the problems with this jurisdiction and this particular crime is that there hasn't been any case law to assist in interpreting the offences. We came to the view that the dishonesty test in the offence, as opposed to essentially introducing a new concept, would be good, because it would remove some of the uncertainty. It would introduce a concept that is well-known in Australian law while still achieving what we need to achieve under the OECD convention. That was our perspective. We did see that the improvement suggested in the draft legislation had some merit in the sense that it was consistent with the UK, I believe. But on balance, we thought that [the] most quick and efficient way to achieve a good law in this area was to simply use dishonesty, which is so well known and so well tested by the courts…

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13 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, pp. 6–7.

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

15 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 37.

16 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

4.21 However, as acknowledged in the 2017 consultation paper, should the concept of 'dishonesty' be introduced into the foreign bribery offence, it would be necessary to decide which test of dishonesty will apply:

- The *Ghosh* test, as prescribed in the Criminal Code—which provides that the conduct is criminally dishonest if it is both objectively dishonest, according to the standards of ordinary people; and known by the defendant to be dishonest according to the standards of ordinary people;[17] or
- The *Peters* test, as adopted by the High Court—which provides that the conduct is criminally dishonest if the fact-finder concludes that 'ordinary, decent people' would consider the conduct to be dishonest.[18]

4.22 Stakeholders had differing views as to which test of dishonesty ought to be applied.

4.23 The Law Council of Australia suggested that if the concept of 'dishonesty' is introduced, the definition in the Criminal Code (the *Ghosh* test) should be explicitly applied. In this context, Mr Game highlighted that if the term is not defined as such, the test of dishonesty would probably revert to the *Peters* test.[19]

4.24 However, AICD had a preference for the *Peters* test because it is objective and considered the *Ghosh* test to be 'quite convoluted'. AICD commented:

> The Peters test, which simply requires the court to be satisfied that the conduct was dishonest by the standards of an ordinary person—in Australia, we might add—is a satisfactory and clear test. I understand it's also consistent with the test of dishonesty in section 184 of the Corporations Act. I would finally add that there has been some judicial commentary in relation to the Ghosh test which points out its problems and its confusing nature for juries. So in short, when you're trying to instruct the jury as to the dual-part test, it's quite a difficult task. That's our position. We think that that would be the clearest way forward.[20]

4.25 Mr Wyld also informed the committee that IBACC tended to favour the present certainty of the *Peters* test because it had been set by the High Court.[21]

Why 'improper influence' and not 'dishonesty'?

4.26 The AGD considered that the proposed approach of 'improper influence' as set out in the CCC bill 'is preferable'.[22] They explained:

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17 *Criminal Code Act 1995*, s. 130.3.

18 *Peters v R* (1998) 192 CLR 493 at 504 [18].

19 Mr Tim Game SC, Co-Chair, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 7 August 2017, pp. 44–45.

20 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 34.

21 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 37.

> Some bribery does not involve dishonesty. For instance, where a company provides an open 'scholarship' to the child of a foreign public official. The scholarship is not necessarily intended to have a 'dishonest' influence, if it is done transparently. However, it could still be done with the intention of improperly influencing the foreign public official in favouring the company when business is being awarded.[23]

4.27 Subsection 70.2A(3) of the CCC bill lists matters that a trier of fact may have regard to when determining whether influence is improper (the list is non-exhaustive). The AGD clarified that:

> It will be a matter for the trier of fact to determine whether there has been improper influence on a case-by-case basis. The explanatory memorandum provides a number of examples, in addition to explaining the list of factors included in subsection 70.2A(3).[24]

4.28 This list includes at paragraph 70.2A(3)(f) that a possible factor for determining improper influence is whether the benefit was provided, offered or promised *dishonestly*.[25] In response to questions on notice posed by the Senate L and C committee, the AGD explained that:

> …dishonesty in this context would be determined according to the standards of ordinary people and whether the defendant must have realised what they were doing was dishonest according to those standards (i.e. the Ghosh test)…[and] that dishonesty is not to be assessed by reference to the standards in the location of the foreign public official.[26]

4.29 The AGD argued that the *Peters* test is not appropriate because:

> …it would be inconsistent with the definition of dishonesty as it applies to other offences in the Criminal Code, for example bribery of Commonwealth officials, abuse of office, forgery, fraud and general dishonesty offences. In addition, given the gravity of the offence of intentionally bribing a foreign public official, it is appropriate to have regard to both the subjective and objective standard when considering whether the defendant behaved dishonestly.[27]

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22 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 5.

23 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 5.

24 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill 2017, p. 4.

25 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 5 [emphasis added].

26 Attorney-General's Department, answers to questions on notice, to the L and C committee's inquiry into the CCC bill 2017, p. 4.

27 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill 2017, p. 4.

Committee view

4.30 The committee acknowledges the concerns raised by stakeholders regarding the challenges of proving the current element of the foreign bribery offence that a benefit or business advantage was 'not legitimately due'.

4.31 The committee observes that stakeholder opinion was divided as to whether the current threshold of 'not legitimately due' should be replaced with the concept of 'dishonesty' or to provide that the benefit must be 'improper'. However, the committee notes that the proposed amendments in the CCC bill adopt the latter approach because some foreign bribery does not involve dishonesty. The committee also notes that 'dishonesty' is included as a relevant factor for determining whether influence is improper under the proposed new offence.

Extend the offence to cover bribery to obtain a personal advantage

4.32 The current foreign bribery offence applies to bribery of foreign public officials to obtain or retain business or business advantages.[28] However, as suggested in the 2017 consultation paper, the proposed new offence in the CCC bill would also apply where the bribe was to obtain or retain a personal advantage.[29]

4.33 In their submission to the L and C committee's inquiry into the CCC bill, the AGD explained that '[l]aw enforcement experience has shown in some cases, foreign bribery can occur where the advantage sought is personal'.[30] By way of example, the AGD stated that:

> Personal advantages could include influencing a foreign public official to bestow a personal title or honour, or in relation to reducing personal tax liability. It is appropriate to criminalise this conduct given that it equally undermines good governance.[31]

4.34 The 2017 consultation paper clarified that if the offence was extended in this way, 'the existing defences would be available' and '[t]he CDPP [Commonwealth Director of Public Prosecutions] would retain the discretion to prosecute matters which are in the public interest.'[32]

28 *Criminal Code Act 1995*, s. 70.2.

29 CCC bill, Schedule 1, item 6.

30 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 4.

31 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 4.

32 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 7.

4.35 The majority of submissions to the 2017 consultation paper supported this proposed amendment.[33] For example, the IBACC described the proposed amendment as:

> …a sensible extension of liability to ensure that there is a prohibition of payment of bribes to foreign public officials for personal as well as business purposes.[34]

Committee view

4.36 The committee is of the view that bribery of a foreign public official to obtain or retain business or business advantage should be treated in the same manner as bribery of a foreign public official to obtain or retain personal advantage.

4.37 The committee recognises the importance of prohibiting all conduct that undermines good governance, including foreign bribery where the advantage sought is personal. The committee considers that the government's action to close this potential loophole is overdue.

4.38 The committee acknowledges that the proposed new offence in the CCC bill would also apply where the bribe was to obtain or retain a personal advantage.

Recommendation 6

4.39 The committee recommends that the foreign bribery offence apply in circumstances where the bribe of a foreign public official was to obtain or retain a personal advantage.

Corporate criminal liability in Australia

4.40 The Criminal Code provides for corporate criminal responsibility at the federal level;[35] with liability usually only resulting where both the physical element (the conduct) and the fault element (the intention, knowledge, recklessness or negligence) of an offence are satisfied.

4.41 The physical element of an offence will be attributed to a corporation where it was committed by an employee, agent or officer acting within the actual or apparent scope of his or her employment.[36]

4.42 The fault element of an offence (for foreign bribery, a guilty intention) will be attributed to the corporation where it is proved that:

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33 Control Risks, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 3; Law Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 3.

34 International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 6.

35 *Criminal Code Act 1995*, Division 12.

36 *Criminal Code Act 1995*, s. 12.2.

> (i) the corporation's board of directors intentionally or knowingly carried out the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
>
> (ii) a high managerial agent of the corporation intentionally or knowingly engaged in the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
>
> (iii) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the offence provision; or
>
> (iv) the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[37]

4.43 'High managerial agent' is defined in the Criminal Code to mean an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.[38] 'Corporate culture' is defined in the Criminal Code to mean an attitude, policy, rule or practice existing in the corporation generally or in the part of the corporation where the relevant offence was committed.[39]

4.44 While the committee notes that each state and territory has its own anti-bribery laws which, for the most part, cover private sector bribery and have uncertain extraterritorial application,[40] the Australian experience demonstrates the challenges of establishing criminal liability for companies for the offence of foreign bribery within the federal statutory framework.

New corporate offence of failing to prevent foreign bribery

4.45 Under the proposed new corporate offence of failing to prevent foreign bribery, as set out in the CCC bill, a company will be criminally liable where, for the profit or gain of the company, an 'associate':

- commits an offence under section 70.2 (the intentional bribery of a foreign public official); or
- engages in conduct outside Australia that would constitute an offence under section 70.2.

4.46 Of note is the exclusion in the CCC bill of the proposed foreign bribery offence based on the fault element of recklessness as set out in the 2017 consultation paper. This is discussed in more detail below. However, it should be noted that the 2017 consultation paper envisaged that such an offence would have also applied to the new corporate offence of failing to prevent foreign bribery; that is, a company would

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37 *Criminal Code Act 1995*, ss. 12.3(2).

38 *Criminal Code Act 1995*, ss. 12.3(6).

39 *Criminal Code Act 1995*, ss. 12.3(6).

40 Allens Linklaters, *Corporate criminal liability: A review of law and practice across the globe*, 2016, p. 8, https://www.allens.com.au/pubs/pdf/ibo/CorporateCriminalLiabilityPublication_2016.pdf (accessed 20 March 2018).

have been criminally liable where, for the profit or gain of the company, an 'associate' recklessly bribed a foreign official.[41]

4.47 'Associate' is defined in the CCC bill as an officer, employee, agent, contractor, subsidiary or controlled entity of the person/company.[42] However, the explanatory memorandum to the CCC bill states that:

> The definition of associate is also intended to have broad application to a person who provides services for or on behalf of another person. Such a person would not necessarily need to be an officer, employee, agent, contractor, subsidiary or controlled entity.[43]

4.48 'Subsidiary' is defined in Division 6 of the *Corporations Act 2001* (Corporations Act). Pursuant to section 46 of the Corporations Act, a subsidiary includes a body corporate that is incorporated outside of Australia and otherwise meets the definition of subsidiary in the Act. Control of a body corporate is also defined in Division 6 of the Corporation Act. Section 50AA provides that an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

4.49 Importantly, under the new offence, corporate criminal liability will be automatic, regardless of whether the persons involved are convicted; and a defence will be available where a company can prove it had adequate procedures to prevent and detect foreign bribery.[44]

4.50 The 2017 consultation paper explained that this proposal is similar to that which is provided for in section 7 of the UK *Foreign Bribery Act 2010* and that the provision would operate such that:

> …a company would be automatically [strictly] liable for bribery by employees, contractors and agents (including those operating overseas), except where they can show they had a proper system of internal controls and compliance in place to precent the bribery from occurring [adequate procedures].[45]

Stakeholder opinion

4.51 The majority of submitters supported the proposed corporate offence of failing to prevent bribery of a foreign public official. For example, the Australian Council of Superannuation Investors suggested that Australia harmonise its legal and enforcement framework for foreign bribery with key international peer jurisdictions, such as the UK, and recommended:

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41 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

42 CCC bill, Schedule 1, item 2.

43 CCC bill, explanatory memorandum, p. 12.

44 CCC bill, explanatory memorandum, p. 18.

45 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

> That an offence of 'failure to prevent a culture of bribery', or equivalent, be introduced into Australian law, in a manner consistent with the overall corporate and director liability framework.[46]

4.52 Mr Neville Tiffen agreed, arguing that holding a company liable for an offence of failure to prevent foreign bribery, unless it can show it has implemented 'adequate procedures', would help to create a corporate culture of compliance in Australia.[47]

4.53 Mr David Lehmann of KordaMentha Forensic also offered his support for the new corporate offence of failing to prevent foreign bribery, noting that:

> Aside from responsible ethical leaders setting and reinforcing acceptable standards of business conduct, creating an incentive for corporations to implement better, more effective antibribery compliance systems is the key to organisational cultural change Implementing the proposed offence of failing to prevent bribery of a foreign public official, with its exception of adequate procedures, should go a long way to creating this incentive.[48]

4.54 Mr Mark Pulvirenti of Control Risks, explained that under the failure to prevent foreign bribery offence in the UK (to which the proposed new corporate offence in Australia would be similar):

> …there is a strict [automatic] liability, corporate-level offence for which the only defence is the ability to demonstrate that adequate procedures to prevent those things from happening were put in place. In essence, it reverses the burden of proof. It puts it back onto the organisation to demonstrate that proper practices and procedures were put in place to try and prevent it. You're not going to always mitigate 100 per cent, but, certainly in the circumstances, on the risks that a certain business faces, proper procedures should be put in place and, if they're not, those criminal charges at the corporate level should stand.[49]

4.55 While offering their in-principle support for the introduction of a corporate offence of the failure to prevent foreign bribery, some submitters raised concerns about the reverse onus of proof and the extent to which corporations can be held liable for the conduct of its subsidiaries.[50]

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46 Australian Council of Superannuation Investors, *Submission* 8, p. 17.

47 Mr Neville Tiffen, *Submission 46*, p. 2.

48 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 15.

49 Mr Mark Pulvirenti, Partner, Control Risks, *Committee Hansard*, 7 August 2017, p. 30.

50 See, for example, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, pp. 32–36; Law Council of Australia, *Committee Hansard*, 7 August 2017, pp. 45–46.

Reverse onus of proof

4.56 Generally, the prosecution will bear the legal and evidential burdens of proof and, unless otherwise provided, the standard of proof is beyond reasonable doubt.[51]

4.57 A legal burden requires proof of the existence of a matter; and the evidential burden requires adducing or pointing to evidence that suggests a reasonable possibility that a matter exists or does not.[52] As proposed, the failure to prevent foreign bribery offence places the legal and evidential burdens of proof on the company, not the prosecution (this is often referred to as a reverse burden).

4.58 The AICD expressed the view that the failure to prevent foreign bribery offence should include only a reverse evidentiary burden of proof, arguing that it 'would still be a very serious offence with a substantial burden of proof on the corporation' which '[c]ombined with the other offence proposals that are suggested…would definitely be a significant improvement from where we are now, from a prosecution point of view'.[53]

4.59 The AICD argued that the failure to prevent foreign bribery offence places an unnecessarily onerous burden of proof on corporations—requiring a company to satisfy the legal burden that it has adequate procedures in place to prevent the commission of a foreign bribery offence, combined with a reverse onus of proof and absolute liability. The AICD stated:

> Given that the purpose of the offence is to encourage corporations to adopt processes to prevent bribery rather than to simply punish corporations for the wrongdoing of their associations, the AICD recommends imposing the evidential burden rather than the legal burden in this circumstance.[54]
>
> We are naturally hesitant around reversing the onus of proof. Our suggestion in our submission to the Attorney-General's Department recommended that, if that is the path that the government chooses to go down, instead of the legal burden being attached to the defendant it be an evidentiary burden. We believe that would, in fact, incentivise corporates more effectively to be able to demonstrate fulsomely the compliance systems and arrangements that they have in place…it would still be a very serious offence that internal compliance frameworks would need to be constructed around.[55]

51 *Criminal Code Act 1995*, s. 13.2.

52 *Criminal Code Act 1995*, s. 13.1.

53 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 33.

54 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

55 Ms Louise Petschler, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 36.

4.60 The Law Council of Australia also raised concerns about attaching absolute liability to a corporation unless they can satisfy the legal and evidentiary onus. The Law Council of Australia suggested that:

> If one is going to penalise this conduct, one has to penalise it at a significantly lower level than one does the other conduct.
>
> …the thing is that the corporation is made liable by the other person's conduct, full stop. They have to bring themselves out of it by persuasive onus...
>
> …If you're going to have a persuasive onus on the defendant, then you should recognise that this is a state of criminality that is satisfied as an absolute offence. That should be reflected in penalty, because it's a far less serious offence. I would look at that provision and I would think I'm looking at a regulatory offence, but then I get to the end and I see you can get fined a tenth of the company's turnover. That could be hundreds of millions of dollars.[56]

4.61 In their submission to the L and C committee inquiry into the CCC bill, the AGD explained that it:

> …is not persuaded by arguments that the offence should be characterised as a regulatory breach (i.e. failure to implement adequate procedures) and the penalty lowered accordingly.[57]

4.62 The AGD reasoned that the policy intention of encouraging corporations to adopt measures to prevent bribery is a sufficient justification for departing from the generally accepted approach to framing offences because:

> The new failure to prevent offence is intended to encourage corporations to adopt adequate compliance measures to prevent bribery and to more effectively address situations of wilful blindness on the part of corporations' senior management…corporations will only be able to avoid liability for this offence by proving that they had adequate procedures in place designed to prevent an associate from committing foreign bribery. The corporation would bear a legal burden in relation to this matter. The standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities (section 13.5 of the Criminal Code)…Placing a legal burden on corporations to prove the existence of adequate procedures will enable prosecuting authorities to deal more appropriately with corporations where senior management turn a blind eye to bribery occurring in their businesses.[58]

4.63 The AGD defended the application of absolute liability to the offence, arguing that it will:

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56 Mr Tim Game SC, Law Council of Australia, *Committee Hansard*, 7 August 2017, pp. 45–46.

57 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 8.

58 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill 2017, p. 16.

> …create a strong positive incentive for corporations to adopt measures to prevent foreign bribery. Applying absolute liability to certain elements of the new offence is necessary to ensure the effectiveness of the new offence and the enforcement regime.
>
> The government considers that there is a risk that requiring the prosecution to prove specific fault elements in relation to this offence may involve unnecessary complexity, also noting the traditional difficulties in prosecuting foreign bribery offences…Specifically, it is necessary to overcome challenges in establishing liability of corporate entities for foreign bribery, and to ensure that corporations are not able to avoid liability through wilful blindness. Attaching fault elements to this offence may also have the potential to undermine the broad policy objectives of this legislation—which is aimed at bringing about a shift in compliance culture across Australian industry.[59]

4.64 With respect to the penalties that apply to the new offence, the AGD's submission to the L and C committee's inquiry into the CCC bill advised that:

> The maximum penalty for the proposed failure to prevent bribery is the same as that for the existing foreign bribery offence (100 000 penalty units (currently $21 million), three times the value of the benefit obtained if the court can determine its value, or 10% of the company's annual turnover (if the value of the benefit cannot be determined)). This reflects the serious nature of bribery and corruption. It will ensure that the offence serves as an appropriate deterrent to companies being wilfully blind to corrupt practices within their business.[60]

4.65 With reference to the AGD *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the AGD highlighted that in some circumstances, a specified maximum penalty may not provide a sufficient deterrent. AGD observed:

> It reflects that, in such circumstances, a maximum penalty expressed as a multiple of the gain obtained through wrongdoing may be more appropriate. This rationale applies to foreign bribery, where wrongdoing can lead to substantial financial benefits and could involve large corporations, for whom a specified maximum penalty may be insufficient deterrent. It is appropriate that all companies can be held accountable for bribery by their associates where they do not take steps designed to prevent such conduct from occurring. In the United Kingdom, corporations that commit or fail to prevent foreign bribery are punishable by an unlimited fine.[61]

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59 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 17.

60 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 16.

61 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 16.

Extent of corporate liability

4.66 Some stakeholders drew the committee's attention to the potential impact of the failure to prevent a foreign bribery offence on parent companies for the conduct of their subsidiaries; in particular, regarding the proposal in the 2017 consultation paper that the charge would also relate to the reckless conduct of an 'associate'. As noted above, this proposal to include a foreign bribery offence which would require a lower fault element of recklessness was omitted from the CCC bill, and is discussed in more detail later in this chapter.

4.67 AICD expressed concern that the proposed offence for failure to prevent foreign bribery by a subsidiary purports to pierce the corporate veil. AICD observed that:

> In some corporate groups a parent company has very limited control over the day-to-day management of the subsidiary. You might even see the situation where policies that are adopted by the parent company may be deemed unsuitable by the directors of the subsidiary and rejected.[62]

4.68 In light of this, AICD recommend that the offence 'be constructed so that it would impose liability on a parent company for the conduct of its subsidiary only where elements of control and fault are established';[63] and that 'the corporate veil should be lifted only where there is a compelling justification'.[64]

4.69 Dr Mark Zrisnak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, informed the committee:

> I have heard from corporates that want to argue that it's more difficult for them to keep control of all their employees, contractors and subcontractors down the chain, but surely you should be accounting for where your money's going at the end of the day, and a defence here would obviously be that you reasonably took steps to know. If someone's clearly gone outside their instructions in deliberate contravention of what you've asked them to do and what they've agreed to do then clearly that would be a defence against a recklessness charge…[65]

4.70 Indeed, Dr Zirsnak's view was that 'where effectively the company is prosecuted and the individuals don't get the deterrent effect that you are seeking…You need individual accountability'.[66]

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62 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

63 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

64 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

65 Dr Mark Zrisnak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 2.

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

4.71 Others also suggested that having the ability to pierce the corporate veil and hold to account those who create corporate structures is essential to helping address the issue of foreign bribery. For example, Mr Wyld stated that IBAACC's view is that:

> …for too long corporate structures have been used to effectively hide and facilitate conduct which is improper. That's not to say that in a vast majority of sound commercial transactions there cannot be, and in fact should be and is, a proper relationship of parent, subsidiaries, regional entities, joint ventures, other companies and agents and incorporated associations, which act perfectly legally and do so quite properly. But, unfortunately, the complexity of the type of foreign bribery that we continue to see internationally is facilitated and generated by opaque financial and corporate structures. Unfortunately, the reality is unless you start having a philosophy that you pierce and are able to pierce that veil in a manner that targets that sort of behaviour, we think it will not change….[67]

4.72 Mr Tiffen also expressed concern about the way the draft legislation is currently framed with respect to holding corporations to account. Mr Tiffen stated:

> I'm not quite sure that, in the way the draft legislation is currently framed, it clearly picks up that a parent company is liable for its subsidiaries, and I think it could be made clearer if that is the intention. The other aspect is, as I said, the liability of directors for not having a culture of compliance, or whatever words we end up with.[68]

4.73 The AGD explained in their answers to questions on notice posed by the L and C committee that the new offence of failing to prevent foreign bribery by a corporation is similar to an offence that has been successfully implemented in the UK. The AGD clarified that the offence:

- will be automatically triggered where an associate of the corporation commits bribery for the profit or gain of the corporation. Attaching absolute liability to the offence will address the issues Australian prosecuting agencies have previously experienced with the lack of written evidence to establish intention in foreign bribery cases; and
- creates an incentive for corporations to implement measures to prevent bribery, because the only way for corporations to avoid liability is to show that they had adequate compliance procedures in place. It will also serve as a deterrent to corporations being wilfully blind to corrupt practices within their business.[69]

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67 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 37.

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

69 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

4.74 The AGD submitted that the objective of the CCC bill is not 'to impose criminal sanctions against corporations with well-integrated compliance regimes that experience an incident of corruption on their behalf'.[70] The AGD explained:

> …to achieve an appropriate balance between the objectives of the legislation and the burden placed on corporations, a full defence is available to corporations with adequate procedures under proposed subsection 70.5A(5). The Attorney-General will publish guidance under proposed section 70.5B to assist corporations to implement appropriate mitigation strategies, and support the development of adequate procedures to prevent foreign bribery.
>
> The thorough implementation of robust and effective steps to prevent foreign bribery should result in a strong and genuine culture of integrity. The government considers it reasonable to expect corporations of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their businesses and to be required to prove the existence of these procedures in instances of non-compliance.[71]

Adequate procedures

4.75 As stated above, a company will not be liable under the new failure to prevent foreign bribery offence where it can prove it had adequate procedures in place to prevent and detect foreign bribery. Evidence to the committee suggested that a company should be able to raise the defence where it took 'reasonable steps' to prevent their 'associates' from engaging in bribery and had an established system in place to ensure 'associates' are using funds in the way in which they were intended.[72]

4.76 In terms of guidance that should be put in place to inform companies about the types of systems that would be required to satisfy the defence, the committee heard evidence about the US hallmarks, UK principles and International Standards Organisation Standard ISO 37001—Anti-bribery management systems (ISO 37001).

4.77 The US hallmarks are part of the Resource Guide to the US *Foreign Corrupt Practices Act* of 1977 (FCPA). The Resource Guide does not include any mandatory standards or form of compliance programs, but stresses that compliance programs are an essential component of internal risk management and identifies the following 'hallmarks' of an effective compliance program:

- commitment from senior management and a clearly articulated policy against corruption;
- a code of conduct and compliance policies and procedures;

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70 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 17.

71 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 17.

72 See, for example, Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, pp. 2–3.

- assignment of responsibility for oversight to a person with adequate autonomy from management and sufficient resources to ensure effective implementation of the compliance program;
- risk assessments of particular transactions so that unnecessary resources are not devoted to low risk projects;
- training and continual advice for directors, officers, employees, agents and business partners;
- inclusion of incentives and disciplinary measures that are commensurate with the violation and apply across the organisation;
- education of third parties of internal policies and assurances of reciprocal commitments and appropriate due diligence in relation to third parties;
- reporting of misconduct internally and a procedure for internal investigations;
- periodic testing and review to ensure continuous improvement of the compliance program; and
- FCPA due diligence in a mergers and acquisition context, including incorporation of the acquired company into the acquiring company's compliance framework.[73]

4.78 The UK principles were released by the UK Ministry of Justice as part of its guidance to accompany the then new *Bribery Act 2010* (UK).[74] The six principles outline procedures which commercial organisations can put into place to prevent persons associated with them from bribing and should be a crucial focus for organisations of any size. The principles are:

- Proportionate procedures: The policies and procedures a commercial organisation has in place to prevent bribery should be proportionate to the bribery risks the organisation faces. Procedures should be aligned to the nature, scale and complexity of the organisation's activities, while also being clear, practical, accessible and effectively implemented and enforced.
- Top-level commitment: The top-level management of a commercial organisation is defined by the nature of the individual company. It can be the board of directors, the owners of the company or any other equivalent body or person. Top-level management should be demonstrably committed to preventing bribery by a person associated with it, fostering a culture within the organisation in which bribery is never acceptable.

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73 Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp. 57–60, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (accessed 1 December 2017).

74 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*, pp. 20–31, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 20 March 2018).

- Risk assessment: For any anti-bribery process to be consistently effective, the organisation must assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be periodic, informed and well documented. As business operations change and evolve, so will the risk facing the organisation, and it is therefore imperative for regular re-assessment to be undertaken.
- Due diligence: Due diligence procedures must be applied, taking a proportionate and risk based approach, with regard to the individuals who perform or will perform services for or on behalf of the organisation. This is crucial if identified bribery risks are to be mitigated.
- Communication: Organisations need to ensure that bribery prevention policies and procedures are embedded and understood throughout the organisation, via both internal and external communication. Communication should include training that is proportionate to the risks the organisation faces.
- Monitoring and review: As an overarching principle, organisations should monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.[75]

4.79 ISO 37001 specifies requirements and provides guidance for establishing, implementing, maintaining, reviewing and improving an anti-bribery management system.[76]

4.80 Mr Greg Golding of the Law Council of Australia suggested that the US hallmarks and the UK principles are a 'very good starting point', and indicated that most Australian companies already conduct themselves in accordance with these standards.[77]

4.81 Transparency International Australia favoured the UK principles approach and recommended that Australia's guidance 'should in fact be a replica of what the UK has, as a first step, because it's much more important to have uniformity of approach'.[78]

4.82 With regard to ISO Standards generally, Mr Wyld informed the committee that:

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75 Lexis Nexis, *Six principles for bribery prevention*, Sam Hemmant (5 August 2015), https://bis.lexisnexis.co.uk/blog/posts/anti-bribery-and-corruption/six-principles-for-bribery-prevention (accessed 1 December 2017).

76 International Organization for Standardization, *ISO 37001:2016, Anti-bribery management systems—Requirements with guidance for use*, https://www.iso.org/standard/65034.html (accessed 1 December 2017).

77 Mr Greg Golding, Chair, Foreign Corrupt Practices Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 7 August 2017, p. 46.

78 Mr Michael Ahrens, Director, Transparency International Australia, *Committee Hansard*, 7 August 2017, p. 23.

> The ISO standards themselves are very thorough and very detailed, and they're quite expensive and time-consuming for companies to undertake the process and comply with them.[79]

4.83 With respect to ISO 37001, the Law Council of Australia stated at a public hearing in August 2017:

> That [it] was only promulgated at the end of last year. There are very few companies globally that are currently certified under that standard. It's a very good standard, but internationally it is very early days with that standard.[80]

4.84 In discussing the copious amounts of guidance available to companies and the key elements of a compliance program, Mr David Lehmann of KordaMentha Forensic told the committee:

> I don't necessarily think that just because you have an ISO certification means you're making your best efforts to deal with the issues specifically. I think what it gets back to is senior management and the board setting the tone and the culture within their organisation…[81]

4.85 Mr Lehmann suggested that:

> What we should be doing is leveraging off the guidance that is there already but making it relevant to our corporations—adopt the best of the best that's going around but have our Australian emphasis on any guidance that's provided to corporations.[82]

4.86 Noting that the 2017 consultation paper suggested that the minister issue guidance on what are, in effect, to be regarded as adequate procedures, Mr Wyld commented:

> …I'm not sure you can go into too much detail, because the more detail you have the more prescriptive it becomes and then it becomes a tick-the-box mentality—'I've done this and done this' and therefore I have adequate procedures…it's far better to have broader concepts and to address the fundamental issues of behaviour and characteristics.[83]

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79 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 38.

80 Mr Greg Golding, Chair, Foreign Corrupt Practices Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 7 August 2017, p. 46.

81 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 15.

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

83 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 38.

4.87 Other submitters also emphasised the importance of avoiding a tick-the-box mentality. For example, Transparency International Australia cautioned:

> The tick box is absolutely the bare minimum, but, if you tick the box, you behave badly and you are still a corporate hero, then you've [the government] achieved nothing.[84]

4.88 Some stakeholders also suggested that internal corporate whistleblowing systems should form part of the adequate procedures designed to prevent foreign bribery.[85] This is discussed in detail in Chapter 6.

Minister's guidance on adequate procedures

4.89 Proposed section 70.5B of the CCC bill provides that the minister must publish guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials. As discussed above, under proposed section 70.1 of the CCC bill, an associate includes a person who is an officer, employee, agent, contractor, subsidiary, or a person who otherwise provides services for or on behalf of the corporation.

4.90 To assist body corporates to determine the extent to which they may be liable for parties 'down the supply chain', the AGD explained that they anticipate that the ministerial guidance:

> …will discuss the concept of 'associate' and its practical application to measures that a body corporate can take to prevent foreign bribery by its associates. The timing for issuing the guidance will be a matter for government, but will occur prior to the commencement of the 'failing to prevent' offence (which will commence 6 months after Royal Assent).[86]

4.91 In addition, AGD confirmed that it 'intends to publicly consult on the draft guidance'.[87]

4.92 In response to questions on notice posed by the L and C committee in relation to the inquiry into the CCC bill, the AGD explained that the ministerial guidance:

> …will be principles-based, aimed at helping corporations understand the steps they can take to prevent bribery of a foreign public official. The guidance will help corporations understand the policies and procedures they may put in place to implement robust and effective steps to prevent foreign bribery, according to their specific circumstances.

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84 Mrs Rebecca Davies, Director Transparency International Australia, *Committee Hansard*, 7 August 2017, p. 22.

85 See, for example, Associate Professor Vivienne Brand, *Submission 4* to the L and C committee's inquiry into the CCC bill, p. 2.

86 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 7.

87 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, pp. 8–9.

> Corporations that are able to point to the existence of effective and well-integrated compliance regimes would be able to establish the defence in proposed subsection 70.5A(5).D.[88]

4.93 In addition, the AGD confirmed that, in line with the preference of industry stakeholders to the 2017 consultation, the guidance will be informed by the guidance issued by the UK Ministry of Justice in relation to section 9 of the *Bribery Act 2010* (UK).[89] Further, AGD advised that:

> In preparing this guidance, the department will also have regard to other existing guidance, including that published by the Australian Trade Commission; United States Department of Justice; International Organization for Standardization; and OECD, UNODC [United Nations Office on Drugs and Crime] and World Bank.[90]

4.94 The AGD suggested that, while it is reasonable to expect corporations of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their business, the application of steps to prevent foreign bribery will differ substantially from corporation to corporation:

> It is not reasonable to expect small and medium-sized enterprises to put in place a compliance program of the same size that would be required of a large multi-national corporation. Similarly, a corporation with limited exposure to foreign bribery risk should not be expected to take mitigation measures as extensive as another corporation that has a significantly greater risk profile. [91]

Committee view

4.95 The committee notes that evidence presented demonstrates that foreign bribery often occurs in instances of wilful blindness by senior management to activities occurring within their corporations. In addition, the committee observes the difficulties surrounding proving intention where there is often a lack of readily available written evidence.

4.96 The committee considers that introducing a corporate offence of failing to prevent foreign bribery in Australia is overdue. Where corporations fail to take steps to prevent foreign bribery from occurring, they should be held to account for foreign bribery by their associates. For too long the law has protected those who facilitate and generate opaque financial and corporate structures from being criminalised for corrupt behaviour.

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88 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 10.

89 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 12.

90 Attorney-General's Department, answers to questions on notice L and C committee's inquiry into the CCC bill, p. 12.

91 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 12.

4.97 The committee acknowledges that the CCC bill proposes a new corporate offence of failing to prevent foreign bribery, where a company will be criminally liable when, for the profit or gain of the company, an 'associate': commits an offence under section 70.2 (the intentional bribery of a foreign public official) of the Criminal Code; or engages in conduct outside Australia that would constitute an offence under section 70.2 of the Criminal Code.

4.98 The committee notes concerns raised by industry stakeholders that the failure to prevent foreign bribery offence places a heavy burden of proof on corporations—requiring a company to satisfy the legal burden that it has adequate procedures in place to prevent the commission of a foreign bribery offence, combined with a reverse onus of proof and absolute liability. However, in the committee's view it is appropriate to require corporations to prove the existence of an adequate compliance regime. In this context, the committee notes that introducing such an offence would simply be bringing Australia in line with comparator jurisdictions, such as the UK—only nearly a decade later.

4.99 The committee also notes that wrongdoing can lead to substantial financial benefits and could involve large and lucrative corporations. It is therefore important for the available penalties to be a sufficient deterrent.

4.100 With respect to the minister's guidance that is to be issued on adequate procedures, the committee is of the opinion that a principles-based approach is preferable to a tick-a-box checklist. The committee also cautions that it is important for the minister's guidance be designed such that it is of general application to corporations of all sizes and in all sectors. To ensure the minister's guidance will achieve its stated objective, the committee is of the opinion that adequate consultation must be undertaken on any draft guidelines. In addition, to allow companies sufficient time to implement the appropriate changes and to help encourage a culture of compliance, the minister's guidance should be finalised and published well in advance to the commencement of the new failing to prevent foreign bribery offence.

4.101 The committee acknowledges that the CCC bill provides that the minister must publish guidance on the steps a body corporate can and should take to prevent an associate from bribing foreign public officials.

Recommendation 7

4.102 The committee recommends that the *Criminal Code Act 1995* be amended to include a new corporate offence of failing to prevent foreign bribery, and that principles-based guidance be published as to the steps companies need to take in order to establish and implement adequate procedures in relation to the new failing to prevent foreign bribery offence.

Recommendation 8

4.103 The committee recommends that as part of the public consultation on the minister's guidance on adequate procedures in relation to the new failing to prevent foreign bribery offence, the government publish an exposure draft of the guidance and allow a period of no less than four weeks for stakeholders to provide comment.

Recommendation 9

4.104 The committee recommends that the minister finalise and publish the guidance on adequate procedures with sufficient time before the commencement of the new failing to prevent foreign bribery offence to allow companies to implement the necessary compliance measures.

Other reforms to the foreign bribery offence

Remove the requirement of influencing a foreign official 'in their official capacity'

4.105 The current foreign bribery offence requires that the bribe be provided, promised or offered with the intention of influencing a foreign public official 'in the exercise of their duties as foreign public official' to obtain or retain business or an advantage that is not legitimately due.[92]

4.106 The amendments proposed in the 2017 consultation paper and the CCC bill remove the requirement that the foreign official must be influenced in the exercise of the official's duties.[93] The AGD explained that this requirement placed:

> …an unnecessary burden on the prosecution to prove the scope of a foreign public official's duties. Additionally, proof of foreign official duties relies on international legal assistance processes, which can be protracted or unsuccessful.[94]

4.107 In submissions to the 2017 consultation, the Export Council of Australia and Control Risks supported the proposed amendment.[95] Control Risks explained that:

> …it is irrelevant whether the official is improperly influenced either within or beyond their official duties. The current wording simply provides one more hurdle for the prosecution to overcome, which does not contribute to the intention of the legislation.[96]

4.108 However, the Law Council of Australia and IBACC[97] suggested that further consideration should be given to removing the requirement of influencing a foreign public official 'in their official capacity', and that widening the definition of the

92 *Criminal Code Act 1995*, ss. 70.2(c).

93 CCC bill, s. 70.2

94 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 6.

95 Export Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 3.

96 Control Risks, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 4.

97 Law Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 6; International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9.

foreign public officials capacity may be better course of action.[98] In this context, IBACC urged caution:

> to ensure that the criminal nature or otherwise of the bribe in a personal or business matter does not depend on the status of the recipient as a public official or private individual.[99]

Clarify that business or business advantage can be obtained for someone else

4.109 In its current form, the Australian foreign bribery offence is ambiguous as to whether it covers instances where a person provides, promises or offers a benefit in order to secure business or a business advantage for another person.[100] As acknowledged by the government in the 2017 consultation paper:

> The Anti-Bribery Convention clearly intends to criminalise bribery of foreign public officials where bribery is carried out by one person to secure business for another person. The Commentaries to the Anti-Bribery Convention note that 'the conduct … is an offence whether the offer or promise is made, or the pecuniary or other advantage is given, on the person's own behalf or on behalf of any other natural person or legal entity.'[101]

4.110 The US, UK, Canada and New Zealand all explicitly provide that a person who obtains the business does not have to be the same person who provides or offers the benefit.[102]

4.111 In submissions to the 2017 consultation, Control Risks, Australia-Africa Minerals & Energy Group (AAMEG), and Allens Linklaters were among those

98 Law Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 6.

99 International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9.

100 See *Criminal Code Act 1995*, subpara. 70.2(1)(c)(ii); Control Risks, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 4; Australia-Africa Minerals & Energy Group, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9; Allens Linklaters, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act* 1995, p. 5.

101 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 9.

102 For instance, the US *Foreign Corrupt Practices Act 1977*, the UK *Bribery Act 2010*, the Canadian *Corruption of Foreign Public Officials Act 1998* and the New Zealand *Crimes Act 1961*.

stakeholders who endorsed the proposed change to clarify that business or business advantage can be obtained for someone else.[103]

Clarify that the accused need not have a specific business or business advantage in mind

4.112 Both the 2017 consultation paper and the CCC bill propose amendments to clarify that there need not be a specific business or business advantage intended to be secured when providing or offering the bribe.[104]

4.113 The majority of submitters to the 2017 consultation process supported the proposed amendment to clarify that the payer of a bribe does not need to intend to obtain or retain any specific business or business advantage.[105] The IBAACC explained that as a result of the proposed change:

> …the offence would cover situations where a person is, for example 'currying favour' with the intention that a foreign public official would assist in providing an unspecified, undue or improper advantage in the future.[106]

Committee view

4.114 The committee agrees with stakeholders that in determining whether a foreign public official is improperly influenced, it is irrelevant whether the official is improperly influenced within or beyond their official duties. To ensure Australia's foreign bribery legislation is operating as intended, and that prosecution of foreign bribery matters are not unnecessarily protracted, the committee believes consideration should be given to removing the requirement that the foreign public official must be influenced in the exercise of the official's duties.

4.115 The committee notes that the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions clearly intends to criminalise bribery of foreign public officials where bribery is carried out by one person to secure business for another person—whether the offer or promise is made, or the pecuniary or other advantage is given, on the person's own behalf or on behalf

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103 Control Risks, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 4; Australia-Africa Minerals & Energy Group, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9; Allens Linklaters, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

104 See CCC bill, Schedule 1, item 6.

105 International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 10; Law Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act* 1995, p. 6.

106 International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9.

of any other natural person or legal entity. The committee also notes that the US, UK, Canada and New Zealand have explicitly provided that a person who obtains the business does not have to be the same person who provides or offers the benefit. In this context, the committee is disappointed the government has delayed taking action on this uncontroversial issue, to clarify that a person is prohibited from bribing a foreign public official to obtain a business advantage for someone else.

4.116 The committee is of the view that there is no reason why the Criminal Code should not be amended to make it clear that the payer of a bribe does not need to intend to obtain or retain any specific business or business advantage to be guilty of the foreign bribery offence. As stated above, the committee is very concerned that the government has delayed taking action to clarify the operation of the law.

4.117 The committee acknowledges that the CCC bill proposes to remove the requirement that a foreign official must be influenced 'in their official capacity'. In addition the CCC bill clarifies that the business or business advantage can be obtained for someone else; and that the payer of a bribe does not need to intend to obtain or retain any specific business or business advantage to be guilty of the foreign bribery offence.

Recommendation 10

4.118 The committee recommends that the foreign bribery offence be amended to clarify that:

- **a person is prohibited from bribing a foreign public official to obtain a business advantage for someone else; and**
- **the payer of a bribe does not need to intend to obtain or retain any specific business or business advantage to be guilty of the foreign bribery offence.**

Introducing a lesser offence of recklessness

4.119 Given the difficulties that arise in proving direct criminal liability under Australia's foreign bribery provisions, for the most part, submitters welcomed the suggestion of a foreign bribery offence which would require a lower fault element of recklessness as proposed in the 2017 consultation paper (but omitted from the CCC bill). However, concern was noted with regard to how it would operate with the proposed new corporate offence of failing to prevent foreign bribery.

4.120 While the proposed recklessness offence would still require the prosecution to prove intention as to the conduct of providing, promising or offering the benefit, it would only require proof that a person was reckless as to the circumstance; that is, the person was aware of a substantial (and unjustifiable) risk that the conduct of providing the benefit would improperly influence a foreign public official in relation to obtaining or retaining business or an advantage.[107]

107 *Criminal Code Act 1995*, s. 5.4.

4.121 The penalty for the new recklessness offence proposed in the 2017 consultation paper was half of the corresponding intention offence.[108] The 2017 consultation paper also noted that these penalties are comparable to those imposed under the Criminal Code for money laundering and false accounting offences.[109] The paper explained that the recklessness offence was aimed to:

- ensure that foreign bribery offences are of greater utility in addressing foreign bribery (which often occurs in situations where it is difficult to establish intention) while at the same time differentiating between differing degrees of culpability; and
- serve as a deterrent and encourage greater vigilance in providing, offering or promising benefits in circumstances where there is a substantial risk that a foreign public official will be improperly influenced by this conduct.[110]

4.122 Mr Shane Kirne of CDPP commented that 'from a prosecutor's perspective, obviously, it's a lower test'. However, Mr Kirne went on to state that:

> It's still quite a high test—an awareness 'of a substantial risk that the circumstance exists' and 'it is unjustifiable to take that risk'.[111]

4.123 Dr Cindy Davids, Associate Professor, School of Law, Deakin University, argued that 'there is practical value in extending the fault element for the conduct component…to include recklessness as a less serious alternative'.[112] Mr Mark Pulvirenti, Control Risks, agreed, explaining that he saw the new offence based on the fault element of recklessness working in a situation 'where an organisation allows a payment to be made and intent can't necessarily be proved but, in the circumstances, it was reckless for the amount to have been paid'.[113]

4.124 Dr Zirnsak of the Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, reflected on how the proposed recklessness offence would operate with the existing intention offence:

> I think you normally would have both categories, so intentionality would normally attract a greater penalty than 'reckless', if the state's able to prove there was an intention to pay a bribe to achieve an outcome, or to pay a bribe even while being uncertain about the outcome, versus simply being

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108 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

109 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

110 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

111 Mr Shane Kirne, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 31 October 2017, p. 38.

112 Dr Cindy Davids, Associate Professor, School of Law, Deakin University, Melbourne, *Submission 34*, p. 19.

113 Mr Mark Pulvirenti, Partner, Control Risks, *Committee Hansard*, 7 August 2017, p. 29.

> reckless in the payments. I think in this case Australia should lead with this. I think it would send a signal to companies about being more cautious when they make payments and about the way they do business…[114]

4.125 Indeed, Mr Wyld, representing the IBAACC, suggested that creating two levels of offences, 'one an intentional offence and the other a reckless offence', would be a 'significant improvement'.[115]

Why the fault of element or recklessness was excluded from the CCC bill

4.126 The AGD stated that the rationale for excluding the fault element of recklessness in section 70.2 of the CCC bill was:

> …after considering the benefits and disadvantages of an offence of recklessly bribing a foreign public official, including views expressed in submissions received in response to the April 2017 discussion paper, the government elected not to proceed with a recklessness offence.[116]

4.127 The AGD's submission to the L and C committee's inquiry into the CCC bill detailed the following benefits which would be achieved as a result of the introduction of a recklessness offence:

- address challenges in obtaining necessary and sufficient evidence from overseas to prove intention—due to the nature of foreign bribery, relevant conduct almost exclusively occurs overseas; the target of the bribe may also be located in a country that is unwilling to cooperate in relation to the bribery of one of its public officials;
- address challenges in establishing intention where the conduct is historical—in the foreign bribery context, investigations most often commence after a company has self-reported, after media reporting, or after a whistleblower has come forward;
- overcome instances where it is difficult to obtain sufficient documentary evidence—as foreign bribery usually occurs in a business setting, persons involved exercise great caution and transact verbally or face-to-face, again usually overseas, with witnesses also overseas; and
- serve as a greater deterrent and encourage greater vigilance in providing, offering or promising benefits in circumstances where there is a substantial risk that a foreign public official will be improperly influenced by this conduct.[117]

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114 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 2.

115 Mr Robert Wyld, Co-Chair, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, p. 23.

116 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

117 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 6.

4.128 The AGD's submission to the L and C committee's inquiry into the CCC bill also noted that both the Australian Federal Police and the CDPP supported the creation of a recklessness offence as 'it would effectively capture instances of wilful blindness by suspects, including senior company officers (such as directors)'.[118] The submission explained:

> Most foreign bribery cases involve bribes paid by third parties in circumstances where the suspects (individuals and companies) are wilfully blind as to the activities of their agents (including employees, subsidiaries and third party agents).[119]

4.129 However, the AGD stated that:

> After balancing these arguments against other views expressed in submissions received in response to the April 2017 discussion paper, the Government elected not to proceed with a recklessness offence.[120]

4.130 In response to questions notice posed by the L and C committee regarding the CCC bill inquiry, the AGD noted the following concerns expressed by stakeholders in response to the 2017 discussion paper:

- the offence would set too low a standard for culpability;[121]
- it would be difficult for corporations to develop policies and procedures that govern the assessment of an unjustified substantial risk in the context of foreign bribery, which is complex by nature and can be particularly difficult to identify and easy to conceal;[122] and
- a recklessness offence would be inconsistent with international standards.[123]

4.131 The AGD also defended the decision not to adopt a recklessness offence based on the fact that comparator jurisdictions, such as the US and the UK, had also not adopted such an offence. The AGD observed that:

> The US and UK have not adopted a recklessness offence. The US Congress has previously considered and rejected a 'reckless disregard' fault standard with respect to the Foreign Corrupt Practices Act 1977, and in 2008 the UK

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118 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 6.

119 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, pp. 6–7.

120 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 7.

121 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

122 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

123 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

Law Commission rejected the inclusion of recklessness as a fault element for foreign bribery in the now Bribery Act 2010.[124]

Committee view

4.132 The committee notes that the proposal in the 2017 consultation paper to include a foreign bribery offence which would require a lower fault element of recklessness is omitted from the CCC bill.

4.133 The committee acknowledges that the offence of failing to prevent foreign bribery will go some way to addressing wilful blindness on the part of companies. However, without a recklessness offence, it is possible that companies and individuals may still be able to structure their affairs in ways which allow them to limit or avoid exposure to criminal liability for conduct that should be criminalised.

4.134 It is apparent to the committee that Australia's current laws are not operating to effectively criminalise and deter companies and individuals who are engaging foreign bribery. While the committee notes that neither the US nor the UK, have progressed a recklessness offence, it should not be ruled out.

4.135 The committee notes that the proposal to introduce a new separate foreign bribery offence based on recklessness is not required for Australia to meet its obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. However, upon such time that a future review is undertaken of Australia's foreign bribery regime, the committee suggests that a new separate foreign bribery offence based on recklessness, with the proposed maximum penalty being half that of the corresponding intention offence, be further explored.

124 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 2.

Chapter 5

Encouraging self-reporting by corporations—A deferred prosecution agreement scheme

5.1 Given the difficulties that law enforcement agencies have in identifying instances of foreign bribery and corruption, measures that encourage self-reporting by corporations will greatly assist information and evidence gathering. This is particularly evident given that, of the 57 foreign bribery allegations reported by Australia that proceeded to evaluation or investigation, only eight came to the attention of law enforcement authorities through self-reports by companies.[1]

5.2 In considering options to encourage greater self-reporting by companies, the government released a public consultation paper on a possible scheme for deferred prosecution agreements (DPAs) in 2016 (2016 discussion paper);[2] and in March 2017, the government released a second public consultation seeking views on a proposed DPA model (2017 DPA model).[3]

5.3 The 2017 DPA model would give prosecutors the option to invite a company to negotiate a DPA. The DPA's terms would typically require the company to cooperate with any investigation; pay a financial penalty (the amount of which could partly reflect the level of cooperation); and implement a program to improve compliance through ongoing monitoring. In return, the prosecution would be deferred. Under the 2017 DPA model, the final terms of a DPA would then need to be approved by a retired judge and, upon fulfilment of the terms of the DPA, the matter would be considered resolved without prosecution or conviction.[4]

5.4 Following the above consultations, in December 2017, the government introduced the Crimes Legislation (Combatting Corporate Crime) Bill 2017 (CCC bill) that, in addition to the reforms discussed in chapter 4, seeks to introduce a DPA scheme which would apply to foreign bribery and other specified serious corporate offences.

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1 OECD Working Group on Bribery, *Implementing the OECD Anti-bribery Convention, Phase 4 report: Australia*, 15 December 2017, p. 52, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

2 Attorney-General's Department, *Deferred prosecution agreements—public consultation*, 2016, https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 4 January 2018).

3 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

4 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

5.5 This chapter considers the evidence received by the committee in relation to the introduction of a DPA or non-prosecution agreement (NPA) scheme in Australia, including the use of such agreements in the United Kingdom (UK) and the United States (US). It then examines the key features of the proposed model for a DPA scheme contained in the CCC bill.

What are deferred and non-prosecution agreements?

5.6 Under a DPA, a company is charged with an offence, but prosecution is deferred for a period of time agreed by the parties. Within that timeframe, the company must meet certain conditions. For example, the payment of a financial penalty, admission of material facts and establishment of measures to prevent future offending. If the company meets these conditions, the prosecutor will move to dismiss the charges.[5]

5.7 NPAs represent a similar arrangement. However, no charges are laid and the agreement is not filed with a court. Under an NPA, the company must again meet certain conditions, such as waiving the statute of limitations, agreeing to ongoing cooperation, meeting compliance and remediation obligations, and paying a penalty. An NPA may also include an agreement to undertake some form of corporate monitoring or self-reporting. Where any of these conditions are breached, recourse to prosecution remains an option.[6]

Use in United Kingdom and United States

5.8 In February 2014, DPAs were introduced in the UK following a consultation process led by the Ministry of Justice. The power to enter into a DPA was introduced by amendment to the *Crime and Courts Act 2013* (UK).[7]

5.9 This power was first exercised on 30 November 2015 after Standard Bank PLC, who had been charged with failure to prevent bribery under section 7 of the UK's *Bribery Act 2010*, agreed to a DPA. Subsequently, the charges were immediately suspended and Standard Bank PLC was ordered to pay a US$25.2 million fine, as well as paying compensation of a further US$7 million to the Government of Tanzania. Standard Bank PLC also agreed to pay £330,000 towards the UK's Serious Fraud Office's (SFO) costs in relation to the investigation and subsequent resolution of the matter.[8]

5.10 By contrast, there is no statutory basis for the use of such agreements in the US. Rather, the source of authority is the general authority and discretion of

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5 BHP Billiton, *Submission 37*, p. 6.

6 BHP Billiton, *Submission 37*, p. 6.

7 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 12, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 10 May 2016).

8 Serious Fraud Office, *Standard Bank PLC*, 1 June 2016, https://www.sfo.gov.uk/cases/standard-bank-plc/ (accessed 22 July 2016).

prosecutors. Guidance for the use of DPAs and NPAs was issued in 2008 in the US Attorneys' Manual, *Principles of Federal Prosecution of Business Organisations*, Titles 9 28.000 to 9 28.1300.[9]

5.11 The US Securities and Exchange Commission (SEC) has entered into a number of DPAs in relation to offences under the *Foreign Corrupt Practices Act* of 1977 (FCPA). For example, a DPA was entered into in a case involving an engineering firm, and one of its former executives, who were charged with violating the FCPA by offering and authorising bribes and employment to foreign officials to secure Qatari government contracts. The DPA together with the executive's employer, PBSJ Corporation: deferred the charges for two years; required the company to pay a US$3.4 million fine (which reflected the company's significant cooperation with the authorities' investigation); and required the company to comply with certain undertakings.[10]

5.12 Some submitters commented on the impact of the US DPA scheme. Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, opined of the US model:

> An environment was created in which we had much more detection and it allowed us more prosecution, and hopefully there will be more deterrents going into the future…[P]rosecutors were not to engage in deferred prosecution agreements that gave immunity to individuals and…there should be active pursuit of the individuals. At the end of the day, it's not the company that pays the bribe; it's individuals within the company who made the decision, authorised it and made the payment.[11]

5.13 The International Bar Association Anti-Corruption Committee (IBAACC) also commented that the US system has been criticised for 'allowing the criminal justice system to be conducted by administrative fiat'.[12] However, it argued that the system had been nonetheless effective in producing settlements that are transparent, subject to oversight by the court and ultimately publicly available.[13]

Current situation in Australia

5.14 Australia does not have a DPA scheme for serious corporate crime, including for the offence of foreign bribery. As such, under the current legal framework in

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9 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 11, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 11 December 2017).

10 US Securities and Exchange Commission, *SEC Charges Former Executive at Tampa-Based Engineering Firm With FCPA Violations*, https://www.sec.gov/news/pressrelease/2015-13.html (accessed 11 December 2017).

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

12 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 29.

13 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 29.

Australia, there are limited tangible legal incentives for companies to proactively report any potential instances of foreign bribery identified internally, and a lack of certainty as to whether any meaningful benefit will flow from cooperation during a criminal investigation. The Attorney-General's Department (AGD) explained that:

> The Australian Government faces challenges in detecting, investigating and prosecuting serious corporate crime. New threats and increasingly sophisticated offending make it difficult to prevent and police this kind of criminal conduct. Identifying corporate wrong doing often depends on companies cooperating or whistleblowers coming forward, but under current arrangements, there is little incentive for companies to self-report misconduct.[14]

5.15 Notwithstanding the above, Mr Neville Tiffen highlighted that there is some flexibility in the manner in which a prosecution can be pursued in Australia. He referred to the *Prosecution Policy of the Commonwealth* (the Prosecution Policy) and noted that the Commonwealth Director of Public Prosecutions (CDPP) may enter into an agreement with a defendant to provide immunity.[15] While the Prosecution Policy does provide for such agreements, they are only available in circumstances where the defendant is an accomplice or the charges relate to cartel conduct under sections 44ZZRF and 44ZZRG of the *Competition and Consumer Act 2010*.[16]

5.16 There are no such provisions for foreign bribery. However, Mr Tiffen noted that antitrust regulators in several countries have indicated the benefits of self-reporting in the context of cartel behaviour. Mr Tiffen argued that there is therefore no reason that similar arrangements cannot be made in the context of foreign bribery.[17]

5.17 Mr Tiffen also noted that the CDPP may enter into an agreement whereby the defendant pleads guilty to some charges or to lesser charges.[18] This is embodied in paragraphs 6.14 to 6.21 of the Prosecution Policy, which provides for charge negotiation.[19] There are a range of factors that must be considered before a charge

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14 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 3, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 11 December 2017).

15 Mr Neville Tiffen, *Submission 16*, p. 7.

16 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, pp. 12–14, 20–23, https://www.cdpp.gov.au/sites/g/files/net391/f/Prosecution-Policy-of-the-Commonwealth_0.pdf (accessed 11 December 2017).

17 Mr Neville Tiffen, *Submission 16*, p. 7.

18 Mr Neville Tiffen, *Submission 16*, p. 7.

19 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, p. 13, https://www.cdpp.gov.au/sites/g/files/net391/f/Prosecution-Policy-of-the-Commonwealth_0.pdf (accessed 11 December 2017).

negotiation proposal can be agreed to, including whether the defendant is willing to cooperate in the investigation or prosecution of others.[20] These measures have a general application and could be applied in the context of foreign bribery investigations.

5.18 Finally, Mr Tiffen referenced the discretion of the CDPP to proceed with a charge summarily rather than by indictment, which may include an agreement that the CDPP will not oppose a defence submission to the Court on the appropriate sentence range.[21]

Implementing a deferred prosecution agreement scheme in Australia

5.19 Since March 2016, the government has been considering whether to introduce a DPA scheme in Australia. The AGD suggested that:

> An Australian DPA scheme for serious corporate crime may improve agencies' ability to detect and pursue crimes committed by companies and help to compensate victims of corporate crime. It may help avoid lengthy and costly investigations and prosecutions, and provide greater certainty for companies seeking to report and resolve corporate misconduct. It would be compatible with the Government's policy to tackle crime and ensure that our communities are strong and prosperous.[22]

5.20 This part of the chapter considers the views expressed by stakeholders in relation to the proposed introduction of a DPA scheme in Australia, before looking at the DPA scheme proposed in the CCC bill which would apply to foreign bribery and other specified serious corporate offences.

Support for the introduction of a DPA scheme

5.21 The overwhelming majority of responses to the AGD consultation on the 2017 DPA model (and the 2016 consultation), as well as submissions to this inquiry, endorsed the introduction of DPAs in Australia.[23] These submissions also cautioned

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20 Commonwealth Director of Public Prosecutions, *Prosecution Policy of the Commonwealth: Guidelines for the Making of Decisions in the Prosecution Process*, p. 13, https://www.cdpp.gov.au/sites/g/files/net391/f/Prosecution-Policy-of-the-Commonwealth_0.pdf (accessed 11 December 2017).

21 Mr Neville Tiffen, *Submission 16*, p. 7.

22 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 3, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 11 December 2017).

23 Attorney-General's Department, Deferred prosecution agreements—public consultation, 2016, https://www.ag.gov.au/Consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 4 January 2017); Attorney-General's Department, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2017).

the need to apply learnings from the existing US and UK models, and ensure clear guidance accompanies any such legislative change.[24]

5.22 Mr William Brind Zichy-Woinarski, Member of and Consultant to the IBAACC, told the committee that the use of DPAs in Australia could lead to resource efficiencies:

> …if you can have a deferred arrangement situation, it will in many cases save the AFP, the CDPP, whoever the respective agency is that is responsible, a lot of money also, so you have a better use of your resources. We have touched upon it briefly, but one of the real problems, first of all, is you have to find out where foreign bribery is occurring, but when you do it is a very expensive thing to do and the demands on any of the agencies involved in these are very high.[25]

5.23 A number of submissions to the inquiry also advocated for the use of DPAs or NPAs as a measure to encourage organisations to self-report any foreign bribery offences.[26] By encouraging self-reporting, it is possible that instances of foreign bribery could be detected in higher numbers with a lower cost to the taxpayer. Further, DPAs may lead to greater transparency in the prosecution of foreign bribery.

5.24 Mr Tiffen endorsed the adoption of a DPA system similar to that of the UK, where a DPA must go before a judge before it can be adopted. Mr Tiffen suggested that the Australian Competition and Consumer Commission and Australian Securities and Investment Commission (ASIC) could be consulted with a view to identifying how enforceable undertakings are used, and to see if the same principles could be applied in the context of foreign bribery, particularly in the context of DPAs.[27]

5.25 Mr Tiffen stressed that DPAs should only be available if a company fully cooperates with regulators, including disclosure of all relevant facts (even where those facts may be covered by legal privilege).[28]

5.26 In evidence before the committee, Mr Nick McKenzie explained that companies and their legal advisers are reluctant to come forward because there is a lack of certainty about what may happen. While cautioning that DPAs 'are simply one tool in a toolbox',[29] Mr McKenzie acknowledged that:

> A deferred prosecution agreement where there is a more certain process that can be adopted—and that companies are aware of and know that there is a

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24 See, for example, Mr Neville Tiffen, *Submission 16*, p. 8; ANZ, *Submission 20*, p. 6; BHP Billiton, *Submission 37*, p. 5.

25 Mr William Brind Zichy-Woinarski, Member and Consultant, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, p. 22.

26 See, for example, Mr Neville Tiffen, *Submission 16*, p. 8; ANZ, *Submission 20*, p. 6; BHP Billiton, *Submission 37*, p. 5.

27 Mr Neville Tiffen, *Submission 16*, p. 8.

28 Mr Neville Tiffen, *Submission 16*, p. 8.

29 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, p. 8.

> commitment by the regulators to working with corporations through these issues—would lend itself to an environment which is more inductive for companies to come forward. If there's more certainty about what the process is and what might happen, then therein lies the incentive for people to come forward.[30]

5.27 Mr David Lehmann, Director, KordaMentha Forensic, also supported the introduction of a DPA scheme in Australia, suggesting that such a regime would help:

> …foster a willingness on the part of corporations to appropriately and effectively investigate alleged bribery and self-report it to regulators when there is evidence to support the alleged misconduct.[31]

The need for clear guidance

5.28 The 2017 DPA model (and the 2016 discussion paper) contemplated that detailed guidance would be issued outlining when a prosecutor is likely to offer DPA negotiations. A number of stakeholders emphasised the importance of the quality and clarity of this guidance in setting out when a company may be invited to enter into DPA negotiations, and suggested that the range of outcomes that they might expect would be particularly important.[32]

5.29 For example, in recommending that clear guidance should be made available on the benefits of entering into DPA negotiations and the factors the prosecutor will take into account, King & Wood Mallesons suggested that:

> In order to encourage companies to self-report actual or suspected misconduct, the legislation or a supporting policy document should contain clear criteria which will be considered when deciding whether to enter into DPA negotiations.[33]

5.30 In this context, King & Wood Mallesons suggested that the UK's DPA Code of Practice would serve as a good example of the sort of criteria which could be used as a starting point in Australia.[34] The UK's DPA Code is issued by the Director of

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30 Mr Nick McKenzie, Private capacity *Committee Hansard*, 7 August 2017, p. 17.

31 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 15.

32 King & Wood Mallesons, Mr Neville Tiffen, Norton Rose Fulbright, Responses to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2017).

33 King & Wood Mallesons, Response to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, p. 2, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

34 King & Wood Mallesons, Response to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, p. 2, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

Public Prosecutions and the Director of the SFO.[35] It specifies matters prosecutors should have regard to when:

- negotiating DPAs with an organisation whom the prosecutor is considering prosecuting for a relevant offence;
- applying to the court for the approval of a DPA; and
- overseeing DPAs after their approval by the court, in particular in relation to variation, breach, termination and completion.[36]

5.31 In contrast, Mr Tiffen recommended the US Department of Justice's guidance on what it expects companies to do in order to receive beneficial treatment as a good starting point for Australia. He explained:

> The guidance has three main limbs—voluntary self reporting; full cooperation with the regulators; and remediation inside the company to ensure that the event is not repeated. I submit that, if a company does all of the three elements, it should be entitled to a DPA along lines set out in clear guidance. As the US guidance indicates, the self reporting must be prior to any imminent threat of disclosure or government investigation and within a reasonably prompt time of becoming aware of the conduct.[37]

5.32 Norton Rose Fulbright explained that certainty is essential to engage corporates, and suggested that the introduction of DPAs must therefore be supported by a suite of government guidance, including guidance which explains:

- the weight of a corporate's decision to self-report to the regulator, such as in circumstances in which the corporate is providing information which is otherwise unknown to the regulator;
- the weight afforded to genuine co-operation and remediation; and
- the extent to which corporates will be afforded time to investigate properly and effectively allegations or issues which arise before determining whether any reporting is required.[38]

Impact on foreign bribery

5.33 While commending the introduction of a DPA regime in Australia, some stakeholders submitted that in order to be successful in incentivising voluntary

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35 *Crime and Courts Act 2013* (UK), Schedule 17, para. 6(1).

36 UK Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice*, p. 2, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed 9 March 2018).

37 Mr Neville Tiffen, Response to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, p. 5, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

38 Norton Rose Fulbright, Response to AGD, Proposed model for a deferred prosecution agreement scheme in Australia, 2017, p. 9, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2017).

reporting in the foreign bribery space, the proposed scheme needed to be supported by robust enforcement of the foreign bribery offence.[39]

5.34 For example, Mr Mark Pulvirenti, Partner, Control Risks, suggested that DPAs will not be a success in the current environment where prosecutions are difficult and rare. Mr Pulvirenti stated:

> …in order for DPAs to appear attractive to companies there needs to be an otherwise very real risk of successful prosecution involving greater penalties than would be available via a DPA.[40]

5.35 Mr Tiffen agreed, arguing that the lack of successful foreign bribery prosecutions has resulted in companies ignoring their legal obligations. He stated:

> I would think that at the moment, without clear guidance as to what companies should be doing to really take advantage of a DPA, that a lot of lawyers might be advising their companies to wait and see—perhaps to risk the prosecution. But if we had a clear DPA process and clear guidance from the regulators about what they expect to be an effective compliance program, there would be a lot of companies that would see that as an incentive to actually start an effective compliance program in the first place. I think it would be a real incentive for companies to lift their performance so that they could take advantage of a DPA mechanism. That would also encourage self-reporting, and that would be much better for our investigators and prosecutors.[41]

5.36 Transparency International Australia (TIA) also argued that without appropriate constraints, DPAs may not achieve their desired result. In particular, TIA suggested that DPAs should include:

> …an admission of liability. It should not be just an agreement on a set of facts without an admission at the conclusion and the entry into a deferred prosecution agreement…[42]

Key features of the DPA scheme proposed in the CCC bill

5.37 The CCC bill seeks to introduce a DPA scheme which would only be available for companies (not individuals);[43] and would only apply to a publicly available list of Commonwealth 'serious corporate crime' offences, including foreign bribery.[44]

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39 See, for example, Mr Mark Pulverenti, Partner, Control Risks, *Committee Hansard,* 7 August 2017, p. 26.

40 Mr Mark Pulverenti, Partner, Control Risks, *Committee Hansard,* 7 August 2017, p. 26.

41 Mr Neville Tiffen, Private capacity, *Committee Hansard*, 31 October 2017, p. 4.

42 Mr Michael Ahrens, Director, Transparency International, *Committee Hansard,* 7 August 2017, p. 22.

43 CCC bill, Schedule 2, item 7, new ss. 17A(1).

44 CCC bill, Schedule 2, item 7, new s. 17.

5.38 Under the proposed scheme, the Director of the CDPP (Director) will have discretion to negotiate and enter into a DPA on behalf of the Commonwealth.[45]

5.39 The proposed scheme seeks to make the following terms and features mandatory for all DPAs:

- a statement of facts relating to each offence specified in the DPA;
- the last day for which the DPA will be in force;
- the requirements to be fulfilled by the person under the DPA;
- the amount of financial penalty to be paid by the person to the Commonwealth;
- the circumstances which constitute a material contravention of the DPA; and
- consents to the Director instituting a prosecution of the person on indictment for an offence specified in the DPA without the person having been examined or committed for trial in circumstances where the party to the DPA provided inaccurate, misleading or incomplete information to a Commonwealth entity in connection with the agreement; and the party knew, or ought to have known that the information was inaccurate, misleading or incomplete.[46]

5.40 In addition, it provides a non-exhaustive list of terms and features that may be included in a DPA.[47]

5.41 It also outlines the process by which a DPA must be approved.[48] This includes a process for the appointment of 'approving officers' by the minister who must approve a DPA if they are satisfied that its terms are in the interests of justice, and are fair, reasonable and proportionate.[49] The process by which a DPA may be varied is also set out in the scheme. Ultimately, after the company and the Director consent to a variation, the varied DPA then follows a process that is similar to that by which a DPA must be approved.[50] Once it is approved the CDPP must publish a DPA unless it would not be in the interests of justice to do so.[51]

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45 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 9, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 11 December 2017).

46 CCC bill, schedule 2, item 7, new ss. 17C(1).

47 CCC bill, schedule 2, item 7, new ss. 17C(2).

48 CCC bill, schedule 2, item 7, new ss. 17D(1)—(6).

49 CCC bill, schedule 2, item 7, new ss. 17D(1)—(2).

50 CCC bill, schedule 2, item 7, new s. 17F.

51 CCC bill, schedule 2, item 7, new ss. 17D(7)—(10). See also Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 29.

5.42 The DPA scheme limits the use of material generated or provided to Commonwealth agencies during the course of DPA negotiations, and/or in compliance with a DPA in subsequent criminal proceedings.[52]

5.43 Should a DPA be breached, the CDPP may commence prosecution or renegotiate the terms of the DPA.[53] Absent a breach, the DPA would be concluded by fulfilment of its terms, and the company will not subsequently be prosecuted in relation to the offences specified in the DPA.[54]

Content of DPAs

5.44 In their submission to the Legal and Constitutional Affairs Legislation Committee's (L and C committee) inquiry into the CCC bill, the Justice and International Mission Unit, Synod of Victoria and Tasmania, Uniting Church in Australia, suggested that the following terms and features should be mandatory for all DPAs:

> Details of any financial gain or loss, with supporting material, in the statement of facts relating to each offence specified in the DPA; and
>
> The company's formal admission of criminal liability for specified offences, consistent with any relevant laws of evidence.[55]

5.45 While the non-exhaustive list of terms that may be included in a DPA in the CCC bill includes requiring a corporation to forfeit any likely benefits (including profits) accrued as a result of the misconduct specified in a DPA, there is no mandatory requirement for DPAs to include details of financial gain or loss relating to the offence/s specified in a DPA.

5.46 The AGD argued that as the CCC bill requires the terms of a DPA to be in the interests of justice, and to be fair, reasonable and proportionate:

> Information detailing any financial gain or loss incurred by the corporation may often be highly relevant to determining whether the terms of a DPA fulfil these criteria.[56]

5.47 With respect to mandating that companies formally admit criminal liability for specified offences in a DPA, the AGD cautioned that:

> The success of the DPA scheme is contingent on the scheme striking an appropriate balance between the need to encourage corporations to self-

52 CCC bill, schedule 2, item 7, new s. 17H.

53 CCC bill, schedule 2, item 7, new s.17A. See also, CCC bill, explanatory memorandum, p. 3.

54 CCC bill, explanatory memorandum, p. 3.

55 Uniting Church in Australia, *Submission 1* to the L and C committee inquiry into CCC bill, pp. 1 and 11.

56 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 25.

> report serious offending and the need to hold corporations accountable for serious corporate crime.[57]

5.48 The AGD explained that feedback to the government's 2017 DPA model suggested that corporations would be deterred from seeking a DPA if they were required to formally admit criminal liability to obtain a DPA.[58] Therefore, the CCC bill 'does not require a corporation to formally admit to criminal liability in order to obtain a DPA'.[59]

5.49 Similar to the approach taken by the UK,[60] the CCC bill requires a corporation to admit to agreed facts detailing the nature and scope of their offending, which, if a company subsequently materially contravenes the DPA, will be taken to be the agreed facts for the purposes of the criminal proceeding.[61]

The integrity of the DPA process

Publication

5.50 The consultation paper on the 2017 DPA model stated that 'approved DPAs would be made public' such that '[c]ompanies could draw on these records as an additional source of guidance on the DPA scheme'.[62] However, in its submission to the L and C committee's inquiry into the CCC bill, the IBAACC raised concerns about whether the decision (or reasons) of the 'approving officer' are going to be published.[63] IBAACC explained:

> The Committee is concerned that all that will or may be published is the terms of the DPA and the 'decision' whether or not a DPA will or will not be approved, absent reasons. The Committee strongly believes that the approving officer must give reasons for making a decision and those reasons, together with the DPA (to the extent the Director does so without prejudice to any other ongoing investigation) must both be published. This will enhance the integrity of the process, it will ensure that Australia

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57 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 26.

58 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 26.

59 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 26.

60 In the UK, the statement of facts is treated as an admission of fact by the corporation in any criminal proceedings brought against a corporation for the offences specified in the DPA. See s. 10 of the *Criminal Justice Act 1967* (UK) and Schedule 17, s.13 of the *Crime and Courts Act 2013* (UK).

61 CCC bill, Schedule 2, new ss. 17H(5).

62 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 16, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

63 International Bar Association's Anti-Corruption Committee, *Submission 2* to the L and C committee inquiry into CCC bill, p. 3.

> follows the UK model with reasons, orders and the DPA being published) so the community can see the system working transparently.[64]

5.51 The AGD confirmed that in circumstances where a DPA is not approved, the CCC bill does not require the 'approving officer' or any person or authority to publish a notification or reasons.[65] The AGD indicated that:

> The terms of the approving officer's appointment would specify that this information should not be disclosed by the approving officer to anyone other than the parties to DPA negotiations. The non-disclosure of this particular information is appropriate because the CDPP and corporation may elect to continue to negotiate the DPA and submit a new draft DPA for the approving officer's consideration. The parties should be able to continue negotiations with the same level of confidentiality that attaches to DPA negotiations before an approving officer has considered a draft DPA. This will encourage corporations to continue to engage openly and honestly in DPA negotiations. Further, corporations are unlikely to enter into DPA negotiations if there is a risk that the existence and content of these negotiations may be made public in the event that DPA negotiations fail.[66]

5.52 Likewise, the AGD suggested that the CCC bill does not require the reasons for approving a DPA to be published because:

> It is proposed that the terms of the approving officer's appointment and/or engagement will specify that this information may be published if the parties to the DPA agree. This will ensure that an approving officer may write and publish reasons where appropriate.[67]

Monitoring compliance

5.53 The consultation paper on the 2017 DPA model included discussion around independent monitors and oversight of DPAs. Specifically, the consultation paper stated:

> A DPA would typically include commitments by the company to reform its corporate culture to avoid re-offending. To ensure such commitments are met, it will be important that there is appropriate external monitoring.[68]

5.54 In the US, external independent monitors may be appointed at the cost of the defendant to oversee the defendant's compliance with the DPA.[69] In the UK, the Code

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64 International Bar Association's Anti-Corruption Committee, *Submission 2* to the L and C committee inquiry into CCC bill, p. 4.

65 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 28.

66 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 28.

67 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 28.

68 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 11, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

of Practice for Prosecutors published jointly by the SFO and Crown Prosecution Service sets out a framework for the appointment of monitors, including that companies:

- will be responsible for all of the costs of the monitorship (including the prosecutor's costs); and
- must give the monitor complete access to all relevant aspects of its business.[70]

5.55 The UK Code of Practice for Prosecutors also suggests that prior to the approval of the DPA, the prosecutor and the company should agree between them which monitor will be appointed, the cost and terms of the monitorship and the scope of the first year work plan.[71]

5.56 However, the proposed DPA scheme in the CCC bill does not provide a legislative basis on which the authorities may impose monitors in the appropriate circumstances. In their submission to the L and C committee's inquiry into the CCC bill, Morgan Lewis & Bockius LLP observed that 'monitors have become an important tool for the UK SFO to make sure corporates implement necessary improvements to their compliance programme, reduce the risk of corporate re-offending and ensure compliance with the terms of the DPA'.[72] In this context, they suggested that consideration be given to:

> (i) the extent to which monitorships should be an available term of a DPA in appropriate cases; and
>
> (ii) issuing guidance in relation to the appointment and methodology of monitors.[73]

5.57 In response to questions on notice regarding the government's rationale for excluding monitorships from the DPA scheme, the AGD suggested that the bill:

> Does not limit the terms that might be included in a DPA, and the government envisages that it will often be appropriate for DPAs to include terms requiring the engagement of an independent monitor to carry out particular functions in a manner that is adapted to the circumstances of the case at hand. These functions may include assessing the effectiveness of a

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69 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 12, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

70 UK Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice*, pp. 13–15, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed 9 March 2018).

71 UK Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice*, pp. 13–15, https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/deferred-prosecution-agreements/ (accessed 9 March 2018).

72 Morgan Lewis & Bockius LLP, *Submission 3* to the L and C committee inquiry into the CCC bill, p. 8.

73 Morgan Lewis & Bockius LLP, *Submission 3* to the Land C committee inquiry into the CCC bill, pp. 1 and 8.

> corporation's existing compliance program, advising on how a corporation can develop an effective (or more effective) compliance program and monitoring a corporation's compliance with DPA terms.[74]

5.58 The AGD went on to explain that they propose to include information on the possible roles and appointment of independent monitors in the DPA Code of Practice which is currently being developed.[75] The DPA Code of Practice is discussed in more detail below.

Judicial involvement

5.59 The consultation paper on the 2017 DPA model included discussion around the extent of judicial involvement in an Australian DPA scheme. The consultation paper stated:

> Judicial involvement in a DPA scheme helps to foster confidence in the process. In the US, DPAs are entered into and conducted with comparatively limited judicial involvement. While DPAs are filed with a court, and a judge is required to approve the terms of the DPA, no judicial hearing is required and the level of ongoing judicial involvement in the DPA varies from case to case.
>
> By contrast, the UK scheme involves a greater oversight role for the judiciary throughout the life of the DPA. This includes two judicial hearings to approve the DPA, as well as further judicial determinations to identify whether a breach of a DPA has occurred, or to vary or discontinue a DPA.[76]

5.60 However, the consultation paper also brought to attention the arrangements for Australia's federal judicial system provided for in the *Australian Constitution*.[77] Specifically, the consultation paper stated:

> …courts cannot merely 'rubber stamp' administrative processes or penalties that have been 'agreed' in advance by the parties. To do so would not be consistent with the role and function of courts under the Constitution.[78]

5.61 In response to questions on notice by the L and C committee in relation to the CCC bill, the AGD argued that:

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74 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 33.

75 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 33.

76 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, pp. 16–17, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

77 *Australian Constitution*, Chapter III.

78 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 16, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

> The Bill ensures that DPAs in Australia are subject to independent and expert scrutiny. All DPAs will need to be approved by a DPA 'approving officer' before entering into force. DPA approving officers will be former judges, with relevant expertise and knowledge (for example, in business or corporate law). Approving officers will bring expertise in fair and impartial adjudication to the DPA process, and provide independent assurance that all DPAs are in the interests of justice.[79]

Guidance—The DPA Code of Practice

5.62 As noted above, a number of stakeholders emphasised the necessity for clear public guidance to be provided in conjunction with any DPA scheme. Indeed, the consultation paper on the 2017 DPA model stated:

> …a successful DPA scheme will require clear and detailed guidance on when a prosecutor is likely to offer DPA negotiations. This information could be provided in the *Prosecution Policy of the Commonwealth*…and/or in other public documents produced by Government.[80]

5.63 The consultation paper on the 2017 DPA model went on to explain that such documents would also 'detail the types of public interest considerations' to guide the CDPP's decision-making as to whether to initiate formal DPA negotiations. The consultation paper on the 2017 DPA model explained:

> Where a company has self-reported misconduct and has genuinely cooperated with any investigation and pre-negotiation discussions, this would be given considerable weight in favour of the initiation of formal negotiations. Such cooperation may include providing the CDPP and any investigative agency with complete and accurate details about corporate and individual misconduct. Other considerations would include the likely success of negotiations, and the company's past conduct, role in the offending, cooperation with any ongoing investigations, and apparent willingness to cooperate once offending is brought to its notice.[81]

5.64 Following the introduction of the 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).[82] These guidelines set out the principles and process that the AFP

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79 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 30.

80 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 7, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

81 Attorney-General's Department, *Proposed model for a deferred prosecution agreement scheme in Australia*, 2017, p. 7, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

82 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).

and the CDPP will apply if a company self-reports conduct involving a suspected breach of Division 70 if the *Criminal Code Act 1995* (foreign bribery).[83] In their submission to the L and C committee's inquiry into the CCC bill, the IBAACC noted that:

> …these Guidelines are a good start for companies (and their advisers) to understand how the CDPP will exercise its discretion in terms of whether or not to initiate negotiations for a DPA.[84]

5.65 The Guidelines for self-reporting are discussed in more detail in Chapter 8. However, 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.[85]

5.66 In addition to the Guidelines for self-reporting, the AGD has indicated that it 'is currently developing a draft DPA Code of Practice (the Code) for public consultation'.[86] The AGD explained that:

> The purpose of the Code is to provide detail on the practical operation of the DPA scheme, including on the types of matters that might be included in a DPA.[87]

5.67 The AGD also indicated that the Code of Practice would include:

- information on how the CDPP would consult with other government agencies throughout the DPA process to ensure relevant matters are included in the DPA (either in the DPA's terms or in the DPA's statement of facts);[88] and

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83 CDPP, *Best Practice Guideline: 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 13 March 2018).

84 International Bar Association's Anti-Corruption Committee, *Submission 2*, L and C committee inquiry into CCC bill, p. 3.

85 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).

86 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 25.

87 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 25.

88 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 25.

- guidance on the level of cooperation expected from corporations seeking a DPA, and on the steps corporations may be expected to take to meet the required degree of cooperation.[89]

Committee view

5.68 The committee considers that Australian regulators should adopt processes that would encourage companies to self-report instances of foreign bribery. The committee is of the view that introducing a DPA scheme will foster a greater willingness on the part of corporations to appropriately and effectively investigate alleged bribery and self-report it to regulators when there is evidence to support the alleged misconduct. The committee notes that any such DPA scheme must be supported by a strong legislative framework, which requires strict compliance and allows for adequate responses in the event of a breach. The committee also notes that both the US and the UK have DPA schemes in relation to serious corporate offences.

5.69 The committee considers that an effective DPA scheme will require clear, public guidance outlining its operation to provide companies greater certainty on DPA processes. The committee is also of the view that it is essential for approved DPAs to be made public, in all but exceptional circumstances, to allow companies to draw on these records as an additional source of guidance on the DPA scheme. The committee is also of the opinion that details on how a company has complied with the terms and conditions, as well as details of any breach, variation or termination, should be published in all but exceptional circumstances. These materials would provide assurance to members of the public as to the transparency and consistency of the DPA scheme.

5.70 The committee notes concerns raised that the proposed DPA model in the CCC bill does not provide a legislative basis on which the authorities may impose monitors in appropriate circumstances. The committee believes that including an avenue to appoint independent external monitors at a company's expense to monitor compliance with a DPA and report to the CDPP is integral to the success of a DPA scheme in Australia; in particular, where the agreed terms of the DPA oblige the company to instigate organisational or cultural change to avoid re-offending. However, the committee considers that providing for the appointment and methodology of independent external monitors in the Code of Practice is appropriate to ensure ongoing compliance with DPAs.

5.71 The committee believes that as the Draft Code of Practice will provide detail on the practical operation of the DPA scheme (including on the types of matters that might be included in a DPA), adequate public consultation on the Draft Code is critical to promote a level of trust between regulators and the corporate sector.

89 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 38.

Recommendation 11

5.72 The committee recommends that the government introduce a deferred prosecution agreement scheme for corporations, supported by a strong legislative framework which requires strict compliance and allows for adequate responses in the event of a breach.

Recommendation 12

5.73 The committee recommends that, other than in exceptional circumstances, deferred prosecution agreements be published, together with details on how a company has complied with the terms and conditions, and any breach, variation or termination.

Recommendation 13

5.74 The committee recommends that the Code of Practice make provision for the appointment and methodology of independent external monitors at the company's expense to monitor compliance with a deferred prosecution agreement.

Recommendation 14

5.75 The committee recommends that as part of the public consultation on the draft Code of Practice, the government publish an exposure draft and allow a period of no less than four weeks for stakeholders to provide comment.

Chapter 6

Protecting whistleblowers who expose foreign bribery

6.1 Information about foreign bribery is difficult to source and often relies on 'inside information' and investigative journalism for exposure. Whistleblowers therefore play an important role in exposing foreign bribery and corruption—be it alerting authorities or the general public to potential offences. Appendix 1 to this report includes some case examples of foreign bribery involving Australian entities which were brought to attention by whistleblowers.[1]

6.2 This chapter examines Australia's current whistleblower protections, and explores the complex nature of protecting those who blow the whistle on foreign bribery where the offending conduct or retribution occurs offshore. It then considers the suggestions for reform raised by stakeholders, before discussing recent reviews of Australia's whistleblower protections and the reforms proposed in the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (EWP bill).

Current whistleblower protections

6.3 Australia's whistleblower protection measures, often referred to as public interest disclosure, are made up by a patchwork of legislation. Different protections may apply to public interest disclosures in different circumstances, and current protections for disclosures by whistleblowers in the public and private sector are provided for in different Acts.

Commonwealth public sector

6.4 Certain public interest disclosures in the Commonwealth public sector are protected by the *Public Interest Disclosure Act 2013* (PID Act). The PID Act is intended to promote the integrity and accountability of the Commonwealth public sector by:

- encouraging and facilitating the making of disclosures of wrongdoing by public officials;
- ensuring that public officials who make protected disclosures are supported and protected from adverse consequences relating to the making of a disclosure; and
- ensuring that disclosures are properly investigated and dealt with.[2]

6.5 These protections are quite comprehensive, in so far as they require public sector organisations to implement internal procedures for facilitating disclosures, and

1 See for example the Leighton Holdings Limited case example discussed in Appendix 1.

2 Commonwealth Ombudsman, *Agency Guide to the Public Interest Disclosure Act 2013*, April 2016, p. 2.

protecting and supporting employees who report wrongdoing.[3] However, this comprehensive regime of whistleblower protection does not extend to other sectors.

Registered organisations

6.6 In November 2016, the Parliament passed amendments to the *Fair Work (Registered Organisations) Act 2009* (FWRO Act) which strengthened whistleblower protections for people who report corruption or misconduct in unions and employer organisations. The amendments provide protections to whistleblowers who disclose information about contraventions of the law, including current and former officers, employees, members and contractors of organisations.[4] Amendments that were introduced by the Senate and passed both Houses include:

- defining what constitutes a reprisal;
- civil remedies against reprisals;
- awarding of costs against vexatious proceedings;
- civil penalties for reprisals;
- criminal offences for reprisals;
- that protections have effects despite other Commonwealth laws;
- provisions for the investigation and handling of disclosures;
- time limits for investigations;
- disclosures to enforcement agencies; and
- protection of witnesses.[5]

Corporate sector

6.7 Current protections for whistleblower disclosures in the corporate sector are contained in Part 9.4AAA of the *Corporations Act 2001* (Corporations Act) which was introduced as part of a range of legislative reforms in 2004.[6] Those protections:

- confer statutory immunity on the whistleblower from civil or criminal liability for making the disclosure;

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3 Simon Wolfe, Mark Worth, Suelette Dreyfus and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, p. 25, https://blueprintforfreespeech.net/wp-content/uploads/2015/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf (accessed 5 December 2017).

4 Australian Government, The Treasury, *Review of tax and corporate whistleblower protections in Australia* 20 December 2016, p. 7, https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/ (accessed 20 March 2018).

5 *Fair Work (Registered Organisations) Act 2009*, Part 4A.

6 Australian Government, The Treasury, *Review of tax and corporate whistleblower protections in Australia* 20 December 2016, p. 4, https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/ (accessed 20 March 2018).

- constrain employer rights to enforce a contract remedy against the whistleblower (including any contractual right to terminate employment) arising as a result of the disclosure;
- prohibit victimisation of the whistleblower;
- confer a right on the whistleblower to seek compensation if damage is suffered as a result of victimisation; and
- prohibit revelation of the whistleblower's identity or the information disclosed by the whistleblower with limited exceptions.[7]

6.8 Whistleblower protections for certain public interest disclosures concerning misconduct or an improper state of affairs or circumstances affecting the institutions supervised by the Australian Prudential Regulation Authority (APRA), are found in the following Acts:

- *Banking Act 1959*;
- *Insurance Act 1973*;
- *Life Insurance Act 1995*; and
- *Superannuation Industry (Supervision) Act 1993*.[8]

6.9 However, these provisions have been criticised on the basis that:

> …the scope of wrongdoing covered is ill-defined, anonymous complaints are not protected, there are no requirements for internal company procedures, compensation rights are ill-defined, and there is no oversight agency responsible for whistleblower protection.[9]

Whistleblowers need to be better supported

6.10 A number of submissions to this inquiry observed that Australia's whistleblower protection regime in the context of foreign bribery is insufficient, particularly for employees of private companies.[10] These conclusions are supported by the assessments of the Organisation for Economic Co-operation and Development

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7 Australian Government, The Treasury, Review of tax and corporate whistleblower protections in Australia 20 December 2016, p. 4, https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/ (accessed 20 March 2018).

8 Australian Government, The Treasury, Review of tax and corporate whistleblower protections in Australia 20 December 2016, p. 5, https://treasury.gov.au/consultation/review-of-tax-and-corporate-whistleblower-protections-in-australia/ (accessed 20 March 2018).

9 Simon Wolfe, Mark Worth, Suelette Dreyfus and A J Brown, *Whistleblower Protection Laws in G20 Countries: Priorities for Action*, September 2014, p. 25, https://blueprintforfreespeech.net/wp-content/uploads/2015/09/Whistleblower-Protection-Laws-in-G20-Countries-Priorities-for-Action.pdf (accessed 5 December 2017).

10 The poor treatment of whistleblowers is not confined to instances of foreign bribery. Indeed, the committee has observed the conduct and treatment of whistleblowers within the financial services sector across many inquiries, including: Senate Economics References Committee, *The performance of the Australian Securities Investments Commission* (26 June 2017) and *Scrutiny of Financial Advice* (30 June 2017).

(OECD), the United Nations Convention against Corruption (UNCAC) and the G20 Anti-Corruption Action Plan.[11]

6.11 The December 2017 Phase 4 OECD report noted that 'at least three foreign bribery enforcement actions reported by Australia appear to have been reported by whistleblowers,'[12] and that:

> During the on-site [visit], representatives from across the private sector and civil society repeated widespread media reports that whistleblowers in one foreign bribery enforcement action lost their jobs and have struggled to obtain new employment as a direct consequence of their reports to AFP. They asserted that there is a perception among the Australian public that any form of external whistleblowing will almost definitely result in reprisals.[13]

6.12 The December 2017 Phase 4 OECD report also observed that one participant summarised the status quo in Australia as providing 'no incentive for whistleblowers to speak up and no protection for them if they do'.[14] The report went on to advise that:

> …several private sector commentators expressed the view that stronger whistleblower protections would lead to increased foreign bribery enforcement.[15]

6.13 Research undertaken on the G20 whistleblowing regimes would support this view, as they found that there is a link between the number of whistleblowing reports and the existence of comprehensive and effective whistleblower protection laws in that country.[16]

6.14 The December 2017 Phase 4 OECD report recommended that Australia enhance its whistleblower protections by:

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11 Dr Kath Hall, *Submission 9*, p. 4.

12 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 27, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

13 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 27, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

14 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 27, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

15 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 27, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

16 Cited by Regnan, *Submission 13*, p. 3 (*Where does Australia sit in the world of whistleblowing?*, Australian Institute of Company Directors, 1 March 2014, http://www.companydirectors.com.au/Director-Resource-Centre/Director-QA/Roles-Duties-and-Responsibilities/Where-doesAustralia-sit-in-the-world-of-whistleblowing).

- Enacting legislation that provides clear, comprehensive, protections for whistleblowers across the private sector that align (where appropriate) with the protections for public sector whistleblowers in the PID Act.
- Raising awareness of any new legislation to ensure that employees in all sectors are fully apprised of the new regime.

6.15 Mr David Lehmann, Director of KordaMentha Forensic observed, 'that tips or whistleblowing are the most common means by which fraud is detected'. In this context, Mr Lehmann informed the committee that:

> Moving forward, we hope for and encourage a change in the attitude of business leaders and the wider community to one that sees whistleblowers as courageous and as people to be admired. Unfortunately, consequences such as bullying, harassment and loss of livelihood are often the norm.[17]

6.16 Regnan also noted that:

> Evidence suggests that it is not unusual for [whistleblowers]…to face victimisation or dismissal from the workplace; risk of being sued by their employer for breach of confidentiality or libel; and/or the risk of becoming the subject of criminal sanctions.[18]

6.17 Examples of whistleblowers who were allegedly targeted by their employers after coming forward with information regarding foreign bribery were presented to the committee during the course of its inquiry.[19] For example, KordaMentha reflected on the failings of the Australian whistleblowing regime to protect the whistleblowers in the Securency International and Note Printing Australia (NPA) cases. They explained that a former NPA employee:

> …reported his concerns to management about ongoing corrupt practices on numerous occasions and as a result was subject to various forms of harassment, intimidation and eventually forced from his job. This was despite the reported conduct being in breach of the *Corporations Act 2001* under which employees should be protected for making good faith disclosures about breaches of corporate legislation.[20]

6.18 Mr James Fuller, Chairman of the SKINS Group of companies, also described the experience of a former employee of the Football Federation of Australia (FFA) who blew the whistle on allegedly corrupt conduct in relation to Australia's failed bid to host the FIFA World Cup in 2018 or 2022. Mr Fuller contends that following the termination of the whistelblower's employment with the FFA, the whistleblower was 'denigrated personally in the press and on social media where she was described as bitter and twisted', and 'a disgruntled former employee'.[21] In addition, the

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17 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 15.

18 Regnan, *Submission 13*, p. 9.

19 See, for example, the Leighton Holdings Limited case example discussed in Appendix 1.

20 KordaMentha, *Submission 22*, p. 10.

21 SKINS, *Submission 28*, pp. 9 and 10.

whistleblower has found it difficult to secure work following disclosures about the FFA:

> I am aware that [the whistleblower] was not able to find alternative appropriate employment despite her immense skills, capabilities and experience.[22]

6.19 Reflecting on his experience with whistleblowers, and the culture among corrupt organisations, Mr Fuller described the treatment of the above-mentioned whisteblower as:

> …typical behaviour of powerful people and organisations that are in the wrong. They operate on the basis of a culture of silence and intimidation where people who don't speak-up are rewarded and those who do can suffer.[23]

6.20 Appendix 1 to this report explores the Securency International and NPA and FFA cases in more detail, along with some of the other egregious foreign bribery examples involving Australian entities, including in circumstances where whistleblowers have exposed the foreign bribery and corruption.

6.21 Mr Nick McKenzie, who undertook research with international law enforcement officials as part of a Churchill Scholarship, commented that:

> Most of the anti-corruption and policing officials in Australia interviewed for this report conceded that legislative protection for corporate whistle-blowers here [in Australia] is weak, as are incentives to encourage whistleblowing.
>
> …
>
> Australia needs to improve protections for corporate whistle-blowers to dissuade employers from targeting them.[24]

6.22 There would therefore appear to be benefits from better coordinating and strengthening Australia's whistleblower protections.

Is the scope of coverage sufficient in foreign bribery cases?

6.23 Jurisdictional concerns are central to the development of whistleblowing policies for foreign bribery. In instances of foreign bribery, it is highly likely that whistleblowers will be located wherever their employer might be conducting business, including offshore. While there is no precedent in Australia, experience in the UK highlights some of the difficulties faced in providing protection to those who identify instances of foreign bribery.

6.24 In the UK, the *Public Interest Disclosure Act 1998* amends the *Employment Rights Act 1996* to provide certain protections for whistleblowers. These Acts protect a whistleblower who makes a disclosure to their employer, a legal adviser, a Minister

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22 SKINS, *Submission 28*, p. 10.

23 SKINS, *Submission 28*, p. 10.

24 Mr Nick McKenzie, *Submission 43*, p. 47.

of the Crown, individuals appointed by the Secretary of State for this purpose, or, in limited circumstances, 'any other person'.[25] In making the disclosure, the whistleblower must have a reasonable belief that the disclosure is made in the public interest and tends to show:

> (a) that a criminal offence has been committed, is being committed or is likely to be committed,
>
> (b) that a person has failed, is failing or is likely to fail to comply with any legal obligation to which he is subject,
>
> (c) that a miscarriage of justice has occurred, is occurring or is likely to occur,
>
> (d) that the health or safety of any individual has been, is being or is likely to be endangered,
>
> (e) that the environment has been, is being or is likely to be damaged, or
>
> (f) that information tending to show any matter falling within any one of the preceding paragraphs has been, is being or is likely to be deliberately concealed.[26]

6.25 These protections have been claimed in the context of foreign bribery; *Foxley v GPT Special Project Management Pty Ltd*[27] is one such example.

6.26 Mr Ian Foxley was a retired Army officer who was hired as the Programme Director for GPT Special Project Management Limited (GPT). GPT is a UK subsidiary of the EADS Group, which is the prime contractor for a £1.96 billion scheme to modernise communications in the Saudi Arabian National Guard (the SANGCOM Project). Mr Foxley was based in Saudi Arabia.[28]

6.27 Mr Foxley uncovered evidence of alleged corruption, and attempts to cover it up, within GPT and the SANGCOM Project. Mr Foxley reported his discoveries to EADS Group, the UK Ministry of Defence and the UK Serious Fraud Office (SFO); and his employment with GPT was subsequently terminated.[29]

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25 *Employment Rights Act 1996* (UK), Part IVA.

26 *Employment Rights Act 1996* (UK), ss. 43B(1).

27 *Foxley v GPT Special Project Management Pty Ltd.*, Employment Tribunal, No. 22008793/2011 (12 August 2011).

28 UK Parliament, *Banking Standards: Written evidence from Ian Foxley, Lieutenant Colonel (retired)*, 24 August 2012, https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27iv74.htm (accessed 15 March 2018).

29 UK Parliament, *Banking Standards: Written evidence from Ian Foxley, Lieutenant Colonel (retired)*, 24 August 2012, https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27iv74.htm (accessed 15 March 2018).

6.28 Mr Foxley brought a claim in the UK Employment Tribunal for unfair dismissal on the grounds of his whistleblowing against GPT.[30] The Employment Tribunal found that it had no jurisdiction and that, even though the cause of the dismissal may have been whistleblowing, there was no statutory position to support such a claim. Thus, the Employment Tribunal could not deal with this matter.[31]

6.29 On 7 August 2012, the SFO announced that it would be investigating the matter; the investigation is continuing.[32]

6.30 The Phase 3 Report on the United Kingdom by the OECD Working Group on Bribery, published in March 2012, evaluated and made recommendations on the UK's implementation and application of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions.[33] It stated:

> PIDA's [the UK *Public Interest Disclosure Act 1998*] scope of coverage may be insufficient in foreign bribery cases. The Act does not apply to expatriate workers of UK companies who are based abroad unless there are 'strong connections with Great Britain and British employment law'. [34]

6.31 This example demonstrates the complex nature of providing whistleblower protection for those who disclose foreign bribery (or suspicions of foreign bribery) where the offending conduct or retribution occurs offshore. While this example certainly does not illustrate every aspect of the laws' application, it is useful in understanding how whistleblower protection laws work and how they may apply in the context of foreign bribery in Australian cases.

Suggestions for reform

6.32 As stated above, whistleblowers often suffer significant professional and personal consequences as a result of their disclosures. The IBAACC suggested that 'the Australian culture supported the concept that you 'do not dob in a mate" and that '[i]ndividual employees go along with the herd mentality unless he or she wants to put

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30 *Foxley v GPT Special Project Management Pty Ltd.*, Employment Tribunal, No. 22008793/2011 (12 August 2011).

31 UK Parliament, *Banking Standards: Written evidence from Ian Foxley, Lieutenant Colonel (retired)*, 24 August 2012, https://publications.parliament.uk/pa/jt201314/jtselect/jtpcbs/27/27iv74.htm (accessed 15 March 2018).

32 Serious Fraud Office, *GPT Special Project Management Ltd*, 28 April 2016, https://www.sfo.gov.uk/cases/gpt-special-project-management-ltd// (accessed 6 December 2017).

33 OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom*, March 2012, p. 55, http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf (accessed 14 March 2018).

34 OECD, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United Kingdom*, March 2012, p. 55, http://www.oecd.org/daf/anti-bribery/UnitedKingdomphase3reportEN.pdf (accessed 14 March 2018).

their head above the parapet and suffer the consequences'.[35] The IBAACC warned that in their experience the 'attitude of the Australian Government, as with many State governments and organisations, is to shoot the messenger and avoid the messenger.' The IBAACC expressed the view that as far as ASIC is concerned:

> …a whistleblower is largely on his or her own in fending for himself or herself against, what the Committee has seen in the experience of its members to be, vindictive employers and harassing employees who persecute, humiliate and discriminate against the whistleblower.[36]

6.33 Many stakeholders offered similar views, and argued that whistleblowers should be better supported and better protected.[37] For example, BHP Billiton stated:

> It is critical that individuals who suspect potential wrongdoing feel comfortable to raise concerns, in a timely manner, without fear of retaliation.[38]

6.34 While agreeing for the most part that change was needed to enhance whistleblower protections, suggestions varied as to the most effective way of achieving this goal.

Legislative reform

6.35 Regnan recommended that legislation be introduced to provide robust protection for whistleblowers as in peer jurisdictions. In particular, Regnan advocated for protection for disclosures made in good faith, including anonymous disclosures.[39] This is discussed in more detail below with reference to the EWP bill.

6.36 Professor Simon Bronitt, Professor Nikos Passas, Ms Wendy Pei and Ms Chloe Widmaier argued that legal protection for whistleblowers in the corporate sector should be extended beyond corporation law offences. They suggested that the protections in the *Corporate Law Economic Reform Program (Audit Reform and Corporate Disclosure) Act 2004* could be extended to encompass fraud and corruption offences.[40]

6.37 CPA Australia also proposed extending the scope of whistleblower protections in legislation. It suggested that there may be:

> …scope for either adopting the trust and structure of Corporations Act Part 9.4AAA (Protection for whistleblowers) within Division 70 of the Criminal Code or broadening the scope of Part 9.4AAA (s 1317AA(1)(d)) to cover

35 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 36.

36 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 36.

37 See, for example, Regnan, *Submission 13*, p. 3; CPA Australia, *Submission 18*, p. 4.

38 BHP Billiton, *Submission 37*, p. 7.

39 Regnan, *Submission 13*, p. 3.

40 Professor Simon Bronitt, Professor Nikos Passas, Ms Wendy Pei and Ms Chloe Widmaier, *Submission 35*, p. 13.

> specific matters additional to suspected contravention of Corporations legislation.[41]

6.38 If the scope of the Corporations Act were to be expanded as suggested above, effective interagency cooperation would be essential, as the disclosures would be made to ASIC in the main.[42]

6.39 Flinders University also argued that the cultural bias against whistleblowing is compounded by lack of internal systems mandating the provision of feedback to whistleblowers. Therefore, they considered that legislating to require 'corporations to provide some level of response to informants' would assist in achieving desirable cultural change within corporations.[43]

Compensation schemes v rewards

6.40 Given the significant financial and personal costs associated with being a whistleblower, some stakeholders advocated for a compensation scheme.[44] Submissions drew comparisons with the US scheme where whistleblowers may be entitled to receive rewards between 10 per cent and 30 per cent of any monies offered in bribery.[45]

6.41 Mr Robert Wyld, representing the IBAACC, told the committee that he supported the introduction of a statutory compensation scheme and that the US scheme provides extensive guidance that could help shape an Australian equivalent:

> The framework that you can look at is already in the United States. The regulators from the SEC that I have spoken to—and I know from Mr McKenzie's submission that he has spoken to them; as part of his Churchill Fellowship he looked into these issues—see it particularly as a game-changing process that a whistleblower is, in fact, actively protected and actively compensated. From an Australian perspective, it is better to look at compensation. I think that if you start looking at reward and bounties, it becomes very emotive… I think there is a very legitimate role for it if it is statutorily enacted with a scheme that is transparent and administered by somebody who looks at these people independently and assesses it based on what they have suffered.[46]

6.42 In response to questions on the issue, Mr Wyld conceded that some employees may turn whistleblower in the face of the imminent termination of their employment. However, he emphasised:

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41 CPA Australia, *Submission 18*, p. 4.

42 CPA Australia, *Submission 18*, p. 4.

43 Flinders University, *Submission 19*, p. 3.

44 See, for example, Mr Nick McKenzie, *Submission 43*, p. 8.

45 See, for example, International Bar Association Anti-Corruption Committee, *Submission 6*, p. 37; Governance Institute of Australia, *Submission 14*, p. 2.

46 Mr Robert Wyld, Co-Chair, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, pp. 19–20.

> …I think the reality is that if, in fact, somebody blows the whistle and gives information, and that information leads to a conviction, and that information leads to sentence imposed—as it does in the US—of an award, then that whistleblower, irrespective of anything else, should be entitled to some compensation.[47]

6.43 While some submissions supported this concept, the Governance Institute of Australia suggested that the US scheme creates a moral hazard and noted that its members do not believe it is an appropriate model on which to base Australian reform.[48] BHP Billiton echoed this conclusion, stating that it is not currently clear whether the introduction of incentives would lead to an increase in whistleblower reports.[49]

Incorporating protections in guidance and compliance programs

6.44 Suggestions for reform included the incorporation of whistleblowing issues into any guidance issued by regulators on effective compliance programs and consideration of an effective whistleblowing program in the context of deferred prosecution agreements (discussed in more detail in Chapter 5).[50]

6.45 As discussed in detail in chapter 4, a company will not be liable under the new failure to prevent foreign bribery offence where it can prove it had adequate procedures in place to prevent and detect foreign bribery.[51] The minister will publish guidance on what adequate procedures a body corporate should take to prevent an associate from bribing a foreign public official.[52]

6.46 In a submission to the Legal and Constitutional Affairs Legislation Committee's (L and C committee) inquiry into the CCC bill, Associate Professor Vivienne Brand suggested that internal corporate whistleblowing systems should form part of the adequate procedures designed to prevent foreign bribery.[53] Associate Professor Brand argued that including clear guidance on the extent to which good internal whistleblowing systems can be used as evidence of the taking of 'adequate steps' to prevent foreign bribery by an associate is important because:

- whistleblowing activity is positively correlated with anticorruption outcomes;
- whistleblowing is a relevant factor under the UK's analogous 'adequate steps' foreign bribery provisions; and

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47 *Committee Hansard*, 22 April 2016, p. 20.

48 Governance Institute of Australia, *Submission 14*, p. 2.

49 BHP Billiton, *Submission 37*, p. 7.

50 Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 17*, p. 3.

51 CCC bill, explanatory memorandum, p. 18.

52 CCC bill, new s. 70.5B.

53 Associate Professor Vivienne Brand, *Submission 4*, L and C committee inquiry into the CCC bill, p. 2.

- a significant reform of Australia's corporate whistleblowing regime is currently underway that should lead to increased levels of corporate whistleblowing activity, making this anti-corruption mechanism even more effective.[54]

6.47 The UK's guidance about procedures which relevant corporations can put in place to prevent persons associated with them from bribing, includes a non-exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced. This non-exhaustive list includes 'the reporting of bribery including 'speak up' or 'whistle blowing' procedures.[55]

6.48 In addition, the UK guidance also provides that, as a 'top-level commitment', commercial organisations should include 'internal and external communication' of their 'commitment to zero tolerance to bribery'.[56] The guidance specifically provides that:

> This could take a variety of forms. A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might be tailored to different audiences. The statement would probably need to be drawn to people's attention on a periodic basis and could be generally available, for example on an organisation's intranet and/or internet site.[57]

6.49 The guidance also provides examples of what effective formal statements that demonstrate top level commitment are likely to include, such as:

> …reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing).[58]

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54 Associate Professor Vivienne Brand, *Submission 4* to the L and C committee inquiry into the CCC bill, pp. 2–3.

55 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 22, paragraph 1.7, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

56 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 23, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

57 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 23, paragraph 2.3, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

58 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 23, paragraph 2.3, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

6.50 In response to questions on notice asked by the L and C committee, AGD indicated that 'the department intends to consider' including internal corporate whistleblowing systems as part of any recommended adequate procedures 'designed to prevent the bribery of a foreign public official.'[59]

Recent reviews into whistleblowing protections

6.51 Whistleblower protection has been a perennial subject of many parliamentary committees in both houses over the last thirty years.[60] In the last two years, there have been two major reviews of whistleblowing and public interest disclosure:

- the 'Moss Review' which examined the effectiveness and operation of the PID Act; and
- the Parliamentary Joint Committee on Corporations and Financial Services (PJC) inquiry on Whistleblower Protections.

6.52 The 2016 Moss Review was, amongst other things, tasked with considering 'the breadth of disclosable conduct covered by the [PID] Act, including whether disclosures about personal employment-related grievances should receive protection under the [PID] Act'.[61]

6.53 The Moss Review found that:

- the PID Act had only been partially successful in its aim to promote integrity and accountability in the Commonwealth public sector;
- the PID Act's interactions with other procedures for investigating wrongdoing are overly complex;
- the categories of disclosable conduct are too broad and only a minority of disclosures bring to light allegations of serious integrity risks and wrongdoing; and
- by adopting legalistic approaches to decision-making, the PID Act's procedures undermine the pro-disclosure culture it seeks to create.[62]

6.54 The Moss Review made recommendations including:

- strengthening the ability of the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security to scrutinise and monitor the decisions of agencies;
- creating more investigative agencies under the PID Act;

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59 Attorney-General's Department, answers to questions on notice, L and C committee inquiry into the CCC bill, p. 15.

60 House Standing Committee on Legal and Constitutional Affairs, 2009, *Inquiry into whistleblowing protections within the Australian Government public sector*, p. vii-x.

61 Phillip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, p. 2.

62 Phillip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 6–7.

- strengthening the PID Act's focus on significant wrongdoing—fraud, serious misconduct and corrupt conduct—in order to achieve the integrity and accountability aims;
- expanding the grounds for external disclosure; and
- redrafting procedural aspects of the PID Act using a 'principles-based' approach and providing better protections for witnesses and whistleblowers.[63]

6.55 Following the Moss Review, in November 2016, the PJC was referred an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors.[64] The PJC received 75 submissions and held five public hearings before publishing its report, *Whistleblower protections*, in September 2017.[65]

6.56 The *Whistleblower protections* report identified the fragmented nature of Australia's whistleblower legislation and, in particular, the significant inconsistencies that exist not only between various pieces of Commonwealth public and private sector whistleblower legislation, but also across the various pieces of legislation that apply to different parts of the private sector.

6.57 The report made a large number of recommendations to address these issues. They included broadening the range of whistleblowers who are covered (to include, for example, former employees and suppliers of a company); allowing for anonymous disclosures; increasing penalties for victimisation and for breaching the confidentiality of a whistleblower, and creating civil offences with a lower standard of proof than the existing criminal offences in such cases; and reversing the onus of proof in civil cases.

6.58 An important recommendation was the establishment of a Whistleblower Protection Authority (to be housed within a single body or an existing body) that can support whistleblowers, assess and prioritise the treatment of whistleblowing allegations, conduct investigations of reprisals, and oversee the implementation of the whistleblower regime for both the public and private sectors.[66]

6.59 The report also recommended creating a single private sector system for protecting whistleblowers; extending coverage to the not-for-profit sector; and introducing a rewards scheme for whistleblowers.[67]

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63 Phillip Moss AM, *Review of the Public Interest Disclosure Act 2013*, July 2016, pp. 7–8.

64 Journals of the Senate, No. 22, 30 November 2016, p. 714.

65 *Whistleblower protections*, report of the Parliamentary Joint Committee on Corporations and Financial Services, Whistleblower protections in the corporate, public and not-for-profit sectors, September 2017, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections (accessed 13 March 2018).

66 Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, September 2017, p. ix, https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections (accessed 13 March 2018).

67 Parliamentary Joint Committee on Corporations and Financial Services, *Whistleblower Protections*, September 2017, pp. xiii–xx.

6.60 Following the *Whistleblower protections* report the government established an expert advisory panel on whistleblower protections which, amongst other things, will:

> …review and provide advice to the Government in respect of recommendations for legislative reforms to enhance whistleblower protections in the private, not-for-profit and public sectors made by the PJC…[68]

Recent legislative developments

6.61 In October 2017, the government released an exposure draft of the Treasury Laws Amendment (Whistleblowers) Bill 2017 for consultation.[69] The intention of the bill was to deliver on the Government's commitment under the Open Government National Action Plan and tax integrity measure announced in the 2016 Budget. Submissions for this consultation, which closed on 3 November 2017, have been published.[70]

6.62 In December 2017, the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (EWP bill) was introduced into Parliament. Because work on the EWP bill commenced before the *Whistleblower protections* report was published, it does not purport to address all the recommendations of the PJC.[71]

6.63 The EWP bill proposes to bring the corporations and financial sector whistleblower regimes into alignment under new arrangements in the Corporations Act.[72] It also creates a new whistleblower protection regime in the taxation law, to protect those who expose tax misconduct.[73]

6.64 At present the disclosures that are protected have to do with breaches of the particular act that governs the entity. The amendments to the Corporations Act in the EWP bill would expand the scope of disclosable matters to include misconduct, or an improper state of affairs or circumstances, in relation to the regulated entity, or an

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68 Minister for Revenue and Financial Services, The Hon. Kelly O'Dwyer, MP, *Expert advisory panel on whistleblower protections*, 28 September 2017, http://kmo.ministers.treasury.gov.au/media-release/097-2017/ (accessed 15 March 2018).

69 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 2 November 2017).

70 Department of the Treasury, Treasury Laws Amendment (Whistleblowers) Bill 2017— Exposure Draft, Published Responses, https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/ (accessed 21 February 2018).

71 In effect the bill does address the vast majority of the PJC's 35 recommendations. The recommendations which are not addressed, as they pertain to the private sector, are summarised in the EWP bill, explanatory memorandum, pp. 10–11.

72 EWP bill, Schedule 3.

73 EWP bill, explanatory memorandum, pp. 65–66.

offence against any law of the Commonwealth that is punishable by 12 months imprisonment, or represents a danger to the public or the financial system.[74]

6.65 An eligible whistleblower is an employee, supplier (or employee of a supplier) or associate of the entity; or a relative or dependant or spouse of such a person. Importantly, the EWP bill proposes to widen the definition to cover former employees and associates—people who are likely to have information about matters which should be disclosed.[75]

6.66 The EWP bill provides for 'emergency disclosure' to a journalist or a member of Parliament. Such disclosure will be protected only if the disclosure has already been made to ASIC, APRA or a prescribed body and qualifies for protection, a reasonable period has passed since it was made, and there is now an imminent risk to public health or safety or to the financial system if the disclosure is not acted on immediately. The discloser must give the original recipient written notification of their intention to make an 'emergency disclosure'.[76]

6.67 At present, whistleblowers are required to make disclosures 'in good faith'. This has allowed them to be challenged on the basis that they are acting from malice or other subjective motivations. Pursuant to the EWP bill, this requirement will be replaced by a reasonableness test which requires that the whistleblower have reasonable grounds to suspect misconduct or an improper state of affairs.[77]

6.68 The EWP bill makes it an offence to reveal the identity of a whistleblower without the whistleblower's consent. In a prosecution for an offence the defendant 'bears an evidential burden'—that is, the burden of proof is on the person accused of revealing a whistleblower's identity. Under the EWP bill there will no longer be any requirement that a whistleblower provide his or her name in order to qualify for protection. Anonymous disclosures will now be protected.[78]

6.69 A whistleblower is not subject to any civil, criminal or administrative liability for making a disclosure, and no action can be taken against him or her under a contract; for example, an employment contract or a supply contract with the company the disclosure relates to. Information that will be protected under the EWP bill will not be able to be used against the whistleblower in criminal proceedings or proceedings where a penalty is imposed. However, a note in the EWP bill makes it clear that a person can still be subject to civil, criminal or administrative liability for conduct that is revealed by the disclosure.[79]

6.70 The EWP bill seeks to make it easier for a whistleblower to seek redress for victimisation, because it will allow for civil or criminal prosecutions for victimisation.

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74 EWP bill, Schedule 1, item 2, new ss.1317AA(4).

75 EWP bill, explanatory memorandum, p. 23.

76 EWP bill, Schedule 1, item 2, new s. 1317AAD.

77 EWP bill, Schedule 1, item 2, new ss. 1317AA(4) and (5)

78 EWP bill, explanatory memorandum, p. 28.

79 EWP bill, Schedule 1, item 2, new ss. 1317AB(1).

There is no requirement to prove that the victimiser intended to cause the detriment, nor that the disclosure is the only reason for the detriment. The detriment can be to another person: it does not have to be to the whistleblower, but can also be to a colleague, supporter, friend or relative.[80]

6.71 The claimant for compensation has to point to evidence that suggests a 'reasonable possibility' that the victimisation has taken place. Once that is done, the onus is on the person against whom the claim is made to show that the claim is not substantiated. The claimant cannot be ordered to pay costs, except where the proceedings have been vexatious or where the claimant's behaviour has unreasonably caused the other party to incur costs.[81]

6.72 The EWP bill will requires public companies, large proprietary companies and companies that are trustees of superannuation entities to have a whistleblower policy, and to make that policy available to officers and employees of the company. The policy has to set out information about the protections available to whistleblowers and what disclosures are protected, how the company will support whistleblowers and investigate disclosures, and how the company will ensure fair treatment of employees who are mentioned in disclosures.[82]

6.73 At present disclosing victimisation and disclosing a whistleblower's identity are offences and a contravention has to be proved to the criminal standard, beyond reasonable doubt. The EWP bill leaves this as a possibility, but also makes civil contraventions with a maximum penalty of $200,000 for an individual and $1 million for a corporation.[83]

6.74 The EWP bill amends the *Taxation Administration Act 1953* in ways that are broadly similar to the amendments to the Corporations Act. It creates a regime to protect individuals who report non-compliance with tax laws or misconduct in relation to an entity's tax affairs.[84]

6.75 No explicit mention is made in the EWP bill, or in the explanatory materials, of how it would apply to disclosures made in foreign jurisdictions.

6.76 Among the recommendations in the *Whistleblower Protections* report that are not covered in the EWP bill are:

- the establishment of a Whistleblower Protection Authority;
- extending coverage to the not-for-profit sector; and
- introducing a rewards scheme for whistleblowers.

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80 EWP bill, explanatory memorandum, p. 33.

81 EWP bill, Schedule 1, item 9, new s. 1317AH.

82 EWP bill, Schedule 1, item 9, new s. 1317AI.

83 EWP bill, Schedule 1, items 10 and 11, new ss. 1317E(1) and 1317G(1G).

84 EWP bill, explanatory memorandum, pp. 65–66.

6.77 The EWP bill was referred to the Senate Economics Legislation Committee for inquiry and report by 22 March 2018. Most contributors to the inquiry, on balance, suggested that the EWP bill should be passed because it is an improvement on current arrangements.[85]

6.78 The committee recommended that a requirement for review be included in the EWP bill, so that the possibility of further development is kept open, and, in particular, the recommendations of the PJC that had not been implemented will remain under active consideration.[86]

6.79 Labor Senators in their additional comments noted a number of concerns raised by stakeholders with the EWP bill, including whether the government is committed to progressing further reforms in this term of Parliament, the omission of the role of unions in assisting employees, the effectiveness of the EWP bill in enabling whistleblowers to access adequate compensation for reprisals, the range of allowable emergency disclosures and how internal company processes will manage the range of eligible recipients.[87]

Committee view

6.80 Evidence presented to the committee suggests that Australia's whistleblower protection regime is insufficient, particularly for employees of private companies. Given the significant harm generated by foreign bribery and corporate corruption and the key role insiders can play in exposing such conduct, the committee considers it essential that Australia take immediate action to adequately protect whistleblowers.

6.81 The committee notes that research undertaken on the G20 whistleblowing regimes found that there is a link between the number of whistleblowing reports and the existence of comprehensive and effective whistleblower protection laws in that country. The committee also notes observations made in the December 2017 Phase 4 OECD report that stronger whistleblower protections in Australia would lead to increased foreign bribery enforcement. In particular, the committee notes the report's specific recommendations that Australia: enhance its whistleblower protections by enacting legislation that provides clear, comprehensive, protections for whistleblowers across the private sector that align (where appropriate) with the protections for public sector whistleblowers in the PID Act; and raise awareness of any new legislation to ensure that employees in all sectors are fully apprised of the new regime.

6.82 The committee welcomes the suggestions made by stakeholders to strengthen Australia's public interest disclosure framework. In particular, the committee considers that internal corporate whistleblowing systems should form part of the adequate procedures designed to prevent foreign bribery.

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85 Senate Economics Legislation Committee, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (22 March 2017).

86 Senate Economics Legislation Committee, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (22 March 2017).

87 Senate Economics Legislation Committee, *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (22 March 2017), pp. 29–37.

6.83 The committee notes the Parliamentary Joint Committee on Corporations and Financial Services' *Whistleblower Protections* report and endorses the recommendations made in that report. The committee also notes stakeholder concerns that were raised that the EWP bill represents a limited step in the right direction—with many stakeholders holding concerns about its effectiveness. The committee is also concerned that the bulk of the recommendations made in the PJC *Whistleblower Protections* report remain outstanding.

6.84 The committee welcomes the establishment of the expert advisory panel to review the PJC's recommendations. However, in the context of the unfulfilled expectations from the many parliamentary committees past, the committee considers it imperative that the government support the panel to work expeditiously to progress the outstanding suggested PJC reforms. In so doing, the committee encourages the government to request that the panel consider how any proposals will apply in foreign bribery cases, where the offending conduct necessarily occurs offshore. The committee is of the view that it is particularly important that the scope and application of whistleblower protection laws is well understood by all employees, including those based overseas.

Recommendation 15

6.85 The committee endorses the Parliamentary Joint Committee on Corporations and Financial Services report on Whistleblower Protections, and urges the government to work with the expert advisory panel to expeditiously implement the committee's outstanding recommendations.

Recommendation 16

6.86 The committee recommends that the government request the expert advisory panel on whistleblowers to consider whether the scope of Australia's whistleblower protections provides sufficient coverage in foreign bribery cases.

Recommendation 17

6.87 The committee recommends that the minister's guidance on adequate procedures in relation to the new failing to prevent foreign bribery offence include the existence of internal corporate whistleblowing systems.

PART III

Building a culture of integrity and compliance

Overview of Part III

This part of the report consists of two chapters that identify further changes that could be enacted to bring Australia up to date with comparative countries systems and in doing so, signal that Australia is serious about combatting foreign bribery (and other forms of corruption).

It assesses the adequacy of the government's proposed initiatives and what more needs to be done in light of what has been examined and recommended in evidence to the inquiry and other consultations, including the Phase 4 OECD Report. In particular, it looks at ways that Australia can build a corporate culture of integrity and compliance.

It explores the use of the facilitation payment defence in Australia. In particular, it scrutinises its prevalence internationally and examines arguments to retain or abolish the defence within Australia's anti-bribery legislative framework.

It also evaluates the following options to further strengthen Australia's foreign bribery framework:

- the expansion of the register of beneficial ownership;
- a debarment model; and
- development of official guidance relating to compliance with Australia's foreign bribery laws and how to make a voluntary report of foreign bribery.

Chapter 7

The facilitation payment defence

7.1 A facilitation payment is a minor payment made to a foreign public official for the purpose of speeding up minor routine government action.[1] Such a payment is legislatively recognised in Australia as a complete defence to the core foreign bribery offence in the *Criminal Code Act 1995* (Criminal Code). However, it can be difficult to differentiate between a facilitation payment and a bribe.

7.2 The 1997 Organisation for Economic Co-operation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (OECD Convention) permits facilitation payments as an exception to member states' anti-bribery legislative frameworks. Though more recently the OECD's position has shifted, and since 2009 it has consistently recommended that states review the facilitation payment defence and encourage private enterprises to prohibit, or discourage, facilitation payments in internal company policies.

7.3 Many submissions to this inquiry noted that the defence is 'highly contested' and has been subjected to 'wide criticism' from a range of sectors and bodies.[2] This chapter explores the facilitation payment defence in Australia, scrutinises its prevalence internationally, and examines arguments to retain or abolish the defence within Australia's anti-bribery legislative framework.

Current position in Australia

7.4 Under section 70.2 of the Criminal Code, foreign bribery is punishable by up to 10 years imprisonment and a fine of up to 10,000 penalty units ($2.1 million).[3] However, under section 70.4, a person is not guilty if they can prove that the bribe was a 'facilitation payment'.

7.5 A facilitation payment for the purposes of section 70.4 is a payment of minor value, provided in return for a routine government action. Section 70.4 is a complete defence to a charge of foreign bribery. It provides in full:

> (1) A person is not guilty of an offence against section 70.2 if:
>
> (a) the value of the benefit was of a minor nature; and
>
> (b) the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature; and

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1 What constitutes a 'minor payment' and 'minor routine government action' is conceptually complex and is discussed in more detail below. See the section 'A facilitation payment if distinct from a bribe'.

2 See, for example, Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 8.

3 *Criminal Code Act 1995*, ss. 70.2(4).

(c) as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3); and

(d) any of the following subparagraphs applies:

(i) the person has retained that record at all relevant times;

(ii) that record has been lost or destroyed because of the actions of another person over whom the first-mentioned person had no control, or because of a non-human act or event over which the first-mentioned person had no control, and the first-mentioned person could not reasonably be expected to have guarded against the bringing about of that loss or that destruction;

(iii) a prosecution for the offence is instituted more than 7 years after the conduct occurred.

7.6 Subsection (2) provides further guidance on the meaning of 'routine government action'. It explains that 'routine government action' is an action of a foreign public official that:

(a) is ordinarily and commonly performed by the official; and

(b) is covered by any of the following subparagraphs:

(i) granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country;

(ii) processing government papers such as a visa or work permit;

(iii) providing police protection or mail collection or delivery;

(iv) scheduling inspections associated with contract performance or related to the transit of goods;

(v) providing telecommunications services, power or water;

(vi) loading and unloading cargo;

(vii) protecting perishable products, or commodities, from deterioration;

(viii) any other action of a similar nature; and

(c) does not involve a decision about:

(i) whether to award new business; or

(ii) whether to continue existing business with a particular person; or

(iii) the terms of new business or existing business; and

(d) does not involve encouraging a decision about:

(i) whether to award new business; or

(ii) whether to continue existing business with a particular person; or

(iii) the terms of new business or existing business.

7.7 Notwithstanding this statutory definition, many submissions to this inquiry indicated that businesses and regulators struggle to determine whether a particular payment does satisfy, or would satisfy, the requirements of section 70.4. In particular, King & Wood Mallesons contended that it 'is one of the more conceptually complex [issues] arising from Australia's anti-bribery legislation'.[4] Further, as the defence has never been raised before an Australian court, the absence of judicial commentary has heightened the complexity of interpreting section 70.4.

International move towards abolishing the facilitation payment defence

7.8 In examining whether Australia should abolish the facilitation payment defence, it is useful to look at other comparative countries—many of whom, in recent years, have eliminated the defence entirely. Indeed, Australian companies operating internationally or with subsidiaries domiciled in overseas jurisdictions are also increasingly acting on their own by choosing to prohibit such payments in their internal company policies.[5]

Diminishing acceptance by international organisations

7.9 As stated above, the OECD Convention does not prevent member countries from allowing a defence for facilitation payments. The Commentary on the Convention which was issued in November 1997 notes that 'small "facilitation" payments do not constitute payments "made to obtain or retain business or other improper advantage"' and are therefore not within the meaning of article 1's prohibition on bribery. The Commentary notes further that while OECD member states 'can and should' address the 'corrosive phenomenon' of facilitation payments, 'criminalisation…does not seem a practical or effective…action'.[6]

7.10 However some 12 years later, in 2009, the OECD Council adopted another set of recommendations for further combating bribery of foreign public officials in international business transactions. These included a recommendation to encourage the private sector and their public officials to discourage the use and acceptance of facilitation payments, with the aim of eliminating it entirely. The relevant section of the recommendation of the OECD reads as follows:

> **RECOMMENDS**, in view of the corrosive effect of small facilitation payments, particularly on sustainable economic development and the rule of law that Member countries should:
>
> undertake to periodically review their policies and approach on small facilitation payments in order to effectively combat the phenomenon;

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4 King & Wood Mallesons, *Submission 11*, p. 12.

5 See for example, BHP Billiton, *Submission 37*, p. 1; International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41; and The Australian Institute and Jubilee Australia, *Submission 15*, pp. 4–8.

6 OECD, Commentary on the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, adopted by the Negotiating Conference on 21 November 1997, paragraph 9, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (accessed 19 February 2018).

> encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments are generally illegal in the countries where they are made, and must in all cases be accurately accounted for in such companies' books and financial records….
>
> **URGES** all countries to raise awareness of their public officials on their domestic bribery and solicitation laws with a view to stopping the solicitation and acceptance of small facilitation payments. [7]

7.11 Since 2009, the OECD has continued to focus on alternative mechanisms other than criminalisation. For example, in its update to the Guidelines for Multinational Enterprises issued in 2011, the Council urges businesses to 'prohibit or discourage' the use of small facilitation payments 'in internal company controls, ethics and compliance programmes or measures'. However, recognising that such facilitation payments will continue to be made, the Guidelines note that where and when such payments are made, businesses should 'accurately record these in books and financial records'.[8]

7.12 The Asia Pacific Economic Cooperation (APEC) Code of Conduct for Business follows the OECD approach. Rather than recommending states criminalise facilitation payments, the Code urges businesses to eliminate them.[9] Although the OECD and APEC do not require the criminalisation of facilitation payments, other international instruments and organisations do have stronger positions on facilitation payments. For example, the United Nations Convention against Corruption (UNCAC), a multilateral treaty Australia has ratified, prohibits facilitation payments.[10] Australia's obligations under UNCAC are discussed in detail in Chapter 2.

Comparative countries

7.13 Evidence presented to the committee during the course of the inquiry drew attention to the many countries, including OECD member states, that have, or are making moves to, eliminate the facilitation payments defence.

7.14 For example, facilitation payments are prohibited in the United Kingdom (UK).[11] The *Bribery Act 2011* (UK) does not allow the use of facilitation payments,

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7 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, p. 22, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (accessed 19 February 2018).

8 OECD Guidelines for Multinational Enterprises, Section VII Combating Bribery, Bribe Solicitation and Extortion, para 3, pp. 47–48, http://www.oecd.org/daf/inv/mne/48004323.pdf (accessed 20 February 2018).

9 APEC Anti-corruption Code of Conduct for Business , September 2007, Guideline 3.C, p. 1, https://www.apec.org/Publications/2007/09/APEC-Anticorruption-Code-of-Conduct-for-Business-September-2007 (accessed 20 February 2018).

10 United Nations Convention against Corruption, Article 16.1, https://www.unodc.org/documents/brussels/UN_Convention_Against_Corruption.pdf (accessed 21 February 2018).

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

and the 'defence has never been recognised as a legitimate excuse in any earlier anti-corruption or bribery legislation'.[12] The UK Serious Fraud Office is unequivocal; having stated that such a payment 'is a type of bribe and should be seen as such'.[13] Associate Professor Cindy Davids of Deakin University noted that similar prohibitions are also in force in France and Japan.[14]

7.15 Additionally, Canada 'moved to abolish its facilitation payments defence',[15] through the Fighting Corruption Act 2013 (Bill S-14).[16] Interestingly, Bill S-14 provided for the provision eliminating the exception for facilitation payments to come into force on a date to be fixed by an order of the federal Cabinet. The delayed implementation of this aspect of Bill S-14 was intended to allow businesses adequate time to amend their practices and procedures, and as of 31 October 2017, facilitation payments are no longer permitted under Canadian law, regardless of whether the payment occurred in Canada or abroad.[17]

7.16 Conversely, the United States (US) and New Zealand (NZ) currently retain the facilitation payment defence, albeit narrow in scope.

7.17 In the US, the *Foreign Corrupt Practices Act* of 1977 (FCPA) permits payment to foreign officials 'to expedite or to secure the performance of routine government action'.[18] The FCPA provides the same examples of 'routine government action' as under subection 70.4(2) of the Criminal Code—that is, 'an action which is ordinarily and commonly performed by a foreign official', including:

> (i) obtaining permits, licenses, or other official documents to qualify a person to do business in a foreign country;
>
> (ii) processing governmental papers, such as visas and work orders;
>
> (iii) providing police protection, mail pick-up and delivery, or scheduling inspections associated with contract performance or inspections related to transit of goods across country;
>
> (iv) providing phone service, power and water supply, loading and unloading cargo, or protecting perishable products or commodities from deterioration; or

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12 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 9.

13 Transparency International Australia, *Submission 31*, p. 9; citing www.sfo.gov.uk/bribery--corruption/the-bribery-act/facilitation-payments.aspx.

14 Associate Professor Cindy Davids, *Submission 34*, p. 21.

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

16 Bill S-14; See Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 10.

17 Government of Canada, *Canada repeals facilitation payments exception in Corruption of Foreign Public Officials Act*, https://www.canada.ca/en/global-affairs/news/2017/10/canada_repeals_facilitationpaymentsexceptionincorruptionofforeig.html (accessed 20 February 2018).

18 15 U.S.C. § 78dd-1(b).

(v) actions of a similar nature.[19]

7.18 Nevertheless, the International Bar Association Anti-Corruption Committee, (IBAACC) explained to the committee that in the US the facilitation payments defence has 'been increasingly criticised',[20] and, as Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier note, 'over the years, the scope of the defence has become narrower'.[21] Bronitt et al explain the narrowing of the defence by reference to *United States v Kay*, a federal circuit court decision concerning allegations of bribery of officials in Haiti:[22]

> In this case, the definition was narrowed to exclude acts 'that are within an official's discretion or would constitute misuse of an official's office.' As nearly every country formally prohibits its officials from taking bribes or payments as a form of misuse of public office, this change in the definition has essentially 'killed off' the defence.[23]

7.19 Further, the IBAACC noted that it understands that the Department of Justice and the Securities Exchange Commission now take the position that only the most minor and inconsequential payments can properly be characterised as facilitating or expediting payments.[24] Perhaps responding to the narrowing exception, or anticipating its eventual demise, many companies within the US have begun to prohibit facilitation payments in their own policies and procedures.[25]

7.20 As noted above, the US is not the only country that provides an exception for facilitation payments—NZ also currently retains this defence. However, as the IBAACC noted, the NZ Parliament recently considered a bill that 'significantly cut back the scope of the defence', and indeed, the Opposition attempted to amend the bill to abolish the defence altogether.[26] The Organised Crime and Anti-Corruption Legislation Bill passed into law in NZ in November 2015 by way of 15 amendment Acts. As such, the facilitation payments exception in NZ now excludes any action that

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19 15 U.S.C. § 78dd-1(f)(3)(A).

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

21 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, pp. 9–10.

22 *United States v Kay* 359 F.3d 738 (5th Cir. 2004). The United States Court of Appeals for the Fifth Circuit is a federal court with appellate jurisdiction over 9 district courts in the federal judicial districts of Louisiana, Mississippi and Texas.

23 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, pp. 9–10.

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

25 Norton Rose Fulbright, *Business ethics and anti-corruption world*, Publication Issue 2, February 2014, http://www.nortonrosefulbright.com/wissen/publications/113670/business-ethics-and-anti-corruption-world (accessed 20 February 2018).

26 International Bar Association, *Submission 6*, pp. 41–42. The bill is the Organised Crime and Anti-Corruption Legislation Bill, http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL56502_1/organised-crime-and-anti-corruption-legislation-bill (accessed 20 February 2018).

provides an undue material benefit to a person who makes a payment or an undue material disadvantage to any other person.[27]

Facilitation payment defence in Australia

7.21 In November 2011 the Australian Government released a public consultation paper seeking views on Australia's foreign bribery laws, and in particular the treatment of 'facilitation payments' under Australian law.[28] As noted by the IBAACC in its submission to this inquiry in 2015:

> The Government only allowed a period of approximately 30 days for submissions –that is until December 2011. Since December 2011, a period of 3 years and almost 8 months, there has been silence from Canberra on this topic.[29]

7.22 Some submissions to the 2011 consultation argued strongly for the retention of the defence.[30] However, many argued for its removal, emphasising the inconsistencies between both the defence and Australia's international treaty obligations, and Australia's domestic bribery laws and the domestic laws of comparative countries (which are some of Australia's major trading partners).[31] These submitters also observed the difficulties faced in drawing a distinction between a bribe and a facilitation payment; and considered how the defence would assist in creating a strong culture of compliance.

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27 See Organised Crime and Anti-Corruption Legislation Bill, paras. 105C(1)(c)(i) and (ii). http://www.parliament.nz/en-nz/pb/legislation/bills/00DBHOH_BILL56502_1/organised-crime-and-anti-corruption-legislation-bill (accessed 20 February 2018).

28 See Australian Government, Department of Foreign Affairs and Trade, *Corruption*, http://dfat.gov.au/international-relations/themes/corruption/pages/corruption.aspx (accessed 20 February 2018) and National Library of Australia, Australian Government Web Archive, Attorney-General's Department Crime Prevention, A discussion paper assessing aspects of Australia's foreign bribery laws launched on 15 November 2011, *Bribery of foreign public officials is a crime*, http://webarchive.nla.gov.au/gov/20120316193242/http://www.crimeprevention.gov.au/agd/WWW/ncphome.nsf/Page/Financial_Crime_Bribery_of_Foreign_Public_Officials (accessed 21 February 2018).

29 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41.

30 National Library of Australia, Australian Government Web Archive, Attorney-General's Department Crime Prevention, *Bribery of foreign public officials*, http://webarchive.nla.gov.au/gov/20130904121500/http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx (accessed 21 February 2018). See for example the Australia-Africa Mining Industry Group submission and the Australian Institute of Superannuation Trustees submission.

31 National Library of Australia, Australian Government Web Archive, Attorney-General's Department Crime Prevention, *Bribery of foreign public officials*, http://webarchive.nla.gov.au/gov/20130904121500/http://www.crimeprevention.gov.au/Financialcrime/Pages/Briberyofforeignpublicofficials.aspx (accessed 21 February 2018). See for example the Regnan submission and the Australian Compliance Institute submission.

7.23 In October 2012 the Phase 3 OECD Report on Australia's implementation of the OECD Convention was released. In relation to the application and awareness of the facilitation payment defence it noted that:

> …facilitation payments appear to be frequently equated with any bribes of small value...There is a perception that Australian companies may be making facilitation payments, and that the practice may be prevalent, at least in certain regions.[32]

7.24 In light of the above, the Phase 3 OECD Report recommended that:

> Australia continue to raise awareness of the distinction between bribes and facilitation payments, and encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programmes or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records.[33]

7.25 In March 2015 the Australian Government proposed amendments to Australia's foreign bribery laws, as detailed in the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015. However, no reference was made in the bill to the facilitation payment defence.[34] This bill passed both houses on 10 November 2015.[35]

Current developments

7.26 As discussed in Chapter 2, 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 in April 2017 (2017 consultation paper). However, the 2017 consultation paper noted that:

> It is not proposed that the existing facilitation payment defence be amended. This defence has not presented as an issue in the enforcement of the foreign bribery offence.[36]

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32 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 10, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 1 December 2017).

33 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 11, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 1 December 2017).

34 Parliament of Australia, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5430 (accessed 20 February 2018).

35 Parliament of Australia, Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015, https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=r5430 (accessed 20 February 2018).

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

7.27 As such, it is not surprising that the proposed amendments to Australia's foreign bribery laws, as detailed in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (CCC bill), introduced to the Parliament in December 2017, also make no reference to the facilitation payment defence.

7.28 However, of note is the December 2017 Phase 4 OECD Report which observed that despite the extensive awareness-raising initiatives and consultation processes on the use of the facilitation payment defence:

> …there remains significant dissatisfaction with the existence of the [facilitation payment] defence among Australia's public and private sectors and civil society representatives... [37]

7.29 The Report also went on to recommend that the Working Group on Bribery in International Business Transactions:

> …closely follow-up the Australian Government's ongoing review and monitoring of the defence. In particular, the WGB [Working Group on Bribery in International Business Transactions] should follow-up on any recommendations on facilitation payments that come out of the ongoing Senate Inquiry into foreign bribery.[38]

7.30 Mr Tom Sharp of the AGD, provided evidence to the committee about the previous consultation on the repeal of the facilitation payment defence. However, Mr Sharp stated that:

> There are some parts of business, operating in particular sectors and in particular parts of the world, which believe that facilitation payments are necessary and argue for retention of the defence. Essentially, it's a matter for government as to whether they retain the defence.[39]

7.31 The committee questioned representatives from the AGD as to why the recent 2017 consultation paper had not included a proposal to reform the facilitation payment defence. Ms Kelly Williams of the AGD, stated:

> No reform was proposed in the recent consultation paper…because our advice was that the defence hasn't proposed a barrier to prosecution. In line with our obligations under the OECD convention, obviously, Australia actively discourages individuals and businesses from making those payments.[40]

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37 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 35, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

38 OECD Working Group on Bribery, Implementing the OECD Anti-bribery Convention, *Phase 4 report: Australia*, p. 35, https://www.oecd.org/corruption/anti-bribery/Australia-Phase-4-Report-ENG.pdf (accessed 4 January 2018).

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

40 Ms Kelly Williams, Assistant Secretary, Criminal Law Policy Branch, Attorney-General's Department, *Committee Hansard*, 31 October 2017, p. 49.

7.32 Mr Shane Kirne of the CDPP confirmed this stance, while highlighting to the committee that:

> In the limited number of matters that we've seen come through—bearing in mind we only see what's being investigated—facilitation defence is not likely to be an issue that raises its head in the matters that we're currently looking at.[41]

7.33 Mr Kirne further explained that this is because of the scale of the matter involved and other factors, including:

> …the clandestine nature of what's gone on and the scale of the payments, and there's no record in the company records that would meet the defence, because it has to be recorded in a particular way and signed off by the relevant persons… the defence would not normally be made out, because the books and records wouldn't be recorded appropriately… I suspect many entities that are engaging in foreign bribery are not recording them in the appropriate way. They're not likely to put 'bribe to foreign official' in the expenses account.[42]

Businesses taking action to enhance integrity

7.34 Despite the lack of legislative action in this area, it appears that Australian businesses are taking matters into their own hands and increasingly restricting, or prohibiting, facilitation payments.

7.35 The Australia Institute and Jubilee Australia commissioned research from CAER (a privately owned company which provides independent research and services) on the governance arrangements concerning bribery and facilitation payments across ASX100 companies.[43] CAER's research indicated that many ASX100-listed companies are increasingly taking seriously the issues of bribery and facilitation payments, and the changing nature of governance arrangements around facilitation payments compared to gifts or bribery. Specifically, their evidence showed that governance arrangements restricting facilitation payments had become far more common over the decade before 2015 for ASX100-listed companies, increasing from 24 per cent in 2006 to 65 per cent in 2015. However, as the Australia Institute and Jubilee Australia noted, 'this leaves a third of Australia's major companies without such arrangements'.[44]

7.36 The IBAACC also noted this change, and explained that in their experience:

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41 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. 43.

42 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. 43.

43 The Australia Institute and Jubilee Australia, *Submission 15*, p. 4.

44 The Australia Institute and Jubilee Australia, *Submission 15*, p. 8.

> …many corporations operating out of Australia and a significant number of multi-national corporations with subsidiaries in Australia and many high risk jurisdictions, all ban facilitation payments in their internal codes of conduct and business policies.[45]

7.37 This is the committee's understanding as well. For example, BHP informed the committee that their code 'prohibits all forms of corruption and bribery, including expressly prohibiting facilitation payments'.[46]

Stakeholder opinion

Arguments for the retention of the defence

7.38 A number of submissions argued in favour of retaining the facilitation payment defence. These submissions generally adopted justifications consistent with the typology provided by Associate Professor Davids, who argued that the defence should be abolished. Associate Professor Davids explained that 'several justifications are often put forward to defend facilitation payments', including that:

- facilitation payments do not involve the exercise of discretion by the foreign public official and therefore do not result in the same harms;
- because a facilitation fee is one routinely required by the foreign public official, there is less moral culpability than in those situations in which larger bribes are paid voluntarily in order to influence the exercise of official discretion in specific cases;
- it is not practically possible to do business in some countries without making facilitation payments; and
- implementing a ban would unduly disadvantage Australian companies.[47]

7.39 These justifications can be classed into two broad categories—principled and pragmatic. The first two reasons are principled attempts to reject the notion that facilitation payments are bribes, while the second two explanations ignore this moral question and focus instead on the 'practical realities' of doing business.

7.40 The Australia–Africa Mining Industry Group (AAMIG) provided the strongest defence of facilitation payments and relied on both principled and pragmatic justifications. This section explores this, and other, concerns.

A facilitation payment is distinct from a bribe

7.41 On a principled approach, AAMIG explained to the committee the distinctions between facilitation payments and bribes. AAMIG noted that facilitation payments are 'small payments made to public officials to ensure the timely delivery of routine government services to which there is a legal entitlement'. In contrast, 'when

45 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41.

46 BHP Billiton, *Submission 37*, p. 1.

47 Associate Professor Cindy Davids, *Submission 34*, pp. 21–22.

the intent of such payments is to influence a public official with regard to the awarding or retention of business, it crosses the line and becomes an act of bribery'.[48]

7.42 Diaspora Legal also drew a fine distinction between facilitation payments and bribes, explaining that facilitation payments are 'generally payments to obtain something lawful, in a lawful manner'.[49] However, these arguments appear to presuppose the legality of a facilitation payment, by contending that their use is 'lawful'.

7.43 In any case, where the distinction between a facilitation payment and a bribe centres on 'intent' or 'purpose', it may be difficult to differentiate between the two. For many submitters the complexity of the statutory provision has resulted in an inadequate awareness of the distinction between a facilitation payment and a bribe.

7.44 Diaspora Legal shared this concern and complained that some Australian agencies, such as Austrade, 'mischaracterise' facilitation payments as bribes. In some cases, this is so prevalent that 'prudent legal advice' recommends that Australian entities 'should not engage with Austrade in their international dealings lest they be exposed to a misguided prosecution for conduct which is lawful'.[50] As a consequence, investment and economic activity may possibly be reduced.

7.45 Diaspora Legal called upon the committee to recommend appropriate training for all Australian agencies, 'so that they may understand clearly the difference between a facilitation payment and a bribe and be able to articulate that a facilitation payment is lawful under Australian law and a bribe is not'.[51] However this can go both ways. Mr Neville Tiffen, a specialist consultant on business integrity, corporate governance and compliance, noted that, 'what many people loosely call "facilitation payments" are in fact small bribes that would not fit the definition'.[52]

7.46 King & Wood Mallesons and the Law Society of South Australia echoed the concerns of Diaspora Legal, explaining that greater guidance for businesses seeking to rely on the defence is sorely needed. The Law Society of South Australia suggested that:

> It would be beneficial to obtain greater guidance, particularly as to what payments may be characterised as permissible facilitation payments, and what payments and conduct would amount to conduct giving rise to an offence.[53]

7.47 King & Wood Mallesons clarified that:

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48 Australia–Africa Mining Industry Group, *Submission 7*, p. 2.

49 Diaspora Legal, *Submission 5*, p. 5.

50 Diaspora Legal, *Submission 5*, p. 5.

51 Diaspora Legal, *Submission 5*, p. 6.

52 Mr Neville Tiffen, *Submission 16*, p. 10.

53 Law Society of South Australia, *Submission 23*, p. 2.

> While the elements of the defence are set out in the Criminal Code, there is no case law on how to satisfy the elements. In the absence of guidance from government, businesses have been left to rely on very conservative legal advice.[54]

7.48 King & Wood Mallesons also noted some of the conceptual difficulties facing companies seeking to rely on the defence. For example, under paragraphs 70.4(1)(a) and 70.4(1)(b) of the Criminal Code, the value of the benefit offered and the routine government action that the benefit was intended to secure, must be of a 'minor nature'. However, 'there is no clear guidance about what this phrase means'.[55] King & Wood Mallesons acknowledged that it may not be possible to set a specific dollar amount, particularly because of currency fluctuations or differences in purchasing power in different countries. Nevertheless, the absence of government or judicial guidance causes difficulties for businesses that may have several questions: 'One such question is whether the value of a benefit can be assessed relative to the size of the transaction, or the relative wealth of the recipient'.[56] To illustrate this uncertainty, King & Wood Mallesons provided the following examples:

> A payment by a large multinational corporation of what it considers to be of a minor nature could be characterised very differently if the same payment is made by a small family business.
>
> A payment of $10,000 might, generally speaking, be considered significant; however, it may be perceived as relatively minor if millions of dollars were at stake if the routine governmental action were not secured.
>
> Payments considered to be of a minor nature in a corporation's home country may be viewed differently in the recipient's country depending on typical living standards, incomes and variations in cultural and business practices.
>
> Payments may need to be made to a number of officials to achieve routine government action. The payments may be small when considered individually but may be substantial once aggregated.[57]

7.49 King & Wood Mallesons argued that 'formal guidance from the Australian government' on how and when the facilitation payments defence applies 'would provide the corporate sector with much needed support'.[58] It would also provide clarity to the Australian community about the line of difference between facilitation payments and bribes.

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54 King & Wood Mallesons, *Submission 11*, pp. 2–3.

55 King & Wood Mallesons, *Submission 11*, p. 13.

56 King & Wood Mallesons, *Submission 11*, p. 13.

57 King & Wood Mallesons, *Submission 11*, p. 13.

58 King & Wood Mallesons, *Submission 11*, p. 14.

A pre-clearance process

7.50 In seeking formal guidance on what is classified as a facilitation payment, King & Wood Mallesons contended that a pre-clearance process could be beneficial. They explained that such a process is utilised in the US:

> United States companies considering a prospective payment to foreign public officials may apply to the Attorney-General for an opinion on whether the conduct would violate the FCPA. A consequent opinion must be issued within 30 days and be published online. There is a rebuttable presumption that a company which has acted in accordance with an opinion of the U.S. Attorney-General has complied with the FCPA. Advance clearance of prospective transactions provides legal certainty to companies and the security to proceed without concern for the risk of potential criminal prosecution.[59]

7.51 While acknowledging that some commentators have criticised this system as particularistic, reactive and of limited use,[60] King & Wood Mallesons suggested that adopting a pre-clearance process or an opinion procedure in Australia would be beneficial by:

- demonstrating the Australian government's commitment to enforcing the anti-bribery provisions of the Criminal Code;
- encouraging the voluntary disclosure of potential bribery issues by corporate Australia;
- providing valuable guidance to the corporate sector; and
- providing legal certainty.[61]

Australian companies will be placed at a competitive disadvantage

7.52 Some submissions contended that abolishing the facilitation payment defence would place Australian companies at a competitive disadvantage. In particular, AAMIG argued that abolishing the defence would disproportionately impact small and mid-tier mining companies. AAMIG explained that it is 'simply unrealistic' to expect that smaller companies, which do not have the 'financial resources to withstand being delayed for extended periods of time', or the 'political capital to influence host-country Government officials to carry out their duties in a timely fashion' to 'carry the responsibility for changing the behaviour of public officials adversely influenced by poverty, or influence government resourcing'.[62]

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59 King & Wood Mallesons, *Submission 11*, p. 14.

60 King & Wood Mallesons, *Submission 11*, p. 15; citing OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (October 2010), p. 29, para. 94.

61 King & Wood Mallesons, *Submission 11*, p. 16.

62 Australia–Africa Mining Industry Group, *Submission 7*, p. 3.

7.53 The Export Council of Australia agreed, explaining that small and medium enterprises are at a 'specific disadvantage' and abolition of the facilitation payment defence would have a 'disproportionately adverse effect' on them and their service providers 'when called upon to make such facilitation payments'.[63] With specific reference to service providers to exporters, such as licenced customs brokers and freight forwarders, the Export Council Australia explained:

> In many cases those service providers make payments or adopt procedures based on direction from government agencies or from parties without whose consent services cannot be provided. For example, such service providers are regularly requested by local Customs' authorities or other parties to undertake separate procedures and pay additional amounts to shipping lines, airlines or port authorities to ensure that "space" is provided at times of peak demand for the passage of freight. In those circumstances, both the relevant service provider and the SME [small to medium-sized enterprises] are subjected to significant pressure in circumstances in which recourse to external assistance cannot be secured at short notice. If a relevant service provider undertakes action in accordance with those directions and makes the best effort possible to ensure that the payments are validly made or other procedures are followed as directed, then both the SME and the service provider should not be subject to further adverse action by the authorities.[64]

7.54 Diaspora Legal was also concerned about the competitive disadvantage that abolishing the facilitation payments defence might place on Australian businesses. However, it explained that it considered that Australian businesses already suffer a significant disadvantage compared to international competitors as Australian law exceeds OECD requirements. Therefore removing the facilitation payments defence would place further undue and unequal pressures on Australian businesses forced to operate on a different playing field.[65]

7.55 While acknowledging that Australian law as-written does not exceed OECD requirements, Diaspora Legal contended (as mentioned above) that Australian agencies, 'such as Austrade' miscategorise facilitation payments as bribes, and then implement 'a policy of reporting everything they have classified as bribes for investigation and prosecution'.[66] Diaspora Legal therefore considered that, in practice, Australian law surpasses OECD requirements.

7.56 However, 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 explained that the scope of the facilitation payments defence generally does not cover making companies more competitive. Mr Preston-Stanley noted that 'routine government action' is quite limited and 'does not involve a

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63 Export Council of Australia, *Submission 30*, p. 3.

64 Export Council of Australia, *Submission 30*, p. 4.

65 Diaspora Legal, *Submission 5*, p. 5.

66 Diaspora Legal, *Submission 5*, p. 5.

decision about whether to *award new business*; or whether to *continue existing business* with a particular person; or the *terms of new business or existing business*', thus:

> Any benefit to obtain or retain business is therefore a bribe, regardless of any competitive factors, perceived entitlement as the "best" bidder, or perceived threat of business not continuing…Australian law has never accepted that any benefits are acceptable in competing for business or in ensuring that one continues to do business.[67]

Prohibition will not eliminate bribery

7.57 AAMIG adopted another pragmatic justification for the retention of the facilitation payments defence—that removing the defence will have no effect on the prevalence of bribery or corruption.[68] As will be examined in the following section, a common reason given by proponents for eradicating the defence centred on its very existence as helping to maintain an environment in which corruption can flourish. For these submitters,[69] the removal of the defence would help to make clear that all forms of bribery or corruption are wrong.

7.58 However, AAMIG argued that the causes of bribery and corruption are 'very complex', and removing the defence would be a 'blunt instrument approach' which 'will not have the desired effect of helping to eliminate bribery across the African continent'.[70] AAMIG explained that 'poverty is the root cause of host government officials pushing for facilitation payments' and therefore behavioural change is unlikely to occur until:

- sufficient industrial development has occurred (largely through continued flows of Direct Foreign Investment);
- governments collect reasonable levels of taxes from newly established industry and individuals who are gainfully employed; and
- host governments have the financial resources and governance structures to ensure their officials are reasonably well paid and provided with the essential tools to do their jobs effectively.[71]

7.59 AAMIG explained further that while their members would 'like to be able to conduct business in Africa without the need for facilitation payments', such a situation 'will not materialise overnight', nor in response to legislative changes 'imposed by Ottawa, London or Canberra'. AAMIG continued, noting that it is 'simply unrealistic to expect practical progress of this scope and nature to occur overnight',[72] because

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67 Mr Kane Preston-Stanley, *Submission 40*, pp. 4–5 (emphasis in original).

68 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

69 See, for example, Regnan, *Submission 13*; Control Risks, *Submission 12*; Mr Neville Tiffen, *Submission 16*.

70 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

71 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

72 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

prohibiting such payments does not take into account the 'practical realities of doing business' in some countries in Africa.[73] In fact, according to AAMIG, banning facilitation payments will be counterproductive 'and result in driving such payments underground'.[74]

Prohibition will hurt people most in need

7.60 Relatedly, AAMIG also contended that facilitation payments should be understood in a different light—that is, rather than an exception to the anti-bribery regime, facilitation payments can have a positive effect on the receiving society. AAMIG explained:

> …the governments of many impoverished host countries in Africa lack the resources to pay some public servants adequately, or sometimes at all, particularly in those countries recently emerging from conflict. This has led to a tendency for public officials to often need some additional modest support to satisfactorily complete their work, hence the facilitation payment, e.g. a public official may need petrol for his government vehicle, to enable him to carry out on-site inspections (notwithstanding he may have already been given a small but inadequate allowance for this purpose).[75]

Lack of empirical evidence

7.61 Associate Professor Davids acknowledged that there are 'undoubted complexities' for businesses that operate in high risk parts of the world and in high risk sectors, but considered that greater transparency over the use of facilitation payments by businesses would be beneficial and would allow an informed debate over their advantages. Associate Professor Davids indicated that she 'would like to see a preparedness by industry sectors subject to particular risk in these areas to open the door to researchers', so that:

> …we can have an informed debate around the ostensible need for and use of facilitation payments. It may be the case that an evidence-based argument can be made for the retention of facilitation payments, based on a nuanced micro analysis. We simply don't know.[76]

7.62 Associate Professor Davids told the committee that accurate research on the actual use of facilitation payments remains scarce. Associate Professor Davids explained:

> Proponents arguing in favour of the retention of a facilitation payments defence rarely cite surveys or empirical evidence detailing the specific circumstances and frequency of use surrounding payments…However, beyond the formal definitions provided for in the Australian framework,

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73 Australia–Africa Mining Industry Group, *Submission 7*, p. 3.

74 Australia–Africa Mining Industry Group, *Submission 7*, p. 4.

75 Australia–Africa Mining Industry Group, *Submission 7*, p. 3.

76 Associate Professor Cindy Davids, *Submission 34*, p. 24.

> there is a lot of guesswork around the varying notions of what people on the ground regard as facilitation payments.[77]

7.63 Dr Zirnsak, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, explained that:

> We tried to track this down. We spoke to the Australian Taxation Office about if companies declare their facilitation payments in their tax returns. The answer was 'No'. Effectively, it will be hidden in their other costs. Again, you have no sense of how many of these are being paid or what size they are.[78]

7.64 Without this information it is unclear whether the arguments in favour of the retention of the facilitation payment defence are justified.

Arguments in favour of abolishing the facilitation payment defence

7.65 A majority of submissions argued in favour of abolishing the facilitation payments defence.[79] Generally speaking, the justifications offered fell into the following categories—that, facilitation payments:

- are no different to bribery;
- help to maintain an environment in which bribery can take root and flourish;
- are already publically discouraged by the Australian government (and the OECD); and
- are prohibited by many comparative countries, meaning that retaining the defence actually places Australia at a competitive disadvantage.

7.66 Many of these arguments directly contradict those of the submitters who contended the defence should be retained and can also be divided into principled and pragmatic justifications.

7.67 Mr Mark Pulvirenti, Partner, Control Risks stated:

> I am unequivocal in my position—that the defence of facilitation payments should be removed from the Criminal Code. We see facilitation payments as bribes, period.[80]

7.68 In evidence before the committee, Mr Pulvirenti went on to explain:

> …we just consider that the government sends a very mixed message, to say to the community that facilitation payments are okay—effectively saying, 'You can bribe someone as long as it's a small amount,' which really sends a very mixed message, and one that I don't think is a proper one.[81]

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77 Associate Professor Cindy Davids, *Submission 34*, p. 24.

78 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 3.

79 Law Council of Australia, *Submission 10*, p. 10.

80 Mr Mark Pulvirenti, Partner, Control Risks, *Committee Hansard*, 7 August 2017, p. 28.

81 Mr Mark Pulvirenti, *Committee Hansard*, 7 August 2017, p. 29.

7.69 Mr Robert Wyld, the Past Co-Chair of the IBAACC agreed, and expressed an opinion that facilitation payments should be banned with 'no exceptions'.[82]

7.70 In speaking to the committee about the retention of the facilitation payment defence, Mr Tiffen stated:

> I think that's very disappointing. I think it's an archaic defence. I know it still exists in the US. The UK has clearly removed it. It was already not a defence in the UK, even before the Bribery Act, but they have clearly continued that. Canada has recently removed the exemption. It is a nonsensical exemption because facilitation payments are bribes and they are illegal in the country in which they are paid, and most companies or organisations, in their code of conduct, make the statement, 'We comply with the laws wherever we operate.' As soon as a company says, 'We will allow facilitation payments,' it is saying to its staff, 'There are some laws we don't think you need to comply with,' and that's just a crazy message to be sending to staff members.[83]

Facilitation payments are no different to bribery

7.71 On a principled front, many submissions simply did not see a distinction between facilitation payments and bribery—contending that such payments are 'nothing more than small institutionalised bribes'[84] or 'not qualitatively different to bribery'.[85] Significantly, a case was made by Transparency International Australia that while facilitation payments may be customary in certain parts of the world, it is likely that it is illegal for them to be offered or received under local law.[86] As such, if a facilitation payment is not materially different from a small bribe there is no reason for a defence to exist as an exception to Australia's anti-bribery legislative framework.

7.72 The IBAACC also argued that facilitation payments are no different to bribery. The IBAACC quoted an address by Justice Terence Cole AO that emphasised the importance of consistency in rooting out all instances of bribery and corruption:

> Once the seed of sin and corruption is planted, and society has determined that it is morally, ethically and legally wrong, the seed must be sought and rooted out. The alternative is to accept corruption, and that our society has determined not to do. Rejecting corruption means rejecting all corruption. One cannot allow just a little bit of ethically or morally wrong conduct because if one does it becomes impossible to draw the bright line which permissible conduct must not cross.
>
> Under our law business is permitted to make what are euphemistically called 'facilitation payments' and, worse, are entitled to claim such

82 Mr Robert Wyld, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 39.

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

84 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41.

85 Regnan, *Submission 13*, p. 2. See also Control Risks, *Submission 12*, p. 2; Mr Neville Tiffen, *Submission 16*, p. 9; CPA Australia, *Submission 18*, p. 4; GRC Institute, *Submission 1*, p. 6.

86 Transparency International Australia, *Submission 31*, p. 9.

> payments as tax deductions. Only sophistry enables one to distinguish a facilitation payment—which is a small bribe—from the notion of a corrupt payment.
>
> Facilitation payments constitute a departure from the anti-corruption standards which our society has accepted as a basic tenet of our governmental, economic and organisational life. The laws which permit such payments and make them tax deductible blur the bright line between permissible and impermissible conduct.[87]

7.73 The IBAACC emphasised the need for clear lines:

> …it is never acceptable for such conduct to occur. Such payments blur the clear line between a bribe and a facilitation payment to the point where ethical (and indeed legal decisions) come to depend upon an individual view on the amount, scale, frequency and for what service the payment is being made.[88]

7.74 KordaMentha likewise identified the need for a clear distinction between bribery and corruption on the one hand, and ethical conduct on the other. KordaMentha cited the UK Ministry of Justice's Guidance on the UK *Bribery Act 2010*, which explained that an exemption for facilitation payments would:

> …create artificial distinctions that are difficult to enforce, undermine corporate anti-bribery procedures, confuse anti-bribery communication with employees and other associated persons, perpetuate an existing 'culture' of bribery and have the potential to be abused.[89]

A slippery slope to bribery

7.75 Many submissions argued that retaining the facilitation payments defence is inconsistent with Australia's wider anti-bribery efforts.

7.76 Woodside Petroleum considered that the permissibility of facilitation payments 'helps to maintain an environment in which bribery can take root and flourish',[90] and therefore, it 'will be difficult, if not impossible, to comprehensively stamp out bribery of foreign public officials whilst Australian laws continue to condone the making of facilitation payments'.[91]

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87 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41, citing 'Corruption', an address by The Honourable Terence Cole AO RFD QC to the 6th National Investigations Symposium, 2 November 2006, pp. 2–3 and 7.

88 International Bar Association Anti-Corruption Committee, *Submission 6*, p. 41.

89 KordaMentha, *Submission 22*, p. 9; citing Guidance on the UK *Bribery Act 2010* issued by the UK Ministry of Justice (March 2011), p. 18.

90 Woodside Petroleum Ltd, *Submission 4*¸ p. 2. See also Mr David Wildman, FTI Consulting, *Submission 38*, p. 5.

91 Woodside Petroleum Ltd, *Submission 4*¸ p. 2.

7.77 Control Risks agreed, explaining that the 'legislative aim should be to eradicate corruption',[92] and that facilitation payments make this impossible.

7.78 Transparency International Australia concurred, arguing that 'removing the facilitation payments defence will reinforce the notion of zero tolerance towards all forms of bribery by a company'.[93]

7.79 These submissions also highlighted the importance of consistency in Australia's anti-bribery framework. Emphasising these points was the submission from Bronitt et al which argued that abolishing the facilitation payments defence will convey a 'strong and consistent policy message that corporations should not stimulate markets for bribes, irrespective of size and whether or not such payments to foreign public officials are considered to be "mandatory"'.[94] FTI Consulting agreed with this position, making a strong case that 'legislation should be unequivocal about prohibiting facilitation payments'.[95]

7.80 The Australia Institute and Jubilee Australia made a similar point. In surveying the trend towards private enterprises prohibiting facilitation payments internally, they noted:

> Prohibition of facilitation payments has become an accepted policy approach for an increasing number of Australian corporations, in line with international policy. Action by one country has led to improvements in corporate governance in others. An Australian policy to prohibit facilitation payments would therefore contribute to efforts to stamp out the practice well beyond our borders.[96]

7.81 A number of submissions also took issue with the claim by proponents of retaining the defence that facilitation payments are benign. KordaMentha explained that allowing facilitation payments 'muddies the waters' and 'may lead to a culture of expediency to achieve results'.[97] Associate Professor Davids noted that while facilitation payments were previously considered 'harmless', they are now recognised to be 'harmful' as they are often 'funnelled up through the system and help nurture and sustain corrupt bureaucracies, political parties and governments'.[98]

7.82 Dr Zirnsak, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, explained that:

> Our concern here is not primarily that a small bribe might be paid. The issue we found with this is the wider impact. We have had conversations

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92 Control Risks, *Submission 12*, p. 2.

93 Transparency International Australia, *Submission 31*, p. 9.

94 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 12.

95 Mr David Wildman, FTI Consulting, *Submission 38*, p. 5.

96 The Australia Institute and Jubilee Australia, *Submission 15*, p. 3.

97 KordaMentha, *Submission 22*, p. 9.

98 Assoiciate Professor Cindy Davids, *Submission 34*, p. 23. See also Uniting Church in Australia Synod of Victoria and Tasmania and Publish What you Pay Australia, *Submission 17*, p. 2.

> with people who have worked in companies where small bribes are paid, and they indicated that it quickly escalated. The issue is: once you start paying bribes to low-level officials, it's hard to see how you then resist demands for bribes from those further up the chain.[99]

7.83 Indeed, Regnan explained that facilitation payments have 'wider corrosive effects', including:

> …the potential for regulatory or bureaucratic capture by businesses when officials and public sector wage structures come to depend on such payments and entrenchment of other forms of corruption (e.g. nepotism) when opportunities for disproportionate gains are available.[100]

OECD discourages the use of facilitation payments

7.84 Some submissions noted that the Australian government appears ambivalent about the efficacy or value of the defence, and, in fact, actively discourages the use of facilitation payments.[101] The cross-agency submission led by the AGD's explained that 'Australian agencies strongly discourage businesses from making facilitation payments', because while such payments are permissible under Australian law, they 'may still constitute a criminal offence in the jurisdiction they are made'.[102] Woodside Petroleum noted that this suggests that government already understands the broader adverse consequences to which facilitation payments can give rise.[103] Dr Zirnsak, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, agreed, stating that:

> At the very minimum it should be illegal to pay bribes in places where it is illegal for the bribe to be paid. Australia should not be facilitating the breaking of other people's laws. What [sic] would be the logic to that.[104]

7.85 This position also accords with the OECD's 2009 recommendations for further combating bribery of foreign public officials in international business transactions. As noted above, the OECD has recommended that member states should encourage companies to 'prohibit or discourage the use of small facilitation payments in internal company controls'.[105] As research from CAER cited above demonstrated, many ASX-100 listed companies already prohibit facilitation payments and a trend, particularly post the 2009 OECD recommendations, is clearly identifiable. In light of

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99 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 2.

100 Regnan, *Submission 13*, p. 2.

101 Mr Neville Tiffen, *Submission 16*, p. 10.

102 Attorney-General's Department, *Submission 32*, p. 25.

103 Woodside Petroleum Ltd, *Submission 4*, p. 2.

104 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 3.

105 OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions, p. 22, Recommendation 6, https://www.oecd.org/daf/anti-bribery/ConvCombatBribery_ENG.pdf (accessed 19 February 2018).

this, some submissions noted that Australia's current position is increasingly isolated.[106]

Removing the defence will level the playing field

7.86 In stark contrast to AAMIG and Diaspora Legal, some submissions argued that removing the facilitation payment defence will actually better position Australian companies in the international market.

7.87 As the previous section noted, there is a growing trend internationally towards eradicating the distinction between facilitation payments and ordinary bribery. As such, many Australian businesses that operate internationally may already be subject to such laws, either as a subsidiary or through operating in different jurisdictions. Control Risks noted that these Australian corporations are therefore 'currently subject to a "high water mark" of legislative requirements, effectively prohibiting the payment of facilitation payments, notwithstanding the current legality of these payments under Australian legislation'.[107]

7.88 Woodside Petroleum, one company subject to these dual regimes, considered that removing the defence will 'support a level playing field', by ensuring that all Australian businesses are subject to the same regulatory framework.[108]

7.89 BHP Billiton agreed. BHP explained that they do not believe that removing the defence would adversely impact the competitiveness of Australian companies because:

- facilitation payments are prohibited in the current foreign bribery legislation with extraterritorial application, such as the UK Bribery Act;
- such payments are also not permitted by 'local law' in most countries and therefore, companies should not be making the payment in any event; and
- the defence as it currently stands is limited in scope, applying only to payments of a minor nature to expedite routine government action and where the payments are recorded in a company's books and records.[109]

7.90 Removing the defence would bring Australia into line with international comparator countries and mean that multinational companies will face the same regulatory burden across jurisdictions.

Grace period

7.91 Many submissions that advocated for the abolition of the facilitation payments defence contended that this abolition should proceed with a transition period to allow businesses time to implement the change in its internal processes and inculcate a culture of compliance amongst its employees. For example, Control Risks noted:

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106 Simon Bronitt, Nikos Passas, Wendy Pei and Chloe Widmaier, *Submission 35*, p. 9.

107 Control Risks, *Submission 12*, p. 8.

108 Woodside Petroleum Ltd, *Submission 4*¸ p. 2.

109 BHP Billiton, *Submission 37*, pp. 6–7.

> The Australian position would, in our view, do well to offer a moratorium period, within which corporations would be required to amend their business practices, to eventually comply with amended legislation that would take effect at some later date.[110]

7.92 BHP Billiton also agreed with this approach, suggesting that to mitigate any disruption to Australian businesses, a 'reasonable period of time' should be granted to allow companies to introduce systems to minimise the risk of contravention.[111] Mr Tiffen and Transparency International Australia considered that two years would be a reasonable timeframe for transition.[112]

7.93 However, Transparency International Australia and FTI Consulting argued that Australian businesses should only be able to rely on this grace period if the company demonstrates 'the steps it is taking to eradicate such payments within their operations'.[113] Transparency International Australia further suggested a number of steps that could be considered as part of a commitment to zero tolerance towards facilitation payments:

- the company issues a clear policy prohibiting facilitation payments;
- the company's employees and associated persons have access to and are trained on written guidance on the procedure they should follow if they are asked to make a facilitation payment;
- the company assesses whether the employees and associated persons are following the procedures;
- all facilitation payments are recorded in the company's books and records; and
- the company takes proper action (collective or otherwise) to tell the appropriate authorities in the countries concerned that facilitation payments are being demanded.[114]

Tax deductions for facilitation payments

7.94 Facilitation payments can be claimed as tax deductions under subsections 26-52(4) and 26-52(5) of the *Income Tax Assessment Act 1997* (Income Tax Assessment Act). Submissions that considered that the facilitation payments defence should be abolished, simultaneously argued that these provisions in the Income Tax Assessment Act should also be repealed.[115]

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110 Control Risks, *Submission 12*, p. 2. See also Regnan, *Submission 13*, p. 2; Mr Neville Tiffen, *Submission 16*, pp. 3, 10.

111 BHP Billiton, *Submission 37*, p. 7.

112 Mr Neville Tiffen, *Submission 16*, pp. 3, 10; Transparency International Australia, *Submission 31*, p. 9.

113 Mr David Wildman, FTI Consulting, *Submission 38*, p. 5.

114 Transparency International Australia, *Submission 31*, p. 9.

115 See, for example, Uniting Church in Australia Synod of Victoria and Tasmania and Publish What you Pay Australia, *Submission 17*, p. 4.

Committee view

7.95 The committee agrees with submitters that determining whether a particular payment does satisfy, or would satisfy, the requirements of section 70.4 of the Criminal Code is extremely difficult. Indeed, the committee considers facilitation payments are one of the more conceptually complex issues arising from Australia's anti-bribery legislation, and recognises that this is heightened by the fact that the defence has never been raised before an Australia court, and therefore judicial commentary has not been able to shed any light on this vexed issue.

7.96 While the committee acknowledges that the government has undertaken awareness-raising initiatives on the use of the facilitation payment defence, the committee is concerned that the OECD's December 2017 Phase 4 OECD Report observed that there remains significant dissatisfaction with the existence of the facilitation payment defence among Australia's public and private sectors and civil society representatives.

7.97 The committee notes the evidence received during the course of the inquiry which drew attention to the many comparator countries, including the UK and Canada, that do not permit facilitation payments. In this context, the committee believes Australia's position on this issue is increasingly isolated, and the committee is concerned about the inconsistencies between international standards and Australia's domestic bribery laws and the domestic laws of comparative countries (of which some are Australia's major trading partners).

7.98 The committee is persuaded by the majority of submissions to both this inquiry and to the government's 2011 public consultation seeking views on Australia's foreign bribery laws (including the treatment of facilitation payments) which argued in favour of abolishing the facilitation payment defence.

7.99 The committee notes the government's efforts to strongly discourage businesses from making facilitation payments on the basis that the payment may constitute a criminal offence in the jurisdiction where they are made. The committee further observes that these efforts suggest that the government already understands the broader adverse consequences to which facilitation payments can give rise. However, the committee is deeply concerned and disappointed about the lack of legislative action that the government has taken in this area, and wishes to recognise the initiatives of Australian businesses who have taken matters into their own hands by implementing internal policies prohibiting facilitation payments.

7.100 The committee notes the government's proposed amendments to Australia's foreign bribery laws, as detailed in the CCC bill which are currently before the Parliament. In light of this inquiry and the evidence received, the committee considers that the CCC bill is deficient as it makes no provision for the abolishment of the facilitation payment defence. In the committee's view this exacerbates the perception that Australia is not serious about combatting foreign bribery (and other forms of corruption), and further isolates Australia from international norms.

7.101 In the committee's view a facilitation payment is not materially different from a small bribe and therefore should not be recognised as a defence to a foreign bribery

offence in Australia. It is apparent to the committee that there is a need for a clear distinction between bribery and corruption on the one hand, and ethical conduct on the other. The committee considers that removal of the defence will make clear that all forms of bribery and corruption are wrong.

7.102 The committee believes that retaining the facilitation payment defence is inconsistent with Australia's wider anti-bribery efforts and accepts that allowing facilitation payments muddies the waters and risks encouraging a culture of expediency to achieve results. In the committee's opinion, abolishing the facilitation payments defence will convey a strong and consistent policy message that corporations should not stimulate markets for bribery, irrespective of their size, and whether or not such payments to foreign public officials are considered to be mandatory. In this context, it is apparent to the committee that removing the facilitation payment defence will better position Australian companies in the international market.

7.103 Based on the evidence presented during the course of the inquiry, the committee is persuaded that abolition of the facilitation payment defence should proceed with a transition period to allow businesses time to implement the changes to their internal processes and to inculcate a culture of compliance amongst its employees. In conjunction with this change, the committee also suggests that subsections 26-52(4) and 26-52(5) of the Income Tax Assessment Act, which allow facilitation payments to be claimed as tax deductions, be repealed.

Recommendation 18

7.104 The committee recommends that the facilitation payment defence currently provided for in section 70.4 of the *Criminal Code Act 1995* (and the associated subsections 26-52(4) and 26-52(5) of the *Income Tax Assessment Act 1997*) be abolished over a transition period, to enable companies and individuals to adjust their business practices and procedures to comply with the law as amended.

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.
>
> …
>
> 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

Appendix 1

Examples of foreign bribery involving Australian entities

1.1 To provide some context of the scale and magnitude of foreign bribery, some of the most egregious examples involving Australian entities are explored below. A brief outline of the two most well-known scandals is presented; the Australian Wheat Board's (AWB) involvement in the United Nations Oil-for-Food Programme and the Securency and Note Printing Australia (NPA) scandal.

1.2 In addition, more recent accusations from the private and non-government sectors are also presented to demonstrate some of the perceived shortcomings in the legislation and enforcement of Australia's foreign bribery regime. These include the allegations against Football Federation Australia (FFA), Australian mining companies BHP Billiton, Getax, and OZ Minerals, and Leighton Holdings Limited (now CIMIC Group).

1.3 It is necessary to recognise that information about foreign bribery is difficult to source and often relies on 'inside information' and investigative journalism for exposure. As such, many of the accusations made against the entities listed in this chapter are not easily verifiable unless some type of action has been taken by the Australian Government or the government of another jurisdiction (such as the Government of the United States). While the committee has attempted on multiple occasions to contact the entities named in order to substantiate the accusations and offer a right of reply, very few of these entities have responded to the committee's requests.

1.4 The committee also recognises the important role that whistleblowers play in exposing foreign bribery and corruption.

The Australian Wheat Board

1.5 In August 1990, the United Nations Security Council adopted Resolution 661 imposing an international trade embargo against Iraq to prevent it from augmenting its military capabilities.[1] In response to claims that the embargo was harming Iraqi citizens, the United Nations (UN) established an Oil-for-Food Programme in 1995 which allowed Iraq to sell oil in exchange for food and medical supplies for civilians.[2]

1.6 In 1999, AWB entered into a contract for inland transportation with a Jordanian company, Alia. Of the associated fees paid to that company, Alia sent the

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1 United Nations, Security Council Resolutions, *Resolution 661: Iraq-Kuwait* (6 August 1990) http://daccess-ods.un.org/access.nsf/Get?Open&DS=S/RES/661%20(1990)&Lang=E&Area=RESOLUTION (accessed 14 March 2018).

2 United Nations, *Office of the Iraq Programme: Oil-for-Food*, 4 November 2003, http://www.un.org/Depts/oip/background/ (accessed 15 March 2018).

majority to the Iraqi government. In all, the UN estimated that AWB paid $221.7 million for 'inland transportation costs'.[3]

1.7 After the 2003 invasion of Iraq, the UN undertook an inquiry known as the *Independent Inquiry Committee into the United Nations Oil-for-Food Programme*, or the Volcker Inquiry. The committee found that Iraq derived more than $1.5 billion in income from kickbacks such as those paid by AWB.[4]

1.8 Following the Volcker inquiry, the Australian Government instigated a royal commission into the role of Australian companies in the affair. The *Inquiry into certain Australian companies in relation to the UN Oil-For-Food Programme* or simply, the Cole Inquiry, was chaired by the Honourable Terence RH Cole and released its final report in November 2006. The commission found possible breaches of the *Crimes Act 1914*, the *Criminal Code 1995* (Criminal Code), the *Crimes Act 1958* (Vic) and the *Banking (Foreign Exchange) Regulations 1959*. It recommended that each of the matters be referred to the appropriate authority for consideration.[5]

1.9 The Australian Federal Police (AFP) commenced an investigation into the conduct of the AWB officials; however, in August 2009, the AFP ultimately decided to discontinue its investigation. The Commonwealth Director of Public Prosecutions (CDPP) advised that the decision was made by the AFP after obtaining independent legal advice from Mr Peter Hastings QC. The CDPP stated in its submission that 'advice was to the effect that *due to a range of factors the prospects of a successful criminal prosecution were limited and not in the public interest*'.[6]

1.10 Investigative journalist Mr Nick McKenzie laments that the scandal did not lead to reform of Australia's anti-bribery laws:

> Even the AWB oil-for-food kickback scandal and royal commission in 2006 did not lead to major reform. Indeed, the AWB scandal produced no criminal bribery charges. Justice Terence Cole, who headed the royal commission, found that as the kickback payments were made at the probable direction of Iraqi Government officials, they were in all likelihood legal under Iraqi law. This was a defence for conduct that was illegal here but permitted by the law (even unwritten) in another country. Instead, the allegedly corrupt former AWB executives faced drawn out ASIC civil

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3 Hon Terence RH Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, vol 1, November 2006, p. 38, https://web.archive.org/web/20070830174503/http:/www.offi.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report (accessed 15 March 2018).

4 Independent Inquiry Committee into the United Nations Oil-for-Food Programme, *Report on Programme Manipulation*, 27 October 2005, p. 4, http://dpl/Books/2005/IIC_ManipulationOilForFood.pdf (accessed 15 March 2018).

5 Hon Terence RH Cole, *Report of the Inquiry into certain Australian companies in relation to the UN Oil-for-Food Programme*, vol 1, November 2006, p. xxxii, https://web.archive.org/web/20070830174503/http:/www.offi.gov.au/agd/WWW/unoilforfoodinquiry.nsf/Page/Report (accessed 15 March 2018).

6 Commonwealth Director of Public Prosecutions, *Submission 39*, p. 3 (emphasis in original).

> prosecutions. Although the former Managing Director and Chief Financial Officer did a deal and settled with ASIC for agreed penalties (disqualification from office and a fine), the saga was far from a catalyst for change. The AWB scandal became another example of Australia's failure to effectively enforce foreign bribery laws and a reminder that simply having laws that prohibit paying bribes does not mean the allegedly corrupt will be detected and punished.[7]

1.11 As this matter was extensively investigated during the Cole Inquiry, it was not a major focus of this inquiry into foreign bribery. However, it is an example of how foreign bribery legislation and/or its enforcement could be improved to more effectively deter such behaviour.

Securency and Note Printing Australia

1.12 The allegedly corrupt practices of subsidiaries of the Reserve Bank of Australia (RBA), Securency and NPA, are also well-known. During the 1990s, the RBA decided to sell the technology used to print polymer bank notes. It used subsidiaries Securency and NPA to market the technology to foreign investors; however, the task of promoting the technology proved difficult.

1.13 The ABC's Four Corners current affairs program reported that, over a ten year period, directors of the two subsidiaries oversaw corruption-prone business practices, including the payment of tens of millions of dollars to foreign agents. These foreign agents allegedly used the funds to bribe foreign public officials in Vietnam, Indonesia, Nepal and Malaysia in order to secure lucrative contracts.[8]

1.14 Following an extensive investigation, the AFP charged Securency and NPA, as well as six former executives, in July 2011 with paying bribes to foreign officals 'in order to win banknote supply contracts'. A number of further individuals were subsequently charged and, as of March 2013, a total of nine individuals had been charged in relation to the Securency and NPA matter.[9]

1.15 In October 2011, Securency and NPA pleaded guilty to three charges each of conspiring to bribe foreign public officials and were ordered to pay penalties of $19.8 million and $1.8 million respectively under the *Proceeds of Crime Act 2002*.[10] On 20 August 2012, Mr David Ellery, former Chief Financial Officer of Securency,

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7 Mr Nick McKenzie, *Submission 43*, p. 16.

8 Four Corners, *Cover Up*, 30 September 2013, http://www.abc.net.au/4corners/stories/2013/09/30/3857148.htm (accessed 16 March 2018); OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 8.

9 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Integrity of overseas Commonwealth law enforcement operations*, June 2013, pp. 9–10.

10 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Integrity of overseas Commonwealth law enforcement operations*, June 2013, p. 10.

was sentenced by the Supreme Court of Victoria to imprisonment for six months, wholly suspended for two years.[11]

1.16 The OECD reports that, in addition to Securency and NPA, nine former executives and sales agents of the two subsidiaries were charged with foreign bribery, conspiracy to commit foreign bribery, and/or false accounting.[12]

1.17 The trials have been shrouded in secrecy, with the court orders and identities of certain individuals unknown due to suppression orders.[13] These prosecutions are ongoing and are reported to be the longest committal proceeding in Victorian history.[14]

1.18 With respect to the Securency and NPA trial, investigative journalist, Mr Nick McKenzie observed that:

> Our legal system is not well equipped to deal with these sorts of matters. There are a lot of factors at play as to why it's gone so poorly, but it is our first foreign bribery prosecution and, at the moment, it is an absolute disaster.[15]

1.19 Meanwhile, former Securency official Mr Peter Chapman was convicted at Southwark Crown Court in London in May 2016 of paying approximately US$205,000 in bribes to an agent of Nigerian Security Printing and Minting PLV in order to secure orders for the purchase of reams of polymer substrate from Securency.[16]

1.20 Mr Chapman was sentenced to 30 months on each count (2 years and 6 months), to be served concurrently.[17] Due to time already served, he is serving the remainder of his sentence on licence.[18]

1.21 In an update discussing important developments in Australia and overseas in the area of foreign bribery policy, Mr Robert Wyld noted that:

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11 Parliamentary Joint Committee on the Australian Commission for Law Enforcement Integrity, *Integrity of overseas Commonwealth law enforcement operations*, June 2013, pp. 10–11.

12 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 8.

13 Mr Neville Tiffen, *Submission 16*, p. 10; Mr Nick McKenzie, *Submission 43*, pp. 13–14.

14 Mr Nick McKenzie, *Submission 43*, p. 13.

15 Mr Nick McKenzie, Private capacity, *Committee Hansard*, 7 August 2017, p. 8.

16 UK Serious Fraud Office, News Releases, Former securency manager convicted of corruption, 11 May 2016, https://www.sfo.gov.uk/2016/05/11/former-securency-manager-convicted-corruption/ (accessed 5 March 2018).

17 UK Serious Fraud Office, Case Information, Securency PTY Ltd, 31 March 2017, https://www.sfo.gov.uk/cases/securency-pty-ltd/ (accessed 5 March 2018).

18 UK Serious Fraud Office, Case Information, Securency PTY Ltd, 31 March 2017, https://www.sfo.gov.uk/cases/securency-pty-ltd/ (accessed 5 March 2018). Serving a sentence 'on licence' means that the for the sentence period the prisoner must obey certain conditions.

> In passing sentence, the [Southwark Crown] Court said that while the seriousness of the conduct required a custodial sentence, the total sum of bribes was 'small in comparison' to other bribes Securency had allegedly paid in other parts of the world.[19]

1.22 Mr Wyld went on to highlight that the Court noted that a significant factor in mitigating the sentence in this case, was that Mr Chapman was:

> …put under considerable pressure by your superiors to achieve sales and you complained to them about that…senior management from the managing director down gave you the go-ahead (for the bribes).[20]

1.23 A directions hearing in regard to the Australian Securency trial was held before the Supreme Court of Victoria on 31 January 2018.[21]

Football Federation of Australia

1.24 The Fédération Internationale de Football Association (FIFA), the governing body of association football, futsal and beach football, has recently been the subject of much scrutiny amidst claims that it engages in corrupt practices.[22] The Australian arm, the Football Federation of Australia (FFA), has been similarly scrutinised in the media and in a number of submissions to this inquiry.[23] The FFA is reported to have paid a number of bribes in relation to the organisation's unsuccessful bid for the right to host the 2018 and 2022 FIFA World Cups. The bribes were allegedly paid with a view to inducing particular FIFA officials to support Australia's bid.

1.25 The committee received a submission concerned with this subject from Mr Jaimie Fuller who is the chairman of SKINS, a company that designs and sells compression sportswear. Mr Fuller alleged that the FFA paid the Confederation of North, Central American and Caribbean Association Football (CONCACAF) the sum of US$462,000 for the upgrade of stadium facilities at the Joao Havelange Centre of Excellence in Trinidad and Tobago in September 2010. Mr Fuller notes that the facility is owned by the then President of CONCACAF and FIFA Executive

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19 Mr Robert Wyld, Johnson Winter & Slattery, *Foreign Bribery Update — May 2016*, May 2016, https://www.jws.com.au/en/acumen/item/775-foreign-bribery-update-may-2016 (accessed 5 March 2018).

20 Mr Robert Wyld, Johnson Winter & Slattery, *Foreign Bribery Update — May 2016*, May 2016, https://www.jws.com.au/en/acumen/item/775-foreign-bribery-update-may-2016 (accessed 5 March 2018).

21 Supreme Court Victoria, *Supreme Court List for Wednesday 31 January 2018*, 31 January 2018, see *R v Christian Boillot*, *R v John Leckenby* and *R v Barry Thomas Brady*, https://www.supremecourt.vic.gov.au/sites/default/files/embridge_cache/emshare/original/public/2018/02/f0/e8035e0f4/scvdailylistforwednesday31january2018.pdf (accessed 6 March 2018).

22 See, for example, Law Council of Australia, *Submission 10*, p. 11.

23 See, for example, Mr Nick McKenzie, *Submission 43*, p. 1.

Committee member, who would later vote on the World Cup bids.[24] The ABC reports that the money was in fact pocketed by the then President of CONCACAF,[25] who was later arrested and charged by US prosecutors, along with 13 FIFA colleagues, over allegations of corruption spanning 24 years.[26]

1.26 Mr Fuller also criticises the FFA over the amounts paid to consultants for their work on the bid. The FFA's Final Report to government shows consultants engaged to facilitate Australia's bid were paid significant sums for their work on the bid which appear not to have resulted in any tangible outcomes.[27] Mr Fuller questions why these sums were so large and suggests that the FFA should be required to justify these consultancy fees. He also suggests that a percentage of these sums may have been intended for certain influential individuals.[28]

Mining company activities in developing countries

1.27 Mining companies have been regularly accused of foreign bribery in developing countries, as demonstrated by the cases described below. In its submission, the Australia-Africa Mining Industry Group (AAMIG) discussed the challenges faced by the Australian mining industry when seeking to develop activities in African countries. Without suggesting corruption, AAMIG freely admits that facilitation payments are an essential element of business in Africa:

> In some of the more advanced countries, it is reasonable to expect to be able to conduct business without the need to use facilitation payments. Unfortunately, for most countries this is not the case. Legislative changes designed to govern corporate behaviour, but which treat Africa as a single entity, are likely to be ineffective as they do not to take into account the practical realities of doing business there.[29]

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24 SKINS, *Submission 28*, p. 6. See also Peter Rolfe, *Australian whistle-blower Bonita Mersiades says Sepp Blatter shouldn't be allowed to restructure FIFA*, 5 June 2015, http://www.heraldsun.com.au/sport/football/australian-whistleblower-bonita-mersiades-says-sepp-blatter-shouldnt-be-allowed-to-restructure-fifa/news-story/95a49a8c26cf3288aad1fca861294205 (accessed 21 April 2016).

25 ABC and wires, *FIFA corruption: FFA chairman Frank Lowy wants Senate inquiry to prove Australia's 2022 World Cup bid was clean*, 9 June 2015, http://www.radioaustralia.net.au/international/2015-06-09/fifa-corruption-ffa-chairman-frank-lowy-wants-senate-inquiry-to-prove-australias-2022-world-cup-bid-/1456616 (Accessed 20 April 2016).

26 Ed Thomas, *Fifa corruption: Document show details of Jack Warner 'bribes'*, 7 June 2015, http://www.bbc.com/news/world-latin-america-33039014 (accessed 20 April 2016).

27 Football Federation of Australia, *Final Report*, p. 29 of 38, (accessed 23 February 2016).

28 SKINS, *Submission 28*, pp. 4–5. See also Peter Rolfe, *Australian whistle-blower Bonita Mersiades says Sepp Blatter shouldn't be allowed to restructure FIFA*, 5 June 2015, http://www.heraldsun.com.au/sport/football/australian-whistleblower-bonita-mersiades-says-sepp-blatter-shouldnt-be-allowed-to-restructure-fifa/news-story/95a49a8c26cf3288aad1fca861294205 (accessed 21 April 2016).

29 Australia-Africa Mining Industry Group, *Submission 7*, p. 3.

1.28 However, as discussed in more detail below, allegations have been made that some Australian mining companies go beyond facilitation payments and engage in foreign bribery. Some salient examples are BHP Billiton's conduct as a sponsor of the 2008 Beijing Olympics, Getax's phosphate ventures in Nauru, OZ Minerals' mineral exploration in Cambodia, and Sundance's involvement in the Congo.

BHP Billiton

1.29 In May 2015, the United States Securities and Exchange Commission (SEC) reported that BHP Billiton invited 176 foreign public officials, primarily from countries in Africa and Asia, to attend the Beijing Olympics at BHP Billiton's expense. Sixty guests, as well as spouses and other guests, took up the offer and benefitted from hospitality packages that included event tickets, luxury accommodation, and sightseeing excursions valued at US$12,000 to $16,000 per package.[30]

1.30 The SEC commenced an investigation into the hospitality program, and ultimately found that BHP Billiton had invited government officials who were 'directly involved in, or in a position to influence, pending negotiations, regulatory actions, or business dealings' with the company.[31] These guests in question were from Burundi, the Philippines, the Democratic Republic of the Congo and the Republic of Guinea; however, not all of these guests ultimately attended.[32]

1.31 As a result of its investigation, the SEC found that BHP Billiton failed to adequately detail in its books and records pending negotiations or business dealings between BHP Billiton and invited guests.[33] It further found that BHP Billiton failed to devise and maintain sufficient internal accounting controls over the hospitality program.[34] These actions constituted a breach of sections 13(b)(2)(A) and 13(b)(2)(B)

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30 United States, Securities and Exchange Commission, *SEC Charges BHP Billiton with Violating FCPA at Olympic Games*, 20 May 2015, https://www.sec.gov/news/pressrelease/2015-93.html (accessed 5 March 2018).

31 United States Securities and Exchange Commission, *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-And-Desist Order*, 20 May 2015, p. 7, https://www.sec.gov/litigation/admin/2015/34-74998.pdf (accessed 5 March 2018).

32 United States Securities and Exchange Commission, *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-And-Desist Order*, 20 May 2015, p. 9, https://www.sec.gov/litigation/admin/2015/34-74998.pdf (accessed 5 March 2018).

33 United States Securities and Exchange Commission, *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-And-Desist Order*, 20 May 2015, p. 9, https://www.sec.gov/litigation/admin/2015/34-74998.pdf (accessed 5 March 2018).

34 United States Securities and Exchange Commission, *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-And-Desist Order*, 20 May 2015, p. 9, https://www.sec.gov/litigation/admin/2015/34-74998.pdf (accessed 5 March 2018).

of the United States *Securities Exchange Act of 1934*, and BHP Billiton agreed to pay US$25 million to settle the charges.[35]

Getax

1.32 The joint submission from Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania referred to the activities of Getax, an Australian mineral export company, in Nauru.[36] The submission referred to allegations from ABC's *7.30* that Getax paid hundreds of thousands of dollars in bribes to the Nauruan opposition to install a government that would allow Getax to purchase phosphates below market value.[37]

1.33 The submission also cited claims that the AFP had interviewed two complainants about the allegations concerning the mining permit, but that the investigation could not continue due to a lack of jurisdiction. It stated that this investigation has been reopened and an investigation into Getax is well-progressed.[38]

1.34 The Phase 3 OECD Report published in 2012 referred to the allegedly corrupt activities of an Australian phosphate mining company in a foreign country.[39] In January 2013, an article by Mr Maris Beck and Mr Ben Butler published in *The Sydney Morning Herald* named this company as Getax, and alleged that it had bribed parliamentarians in Nauru in order to obtain a phosphate mining permit.[40]

1.35 In September 2016, the ABC's *7.30* again reported on the matter, alleging that Getax paid tens of thousands of dollars to the family of Nauru's justice minister back

35 United States Securities and Exchange Commission, *Order Instituting Cease-and-Desist Proceedings Pursuant to Section 21C of the Securities Exchange Act of 1934, Making Findings, and Imposing a Cease-And-Desist Order*, 20 May 2015, p. 10, https://www.sec.gov/litigation/admin/2015/34-74998.pdf (accessed 5 March 2018).

36 Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 17*, p. 7.

37 Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 17*, p. 7; 7.30, *Nauru President and Justice Minister face bribery allegations involving Australian company*, 8 June 2015, http://www.abc.net.au/7.30/content/2015/s4251115.htm (accessed 18 February 2018).

38 Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 17*, p. 7.

39 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 24, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 15 February 2018).

40 Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania, *Submission 17*, p. 7; Maris Beck and Ben Butler, *Police reopen OZ, Cochlear bribery cases*, 13 January 2013, http://www.smh.com.au/business/police-reopen-oz-cochlear-bribery-cases-20130112-2cmrt.html (accessed 18 February 2018).

in 2008.[41] Indeed, the SBS and the ABC also reported that Getax was facing investigation by the AFP.[42]

1.36 In response to questions taken on notice by the AFP at the Senate Standing Committee on Legal and Constitutional Affairs estimates hearing on 17 October 2016 in relation to this investigation, the AFP stated:

> Between February 2012 and March 2013, AFP investigators engaged the Nauru Police Force on a police-to-police basis to determine if the alleged recipients of bribes, paid by Getax Australia Proprietary Limited, were Nauruan public officials at the time. No subsequent requests for assistance were made to the Nauru Police Force after March 2013.[43]

OZ Minerals

1.37 In 2011, *The Cambodia Daily* paper released an investigative report which alleged that OZ Minerals had been involved in foreign bribery in Cambodia.[44] The conduct in question related to OZ Mineral's actions in buying out its partner in a Mondolkiri province gold mine in 2009. In particular, the paper alleged that OZ Minerals had paid thousands of dollars to family members of government officials associated with the buyout. It was alleged that OZ Minerals paid $US4.6 million to buy out Shin Ha, a company which held a twenty per cent share in the Mondolkiri project.[45]

1.38 *The Cambodia Daily* alleged that a memorandum of agreement in its possession showed that the sale required Shin Han to provide OZ Minerals with new exploration licences 'signed by the Cambodian Minister for Mines and Energy'.[46] This alleged transaction was made possible by three Shin Ha directors, who were all close

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41 ABC, *Money trail from Australian phosphate company Getax leads to Nauru minister David Adeang*, 14 September 2016, http://www.abc.net.au/news/2016-09-14/australian-phosphate-company-getax-payments-to-nauru-minister/7838170 (accessed 5 March 2018).

42 SBS, *Gupta's company under investigation for corruption in Australia, India*, 16 September 2016, https://www.sbs.com.au/yourlanguage/punjabi/en/article/2016/09/16/guptas-company-under-investigation-corruption-australia-india (accessed 5 March 2018); and ABC, *Money trail from Australian phosphate company Getac leads to Nauru minister David Adeang*, http://www.abc.net.au/news/2016-09-14/australian-phosphate-company-getax-payments-to-nauru-minister/7838170 (accessed 5 March 2018).

43 Australian Federal Police, answers to questions on notice, Senate Standing Committee on Legal and Constitutional Affairs estimates hearing on 17 October 2016, Question No. SBE16/011, p. 2.

44 Douglas Gillison and Phann Ana, 'OZ Minerals Deal a Windfall for Officials' Kin', *The Cambodia Daily*, 31 May 2011, https://www.cambodiadaily.com/news/oz-minerals-deal-a-windfall-for-officials-kin-101770/ (accessed 6 March 2018).

45 Douglas Gillison and Phann Ana, 'OZ Minerals Deal a Windfall for Officials' Kin', *The Cambodia Daily*, 31 May 2011, https://www.cambodiadaily.com/news/oz-minerals-deal-a-windfall-for-officials-kin-101770/ (accessed 6 March 2018).

46 Douglas Gillison and Phann Ana, 'OZ Minerals Deal a Windfall for Officials' Kin', *The Cambodia Daily*, 31 May 2011, https://www.cambodiadaily.com/news/oz-minerals-deal-a-windfall-for-officials-kin-101770/ (accessed 6 March 2018).

relations to officials in the Cambodian mining ministry. The directors were alleged to have received funds in proportion to their shareholding.[47]

1.39 However, the 2012 Phase 3 OECD Report noted that the AFP elected not to commence an investigation having 'received information from the AFP's overseas network that the transaction had been undertaken with due diligence and that all payments were made at the joint venture partner's request'.[48]

1.40 The OECD was critical of the AFP's decision, writing that:

> The AFP did not inquire into key matters that could have corroborated the allegations, such as whether the board members were indeed related to foreign public officials; the due diligence conducted by the company was sound; and the buy-out proceeds were channelled to the board members.[49]

1.41 Following this criticism, the AFP reportedly commenced an investigation proper. OZ Minerals announced in its 2014 annual report that:

> The Australian Federal Police (AFP) advised OZ Minerals in September 2014 that it is now conducting an investigation of OZ Minerals' 2009 acquisition of the remaining holding in the Okvau joint venture in Cambodia in relation to foreign bribery claims. [50]

1.42 According to OZ Mineral's 2015 annual report, the scope of the AFP's investigation has since been extended to OZ Minerals' former Cambodian operations generally in relation to foreign bribery allegations.[51]

1.43 To date, it appears that no legal action has been taken on this matter and that the AFP investigation is continuing.[52]

Sundance Resources

1.44 Sundance Resources has worked for over a decade to develop the Mbalam-Nabeba Iron Ore project, a significant iron ore resource which spans the Republic of Cameroon and the Republic of Congo.

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47 Douglas Gillison and Phann Ana, 'OZ Minerals Deal a Windfall for Officials' Kin', *The Cambodia Daily*, 31 May 2011, https://www.cambodiadaily.com/news/oz-minerals-deal-a-windfall-for-officials-kin-101770/ (accessed 6 March 2018).

48 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 23, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 15 February 2018).

49 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia*, October 2012, p. 23, http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf (accessed 15 February 2018).

50 OZ Minerals, *Annual Report 2014*, p. 106, https://www.ozminerals.com/uploads/media/ozm-ar-2014-web-c2113c7f-2989-48f7-8400-e74c1b15dc8f-0.pdf (accessed 15 February 2018).

51 OZ Minerals, *Annual Report 2015*, p. 25, http://www.ozminerals.com/uploads/media/oz_minerals_ar2015_web.pdf (accessed 15 February 2018).

52 OZ Minerals, *Annual Report 2017*, p. 119, https://www.ozminerals.com/uploads/media/OZMinerals_2017_Annual_and_Sustainability_Report.pdf (accessed 27 March 2018).

1.45 In August 2016, Fairfax Media raised a number of allegations regarding Sundance's activities in attempting to secure the support of the government of the Republic of Congo to develop the project. It is alleged that exclusive permits over the exploration area were granted in return for gifting shares in Sundance Resources, worth up to $13 million, to the President's family.[53]

1.46 To date, it appears that no legal action has been taken on this matter.

Leighton Holdings Limited

1.47 In October 2013, investigative journalists Mr Nick McKenzie and Mr Richard Baker reported that Leighton Holdings Limited (Leighton),[54] one of Australia's biggest construction companies, had been implicated in a number of instances of foreign bribery. Further allegations of foreign bribery were raised in the media in March 2016.[55]

1.48 To support their claims, the investigative journalists cited internal company files which allegedly documented instances of foreign bribery. Mr Stephen Sasse, a former executive of Leighton, was able to corroborate some of this evidence for the committee.

Construction of a barge in Batam, Indonesia

Allegations

1.49 One case of corruption apparently involved the construction of a barge in Batam, Indonesia. Mr Sasse provided background on the case to the committee:

> In 2008-09, the Leighton International business started the process of constructing an offshore pipelay barge, which is a vessel that is designed to fix itself to the seabed using the anchoring system and then weld together and drop pipes on the sea floor for offshore oil installations and facilities…
>
> In around 2009, the same business unit within Leighton International received a tender to build a relatively small steel structure which I described earlier as the RORO—the roll-on roll-off, facility. It was designed to go to the port of Mundra in India, which has a relatively shallow depth. So the role of this RORO was to form, if you like, a little floating bridge between the back of the roll-on roll-off car-carrying ship and the shore—so a

53 Nick McKenzie, Emmanuel Freudenthal, Michael Bachelard, and Richard Baker, 'Sundance Resources took risks in Congo business', *Australian Financial Review*, 24 August 2016, http://www.afr.com/business/sundance-resources-took-risks-in-congo-business-20160824-gr04h2 (accessed 6 December 2017); Nick McKenzie and Emmanuel Freudenthal, 'Sundance Resources, Snowy Mountain Engineering Co embroiled in bribery scandals in Sri Lanka and Congo', *Australian Broadcasting Corporation*, 25 August 2016, http://www.abc.net.au/news/2016-08-24/australian-companies-embroiled-in-bribery-scandals/7778324 (accessed 6 December 2017).

54 Now known as 'CIMIC Group Limited'.

55 See, for example, *The Bribe Factory*, Fairfax Media and Huffington Post, [article not dated] http://www.theage.com.au/interactive/2016/the-bribe-factory/day-1/leighton-news.html (accessed 6 March 2018).

> relatively small piece of steel fabrication. Shortly after the Leighton International group received that tender, managers involved in responding to that tender put in a bid to build that RORO in their own capacity. So what had happened was the company had received an invitation to tender and then, in parallel, executives of that company involved in managing that tender put in their own private tender to build the RORO. They won the tender in their private capacity, and it was fabricated in the same shipyard in Batam as was the pipelay barge known as the *Leighton Eclipse*.
>
> What the whistleblower within Leighton International had been trying to make known throughout the group for the two or three years preceding my involvement was that the steel that was being used to construct the RORO had been purchased and allocated to the *Eclipse*. So we had a situation where not only had the entity constructing the RORO stolen the work, if you like, from its employer but the entire construction of the RORO was funded or procured through the cost code and systems that were building the *Eclipse*.[56]

1.50 The allegation that steel was diverted from the *Eclipse* was also reported by Mr McKenzie, who said that $500,000 worth of steel was procured but was apparently surplus to requirements and used to build a barge for Indian company Adani.[57] Indeed, Mr Sasse, alleged the theft was valued at US$12 to US$14 million.[58]

Internal investigation by Leighton

1.51 Mr Sasse gave evidence to the committee on his role in the investigation of the allegations. Mr Sasse told the committee that, around the time he joined Leighton, the CEO-elect Mr David Stewart gave him a series of emails dating back to 2008 which dealt with allegations of corruption to do with the Batam barge. The allegations were made by an employee of Leighton International to senior leaders within the company; however, Mr Sasse commented that:

> No-one had really responded properly to those concerns and allegations, and in October 2010 I started a process of investigating what had gone on and what was underneath these allegations.[59]

1.52 Mr Sasse reported that he had 'more or less completed' that investigation by April 2011. As part of this process, Mr Sasse had reported the matter to the board and engaged a third-party specialist forensics firm to look into what Mr Sasse categorised as 'a very odd relationship with a Singapore based company that seemed to have an involvement in almost every contract that they bid'.[60]

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56 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 1.

57 Nick McKenzie and Richard Baker, *Building giant Leighton rife with corruption: claims*, 3 October 2013, http://www.smh.com.au/business/building-giant-leighton-rife-with-corruption-claims-20131002-2ut2e.html (accessed 12 February 2018). The type of currency was not specified in the article.

58 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 2.

59 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 1.

60 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 2.

1.53 No disciplinary action was taken against the employee for the alleged theft; in fact, investigative journalists, Mr McKenzie and Mr Baker report that he was given a bonus and thanked for his work by a former Leighton executive who was aware of this alleged corruption. Following legal advice, Leighton ultimately terminated the employment of the person in question and initiated legal proceedings against him to recover the missing funds.[61]

Investigation by law enforcement bodies

1.54 Concerns have been raised that these allegations have not been adequately investigated by Australian authorities. Mr McKenzie and Mr Baker refer to:

> …the apparent failure of the corporate watchdog, the Australian Securities and Investments Commission [ASIC], to conduct rigorous investigations in the two years since Leighton alerted federal police that it may have breached foreign bribery laws in Iraq.[62]

1.55 Despite witnesses expressing concern to the AFP about corporate offences in the company, ASIC is reported not to have spoken to witnesses or suspects. Further, AFP agents are reported to have privately complained about insufficient resources to conduct an adequate investigation.[63]

1.56 Acting Deputy Commissioner Operations, Mr Ian McCartney, outlined the AFP's approach to the Leighton investigation, explaining that it was cooperating with Australian and international agencies to obtain information:

> In this space, we jointly work with ASIC and have a seamless approach. The joint approach has been extremely beneficial. We also leverage off our foreign international partners. The AFP are part of the International Foreign Bribery Taskforce. Obviously, with all the recent reporting on [Unaoil] and Leightons, those are examples where the AFP has engaged, through the taskforce, with our international partners.[64]

1.57 When asked about the progress of the investigation, Mr McCartney informed the committee that the investigation was well underway:

> …I do not want to delve into individual investigations. I can say that it is progressing well. I can say it has been an incredibly complex investigation,

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61 Nick McKenzie and Richard Baker, *Building giant Leighton rife with corruption: claims*, 3 October 2013, http://www.smh.com.au/business/building-giant-leighton-rife-with-corruption-claims-20131002-2ut2e.html (accessed 12 February 2018).

62 Nick McKenzie and Richard Baker, *Building giant Leighton rife with corruption: claims*, 3 October 2013, http://www.smh.com.au/business/building-giant-leighton-rife-with-corruption-claims-20131002-2ut2e.html (accessed 12 February 2018).

63 Nick McKenzie and Richard Baker, *Building giant Leighton rife with corruption: claims*, 3 October 2013, http://www.smh.com.au/business/building-giant-leighton-rife-with-corruption-claims-20131002-2ut2e.html (accessed 12 February 2018).

64 Mr Ian McCartney, Acting Deputy Commissioner Operations, Australian Federal Police, *Committee Hansard*, 22 April 2016, p. 24.

> and that is linked into how long and how protracted it has been, but from our perspective we are positively progressing that investigation.[65]

1.58 The AFP admitted that the investigation began in 2012 and remained open but confirmed that the committee could expect to see some developments in the future.

1.59 ASIC was also given the opportunity to comment on the Leighton case:

> **ACTING CHAIR:** …In addition to the Unaoil matters that have been through the Fairfax press recently, is there an ongoing investigation into Leighton at the moment? Are you looking at them or are you waiting for the AFP to deal with them first?
>
> **Mr Stogdale:** There is an investigation on foot at the moment in connection with Leightons which I do not particularly want to talk about. It has been on foot, I think, since March 2014. That is about as much as I can tell you.
>
> **ACTING CHAIR:** So there is one 'major matter'—you used that word. It has been traversed through the press. So, without you having to speak to it, I think there is a framework understanding of what we are talking about. It relates to matters to do with Leighton Holdings and that investigation has now been going on for two years—correct?
>
> **Mr Stogdale:** Yes.
>
> **ACTING CHAIR:** We heard from the AFP this morning that they are conducting their own investigation as to whether criminal activity took place as part of that. They have been in touch with you about that?
>
> **Mr Stogdale:** Yes, we have liaised with them in relation to our investigation.[66]

1.60 The committee notes the need for discretion in relation to ongoing investigations, and understands that at the time of the hearing it was unclear whether ASIC had spoken to witnesses or suspects, as reported. However, it was apparent that an investigation was underway.

Recent false accounting prosecution against ex-Leighton Holdings Executives

1.61 In 2017, ASIC charged two former Leighton employees for engaging in conduct that resulted in the falsification of the company's books in contravention of the *Corporations Act 2001*.[67] The trial of the two accused was initially listed to

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65 Mr Ian McCartney, Acting Deputy Commissioner Operations, Australian Federal Police, *Committee Hansard*, 22 April 2016, p. 24.

66 Mr George Stogdale, Senior Executive, Corporations and Corporate Governance Enforcement, Australian Securities and Investments Commission, *Committee Hansard*, 22 April 2016, p. 36.

67 ASIC, Media centre, *17-020MR Former Leighton employees charged*, 31 January 2017, http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-020mr-former-leighton-employees-charged/ (accessed 5 March 2018).

commence on 27 November 2017. However, on 29 November 2017, the trial was adjourned to 15 October 2018.[68]

Unaoil

1.62 In 2013, it was alleged that Leighton paid a $42 million kickback to Unaoil, an engineering and construction services firm linked to Iraqi officials, who awarded Leighton a $750 million oil pipeline contract. It is alleged that an internal memorandum indicated that the Leighton International Managing Director and the Leighton CEO were aware of this kickback, with the CEO himself approving the payment.[69]

1.63 The scale of Leighton's alleged corruption was further revealed in March 2016 with the culmination of a six month investigation by Fairfax Media and Huffington Post. The team of journalists acquired thousands of emails from the account of the chief executive of Unaoil.

1.64 Fairfax alleges that Leighton Holdings, through its international arm, Leighton Offshore, paid a number of bribes to senior Iraqi officials in 2010 in order to win contracts and extensions to an existing contact. Fairfax alleges that these bribes were paid with the knowledge of the former Leighton Offshore chief. Fairfax further alleges that Leighton Offshore backdated an invoice which was then paid through a money-laundering hub in the United Arab Emirates. The value of this alleged bribe was approximately $6.4 million and included an $800,000 fee to Unaoil for facilitating the transaction. Leighton Offshore is also accused of setting up its own relationships with corrupt Iraqi officials in the South Oil Company.[70]

1.65 Investigative journalists, Mr McKenzie and Mr Bachelard, wrote that:

> The evidence will revive a long-running Australian Federal Police bribery investigation into the company and its former executives, which began in 2011 but is yet to lead to any charges.[71]

1.66 Mr Baker and Mr McKenzie also reported in April 2016 on the treatment of a whistleblower employed by Leighton subsidiary, Thiess. The whistleblower raised concerns about a contract in India with Leighton's ethics committee chair. The whistleblower approached Leighton's ethics committee chair in 2014 referring to an internal report prepared for Thiess by its law firm, Ashurst, which is said to reveal Thiess' exposure to an alleged multi-million dollar bribery scandal in India. After the

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68 ASIC, Media centre, *17-020MR Former Leighton employees charged*, 31 January 2017, http://asic.gov.au/about-asic/media-centre/find-a-media-release/2017-releases/17-020mr-former-leighton-employees-charged/ (accessed 5 March 2018).

69 Nick McKenzie and Richard Baker, *Building giant Leighton rife with corruption: claims*, 3 October 2013, http://www.smh.com.au/business/building-giant-leighton-rife-with-corruption-claims-20131002-2ut2e.html (accessed 12 February 2018).

70 Nick McKenzie and Michael Bachelard, 'Leightons' bribery ran into millions', *The Age*, 31 March 2016, p. 9.

71 Nick McKenzie and Michael Bachelard, 'Leightons' bribery ran into millions', *The Age*, 31 March 2016, p. 9.

whistleblower's disclosure, the report was 'buried' and the employee was allegedly 'forced' out of their job. Thiess later settled an unfair dismissal case with the whistleblower for an undisclosed sum.[72]

1.67 The committee has written to Leighton Holdings, now CIMIC, on a number of occasions to seek a response to the allegations. No response has been received to date.

Procedures for handling allegations of corruption

1.68 Mr Sasse also made other allegations of corruption that he discovered during his time with Leighton,[73] but with respect to the RORO investigation he concluded that it:

> …turned up numerous other issues that needed to be followed up and tracked down: kickbacks to subcontractors, allegations about payments for the procurement of work—that is, facilitation payments, which fall under the bribery heading. An almost overwhelming collection of issues came out of that core RORO investigation.[74]

1.69 Mr Sasse highlighted the lack of procedures for handling allegations of corruption and provided a damning assessment of Leighton's culture:

> The Leighton International business operated without any of the governance structures and frameworks that I expected, having come from one of the other Leighton subsidiaries where I had worked for the better part of a decade. I cannot say specifically that I came across other RORO examples, but there were certainly some very odd practices in terms of governance, reporting and the way jobs were bid… The division had its own board. It did have a mechanism for whistleblowers and, as I mentioned earlier, one of the investigations that that board initiated in relation to the whistleblower's complaints, which was conducted by an external third party, seems to have been done specifically with the instruction not to get to the bottom of it.[75]

Ethics, Compliance and Sustainability Committee

1.70 In 2015 Leighton changed its name to CIMIC Group (CIMIC). As part of its corporate governance structure, CIMIC has constituted an Ethics, Compliance and Sustainability Committee (ECS committee). The ECS committee is bound by a charter, which sets out the role, authority, responsibilities, membership and operations of the committee. The stated objectives of the ECS committee are:

> …to assist the Board in fulfilling its corporate governance and oversight responsibilities by:
>
> (a) monitoring and reviewing:

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72 Richard Baker and Nick McKenzie, 'Pressure mounts on ABC director over handling of corruption red flags', *The Age*, 8 April 2016, p. 6.

73 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 3.

74 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 4.

75 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 2.

(i) the ethical standards and practices generally within the Group and compliance with the Group Code of Conduct; and

(ii) compliance with applicable legal and regulatory requirements and internal policies, procedures and standards in the areas of work health and safety, the environment, sustainability and business conduct.[76]

1.71 The ECS committee has no set time for meetings; however, committee members may, and the secretary must on the request of a committee member, call a meeting of the committee.[77]

1.72 The ECS committee has a number of powers. Clause 6.1 of the Charter provides that:

> The Committee is authorised to review or investigate any activity or function of any Group member and, so far as practicable, its associates, in accordance with its role under this Charter and will advise the Chairman of the Board and CEO accordingly. The Committee is authorised to make recommendations to the Board regarding appropriate actions resulting from such investigations.[78]

1.73 In carrying out such investigations, the ECS committee may 'obtain information, interview management and internal and external auditors (with or without management present), and seek advice from consultants or specialists' but only with the knowledge of the CEO.[79]

1.74 Despite the powers and responsibilities ascribed to the ECS committee, Mr Sasse suggested in his evidence that the committee was not effective in carrying out its functions during his tenure.

> **Senator EDWARDS:** Did you approach the ethics community, or was the ethics committee a new structure after you left as well?
>
> **Mr Sasse:** No, the board has had an ethics committee for some time. Its primary role was oversight of work health and safety issues, but these issues went to the board pretty much immediately I got to the point that I realised the magnitude of the problem. I think the first written report to the

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76 CIMIC, *Ethics, Compliance and Sustainability Committee Charter*, 31 October 2017, p. 1, https://www.cimic.com.au/__data/assets/pdf_file/0016/3454/ECSC-Charter_Final.pdf (accessed 5 March 2018).

77 CIMIC, *Ethics, Compliance and Sustainability Committee Charter*, 31 October 2017, p. 2, https://www.cimic.com.au/__data/assets/pdf_file/0016/3454/ECSC-Charter_Final.pdf (accessed 5 March 2018).

78 CIMIC, *Ethics, Compliance and Sustainability Committee Charter*, 31 October 2017, p. 3, https://www.cimic.com.au/__data/assets/pdf_file/0016/3454/ECSC-Charter_Final.pdf (accessed 5 March 2018).

79 CIMIC, *Ethics, Compliance and Sustainability Committee Charter*, 31 October 2017, p. 3, https://www.cimic.com.au/__data/assets/pdf_file/0016/3454/ECSC-Charter_Final.pdf (accessed 5 March 2018).

> board was probably about Leighton International and the RORO was probably April or May 2011.
>
> **Senator EDWARDS:** So it goes back a while. The ethics committee in the organisation was looking after heights of ladders and gangways and things like that, not the corporate culture.
>
> **Mr Sasse:** It was more around if there was a group fatality, the opco [operating company] would have to come in and essentially present to them on what had happened and what they had done to mitigate the findings of investigations and reports and that kind of thing.
>
> **Senator EDWARDS:** So there was nowhere really to go for any kind of reporting of commercial inappropriateness or impropriety?
>
> **Mr Sasse:** If I could put it this way: if the board is not interested, that is kind of the end of the line.[80]

1.75 On this evidence, it appears that the existence of the ECS committee was insufficient to manage the threat of foreign bribery. When allegations were made about discrete instances of foreign bribery, it seems that the will to take immediate and effective action was simply lacking in the organisation.

Internal Code of Conduct

1.76 CIMIC employees are bound by a six page Group Code of Conduct which took effect on 12 August 2015. The Code of Conduct prohibits bribery and corruption:

> The Group prohibits, and has zero tolerance for, all forms of bribery and corruption. You must obey all relevant laws and regulations, and must not participate in any arrangement which gives any person an improper benefit in return for an unfair advantage to any party, directly or through an intermediary. This includes facilitation payments (payments of cash or in kind made to secure or expedite a routine service, or to 'facilitate' a routine Government action), even if allowed under local laws or customs.
>
> Further information is set out in the Anti-Bribery and Corruption Policy.[81]

1.77 The Code of Conduct sets out the protections available to whistleblowers. The relevant section provides:

> All business concerns raised are taken seriously and treated confidentially, and the identity of the Whistleblower who has raised a business concern is only revealed on a 'need-to-know' basis. Any Employee raising a genuinely held business concern has the option to do so on the basis that their identity will be known only by the individual to whom the concern was raised or the Ethics Line provider (as the case may be).
>
> The Ethics Line is an external resource available at zero cost to any Employee who wishes to raise a genuinely held business concern on an

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80 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 8.

81 CIMIC, *Group Code of Conduct*, 12 August 2015, reformatted 1 November 2016, p. 3, https://www.cimic.com.au/__data/assets/pdf_file/0018/3429/Group-Code-of-Conduct.pdf (accessed 4 March 2018).

> independent and confidential basis. Any Employee who feels they have been victimised after raising a concern should contact their Business Conduct Representative, or the Ethics Line.
>
> The Group will not tolerate victimisation of a Whistleblower. Any Employee found to have victimised another will be subject to disciplinary action.[82]

1.78 Mr Sasse suggested that, during his employment, these processes for handling allegations of corruption were ineffective:

> **Senator EDWARDS:** In that division, was there a person nominated within the company at that time to go to for whistleblowing purposes?
>
> **Mr Sasse:** The division had its own board. It did have a mechanism for whistleblowers and, as I mentioned earlier, one of the investigations that that board initiated in relation to the whistleblower's complaints, which was conducted by an external third party, seems to have been done specifically with the instruction not to get to the bottom of it.
>
> **Senator EDWARDS:** So it is like a suggestion box that does not have a lid. It just goes into the ether. It goes into the shredder underneath.
>
> **Mr Sasse:** If you have an absence of managerial will to get to the root of a problem, then there are lots of ways of making sure you never get there.[83]

1.79 The committee accepts that, since Mr Sasse left Leighton, the company has undergone a process of change, including the launch of its Code of Conduct and changing its name to CIMIC. Nonetheless, Mr Sasse's evidence provides a damning assessment of Leighton's ability to handle adequately allegations of corruption and it is not clear that these deficits have ben ameliorated.

1.80 Further, it seems that whistleblowers will be protected if they 'raise a genuinely held business concern'. However, it is not clear how a 'business concern' is defined, and the glossary to the code offers no guidance. This apparent protection mechanism appears to be at odds with the experience of a Thiess whistleblower, part of the Leighton group, as reported by Fairfax Media on 28 August 2016.[84]

1.81 CIMIC's reluctance to participate in the committee's inquiry means that the committee has neither had the opportunity to fully consider the circumstances of individual cases; nor the policies and procedures that CIMIC has in place to investigate and respond to corporate whistleblowing involving foreign bribery.

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82 CIMIC, *Group Code of Conduct*, 12 August 2015, reformatted 1 November 2016, pp. 1–2, https://www.cimic.com.au/__data/assets/pdf_file/0018/3429/Group-Code-of-Conduct.pdf (accessed 4 March 2018).

83 Mr Stephen Sasse, Private capacity, *Committee Hansard*, 22 April 2016, p. 2.

84 Nick McKenzie and Michael Bachelard, 'The 'naively noble' man who could not get his voice heard', *Sydney Morning Herald*, 28 August 2016, http://www.smh.com.au/business/the-naively-noble-man-who-could-not-get-his-voice-heard-20160824-gr0bu5.html (accessed 6 December 2017).

Coalition Senators Additional Comments

General comments

1.1 Coalition Senators note the majority report and the issues raised in the serious matter of foreign bribery.

1.2 Coalition Senators note that corporate crime and foreign bribery are critical issues.

1.3 Coalition Senators also note the current difficulties in achieving successful prosecutions and the need to strengthen Australia's foreign bribery offences.

1.4 Coalition Senators however note that some comments in the minority report represent an overreach in some of its criticisms.

1.5 Coalition Senators note the significant reforms by the government to crack down on foreign bribery and note that the government has taken action since 2013 in response to the Phase 3 OECD Report and Phase 3 OECD Follow-up Report in 2012 and 2015 respectively.

1.6 Coalition Senators also note that many of the reforms underway were instigated as a result of difficulties faced in attempted prosecutions in recent years.

1.7 Coalition Senators note that the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (CCC bill) currently before the Senate seeks to remove impediments to the successful investigation and prosecution of foreign bribery by enhancing Australia's foreign bribery offences and introducing a deferred prosecution agreement (DPA) scheme.

1.8 Coalition Senators note that the Phase 4 OECD Report in December 2017 was largely positive.

1.9 Coalition Senators also note that the majority of recommendations already reflect the government's stated intention.

Chapter 3—Investigation and enforcement

1.10 Regarding Recommendation 3 and further to the majority report's committee comments, Coalition Senators note the significant resourcing provided to those agencies in recent years, including a $321 million injection of funding in the 2017—2018 federal Budget to provide the Australian Federal Police (AFP) with the resources necessary to be more agile in responding to emerging criminal threats. This represents the biggest injection into the AFP's domestic capability in over a decade. This is in addition to the $15 million funding to support the Fraud and Anti-Corruption Centre, announced in 2016.[1]

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1 Prime Minister Malcolm Turnbull MP, Boosting efforts to tackle foreign bribery, 23 April 2016, http://www.malcolmturnbull.com.au/media/boosting-efforts-to-tackle-foreign-bribery (accessed 28 March 2018).

1.11 Coalition Senators note that that the Phase 4 OECD Report into the United Kingdom raised concerns about their blockbuster funding model, with the following commentary:

> The lead examiners further consider that blockbuster funding may lead to perceived, if not real, influence of the executive over law enforcement decisions.[2]

1.12 Taking into account these factors, Coalition Senators note the majority report recommendation that alternative approaches such as this model are worthy of consideration.

Chapter 4—Reforming the foreign bribery offence

1.13 Coalition Senators feel that the following statements in paragraphs 4.13 and 4.37 of the majority report, as well as similar comments made throughout the report, do not provide accurate representations: 'The committee is concerned that the government has delayed taking action to close this potential loophole' and 'the committee considers that the government's action to close this potential loophole is overdue'.

1.14 Coalition Senators note that the previous Labor Government did not amend these specific elements of the foreign bribery offences.

Chapter 5—Encouraging self-reporting by corporations—A deferred prosecution agreement scheme

1.15 Regarding Recommendation 12, Coalition Senators note the recommendation that deferred prosecution agreements (DPAs) be published. However, further consideration should be given by the government as to the specific circumstances where it would be in the public interest to do so.

1.16 Coalition Senators consider that the requirement to publish all details on how a company has complied with the terms and conditions of a DPA, as well as any breach, could place a significant administrative burden on the Commonwealth Director of Public Prosecutions (CDPP).

Chapter 6—Protecting whistleblowers who expose foreign bribery

1.17 Coalition Senators disagree with Recommendations 15 and 16 on the grounds that the government recently introduced Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (EWP bill) in the Senate. The Government has consulted with a number of stakeholders, including the expert panel, in forming this legislation.

1.18 Coalition Senators note that the Senate Economics Legislation Committee recently endorsed the passage of the EWP bill in its current form.

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2 OECD, The United Kingdom Phase 4 Report, 15 March 2017, p. 35, http://www.oecd.org/mwg-internal/de5fs23hu73ds/progress?id=R_fLwOYRO1ULrZNrMcUCxQSwkHjAqmKm7IYGtdV60wA,&dl (accessed 28 March 2018).

Chapter 7—The facilitation payment defence

1.19 Coalition Senators disagree with Recommendation 18 of the majority report and note the Attorney-General's Department's advice to the Senate Legal and Constitutional Affairs Committee inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (CCC bill), in its answers to questions on notice received on 7 March 2018:

> Operational experience has indicated that the facilitation payment defence has not been an impediment to the enforcement of the foreign bribery offence.[3]

1.20 Coalition Senators also note that facilitation payment defences are not prohibited under the OECD Anti-Bribery Convention and also that the United States and New Zealand retain facilitation payment defences. Further, Coalition Senators note that the facilitation payment defence in Australia is narrower than that of the United States, in that it requires in paragraph 70.4(1)(a) that the value of the benefit is of a 'minor nature' and in paragraph 70.4(1)(b) that the conduct was related to a routine government action of a 'minor nature'.[4]

1.21 Coalition Senators are open to the majority report's view that the facilitation payments defence should be reviewed but also recognise that the government is implementing significant reforms to Australia's foreign bribery legal framework. In particular, the CCC bill contains the introduction of a failure to prevent foreign bribery offence and the broadening of the foreign bribery offence to cover bribery to obtain a personal benefit.[5]

Chapter 8—Other reform options

1.22 Coalition Senators take issue with the statement at paragraph 8.81:

> 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.

1.23 Coalition Senators note that:

- the Phase 4 OECD Report was published on 15 December 2017;
- the Guidelines for self-reporting were published by the AFP and CDPP on 7 December 2017;
- this means that the Guidelines for self-reporting were published before the Phase 4 OECD Report was published; and
- therefore the publishing of the guidelines was not a response to the OECD's feedback.

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3 Attorney-General's Department, answers to questions on notice, Senate Legal and Constitutional Committee inquiry into the CCC bill 2017, p. 8.

4 See *Criminal Code Act 1995*, paras. 70.4(1)(a) and 70.4(1)(b).

5 See CCC bill, schedule 1.

1.24 Coalition Senators disagree with Recommendation 19 on the grounds that the government is already progressing with a beneficial ownership register for companies.

1.25 Regarding Recommendation 20, Coalition Senators support a requirement for suppliers to disclose convictions for foreign bribery and a power for agencies to debar such firms from future procurement, where appropriate.

1.26 However, procurement rules should not address foreign bribery in isolation, as a distinct element of the procurement framework. It is appropriate that firms found guilty of other high consequence illegal behaviour should also be handled in a consistent way, for instance where they were convicted of commercial fraud, market collusion, and other forms of serious or criminal misconduct.

1.27 Whatever mechanisms are identified to address these issues and concerns, consideration must be given to ensure that any requirement does not unreasonably add burden and red-tape to procurers or businesses, noting the majority of businesses are law-abiding corporations. Accordingly any disclosure obligation built into the procurement process should consistently capture any forms of serious illegal behaviour, not just foreign bribery in isolation. It would not be best regulatory practice to impose red-tape on law-abiding firms requiring them to establish internal processes to prevent remote likelihood events. Conversely, it should be noted that where a firm has conspired with foreign officials to break the law, a self-disclosure regime may not be a reliable mechanism to uncover evidence of such practices.

Senator Jane Hume
Deputy Chair

Senator Amanda Stoker
Senator for Queensland

Appendix 2

Submissions and additional documents

Submissions

Received in the 44th Parliament

1 GRC Institute

2 Supportive Residents Carers Action Group Inc

3 Engineers Australia

4 Woodside Petroleum Ltd

5 Diaspora Legal

6 International Bar Association

7 Australia-Africa Mining Industry Group (AAMIG)

8 Australian Council of Superannuation Investors (ACSI)

9 Dr Kath Hall, ANU College of Law

10 Law Council of Australia

11 King & Wood Mallesons

12 Control Risks

13 Regnan

14 Governance Institute of Australia

15 The Australia Institute and Jubilee Australia

16 Mr Neville Tiffen

17 Publish What You Pay Australia and the Uniting Church in Australia, Synod of Victoria and Tasmania

18 CPA Australia

19 Dr Vivienne Brand, & Dr Sulette Lombard, School of Law, Flinders University

20 ANZ

21 Norton Rose Fulbright

22 KordaMentha Pty Ltd

23 The Law Society of South Australia

24 Coalition of Major Professional & Participation Sports (COMPPS)

25 NSW Young Lawyers

26 Shell Australia

27 Confidential

28 SKINS

29 Confidential

30 Export Council of Australia

31 Transparency International Australia (TIA)

32 Attorney-General's Department (AGD)

33 McMurray + Associates

34 Associate Professor Cindy Davids, School of Law, Deakin University

35 Professor Simon Bronitt, Professor Nikos Passas, Ms Wendy Pei & Ms Chloe Widmaier

36 Minerals Council of Australia

37 BHP Billiton

38 Mr David Wildman

39 Commonwealth Director of Public Prosecutions

40 Mr Kane Preston-Stanley

41 Bruno Manser Fund & Bob Brown Foundation

42 Note Printing Australia Limited

43 Mr Nick McKenzie

44 Confidential

Received in the 45th Parliament

45 International Bar Association

46 Mr Neville Tiffen

Tabled Documents

1 Opening Statement tabled by Mr Shane Kirne, Deputy Director and Practice Group Leader, Commercial, Financial and Corruption practice, Commonwealth Director of Public Prosecutions, at a public hearing in Melbourne on 31 October 2017.

Answers to Questions on Notice

1 Answers to questions on notice from a public hearing held in Sydney on 22 April 2016, received from the Australian Securities & Investments Commission on 29 May 2017.

2 Answers to questions on notice from a public hearing held in Sydney on 7 August 2017, received from the Australian Institute of Company Directors on 25 August 2017.

3 Answer to question on notice from a public hearing held in Sydney on 7 August 2017, received from Control Risks on 28 August 2017.

4 Answers to questions on notice from a public hearing held in Melbourne on 31 October 2017, received from the Australian Securities & Investments Commission on 17 November 2017.

5 Answers to questions on notice from a public hearing held in Melbourne on 31 October 2017, received from the Attorney-General's Department on 17 November 2017.

Additional Information

1 Additional information provided by Mr Neville Tiffen on 1 August 2017.

2 Additional information provided by Uniting Church in Australia on 7 August 2017.

3 Additional information provided by Commonwealth Director of Public Prosecutions on 17 November 2017.

Additional Hearing Information

1 Hansard transcript clarification received by the Commonwealth Director of Public Prosecutions regarding a public hearing held in Melbourne on 31 October 2017.

Appendix 3
Public hearings

Sydney, 22 April 2016

Members in attendance: Senators Dastyari, Edwards, Ketter, McAllister, Smith and Xenophon.

BROWN, Mr Bradley, Acting National Manager, Strategic Intelligence and Policy, AUSTRAC

CROZIER, Commander Peter Barrington, Manager Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police

DAY, Mr Warren, Senior Executive Leader, Assessment and Intelligence, and Regional Commissioner for Victoria, Australian Securities and Investments Commission

McCAIRNS, Mr Gavin, Deputy Chief Executive Officer, AUSTRAC

McCARTNEY, Mr Ian, Acting Deputy Commissioner Operations, Australian Federal Police

SASSE, Mr Stephen, Private capacity

STOGDALE, Mr George, Senior Executive, Corporations and Corporate Governance Enforcement, Australian Securities and Investments Commission

WHITTAKER, Mr Paul, Senior Manager, Corporations and Corporate Governance Enforcement, Australian Securities and Investments Commission

WYLD, Mr Robert, Co-Chair, Anti-Corruption Committee, International Bar Association

ZICHY-WOINARSKI, Mr William Brind, Member and Consultant, Anti-Corruption Committee, International Bar Association

Sydney, 7 August 2017

Members in attendance: Senators Hume, Ketter, Xenophon.

AHRENS, Mr Michael, Director, Transparency International Australia

DAVIES, Mrs Rebecca, Director, Transparency International Australia

GAME, Mr Tim, SC, Co-Chair, National Criminal Law Committee, Law Council of Australia

GOLDING, Mr Greg, Chair, Foreign Corrupt Practices Committee, Business Law Section, Law Council of Australia

LEHMANN, Mr David, Director, KordaMentha Forensic

McGIRR, Mr Matthew, Policy Adviser, Australian Institute of Company Directors

McKENZIE, Mr Nick, Private capacity

MOLT, Dr Natasha, Senior Legal Adviser, Legal Policy Division, Law Council of Australia

PETSCHLER, Ms Louise, General Manager, Advocacy, Australian Institute of Company Directors

PULVIRENTI, Mr Mark, Partner, Control Risks

WYLD, Mr Robert R, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee

ZIRNSAK, Dr Mark, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia

Melbourne, 31 October 2017

Members in attendance: Senators Hume, Ketter.

BROWN, Mr Bradley, Acting Deputy Chief Executive Officer, International and Policy, Australian Transaction Reports and Analysis Centre

CROZIER, Commander Peter, Manager, Criminal Assets, Fraud and Anti Corruption, Australian Federal Police

CROZIER, Commander Peter, Manager, Criminal Assets, Fraud and Anti-Corruption, Australian Federal Police

DAY, Mr Warren, Senior Executive Leader, Assessment and Intelligence, and Regional Commissioner—Victoria

HAIGH, Ms Kathryn, National Manager, Legal Strategy and Solutions, Australian Transaction Reports and Analysis Centre

KIRNE, Mr Shane, Deputy Director and Practice Group Leader, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions

MILLS, Ms Kate, Principal Adviser, Financial System Division, Treasury

ROBERTSON, Ms Jeldee, Principal Federal Prosecutor, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions

SAVUNDRA, Mr Chris, Chief Legal Officer, Australian Securities and Investments Commission

SHARP, Mr Tom, Senior Legal Officer, Criminal Law Reform Section, Attorney-General's Department

THOMPSON, Ms Fiona, Practice Group Coordinator, Commercial, Financial and Corruption Group, Commonwealth Director of Public Prosecutions

TIFFEN, Mr Neville, Private capacity

WHITTAKER, Mr Paul, Senior Manager, Corporations and Corporate Governance, Enforcement, Australian Securities and Investments Commission

WILLIAMS, Ms Kelly, Assistant Secretary, Criminal Law Policy Branch, Attorney-General's Department