



# **PHASE 3 REPORT ON IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION IN AUSTRALIA**

**October 2012**

This Phase 3 Report on Australia by the OECD Working Group on Bribery evaluates and makes recommendations on Australia'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. It was adopted by the Working Group on 12 October 2012.

This document and any map included herein are without prejudice to the status of or sovereignty over any territory, to the delimitation of international frontiers and boundaries and to the name of any territory, city or area.

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## EXECUTIVE SUMMARY

The Phase 3 report on Australia by the OECD Working Group on Bribery evaluates and makes recommendations on Australia's implementation and enforcement of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The report considers country-specific (vertical) issues arising from changes in Australia's legislative and institutional framework, as well as progress made since Australia's Phase 2 evaluation. The report also focuses on key Group-wide (horizontal) issues, particularly enforcement.

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. The Working Group thus recommends that the AFP take sufficient steps to ensure that foreign bribery allegations are not prematurely closed, and be more proactive in gathering information from diverse sources at the pre-investigative stage. Alternate charges or jurisdictional bases should be considered where appropriate. Co-ordination and case referrals could be improved with clear, written arrangements between the AFP and relevant Commonwealth and State-level government agencies and law enforcement bodies. Concurrent or joint investigations with Australian and foreign authorities should continue to be systematically considered. Corporate liability provisions should be applied where appropriate and coupled with on-going training. Australia recently began strengthening its enforcement efforts, such as by establishing a Foreign Bribery Panel of Experts to advise AFP investigation teams. The Working Group encourages Australia to continue these efforts, and looks forward to evaluating the impact of these developments on Australia's enforcement of its foreign bribery laws.

The report identifies additional areas for improvement. Usage of the corporate liability provisions should be enhanced. ASIC's experience and expertise in investigating corporate economic crimes should be tapped to assist the AFP to prevent, detect and investigate foreign bribery where appropriate. Steps should be taken to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases. The maximum sanctions against legal persons for false accounting should be increased commensurate with Australia's legal framework. Awareness should continue to be raised about the difference between a bribe and a facilitation payment. The record-keeping requirements for facilitation payments in tax legislation should be harmonised with those in the Criminal Code Act. The same requirements to report foreign bribery should apply equally to the public service and independent statutory authorities. Protection of whistleblowers in the public and private sectors need to be strengthened.

The report also notes positive developments. 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 enhanced with the ratification in August 2012 of the Convention on Mutual Administrative Assistance in Tax Matters and the amending Protocol.

The report and its recommendations reflect findings of experts from Canada and Japan and were adopted by the Working Group on 12 October 2012. It is based on legislation and other materials provided by Australia and research conducted by the evaluation team. The report is also based on information obtained by the evaluation team during its four-day on-site visit to Canberra and Sydney on 28-31 May 2012, during which the team met representatives of Australia's public and private sectors, legislature,

judiciary, civil society, and media. Within one year of the Working Group's approval of this report, Australia will make an oral follow-up report on its implementation of certain recommendations. It will further submit a written report on the implementation of all recommendations within two years.

## A. INTRODUCTION

### 1. The On-site Visit

1. On 28-31 May 2012, an evaluation team from the OECD Working Group on Bribery in International Business Transactions (Working Group) visited Canberra and Sydney as part of the Phase 3 evaluation of Australia's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), the 2009 Recommendation for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Anti-Bribery Recommendation), and the 2009 Recommendation of the Council on Tax Measures for Further Combating the Bribery of Foreign Public Officials in International Business Transactions (2009 Tax Recommendation).

2. The evaluation team was composed of lead examiners from Canada and Japan as well as members of the OECD Secretariat.<sup>1</sup> Before the on-site visit, Australia responded to the Phase 3 Questionnaire and supplementary questions, and provided relevant legislation and documents. The evaluation team also referred to publicly available information. During the on-site visit, the evaluation team met representatives of the Australian public and private sectors, legislature, judiciary, civil society, and media. In particular, the evaluation team met the Attorney-General for Australia. Private sector representation was satisfactory.<sup>2</sup> The evaluation team expresses its appreciation to the participants for their openness during the discussions, and to Australia for its co-operation throughout the evaluation.

### 2. Outline of the Report

3. This report is structured as follows. Part B examines Australia's efforts to implement and enforce the Convention and the 2009 Recommendations, having regard to Group-wide and country-specific issues. Particular attention is paid to enforcement efforts and results, and weaknesses identified in previous evaluations. Part C sets out the Working Group's recommendations and issues for follow-up.

### 3. Economic Background

4. Australia is a federal state with three tiers of government: Commonwealth (federal), State/Territory, and local. Of the six States and two Territories, New South Wales (NSW) and Victoria are the two most populous States. Australia is a significant economy, exporter and international investor among Parties to the Convention. In 2010, it was the 11<sup>th</sup> largest economy and 14<sup>th</sup> largest exporter of goods and services among the 40 Working Group members. In 2010, its largest trading partner was China,

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<sup>1</sup> Canada was represented by: Ms. Cheryl Cruz, Deputy Director, Economic Law Section, United Nations, Human Rights and Economic Law Division, Department of Foreign Affairs and International Trade; Ms. Ann Sheppard, Senior Counsel, Criminal Law Policy Section, Department of Justice; Ms. Gisele Rivest, Staff Sergeant, Commercial Crime Branch, Royal Canadian Mounted Police. Japan was represented by Mr. Takeyoshi Imai, Vice-Dean, Professor of Law and Attorney at Law, School of Law, Hosei University; Mr. Kenichi Masamoto, Counselor, Permanent Delegation to the OECD; Messrs. Kazumitsu Ota and Hirotochi Enomoto, respectively Deputy Director and Deputy Chief of the Corporate Accounting and Disclosure Division, Planning and Coordination Bureau, Financial Services Agency. The OECD Secretariat was represented by Messrs. William Loo and Chiawen Kiew, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs.

<sup>2</sup> See Annex 2 for a list of participants.

while India, Thailand, and Indonesia were also in the top ten.<sup>3</sup> Australia ranked 16<sup>th</sup> and 9<sup>th</sup> in the Working Group in terms of outward foreign direct investment (FDI) flows and stocks respectively.<sup>4</sup> Australia also plays a significant economic role in many countries in Polynesia and the South Pacific that have serious corruption risks.

5. A significant portion of Australia's international economic activities are exposed to risks of foreign bribery. A recent study found that 75% of the top 100 companies and 63% of the top 200 companies listed on the Australian Stock Exchange operate in a high risk sector, a high risk country, or both.<sup>5</sup> Of particular note is Australia's large mining and resource sector. Australia is home to some of the largest multinational corporations in this area, though many small- and medium-sized enterprises (SMEs) are also active. Over 220 listed exploration and mining companies with a combined market capitalisation in excess of AUD 250 billion (EUR 208.7 billion) are active in Africa. Australian companies in this sector have more projects in Africa than any other region of the world. Projects have nearly tripled since 2005, and investment has increased from AUD 20 billion (EUR 16.7 billion) in 2009 to an expected AUD 50 billion (EUR 41.7 billion). The sector also contributes to almost half of Australia's exports.<sup>6</sup>

#### **4. Cases Involving the Bribery of Foreign Public Officials**

6. Australia's first set of foreign bribery prosecutions began in July 2011 with charges in the *Securrency/NPA* case. Securrency is a Melbourne-based company jointly owned by a UK company and the Reserve Bank of Australia (RBA), Australia's central bank. RBA appointed half of Securrency's board of directors and the chairman from its board appointees. Note Printing Australia (NPA) is wholly-owned subsidiary of RBA. The allegations concern bribery of foreign public officials in Vietnam, Indonesia, Nepal and Malaysia in 1999-2005 to secure contracts to produce bank notes. Securrency, NPA, and nine former executives and sales agents of the two companies have been charged with foreign bribery, conspiracy to commit foreign bribery, and/or false accounting. One former executive pleaded guilty to false accounting in July 2012. Australian courts have imposed a suppression order prohibiting the publication of certain information concerning the case. Consequently, some aspects of the case are not part of the public record and could not be explored in this evaluation. At the time of this report, a court hearing was also being held to determine whether several of the accused should be committed to trial. Information about the hearing that has been made public is not subject to the suppression order, however, and is referred to in various parts of this report. Criminal investigations in the case are also on-going.

7. This case aside, Australia has had limited enforcement of its foreign bribery laws, despite its companies' risk of exposure to foreign bribery solicitation in the industries in which they operate. This lack of enforcement is not due to an absence of allegations, however. Since Phase 2 in 2005, the Australian

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<sup>3</sup> In 2010, trade with China accounted for 19.7% of the total, up 35% from 2009. Singapore, Japan, UK and US were also among the top 10 export destinations (WTO Trade Statistics; UNCTAD; DFAT (2011), *Australia Trade-at-a-Glance*).

<sup>4</sup> UNCTAD and DFAT (2011), *Australia Trade-at-a-Glance*. Outward FDI was targeted at the US, UK, New Zealand and other OECD countries.

<sup>5</sup> ACSI (October 2011), "Anti-Corruption and Bribery Practices in Corporate Australia", p. 20.

<sup>6</sup> Forbes, "2000 Largest Public Companies 2011"; Financial Review (1 March 2012), "Miners Reject Anti-Corruption Reforms"; Australia-Africa Mining Industry Group ([aamig.com](http://aamig.com)); Harrap, A. (3 March 2011), "Australian Mining Engagement in Africa"; Austrade Media Release (8 February 2011), "Australian Business Interest in Africa's Resources Sector Triples"; International Mining for Development Centre (12 February 2012), "Australian Mining Investment in Africa More than \$50 billion: DFAT"; Australian Financial Review (11 February 2012), "Funding Still a Challenge for Miners in Africa"; DFAT (2011), *Australia Trade-at-a-Glance*, p. 19.



Federal Police (AFP) has received 28 allegations of foreign bribery involving Australian companies and individuals (including the *Securrency/NPA* case). To date, 12 of these cases have been evaluated, rejected for investigation, and “terminated”, while 9 cases were accepted for investigation but have been closed without resulting in charges because of insufficient evidence (i.e. “finalised”, using terminology suggested by the Australian authorities). The remaining 7 cases are on-going. Two additional cases involving allegations received before Phase 2 have also been investigated and “finalised” without charges. The *Securrency/NPA* case was initially rejected without investigation when a whistleblower first approached the AFP in 2008. An investigation began only after the company self-reported wrongdoing to the AFP in the following year (see Annex IV for summaries of selected enforcement actions).

### *Commentary*

*The lead examiners are seriously concerned that Australia’s overall enforcement of the foreign bribery offence to date has been extremely low. This report notes certain deficiencies and makes recommendations to address this concern. The lead examiners, however, welcome Australia’s first foreign bribery prosecutions, acknowledge Australia’s efforts to remedy the situation and anticipate these efforts to bear fruit in due course.*

*The lead examiners recommend that the Working Group monitor Australia’s foreign bribery enforcement efforts through Australia’s Phase 3 Oral Follow-up Report in 2013 and its Written Follow-up Report in 2014. This should include, if possible, exploration of the relevant issues in the Securrency/NPA case that could not be discussed in this evaluation because of a suppression order or on-going investigations.*

## **B. IMPLEMENTATION AND APPLICATION BY AUSTRALIA OF THE CONVENTION AND THE 2009 RECOMMENDATIONS**

8. This part of the report considers Australia’s approach to key horizontal (Group-wide) issues identified by the Working Group for all Phase 3 evaluations. Consideration is also given to vertical (country-specific) issues arising from Australia’s progress on weaknesses identified in Phase 2, or from changes to Australia’s domestic legislative or institutional framework.

### **1. Foreign Bribery Offence**

9. Australia’s foreign bribery offence is in Division 70 of the Criminal Code Act. Facilitation payments are allowed if certain record-keeping requirements are met. The defence is the subject of outstanding Phase 2 Recommendations and a recent public consultation conducted by the Australian federal government. The tax deductibility of facilitation payments is discussed at p. 35. This section also considers two elements of the foreign bribery offence that were the subject of the public consultation, and recent developments regarding hospitality, promotional expenditures, and charitable donations.

#### **(a) Guidance on the Facilitation Payment Defence**

10. Phase 2 Recommendation 5(c) asked Australia to revise and clarify guidance on the defence of facilitation payments issued by the Attorney-General’s Department (AGD) and the Australian Taxation Office (ATO). Australia had amended the guidance by the time of its 2008 Written Follow-Up Report. The Working Group, however, was still concerned that the revised guidance referred to government actions “of a minor nature” rather than payments of a minor value. The Working Group was also concerned that the examples in the guidance may not be of facilitation payments in certain circumstances. Australia has now addressed both concerns by amending the guidance to refer to payments of a minor value and removing the examples of facilitation payments. Phase 2 Recommendation 5(c) is thus fully implemented.

**(b) Public Consultation on the Facilitation Payment Defence**

11. The Australian government commenced a public consultation on 15 November 2011 concerning the facilitation payment defence.<sup>7</sup> A consultation paper described arguments in favour of and against repealing the defence. The consultation closed on 15 December 2011, though late submissions were accepted until February 2012. At the time of this report, the Australian government was considering the responses to the consultation.

**(c) Application and Awareness of the Facilitation Payment Defence**

12. Phase 2 Recommendation 1(b) asked Australia to raise awareness of the facilitation payment defence. The Working Group also decided that it would follow up “the application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements” in the statute (Follow-up Issue 8(a)). Since Phase 2, the defence has not been tested in the courts.

13. Overall, there is general confusion about the facilitation payment defence, according to some representatives of civil society and the accounting and auditing profession at the on-site visit. The evaluation team noted a lack of understanding of what constitutes a “facilitation payment” under Australian law, leading to a misunderstanding of how the requirement to properly record facilitation payments applies in practice. In particular, facilitation payments appear to be frequently equated with any bribes of small value. Often overlooked is the requirement that such payments must be made to secure routine governmental action of a minor nature that does not result in the obtaining of a business advantage.<sup>8</sup> For instance, a recent media article quoted the director of an Australian law firm who stated that “the law would distinguish whether paying a consultant constituted a bribe, depending on the size of the payment made.”<sup>9</sup> A private sector representative believed that a facilitation payment includes paying an official who was threatening grievous physical harm at a roadblock, or supplying diesel to a police vehicle used to arrest a criminal. One company said facilitation payments include those made under duress. The uncertainty over the meaning of a facilitation payment is one reason why many on-site visit participants favoured abolishing the defence.

14. There is a perception that Australian companies may be making facilitation payments, and that the practice may be prevalent, at least in certain regions. A government Minister recently referred to “anecdotal evidence about the need to retain the defence because it is a reality of doing business, especially in the Asia-Pacific region”.<sup>10</sup> At the on-site visit, several companies stated that they had made (and recorded) facilitation payments. Accountants and auditors indicated that they had seen such payments recorded in companies’ books. Several on-site visit participants said that Australian companies are increasingly banning facilitation payments. Yet, one recent study showed that 48% of major Australian companies continue to permit facilitation payments under certain conditions, and only 16-17% prohibit such payments outright.<sup>11</sup> However, some of these perceptions about the prevalence of facilitation payments may be distorted by the misunderstandings described above of what constitutes such a payment.

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<sup>7</sup> Attorney-General’s Department (15 November 2011), “Assessing the ‘Facilitation Payments’ Defence to the Foreign Bribery Offence and Other Measures”, paras. 16-27.

<sup>8</sup> Criminal Code Act, Section 70.4(1)(b) and (2).

<sup>9</sup> Financial Review (1 March 2012), “Miners Reject Anti-Corruption Reforms”.

<sup>10</sup> Trust Law (16 November 2011), “Bribery Reforms: Australia Proposes Ban on Facilitation Payments”.

<sup>11</sup> ACSI (October 2011), “Anti-Corruption and Bribery Practices in Corporate Australia”, pp. 14, 18 & 23.

15. The Australian authorities have made some efforts to discourage the making of facilitation payments. The AGD guidance “recommends that individuals and companies make every effort to resist making facilitation payments.” It goes on to recognise that this “can be a difficult position to take, with short-term risks for business, and that this difficulty is increased for smaller businesses that may feel they lack the bargaining power of major companies.” Presentations by the Department of Foreign Affairs and Trade (DFAT) described further at p. 40 also discourage facilitation payments. On the other hand, the ATO guidance does not discourage facilitation payments, but states that, “For tax purposes, facilitation payments are not bribes and may be deductible.”

*Commentary*

*Australia has made efforts to raise awareness of the facilitation payment defence, including through its proactive consultation process. Nevertheless, there continues to be substantial confusion over the scope of the facilitation payment defence. The lead examiners therefore recommend 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. Finally, the lead examiners recommend that the Working Group follow up the outcome of Australia’s public consultation on the facilitation payment defence. The lead examiners also reiterate Phase 2 Follow-up Issue 8(a) and recommend that the Working Group continue to follow up the application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code.*

*(d) Proof of Intention to Bribe a Particular Foreign Official*

16. The government public consultation paper (paras. 32-33) describes an issue with Australia’s foreign bribery offence that was not considered by the Working Group in previous evaluations. The consultation paper proposes amending the offence to expressly state that proof of an intention to influence a particular foreign official is not required. On one view, to establish the foreign bribery offence, the prosecution may be required to prove that the defendant had an intention to influence a *particular* foreign public official, as mere proof of an intention to influence an unidentified foreign public official is not enough. At the on-site visit, two judges stated that in a domestic bribery case the prosecution is usually required to “close the loop” by proving the intention to bribe a specific official. They added that their statements were not intended to be authoritative. A prosecutor suggested that the proposed amendment might simply clarify rather than change the current law. The consultation paper should not be read to suggest that the current law required proof of an intention to influence a particular foreign official. He acknowledged that defendants might make an alternative argument at trial.

17. Though it is not clear that Australian law requires proof of an intention to bribe a specific foreign public official, such a requirement would significantly reduce the effectiveness of the offence. Foreign bribery is frequently committed through intermediaries; a briber hence rarely meets, and often does not know the identity of, the bribed official. In its questionnaire responses, Australia acknowledged that the use of intermediaries makes it difficult to identify a bribed official.

*Commentary*

*The lead examiners recommend that Australia take appropriate steps to clarify that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery*

*offence. They also recommend that the Working Group follow up whether the foreign bribery offence requires the proof of this element.*

## **2. Responsibility of Legal Persons**

18. Prior to 2001, liability of legal persons for criminal offences was governed by the “identification theory” that originated from English common law. Under this theory, a company is liable only if individuals that constitute its “directing mind” (i.e. most senior officers) commit a crime. The Working Group has repeatedly criticised the identification theory for two reasons. First, a legal person’s directing mind is restrictively defined to a board of directors, managing director, and perhaps other senior officers. Second, liability cannot be based on aggregating the knowledge/states of mind of different people.

19. In December 2001, Australia extended the scope of liability of legal persons substantially. Under Division 12 of the Criminal Code Act, a legal person is liable for crimes committed by an employee, agent or officer acting within the actual or apparent scope of his/her employment if the company’s board or a “high managerial agent” intentionally, knowingly or recklessly committed the offence, or expressly, tacitly or impliedly authorised or permitted the offence. In the latter case of misconduct involving a high managerial agent, the company may escape liability if it had exercised due diligence to prevent the offence, or the authorisation or permission of the offence. In addition, a company is also liable if its “corporate culture” encouraged, tolerated or led to the offence, or if it failed to create and maintain a “corporate culture” that required compliance with the relevant law. (See p. 69 for the full text of these provisions.) A parent company may be held liable for crimes committed by a subsidiary or a joint venture if the parent is a party to the offence by aiding, abetting, counselling, procuring or inciting the commission of the offence by the subsidiary or joint venture. The parent may also be liable if it commits the offence jointly with a subsidiary or joint venture. Australia’s approach to foreign bribery committed by related companies is considered at p. 23.

20. The Phase 2 Report (paras. 151-153) lauded these provisions for being “well-suited to prosecutions for foreign bribery”. However, this conclusion was based on an analysis of the law and not actual practice. At the time of Phase 2, these provisions had not been applied to offences involving intentional crimes (e.g. bribery) but only regulatory offences, such as environmental, and health and safety offences. The Working Group thus decided to follow up the application of these provisions to foreign and domestic bribery (Follow-Up Issue 8(c)).

21. Practice under these provisions for intentional criminal offences remains scant in Phase 3 eleven years after their enactment. Two legal persons – both in the *Securency/NPA* case – have been charged with foreign bribery. Australia could not identify any Commonwealth criminal convictions against companies for domestic bribery, false accounting, money laundering, fraud or tax evasion.<sup>12</sup>

22. The corporate liability provisions founded on “corporate culture” are somewhat novel and have not, to date, been used. The *Securency/NPA* case involves the complicity of senior corporate officers;<sup>13</sup> liability has thus not been asserted on the basis of the “corporate culture” provisions. Commentators (including one senior Australian prosecutor) have stated that how these provisions would operate in practice is unclear. Prosecutors could have evidentiary difficulties establishing liability under these

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<sup>12</sup> Australia referred to the case of *McArdle and Power Financial Planning*, which dealt with an offence of providing financial services without a license contrary to the Corporations Act.

<sup>13</sup> AFP Press Release (1 July 2011) ([www.afp.gov.au](http://www.afp.gov.au)).

provisions.<sup>14</sup> Consequently, the provisions to date “remain largely of academic interest through lack of use”.<sup>15</sup> The Commonwealth Director of Public Prosecutions has not had to deal with these provisions because it has not received from the AFP referrals alleging corporate liability due to intentional crimes.

### *Commentary*

*Phase 2 Follow-up Issue 8(c) concerns the application of the criminal liability of legal persons for foreign bribery. The lead examiners consider that Australia’s corporate liability provisions meet the standard set out in Annex 1 of the 2009 Anti-Bribery Recommendation. There are serious concerns that these provisions have not produced criminal prosecutions or convictions in cases of domestic bribery, false accounting, money laundering, fraud or tax evasion. As noted later in this report, only one case has produced charges against legal persons for foreign bribery out of the 28 allegations received by the Australian authorities. The reason for this is not entirely clear. The lead examiners therefore recommend that Australia take steps to enhance the usage of the corporate liability provisions, including those on corporate culture, where appropriate, and provide on-going training to law enforcement authorities relating to the enforcement of corporate liability in foreign bribery cases.*

## **3. Sanctions for Foreign Bribery and Related Offences**

### **(a) Sanctions against Natural Persons**

23. The maximum penalties for foreign bribery against natural persons have not been changed since Phase 2. The offence is punishable by 10 years’ imprisonment and/or an AUD 1.1 million (EUR 920 000) fine.<sup>16</sup> Australia stated that offenders are also automatically disqualified from managing corporations for 5 years, which may be extended to up to 20 years upon application to the court.<sup>17</sup> They may also be disqualified from being a “responsible officer” in a financial institution.<sup>18</sup>

24. In the absence of convictions for foreign bribery, the Phase 2 Report (paras. 157-160) considered sentences imposed for Commonwealth offences such as fraud and domestic bribery. Both offences carry the same maximum penalty as foreign bribery. Of the 1 713 sentences for fraud imposed in an 18-month period in 2003-2004, a “vast majority” (1 266) resulted in imprisonment of less than 12 months. Periodic detention and home detention were imposed 83 and 73 times respectively, while 1 067 sentences were suspended. Data on fines imposed were not available. In addition, 60 convictions for the Commonwealth domestic bribery offence in 1984-2005 yielded 33 imprisonment sentences, 8 community service sentences, 17 good behaviour bonds, and 9 fines. These statistics raised two concerns. First, the penalties imposed for domestic bribery were much lower than the maximum available, although it also recognised

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<sup>14</sup> Thornton, J. (2008), “Criminal Liability of Organisations”, pp. 10-11 ([www.isrcl.org](http://www.isrcl.org)); Allens Arthur Robinson (February 2008), “[‘Corporate Culture’ as a Basis for the Criminal Liability of Corporations](#)“, pp. 17 and 70. Difficulties cited include how “corporate culture” is to be ascertained, especially when a corporate group or large multinational company is involved.

<sup>15</sup> Clough, J. and Mulhern, C. (2002), *The Prosecution of Corporations*, OUP, Melbourne, p. 148.

<sup>16</sup> Section 70.2(4)(a) provides that the fine is 10 000 “penalty units”. Each penalty unit equates to AUD 110 (Commonwealth Crimes Act 1914 Section 4AA).

<sup>17</sup> Corporations Act 2001, Section 206B.

<sup>18</sup> Superannuation Industry (Supervision) Act 1993 Section 126H; Banking Act 1959 Section 21; Insurance Act 1973, Section 25A; Life Insurance Act 1995, Section 245A.

that most of the cases involved bribes of small or unascertained value. Second, there were questions whether monetary sanctions were routinely sought in domestic bribery cases.

25. Since Phase 2, sanctions have not been imposed for foreign bribery as there have not been convictions. Statistics provided by Australia show that 14 individuals have been convicted for domestic bribery and corruption under Commonwealth law from 1 July 2005 to 22 August 2012. These convictions yielded 13 imprisonment sentences (5 of which were suspended and 3 were for periodic detention). The longest sentence was imprisonment for 29 months. These convictions also yielded 1 fine (AUD 1 000 or EUR 835), 4 reparation orders (two of which were in the amount of AUD 1 560 690 or EUR 1.3 million), 2 community service sentences and 3 good behaviour bonds.

### *Commentary*

*In Phase 2 (Follow-up Issue 8(d)), the Working Group decided to monitor the sanctions imposed on natural persons in Australia for foreign bribery to determine whether monetary sanctions, including fine penalties and confiscation. Since Phase 2, no sanctions have been imposed for foreign bribery. The lead examiners therefore recommend that the Working Group continue to follow up the sanctions imposed in Australia against natural persons for foreign bribery to ensure that they are effective, proportionate, and dissuasive.*

### *(b) Sanctions against Legal Persons*

26. Phase 2 Recommendation 6(a) asked Australia to increase the maximum fine against legal persons for foreign bribery. At that time, legal persons were punishable by a maximum fine of AUD 330 000 (EUR 275 000) which the Working Group and Australia both recognised as being too low. Australia implemented Recommendation 6(a) when it increased the penalties in February 2010 to a fine of not more than the greatest of the following:

- (a) a fine of AUD 11 million (EUR 9.18 million);
- (b) three times the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence, if the court can determine the value of the benefit; or
- (c) if the court cannot determine the value of that benefit, then 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

27. “Benefit” includes “any advantage and is not limited to property” (Criminal Code Act, Section 70.2). The Australian authorities state that “benefit” thus covers “non-financial and non-pecuniary advantages such as a customer base, a market share, or an undefined increase in the profit obtained from the sale of a good or service.” The last part of this statement suggests that the net profit, not gross revenues, of a contract won by bribery would be considered the “benefit”. However, there is no judicial authority on this point as it has yet to be interpreted and applied by the courts. The term “reasonably attributable” is undefined and will also require further interpretation by the courts.

28. Australia has not provided information concerning sanctions imposed against legal persons in practice for domestic bribery or other intentional economic crimes under the Criminal Code Act. This was likely because of a lack of convictions of such crimes against companies (see p. 11).

### *Commentary*

***The lead examiners welcome that Australia has significantly increased the maximum penalties against legal persons for foreign bribery. However, no legal persons have been sanctioned for foreign bribery. The lead examiners therefore recommend that the Working Group continue to follow up whether the sanctions imposed in Australia against legal persons for foreign bribery are effective, proportionate and dissuasive as practice develops.***

#### **(c) Summary vs. Indictable Offence**

29. Proceedings for foreign bribery may be commenced by indictment or as a summary offence. In the latter case, the maximum penalties are reduced. Summary offences can arise under two situations. First, a prosecutor, with the consent of the defendant, may decide to proceed with an offence summarily. The offence is then punishable by two years' imprisonment and/or an AUD 13 200 (EUR 11 020) fine. Second, a prosecutor may seek a court's permission to proceed summarily if the offence relates to property whose value does not exceed AUD 5 000 (EUR 4 174). The offence is then punishable by 12 months' imprisonment and/or an AUD 6 600 (EUR 5 510) fine.<sup>19</sup> As part of a plea bargain (see p. 27), a prosecutor may also agree to proceed summarily instead of by indictment.

30. The Phase 2 Report (paras. 156 and 158) expressed concerns over whether foreign bribery offences would be proceeded with summarily, and whether the resulting sanctions would be sufficient in these cases. Of the 60 convictions for the Commonwealth domestic bribery offence in 1984-2005, at least 27 were proceeded as summary offences. The Working Group decided to follow up the issue as practice developed (Follow-Up Issue 8(d)).

31. Australia provided some additional information on this issue in Phase 3. The *Securrency/NPA* proceedings were commenced by way of indictment. The Prosecution Policy of the Commonwealth (para. 6.12) requires a prosecutor to consider the certain factors when deciding whether to proceed summarily. One consideration is the nature and seriousness of the case. At the on-site visit, the CDPP stated that most foreign bribery cases would be considered sufficiently serious to require proceeding by indictment.

### *Commentary*

***Given that there have only been foreign bribery prosecutions arising from one case, the lead examiners reiterate Phase 2 Follow-up Issue 8(d), and recommend that the Working Group follow up the choice of proceeding in foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive.***

#### **(d) Sanctions for False Accounting**

32. Article 8 of the Convention requires Parties to prohibit foreign bribery-related accounting misconduct by companies, and to provide effective, proportionate and dissuasive sanctions for such misconduct. In Phases 1 and 2, Australia relied on Sections 286 and 1307 of the Corporations Act to implement Article 8. Section 286 requires a company to keep written financial records that "correctly record and explain its transactions and financial position and performance" and "would enable true and fair financial statements to be prepared and audited". This is a strict liability offence (i.e. proof of fault is not required) and may apply to legal persons. Breach of this provision by a natural person is punishable by six

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<sup>19</sup> Commonwealth Crimes Act 1914, Section 4J.

months' imprisonment and/or a fine of 25 penalty units, i.e. AUD 2 750 (EUR 2 295). Breach of the provision by a legal person is punishable by 125 penalty units, i.e. AUD 13 750 (EUR 11 478). Section 1307 prohibits the concealment, destruction, mutilation or falsification of any securities of or belonging to the company or any books affecting or relating to affairs of the company. The misconduct is punishable by 2 years' imprisonment and/or a fine of AUD 11 000 (EUR 9 183). This offence applies only to former or current officers, employees, and members of a company; it does not apply to legal persons. The Australian Securities and Investment Commission (ASIC) is principally responsible for enforcing both offences.

33. In previous evaluations, the Working Group did not appear to have considered whether the maximum sanctions available under these provisions are effective, proportionate and dissuasive. On its face, the available sanctions against legal persons are not adequate. ASIC described the maximum penalties available under Section 286 as "very minor". Within Australia's legal system and practice, substantially higher maximum penalties for this offence would be out of step with the strict liability nature of the offence. A Bill introduced in Parliament on 10 October 2012 would raise the amount of a penalty unit from AUD 110 to AUD 170. This would in turn increase the maximum penalties against legal persons under Section 286 to AUD 21 250 (EUR 17 739). Multiple counts of false accounting may be laid against an accused in a single case where supported by the facts. The total sanctions imposed must be of a severity that is appropriate in all the circumstances of the offences (Crimes Act Section 16A). Cumulative penalties are subject to the principle of totality, i.e. the aggregate sentence must be a just and appropriate measure of the total criminality.

34. In Phase 3, Australia appears to also rely on State-level criminal legislation to implement Article 8, but this approach brings other difficulties. In the *Securrency/NPA* case, three individuals have been charged with false accounting under the Victoria Crimes Act 1958 Section 83(1), one of whom has pleaded guilty to the charge. Legal persons have not been charged with this offence in the case potentially due to miscommunication and lack of co-ordination between AFP and ASIC (see p. 25). The offence is punishable by a maximum of 10 years' imprisonment and a fine of AUD 169 008 (EUR 141 000). Legal persons are punishable by a fine of up to AUD 845 040 (EUR 705 000). The maximum fines may not be effective, proportionate and dissuasive, given the size of bribes and contracts involved in many foreign bribery cases. A further concern is that criminal liability against legal persons at the State level relies on the identification theory. The Working Group has repeatedly criticised this approach (see p. 11). Relying on State-level offences also requires co-ordination with State authorities (see p. 26).

35. The Phase 2 Report (paras. 126-128 and Follow-up Issue 8(f)) expressed additional concerns about the sanctions for false accounting that have been imposed in practice. The Report noted that in 1991-2005, 18 prosecutions under Section 1307 resulted in fines of AUD 500-3 000 (EUR 417-2 504) and jail sentences of 6-12 months. The CDPP had not prosecuted any cases under Section 286 since at least 1991. There was no information on whether ASIC prosecuted any cases under this section. Since Phase 2, four individuals have been convicted under Section 286. Three were fined ranging from AUD 1 500-5 000 (EUR 1 300-4 000) and the other sentenced to a suspended term of imprisonment. There were also five convictions under Section 1307 which yielded three suspended jail sentences, one community service order and one fine of AUD 10 000 (EUR 8 300). There have not been convictions against legal persons for false accounting under the Corporations Act since Phase 2.

36. In the *Securrency/NPA* case, one individual has been sentenced to a suspended six-month sentence of imprisonment for one count of false accounting under the Victoria Crimes Act 1958.<sup>20</sup> The defendant was *Securrency's* chief financial officer and a company secretary. The misconduct concerned the use of false accounting records to hide commissions paid to a Malaysian agent. The court considered the

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<sup>20</sup> *R. v. Ellery*, [2012] VSC 349.



offending to be in the mid-range of false accounting offences. In passing sentence, the court took into account mitigating factors such as the defendant's lack of criminal history and personal gain from the offence. The defendant also pleaded guilty at the earliest opportunity and co-operated fully with the police, including by turning over physical evidence. He is expected to be an "important prosecution witness" in the subsequent trial of other accused. In light of these factors, the court granted a "substantial discount" to the sentence, which would otherwise have been of one year's imprisonment.

#### *Commentary*

*The lead examiners are concerned that Australia's maximum penalties against legal persons for false accounting are not effective, proportionate and dissuasive. The fines available under the Corporations Act Section 286, a strict liability offence, against legal persons is AUD 13 750 (EUR 11 478). The offence under Section 1307 is not available against legal persons. The maximum fines available under State-level legislation are higher but still inadequate. Furthermore, liability under these provisions is difficult to establish in practice because of the reliance on the identification theory.*

*The lead examiners therefore recommend that Australia increase the maximum sanctions against legal persons for false accounting under Commonwealth legislation to a level that is effective, proportionate and dissuasive within the meaning of Article 8(2) of the Convention, commensurate with Australia's legal framework. Alternatively, Australia could increase the maximum sanctions and broaden the scope of liability of legal persons for false accounting offences at the State level.*

*The lead examiners are also concerned with the low level of enforcement of Australia's false accounting offences. They therefore recommend that Australia vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate. Finally, the lead examiners recommend that the Working Group continue to follow up the actual sanctions imposed against natural and legal persons for false accounting in connection with foreign bribery as practice develops.*

#### **4. Confiscation of the Bribe and the Proceeds of Bribery**

37. Australia has modified the legislative and institutional framework for confiscation since Phase 2. Confiscation in foreign bribery cases is available under the Proceeds of Crime Act 2002 (POCA). Two types of conviction-based confiscation are available. First, upon a conviction for a "serious offence", property that is already subject to a restraining order will be automatically forfeited without a further forfeiture order. Foreign bribery is a "serious offence" if it causes, or is intended to cause, a benefit of at least AUD 10 000 (EUR 8 348) (POCA Sections 92-94 and 338). Second, if a person is convicted of foreign bribery, then a court must order the forfeiture of the *proceeds* of the offence if the Australian authorities have applied for the order, and the court is satisfied that the subject property is proceeds of an offence. A court may also order the forfeiture of an *instrument* of the offence. "Proceeds" include property situated in or outside Australia that is wholly or partly derived or realised, whether directly or indirectly, from the commission of the offence. "Instrument" includes property used or intended to be used in, or in connection with, the commission of an offence which presumably would cover a bribe (POCA Sections 48 and 329).

38. Two types of confiscation are also available without a conviction. First, a court must order forfeiture of property that has been restrained for at least six months if it is satisfied on a balance of probabilities that (a) the person whose conduct or suspected conduct formed the basis of the restraining order engaged in a "serious offence" (POCA Section 47); or (b) the property in question is proceeds of an

indictable offence (e.g. foreign bribery), or an instrument of a “serious offence” (see definition above). The Australian authorities must also take reasonable steps to identify and notify persons with an interest in the property (POCA Section 49). In some circumstances, the court may decline to order forfeiture if it is in the public interest to do so (POCA Sections 47(4) and 49(4)).

39. As an alternative to confiscation, a court may impose a pecuniary penalty order if satisfied that a person has been convicted of an indictable offence or has committed a “serious offence”. The value of the order is generally equal to the value of the benefits derived by the person from the offence. Where the benefits exceed AUD 10 000 (EUR 8 348), then the value of the order may be increased to cover the benefits derived from other unlawful activity (POCA Sections 116, 121 and 130).

40. The Working Group has questioned the application of confiscation in practice. The Phase 2 Report (para. 158) noted that, of the 60 domestic bribery convictions in 1984-2005, none resulted in confiscation, and only one pecuniary penalty order was imposed (in a case involving bribe-taking). The Working Group thus decided to follow up this issue (Follow-up Issue 8(d)). In Phase 3, Australia stated that, of the 19 convictions for domestic active and passive bribery under Commonwealth law from 1 July 2005 to 22 August 2012, 2 resulted in forfeiture orders under POCA Section 48. The two orders were for AUD 11 275 (EUR 9 400) and AUD 98 (EUR 81). Two superannuation orders under the Crimes (Superannuation Benefits) Act 1989 were also made and two were under consideration. These orders can be made in relation to an employee of the Commonwealth or a Commonwealth Agency if that person commits a “corruption offence”. Such orders require the employee’s contribution to superannuation not be paid or be recovered if already paid. Information from other sources indicates a general increase since 2002 in the total amount forfeited and the number of forfeitures and pecuniary penalty orders.<sup>21</sup>

41. On 14 January 2011, the Criminal Assets Confiscation Taskforce (CACTF) commenced operations to implement a more integrated and proactive approach towards recovering proceeds of crime. The AFP leads the Taskforce and contributes staff, including its existing Financial Investigations Teams which include forensic accountants and financial investigators. The ATO and Australian Crime Commission provide additional staff. The CACTF appears to focus mainly on proceeds of organised crime.<sup>22</sup> At the on-site visit, the CACTF stated that it would be involved in a foreign bribery case only if requested by the investigators which have conduct of the case. The AFP stated that its investigators would consider a role for the Taskforce in every foreign bribery investigation. However, the AFP did not explain the Taskforce’s role in the foreign bribery investigations to date.

### *Commentary*

***The lead examiners are concerned that, of the 19 recent convictions for domestic bribery from 1 July 2005 to 22 August 2012, only 2 resulted in forfeiture orders. The creation of the CACTF is encouraging, but its impact on foreign bribery cases remains to be seen. The lead examiners therefore recommend that Australia take further concrete steps (such as providing guidance and training) to ensure that its law enforcement authorities routinely considers confiscation in foreign bribery cases.***

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<sup>21</sup> Bartels, L. (2010), “A Review of Confiscation Schemes in Australia”, pp. 8-9. See also CDPP Annual Report 2010-2011, p. 151.

<sup>22</sup> See a description on the Taskforce at [www.afp.gov.au/policing/proceeds-of-crime.aspx](http://www.afp.gov.au/policing/proceeds-of-crime.aspx).

## 5. Investigation and Prosecution of the Foreign Bribery Offence

42. As noted at p. 7, the level of foreign bribery enforcement is extremely low, having regard to the significant number of Australian companies that are exposed to risks of foreign bribery solicitation. As noted at the outset, of the 28 foreign bribery allegations received by the Australian authorities, only 1 has resulted in a prosecution, and 21 other have been terminated or finalised without charges. Even the *Securrency/NPA* case was initially rejected without investigation when the AFP first learned of the allegations in 2008.

43. This evaluation examines how the Australian authorities have dealt with many of the 28 allegations received (Annex 4 of summaries of these cases). As described in greater detail below, there are concerns that some of these cases have been terminated or finalised before certain lines of inquiry or bases of liability were fully considered. Australia has made efforts to address its low level of enforcement. But these measures have yet to produce additional foreign bribery prosecutions.

### *Commentary*

*That Australia has only one case that has led to foreign bribery prosecutions since it enacted its foreign bribery offence in 1999 is of serious concern. Out of 28 referrals received, 21 have been concluded without charges, and only one has resulted in prosecutions. This level of enforcement is not commensurate with the size of its economy and the risk profile of Australian companies. The lead examiners therefore recommend that Australia review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials.*

### *(a) Principal Enforcement Agencies*

44. As in Phase 2, Australia's main criminal law enforcement bodies in foreign bribery cases are the AFP and the CDPP. The AFP is the main criminal investigative agency for offences against Commonwealth criminal law, including the foreign bribery offence in the Criminal Code Act. The AFP may also investigate State criminal offences that have a federal aspect. The AFP is independent at the operational level. The CDPP may issue written directions to the AFP Commissioner that may relate to particular cases (CDPP Act Section 11). The AFP routinely seeks legal advice from the CDPP during an investigation. The advice is not binding and the AFP has ultimate decision-making authority in an investigation. Once the AFP completes an investigation, the matter is referred to the CDPP to consider whether prosecution should be commenced.<sup>23</sup>

45. On a policy level, the Minister of Justice issues a direction to the AFP articulating priority areas designated by the government and which the AFP is required to address through its investigations.<sup>24</sup> The current direction identifies "serious fraud, money laundering and corruption" as a "strategic priority" in the context of "safeguarding the economic interests of the nation from criminal activities".<sup>25</sup> The AFP clearly stated that this statement of priority covers both foreign and domestic corruption.

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<sup>23</sup> Australian Federal Police Act Part II (particularly Section 8) and Section 17.

<sup>24</sup> AFP Act Section 37-38; Financial Management and Accountability Act 1997 Section 44; Ministerial Direction to the AFP (1 July 2010).

<sup>25</sup> [www.afp.gov.au/about-the-afp/governance/ministerial-direction.aspx](http://www.afp.gov.au/about-the-afp/governance/ministerial-direction.aspx)

46. ASIC is Australia's corporate, markets and financial services regulator. ASIC is the principal enforcer of the Commonwealth Corporations Act 2001 and ASIC Act 2001, including the false accounting offences in the Corporations Act (see p. 14). Additional Corporations Act offences could apply to company directors who authorise foreign bribery, or who learn that foreign bribery has been committed but failed to respond adequately.<sup>26</sup> ASIC's investigative powers include the examination of persons, inspection of books and audit information, requirements to disclose information, and search warrants to seize books. ASIC has used these powers to carry out numerous investigations and prosecutions of corporate crime generally, including corporate fraud. ASIC does not have legislated jurisdiction in relation to foreign bribery; its role is limited to investigations for the due administration of the corporations legislation referred to above. The AFP states that it has worked with ASIC, such as in the Australian Wheat Board case. ASIC officials in this case investigated the same target, but given its mandate, focused on breaches of corporations legislation, and not the corruption offences that were the focus of the AFP's inquiry. Evidence gathered by ASIC through coercive measures also could not be shared with the AFP absent a search warrant.

### *Commentary*

*As the principal corporate regulator, ASIC is in a prime position to interact with companies that may commit foreign bribery. In addition, its experience and expertise in investigating corporate economic crimes could be a useful complement to the AFP. The lead examiners therefore recommend that Australia take steps to ensure that ASIC's experience and expertise in investigating corporate economic crimes are used to assist the AFP to prevent, detect and investigate foreign bribery where appropriate. As stated at p. 16, the lead examiners also recommend that Australian law enforcement authorities, including ASIC, vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate.*

### **(b) Case Categorisation and Prioritisation Model (CCPM)**

47. As in Phase 2, after the AFP receives a foreign bribery allegation, it applies a two-stage process to determine whether to open an investigation. First, a preliminary assessment is conducted to determine whether the allegation should be formally "evaluated". If the allegation meets this test, then a formal evaluation is conducted by applying the Case Categorisation and Prioritisation Model (CCPM). The CCPM is essentially a decision-making framework. It requires consideration of numerous factors such as the type of crime; the impact of the matter on Australian society; the importance of the matter to the AFP and the referring agency; and the resources required to investigate the matter. In Phase 2 (paras. 50-52), the Working Group asked Australia to amend a publicly available document explaining the CCPM to expressly classify foreign bribery as an offence with "high impact" on Australian society. The AFP has made the requested amendment. Phase 2 Recommendation 2(a) is therefore fully implemented.

### **(c) Sources of Foreign Bribery Allegations**

48. In Phase 2 (paras. 53-56 and Recommendation 2(b)), there were concerns that the AFP would not consider information from the following sources as the basis for opening an investigation: (i) media reports, (ii) incoming mutual legal assistance (MLA) requests, and (iii) foreign court documents. Instead, foreign bribery investigations may only be triggered by : (a) a formal referral, i.e. a complaint from an

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<sup>26</sup> These include the offence against a director who recklessly or dishonestly fail to exercise their powers and discharge their duties for a proper purpose or in good faith in the best interests of the corporation (Section 184); and offences of making false or misleading statements, or giving false information in relation to the affairs of the company.

individual or government agency; (b) proactive intelligence gathering by the AFP; (c) information that surfaces while investigating a different offence; and (d) proactive investigation of persons or organisations where foreign bribery is suspected.

49. The AFP's position on foreign bribery allegations in media reports has evolved. Initially in Phase 2, the AFP stated that it would not initiate foreign bribery investigations based on media reports, regardless of the report's credibility (para. 53). After the on-site visit, it stated that it would review media reports that were corroborated by independent information (para. 54). The AFP subsequently undertook orally to the Working Group to evaluate foreign bribery allegations contained in "credible media reports" (Written Follow-Up Report para. 7). In Phase 3, the AFP stated in the questionnaire responses that it "does not search all media sources. While the AFP does not generally evaluate media articles, recently the AFP has used information contained in a media article to establish further lines of enquiry in a current investigation." This suggests that the AFP would use media reports to further an opened investigation but not as the sole basis for starting an investigation. At the on-site visit, the AFP said that the media was important and was a source of intelligence and witness information.

50. As for MLA requests and foreign court documents, the AFP stated in Phase 2 (paras. 55-56) that an incoming MLA request would trigger a domestic investigation only if it provided "clear evidence" of "substantial allegations" of foreign bribery. Australia also declined to investigate allegations contained in foreign court documents which claimed that an Australian public official had engaged in foreign bribery. In its 2008 Written Follow-Up Report (para. 7), Australia orally undertook to the Working Group to evaluate foreign bribery allegations contained in "publicly available documents from foreign courts" and in MLA requests. In Phase 3, Australia did not refer to this oral undertaking. Instead, the AFP stated that it would evaluate information that "is made available" but that it "does not search all [...] foreign courts for the information". No information was provided concerning allegations in MLA requests. ASIC added that it would forward to the AFP foreign bribery allegations contained in requests for information under the IOSCO MMOU (see p. 39) only with the consent of the requesting authority.

51. These approaches have yet to lead to actual investigations. The AFP has considered 28 foreign bribery allegations for investigation since Phase 2. According to Australia, these cases came from referrals from government agencies, members of parliament, non-government agencies, members of the public, and corporations. None originated from a media report, MLA request, or foreign court document. In the *Securrency/NPA* case, Australian media referred to foreign press articles that may have emerged as early as 2007 and which described the company's possible misconduct.<sup>27</sup>

52. Overall, the evaluation team believes that Australia should be more proactive in seeking foreign bribery allegations. For example, the AFP's International Liaison Network consists of over 93 officers stationed in 30 countries, including many that are perceived to have high levels of corruption.<sup>28</sup> Officers in the Network, along with Australian embassy officials, are well-positioned to come across foreign bribery allegations involving Australian companies in the media, court documents, and from other sources abroad. These embassy and AFP officials should thus be instructed to be alert to allegations from these sources. They should also proactively reach out to bodies in these foreign countries (such as local business organisations and anti-corruption NGOs) that may have information about Australian companies engaging in foreign bribery. At the international level, the AFP should network with bodies in the anti-corruption community, such as multilateral development banks and NGOs. In addition, the AFP should evaluate all foreign bribery allegations involving Australian entities contained in incoming MLA requests to determine

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<sup>27</sup> Sydney Morning Herald (24 January 2011), "RBA Must Investigate the Securrency Board".

<sup>28</sup> [www.afp.gov.au/policing/international-liaison/international-network.aspx](http://www.afp.gov.au/policing/international-liaison/international-network.aspx).

whether to open a domestic investigation. As well, whenever ASIC receives an IOSCO MMOU request that contains similar information, it should proactively seek the permission of the foreign authorities to forward the information to the AFP.

### *Commentary*

*The AFP has received 28 foreign bribery allegations since Phase 2. While this figure is significant, the relevant Australian authorities should be more proactive in gathering information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations. In 2008, the AFP stated to the Working Group that they were “willing to undertake evaluations on suspected foreign bribery instances based on credible media reports, publicly available documents from foreign courts or mutual legal assistance requests”.<sup>29</sup> Since then, the AFP has not opened a foreign bribery investigation based on information from these sources.*

*The lead examiners welcome the establishment by the AFP of a Foreign Bribery Panel of Experts (see p. 22) to advise foreign bribery investigation teams. They recommend that the Panel consider the Working Group’s recommendations to the AFP. Finally, the lead examiners note that whether securities regulators proactively seek the permission of the foreign authorities to forward foreign bribery allegations contained in an IOSCO MMOU request to other law enforcement authorities, is a horizontal issue among Working Group members.*

#### *(d) Terminated Foreign Bribery Cases*

53. As mentioned at p. 7, the AFP has received 28 foreign bribery allegations since Phase 2. To date, 12 of these allegations have been “terminated”, i.e. evaluated and then rejected for investigation. Another 9 cases were “finalised”, i.e. closed after an investigation had been conducted. This section examines issues raised by some of these closed cases. The names of some cases have been anonymised at Australia’s request. The section also considers the *Securency/NPA* case which has resulted in a prosecution but only after the AFP initially declined to investigate the matter.

##### *(i) Lack of Sufficient Inquiries before Rejecting an Allegation for Full Investigation*

54. The AFP described the inquiries that it would make before declining to conduct a full investigation of a foreign bribery allegation (i.e. termination). As described earlier, the AFP conducts an initial assessment followed by an evaluation with the CCPM before deciding whether to accept an allegation for investigation. One factor in this determination is the sufficiency of evidence. The AFP explained that an allegation must be sufficiently detailed and more than “mere rumour or innuendo” before it would be evaluated. Media reports containing foreign bribery allegations must be corroborated by independent information (see p. 19). If the necessary details are missing from the allegation, then the AFP would ask the party who referred the allegation for more information. The AFP would not necessarily speak to a journalist who writes a press article containing foreign bribery allegations, or seek information or documents from other sources to corroborate the allegation.

55. The *Joint Venture Buyout Case* concretely illustrates the inquiries that would be made before a foreign bribery case is terminated without a formal investigation. Media reports indicated that an Australian company bought out its joint venture partner’s stake in a gold mine in a foreign country. To

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<sup>29</sup> Phase 2 Written Follow-up Report, para. 7.

facilitate the transaction, part of the proceeds of the buy-out were allegedly channelled to board members of the joint venture partner. These board members reportedly were closely related to public officials of the foreign country, thus raising the prospect that these officials were the ultimate beneficiaries of the buy-out proceeds. The AFP declined to open an investigation because it 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. 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.

56. The initial rejection of the *Securrency/NPA* case also shows what inquiries the AFP would make before terminating a foreign bribery case without a full investigation. In April 2008, a Securrency employee informed the AFP of foreign bribery allegations involving Securrency. The AFP explained that the officer in charge of the case spoke to the employee, but then incorrectly applied the CCPM by misunderstanding the nature and seriousness of the offence. The officer then concluded that there was insufficient information to open an investigation. It was not until after a second referral by the Securrency board of directors in May 2009 that the AFP opened an investigation which led to the numerous foreign bribery charges that are currently before the courts. The AFP Commissioner has admitted publicly that the AFP "could have done more" to act on the initial complaint in 2008.<sup>30</sup> AFP officers expressed similar views at the on-site visit. A subsequent "quality assurance review" of the *Securrency/NPA* case, the report of which was finalised in August 2010, made 29 recommendations for improving future multijurisdictional investigations. Many of the recommendations are applicable beyond the *Securrency/NPA* case.

57. The AFP recognises that it may have been overly stringent in filtering out foreign bribery allegations for investigation. In August 2011, the AFP reviewed 17 foreign bribery cases that had been closed without charges, including the 7 cases that had been evaluated but rejected for investigation. The review was initiated by an AFP Commander shortly after he had assumed responsibilities for dealing with foreign bribery matters. The review was conducted by AFP officers who do not normally deal with foreign bribery cases so that a "fresh look" could be taken at the cases in question. The review found two cases that had been rejected for investigation before fully exhausting all of the normal lines of inquiry. Both cases were subsequently re-opened and closed again after these lines of inquiry were investigated.

58. At the on-site visit, the AFP stated that it would create a Foreign Bribery Panel of Experts comprising officers with prior foreign bribery experience. The Panel would take part in "periodic operations reviews" of foreign bribery cases to provide expert knowledge on best practices, to identify areas for improvement, and to monitor the allocation of resources. The Panel will also assist and oversee the regional Operations Committee that evaluates all foreign bribery referrals and decides whether to open an investigation. After the on-site visit, the AFP stated that the Panel had become operational.

### *Commentary*

***The lead examiners are concerned that the AFP may have closed foreign bribery cases before thoroughly investigating the allegations. This may be supported by the Joint Venture Buyout Case, the Securrency/NPA case, and the overall percentage of foreign bribery cases that have been closed without investigation. The lead examiners recommend that the AFP take sufficient steps to ensure that foreign bribery allegations are not prematurely closed. In this regard, the lead examiners commend Australia for conducting a review to address concerns that insufficient inquiries were made in foreign bribery cases.***

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The Age (26 May 2010), "Bank Bribery Probe Widens to Europe and Asia".

***The lead examiners further recommend that the AFP's Foreign Bribery Panel of Experts consider the Working Group's recommendations to the AFP.***

(ii) *Cases Involving Related Companies*

59. The AFP may not have been fully exploring all potential avenues for exercising jurisdiction. In the *Phosphate Mining Case*, company X allegedly bribed parliamentarians in a foreign country to obtain a phosphate mining permit. There were in fact two corporate entities, X(A) and X(B). Only X(B) was implicated in the allegations; X(B) was incorporated in a third country, while X(A) was incorporated in Australia. The two companies did not have cross shareholdings or common directors, and the owners of both companies were not Australian nationals. For these reasons, the AFP concluded that it did not have jurisdiction and could not proceed with a foreign bribery investigation on the basis of the evidence available to it.

60. After the on-site visit, in response to a question of whether financial flows between X(A) and X(B) had been examined, the AFP stated that it could not investigate financial transactions from foreign-owned companies to countries other than Australia. The AFP opened a separate investigation concerning possible acts of foreign bribery that were not related to the original allegation of foreign bribery, which remains finalised.

***Commentary***

***The lead examiners are seriously concerned that the AFP may not have been fully exploring all potential avenues for exercising jurisdiction in foreign bribery cases. The 2009 Anti-Bribery Recommendation Annex I.C states that "Member countries should ensure that [...] a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise or give a bribe to a foreign public official on its behalf." In the lead examiners' view, the term "related" in this context should be interpreted purposively. The AFP and other relevant investigative agencies should therefore continue to take steps to ensure that it explores all avenues for exercising jurisdiction over related legal persons in foreign bribery cases. The AFP stated that its recently-established Foreign Bribery Experts Panel would create an aide m emoire to ensure that future investigations would consistently consider the involvement of related legal persons. The lead examiners recommend that the Working Group follow up the implementation of the aide m emoire.***

(iii) *Terminations Due to Deferrals to Other Agencies*

61. In two terminated cases, the AFP referred the matter to another agency instead of conducting domestic investigations. The *Casino Foreign Bribery Case* concerned an Australian company that owned and managed casinos, including two in Macau, China. In 2008, a former senior public works official in the Macau Government was convicted of accepting bribes. The indictment against the official listed the two casinos in question as among at least ten "suspect projects". The AFP has not commenced a domestic investigation, but has merely exchanged information with the authorities in Macau in July 2009. There was no indication that the Australian company would be prosecuted in Macau.

62. The *Mining Company Case* raises similar concerns. Company Z is a multinational mining company with headquarters in Australia and management offices overseas. In 2010, the company announced that it had disclosed to the US authorities evidence that it had uncovered regarding possible foreign bribery. The AFP reacted following a referral from the Australian Attorney-General's Department, which in turn had received information from the US authorities. Based on material received from the US, the AFP identified suspicious transactions that had been recorded as legitimate business payments. After



consulting the US authorities and ASIC, the AFP referred the case to ASIC without conducting an investigation. At the on-site visit, ASIC stated that it was only concerned with issues in this case relating to corporate governance and accounting standards, given its mandate is limited to investigations for the due administration of corporations legislation (see p. 18). ASIC ultimately did not commence proceedings because Company Z had documented the suspicious payments and disclosed them to the market. The end result is that no Australian body conducted an investigation in Australia into whether crime – including foreign bribery – had been committed and whether Company Z’s staff in Australia were complicit in the crime.

63. After the on-site visit, the AFP explained that it does consider joint investigations and/or parallel investigations with other enforcement bodies. The AFP would not, however, duplicate investigations where possible, but would rather assist and support a partner enforcement body, and achieve maximum impact through the use of the most appropriate agency. Avoiding duplication is an unquestionably worthwhile goal. However, such concerns did not arise in the *Mining Company Case* given ASIC’s decision not to investigate this matter.

#### ***Commentary***

***There are concerns that the AFP has deferred to other enforcement bodies rather than conduct its own investigations in the foreign bribery cases referred to above. The lead examiners recommend that the AFP and other enforcement bodies should, as a matter of policy and practice, continue to systematically consider whether it would be appropriate to conduct concurrent or joint investigations. This is especially the case when foreign bribery is allegedly committed by a company that has its headquarters or substantial operations in Australia.***

#### ***(e) Foreign Bribery-Related False Accounting and Money Laundering***

64. There are continuing concerns about Australia’s enforcement of its false accounting offences. As mentioned at p. 14, the Phase 2 Report (paras. 126-128) noted that there were 18 false accounting prosecutions under Section 1307 of the Corporations Act in 1991-2005, and none under Section 286. The Working Group accordingly decided to follow up this issue (Follow-up Issue 8(f)). Since 2005, there have been nine convictions under these sections.

65. The *Securrency/NPA* case illustrates the basis for these concerns. A former executive of Securrency has been charged with foreign bribery-related false accounting under State-level criminal legislation. However, the companies (Securrency and NPA) have not been charged with this offence. At the on-site visit, the AFP stated that it referred the case to ASIC. ASIC stated, that it only considered (and eventually declined) charges against the companies’ directors for breaches of duties. It did not consider whether to charge the two companies with false accounting since it believed that the criminal charges against the companies sufficiently captured the alleged misconduct. In the end, neither the AFP nor the ASIC considered false accounting charges against Securrency or NPA.

66. In the *Gold Mining Case*, the AFP may not have adequately considered false accounting and money laundering charges as an alternative to substantive foreign bribery charges. In 2007, the AFP received a complaint that a company listed in Australia had bribed officials in a Southeast Asian country to secure a contract to develop a gold mine. The AFP terminated the matter because foreign bribery was not an offence under Australian law before 1999. It did not consider pursuing money laundering and false accounting offences, which did exist before 1999. Furthermore, publicly available information indicates that the company in question continues to operate (and thus generate revenues from) the gold mine. These revenues could conceivably be confiscated in Australia as proceeds of crime, the crime in question being

bribery of a (domestic) official under the laws of the foreign country where the bribery occurred. The AFP has since indicated that it would refer the matter to the Criminal Assets Confiscation Taskforce.

### *Commentary*

*The lead examiners are concerned that, apart from the Securrency/NPA case, none of the foreign bribery allegations received by the AFP have resulted in foreign bribery-related charges such as money laundering and false accounting. They therefore recommend that the AFP routinely consider investigations of foreign bribery-related charges such as false accounting and money laundering, especially in cases where a substantive charge of foreign bribery cannot be proven. The AFP stated that its recently-established Foreign Bribery Experts Panel would create an aide mémoire to ensure that future investigations would regularly consider alternate charges. The lead examiners recommend that the Working Group follow up the implementation of the aide mémoire.*

#### *(f) Case Referral and Co-ordination*

##### *(i) Referrals and Co-ordination between the AFP and ASIC*

67. The *Securrency/NPA* case highlights the potential for miscommunication and a lack of co-ordination between the AFP and ASIC. As described above, the AFP referred the *Securrency/NPA* case to ASIC to consider false accounting charges against the two companies. ASIC, however, only considered charges for breaches of directors' duties given its mandate. In addition, the AFP stated that ASIC may give AFP authority to prosecute offences in the Corporations Act but this was not done in the *Securrency/NPA* case. The AFP also charged an individual with false accounting under State laws, but did not do so against the companies.

68. The *Mining Company Case* (see p. 23) raises similar questions. The AFP referred the case to ASIC without conducting any investigation. ASIC in turn was only interested in confirming whether the company recorded and disclosed the suspicious payments to the market, again because its role is limited to investigations for the due administration of corporations legislation. In the end, neither body investigated.

69. The absence of a clear framework and rules for referral of cases may have been a cause of this problem. The AFP has MOUs with other agencies (e.g. the CDPP) but not with ASIC that would apply to the referral of foreign bribery cases. At various points in on-site visit, the AFP stated that the *Securrency/NPA* was referred to ASIC because these matters were "better managed by ASIC", that they were "a better fit" for ASIC, or that ASIC could obtain "a better outcome". Why referral was "better" was not explained in concrete terms. In any event, these statements by the AFP and ASIC at the on-site visit about case referral and acceptance are not clearly reflected in written policies or agreements between the two bodies.

### *Commentary*

*The lead examiners are concerned that miscommunication between the AFP and ASIC may have left important aspects of foreign bribery cases uninvestigated. They therefore recommend that the two bodies clearly define in writing their roles and responsibilities, and rules for case referral and information sharing with greater precision.*

##### *(ii) Referrals and Co-ordination between the AFP and Other Commonwealth Bodies*

70. The Australian Prudential Regulatory Authority (APRA) regulates Australia's financial services industry. Although its focus is on prudential regulation, APRA may detect foreign bribery committed by a

regulated entity (Phase 2 Report para. 67). APRA may also punish officials of a regulated entity that has committed foreign bribery (see p. 12). In Phase 2, APRA stated that it would refer foreign bribery cases to the AFP. The Phase 2 Report nevertheless raised concerns that APRA is not required by law or directives to make such reports. Recommendation 2(e)(i) thus asked AFP and APRA to enter into a formalised agreement, e.g. an MOU similar to those between the AFP and other Commonwealth agencies.

71. In Australia's 2008 Written Follow-Up Report (p. 14), APRA stated that it had carefully considered Recommendation 2(e)(i). It concluded that the existing documents applying to all Australian civil servants on reporting fraud and crime is sufficient; a specific agreement with the AFP was unnecessary. However, there are concerns that these documents only address fraud and corruption of Australian officials but not foreign bribery. At the on-site visit, APRA added that it had an MOU with ASIC but not with the AFP. APRA also pointed out that it can provide to the AFP information that "will assist [the AFP] to perform its functions or exercise its powers".<sup>31</sup> However, these provisions fall short of mandating reporting or prescribing a procedure for doing so.

72. The Australian Crime Commission (ACC) is Australia's national criminal intelligence body that focuses on serious and organised crime. The ACC Board may authorise "intelligence operations" and "investigations [related to] federally relevant criminal activity", which includes an offence of foreign bribery under the Criminal Code Act. In conducting such authorised operations and investigations, the ACC has broad powers, including the ability to compel the provision of information and documents from individuals and government agencies, and to obtain search warrants. The ACC is required to work in co-operation with law enforcement agencies so far as is practicable (ACC Act Section 17). The ACC has assisted in several foreign bribery investigations. At the on-site visit, the ACC stated that it could not investigate foreign bribery cases without the ACC Board's authorisation. Instead, it would pass on intelligence in these cases to the AFP whenever possible.

### *Commentary*

***The lead examiners reiterate Phase 2 Recommendation 2(e)(i) and recommend that the AFP and APRA set out in writing, following consultations with each other, their complementary roles and responsibilities in foreign bribery and related cases.***

#### *(iii) Referrals and Co-ordination between the AFP and State Law Enforcement Authorities*

73. Australia's federal system allows both the Commonwealth and State governments to enact criminal laws. Commonwealth and State laws may apply concurrently to the extent that the latter is not inconsistent with the former. Each State's police force and prosecutor's office are principally responsible for enforcing the State's criminal laws. Many States also have specialised anti-corruption agencies, though these generally deal only with domestic corruption cases.

74. None of the States has enacted a specific foreign bribery offence, but many have general corruption or bribery offences that cover foreign bribery. There are also concurrent false accounting offences in the Commonwealth Corporations Act and State-level criminal legislation (see p. 14). A State authority has jurisdiction to charge an offence under its laws if the crime occurred wholly in the State. If the crime occurred partly or wholly outside the State, then jurisdiction arises if there is a "real and substantial connection" between the crime and the State. This test could be met if the briber was a company located in the State, according to one State-level prosecutor at the on-site visit. Given this low threshold, most foreign bribery cases would result in concurrent State and federal jurisdiction.

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<sup>31</sup> APRA Act 1998 Section 56(5)(a); APRA Regulations 1998, Regulation 5.

75. Even if it has jurisdiction, whether a State-authority would investigate and prosecute a particular foreign bribery case under State law depends on an exercise of discretion. How that discretion is exercised differs between States. In Phase 2 (para. 71), Commonwealth officials indicated that the State authorities would be “happy to turn over foreign bribery cases to the AFP” and the AFP stated that it did not envisage foreign bribery investigations at the State level. The NSW authorities stated that it may investigate a Commonwealth offence (e.g. foreign bribery) if the crime is combined with State-level offences. In Phase 3, the NSW authorities indicated that they would not investigate foreign bribery cases. The authorities from the State of Victoria indicated that they may retain primacy over a foreign bribery investigation in some cases. Factors to be considered include the complexity of the case, and the priorities given by the State and Commonwealth authorities to the crime. Another factor is the capacity of the State police, since the AFP is a much smaller police force than the Victoria Police. In practice, the State authorities have not referred any foreign bribery cases to the AFP.

76. There may be valid reasons for different State authorities to apply different tests for referral, e.g. differences in legal systems. However, the AFP may not have a common and agreed understanding with each State authority on when cases would be referred. This lack of communication could lead to the incomplete investigation of foreign bribery allegations.

77. A further question is whether the State authorities would inform their Commonwealth counterparts of foreign bribery allegations and investigations. Phase 2 Recommendation 2(e)(ii) asked the AFP to consider establishing measures (e.g. MOUs) in this regard. In Phase 3, the AFP has yet to implement MOUs. The AFP and State and Territorial authorities meet regularly to discuss co-ordination of enforcement efforts, but it is unlikely that these meetings deal with the referral of all cases.

78. There is also a lack of awareness among State-level law enforcement officials of the foreign bribery offence, according to the State authorities at the on-site visit. Australia stated that State law enforcement officials who are informed of a foreign bribery allegation would likely recognise that some sort of offence had been committed and make further enquiries. Nevertheless, it remains unclear whether the allegation would necessarily be forwarded to the AFP.

### *Commentary*

***Phase 2 Recommendation 2(e)(ii) suggested that the AFP consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territorial police and anti-corruption bodies to the AFP even where a State or Territorial law establishes a bribery offence broad enough to cover foreign bribery. Given the continuing lack of referrals from State authorities, the lead examiners reiterate this recommendation and recommend that Australia establish clear guidelines as to when each State and Territorial authority would refer foreign bribery cases to the AFP or commence its own investigations. They further recommend that Australia raise awareness of the foreign bribery offence among State-level law enforcement authorities involved in investigating economic crime.***

### **(g) *Plea Bargaining and Self-Reporting***

79. Australia’s legal system contains some elements for plea bargaining and co-operation from offenders. The CDPP may enter into an agreement with a defendant to provide testimonial or prosecutorial immunity. It may enter into an agreement in which the defendant pleads guilty to some of the charges or to a lesser charge(s), with the remaining charges dropped or not taken into account. The CDPP may agree to proceed with a charge summarily rather than by indictment. The CDPP may agree to not oppose a defence

submission to the Court on the appropriate sentence range. The Commonwealth Prosecution Policy describe the factors that must be considered when deciding whether to enter into one of these agreements.<sup>32</sup> As described at p. 15, one defendant in the *Securrency/NPA* case has agreed to co-operate with the authorities.

80. So far, at least three companies have reported to the AFP evidence of foreign bribery committed by individuals related to the company. All three cases have led to on-going investigations. The AFP expects to see more such referrals, as did some private sector representatives at the on-site visit, though others were more sceptical. At the on-site visit, the AFP stated that “standard procedures” for investigations are followed when it receives reports of foreign bribery from companies, and that it expects the “full co-operation” of companies that report.

### *Commentary*

*To ensure transparency and consistency in plea bargaining and self-reporting, the lead examiners recommend that Australia develop a clear framework that addresses matters such as the nature and degree of co-operation 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 co-operation; measures to monitor the company’s compliance with a plea agreement; and the prosecution of natural persons related to the company.*

### *(h) Resources and Expertise*

81. As in Phase 2, the AFP does not have a dedicated unit for foreign bribery. Instead, these cases are assigned to the AFP’s Special References portfolio (SRP). The SRP is generally responsible for all politically sensitive and complex cases, such as high-level corruption, war crimes, espionage, crimes at sea, nuclear proliferation, and Parliamentary leaks. Other parts of the AFP handle economic crimes such as fraud and money laundering. The Criminal Assets Confiscation Taskforce (see p. 17) is also outside the SRP.

82. Although foreign bribery matters are assigned to the SRP, AFP officers outside the unit are involved in the actual investigation. The AFP uses a “flexible resourcing model”. The SRP is responsible for overseeing foreign bribery cases. Case teams are assembled using AFP officers from both within and outside the SRP. This arrangement allows case teams to draw on officers with special expertise not found within the SRP, such as forensic accounting and information technology. The size of a case team can fluctuate during the course of an investigation depending on operational needs.

83. The flexible resourcing model may enhance resource usage and efficiency but may also have certain drawbacks. Foreign bribery cases must compete for resources such as forensic accountants with other crime types. Flexible resourcing also means that investigators with experience in foreign bribery cases are not necessarily called upon to work on subsequent cases involving the same crime.

84. The AFP overall may also, until recently, have had limited expertise and experience in investigating corporate economic crimes. Several civil society representatives at the on-site visit were of this view. Until the recent foreign bribery investigations such as the on-going *Securrency/NPA* case, there have been few Commonwealth-level criminal investigations of companies by AFP, especially for intentional economic crimes. Most corporate commercial crimes such as fraud are investigated by State-level police or ASIC.

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<sup>32</sup> CDPP Act Sections 9(6), 9(6D) & 9(6E); Commonwealth Prosecution Policy paras. 6.6-6.10 & 6.14-21.

85. To the AFP's credit, it has taken steps to ameliorate the situation. At the on-site visit, the AFP stated that it recognised the need to dedicate resources to foreign bribery cases, and that it was considering upgrading its staff's skills in this area. It has invested in a new software tool to process and manage digital data in its current foreign bribery cases. The tool will likely benefit other foreign bribery investigations in the future. As described at p. 22, the AFP has established a Panel of Experts to advise and oversee investigation teams in future foreign bribery cases. As a follow up to the on-site visit, the AFP stated that the Panel and law enforcement agencies in other countries have formed an International Foreign Bribery Task Force to liaise and meet annually to exchange and discuss best practices. Two Panel members will also be seconded in 2012 to the US Securities and Exchange Commission and Federal Bureau of Investigation.

86. In Phase 3, the AFP stated that its current resources are sufficient to investigate foreign bribery allegations. In 2009, when the AFP terminated an investigation into breaches of UN Oil-for-Food sanctions in the *Australian Wheat Board* case after seeking independent legal advice, there had been public concerns that the AFP was under-resourced.<sup>33</sup> However, the current *Securrency/NPA* case team comprised a core of 20 officers working full-time on the investigation due to the unusual complexity of the case. Of concern are the resources of the CDPP, which is experiencing a 25% decrease in its budget in nominal terms from 2009-2015.<sup>34</sup> According to a Parliamentary Library paper, "while the AFP's investigation into matters arising from the Cole Inquiry [into the *Australian Wheat Board* case] had been under resourced, its current investigation into Securrency and NPA has sufficient resources. What is less clear is the level of resources the CDPP will be able to devote to prosecuting the resulting cases."<sup>35</sup> The AFP, however, stated that it has not experienced difficulties in obtaining legal advice from the CDPP.

### *Commentary*

*The AFP has adopted a flexible resourcing model which applies to all crime types. The model has advantages, but it also raises concerns about the sufficiency of resources. These concerns are exacerbated by the AFP's past lack of experience in corporate investigations and the CDPP's diminishing resources. The lead examiners therefore recommend that the AFP continue to provide its officers with additional training in foreign bribery. Finally, despite an increase in foreign bribery investigations, the resources of the CDPP have not increased correspondingly. They therefore recommend that Australia take steps to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases.*

#### *(i) Article 5 of the Convention*

87. Article 5 of the Convention states that, "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved." Commentary 27 on the Convention adds that, "Article 5 recognises the fundamental nature of national regimes of prosecutorial discretion. It recognises as well that, in order to protect the independence of prosecution, such discretion is to be exercised on the

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<sup>33</sup> The Australian (29 August 2009), "Federal Police Drop AWB Investigation".

<sup>34</sup> CDPP Annual Report 2010-2011, p. vii.

<sup>35</sup> Barker, C. (7 February 2012), "Australia's Implementation of the OECD Anti-Bribery Convention", Parliamentary Library Background Note, p. 16. The note is a research paper authored by the Commonwealth Parliamentary Library. It does not reflect the views of Parliament, and may refer to open source materials.

basis of professional motives and is not to be subject to improper influence by concerns of a political nature.”

88. Since Phase 2, the CDPP has taken steps to ensure compliance with Article 5. On 11 September 2006, the CDPP issued a direction to all prosecutors to disregard Article 5 factors when deciding whether to prosecute a foreign bribery case. In November 2008, Australia added Annexure A to the Commonwealth Prosecution Policy. The document specifically prohibits prosecutors from being influenced by Article 5 prosecutors when deciding whether to prosecute a person for foreign bribery. At the on-site visit, the CDPP added that prosecutorial decisions are generally subject to internal review by senior prosecutors. Prosecutors that do not abide by the Prosecution Policy may be subject to disciplinary action.

89. Australia could strengthen its implementation of Article 5 by taking similar measures for other bodies involved in foreign bribery cases. The AFP has regard to the Prosecution Policy when selecting cases for investigation<sup>36</sup> but it is not bound by the Policy. The AFP’s National Guideline on Politically Sensitive Investigations does not refer to Article 5. The AFP stated that it is independent of the executive branch of government, but Article 5 is not merely concerned with political interference. It also prohibits prosecutors and investigators – acting independently and free from political influence – from considering the factors enumerated in the Article in foreign bribery cases. In any event, the AFP has undertaken to update its existing National Guideline or create a new National Guideline that reflects Article 5.

#### *Commentary*

*The lead examiners commend Australia for amending the Commonwealth Prosecution Policy to expressly prohibit prosecutors from being influenced by the factors described in Article 5 of the Convention. They recommend that the AFP and other bodies involved in foreign bribery investigations and prosecutions take similar measures to continue to ensure that they are not impermissibly influenced by factors listed in Article 5.*

#### *(j) Investigative Techniques*

90. Concerning bank and tax information, the AFP may apply to a Magistrate to issue a notice requiring a bank to produce relevant information (Crimes Act Sections 3ZQO and 3ZQR). The Australian Taxation Office has discretion (but is not obliged) to provide to the AFP tax information that is subject to tax secrecy. The Phase 2 Report (para. 94) noted that the ATO had an excellent record of disclosing information to law enforcement. In Phase 3, the AFP stated that it did not have difficulties obtaining information from the ATO. The requirement of a judicial search warrant to obtain information held by ASIC is discussed at p. 25.

91. Sections 17-19 of the Proceeds of Crime Act 2002 (POCA) allows pre-trial freezing of assets in foreign bribery cases. AUD 41 million (EUR 34.2 million) were restrained in 2010-11, more than double the previous year.<sup>37</sup> However, freezing orders have never been ordered in foreign bribery cases.

92. Telecommunications interception is used by Australia in foreign bribery investigations. After the on-site visit, Australia indicated that Parliament would consider telecommunication interception legislation in foreign bribery cases as part of broader reforms on national security. In addition, when the recently passed Cybercrime Legislation Amendment Bill 2012 enters into force, law enforcement agencies in

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<sup>36</sup> Memorandum of Understanding, AFP and CDPP (6 February 2007), Section 2.1.

<sup>37</sup> AFP Annual Report 2010-11, pp. 2 & 4. See also Bartels, L. (2010), “A Review of Confiscation Schemes in Australia”, p. 9.

foreign bribery cases will have expanded capacities to access communications such as emails and text messages. This development is welcomed.

## **6. Money Laundering**

93. Sections 400.3 to 400.9 of the Criminal Code Act criminalise the laundering and possession of the proceeds of crime. Bribery of foreign public officials is a predicate offence for money laundering, and sanctions imposed depend on the level of intent and the amount being laundered. Since Phase 2, the Criminal Code Act has been amended to enhance the ability of law enforcement agencies to prosecute persons that launder overseas the proceeds of crime. Australia has also increased penalties under Section 400.9 for laundering proceeds of crime worth over AUD 100 000 (EUR 83 480) to three years' imprisonment.

94. The Australian Transaction Reports and Analysis Centre (AUSTRAC) is the anti-money laundering and counter-terrorism financing regulator as well as the Financial Intelligence Unit (FIU). Two statutes govern reporting to AUSTRAC of suspected money laundering. The Financial Transaction Reports Act 1988 (FTR Act) requires "cash dealers" (e.g., financial institutions, casinos, insurers) to report significant cash or currency transfers, international funds transfer instructions and suspicious transactions (SUSTR). The Anti-Money Laundering and Counter Terrorism Financing Act 2006 (AML/CFT Act) broadens the scope of reporting entities. It also imposes additional obligations to take preventive measures and conduct due diligence. Reporting entities are required to report threshold transactions, international funds transfer instructions and suspicious matters (SMRs).

95. Phase 2 Recommendation 1(d) asked Australia to raise awareness among cash dealers of foreign bribery as a predicate offence, and to provide them with guidance on identifying suspicious transactions. AUSTRAC had issued Information Circular No. 42 which touched upon foreign bribery but did not provide specific guidance on detecting foreign bribery. Since Phase 2, Information Circular No. 42 has not been amended. The circular also referred to maximum penalties for non-reporting that are outdated. AUSTRAC has issued case studies and typologies to reporting entities regarding indicators of suspicious transactions since 2007, but none of these refer specifically to foreign bribery. AUSTRAC stated that a typology on foreign bribery was conceivable given Australia's recent enforcement experience.

96. No foreign bribery cases have been initiated as a result of SMRs/SUSTRs. In 2010-11, AUSTRAC received 44 775 SMRs/SUSTRs. Although Australia does not have statistics on the number of SMRs/SUSTRs raising bribery concerns, they reported that 22 of these SMRs/SUSTRs contained the word "bribery". AUSTRAC also reported a noticeable increase in the number of suspect matter reports relating to politically exposed persons (PEPs). This is possibly linked to know-your-customer obligations and enhanced customer due diligence requirements. AUSTRAC's definition of a PEP is broader than the FATF definition of foreign public official as it extends to domestic public officials. In several instances, a financial institution filed SMRs with AUSTRAC only after the media published bribery allegations in a particular case. AUSTRAC explains that, when the transactions covered by these SMRs were made, there may not have been any red flag indicators to warrant the filing of an SMR. However, AUSTRAC cannot confirm whether this was indeed what happened in these cases, or whether the suspicious transactions were missed and should have been reported earlier.

97. AUSTRAC may provide information to support other agencies' investigations. In 2010-11, it forwarded 55 465 SMRs/SUSTRs to other Australian agencies.<sup>38</sup> Most reports were sent to the ATO,

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<sup>38</sup> AUSTRAC, Annual Report 2010-11, p. 69. The number of reports disseminated exceeds the number of reports received because (1) a report may be sent to multiple agencies; and (2) reports received in previous years may be disseminated during 2010-11.



though the AFP received 3 092 reports. AUSTRAC may also assist investigations by analysing SUSTRs and SMRs. AUSTRAC has assisted the AFP in two foreign bribery cases. In the *Securrency/NPA* case, AUSTRAC provided the AFP with intelligence assessments and assisted with “international exchanges”.

### *Commentary*

*The lead examiners reiterate Phase 2 Recommendation 1(d) and recommend that Australia further raise awareness of foreign bribery as a predicate offence, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies.*

## **7. Accounting Requirements, External Audit, and Corporate Compliance and Ethics Programmes**

98. This section of the report considers Australia’s implementation of outstanding Phase 2 recommendations concerning accounting and auditing. It also looks at post-Phase 2 developments in corporate compliance, internal controls and ethics programmes among Australian companies.

### *(a) Accounting Standards*

99. Section 286 of the Corporations Act 2001 requires a company to keep written financial records that “correctly record and explain its transactions and financial position and performance”, as well as “enable true and fair financial statements to be prepared and audited”. Certain companies are required to meet additional financial reporting requirements based on accounting standards set by the Australian Accounting Standards Boards (AASB). As discussed at p. 14, the false accounting and falsification of books offences are found respectively in Sections 286 and 1307 of the Corporations Act 2001 and State-level laws.

### *(b) Detection of Foreign Bribery by External Auditors*

100. The Corporations Act 2001 requires all companies, registered schemes and disclosing entities to submit to external audits. Such audits must be conducted in accordance with the Australian Auditing Standards (ASAs) that have been developed by the AASB based on the International Standards on Auditing. ASA 240 and ASA 250 are relevant to the detection of foreign bribery. ASA 240 requires an external auditor to identify the risks of material misstatements in financial statements due to fraud, and assess the company’s responses to those risks when planning the audit.<sup>39</sup> ASA 250 governs detection of material misstatements due to non-compliance with laws. This includes laws concerning foreign bribery to the extent that they materially impact financial statements.

101. Despite the principal focus on material misstatements due to fraud or non-compliance, auditors would nevertheless consider foreign bribery risk factors when planning an audit, according to auditors at the on-site visit. For companies at risk of foreign bribery, a portion of the audit would be dedicated to testing issues relevant to these risks. Auditors would proactively question management and internal auditors about the organisation’s risk of bribery. Senior members of the audit team are attuned to the risk of foreign bribery due to recent prosecutions in Australia and abroad. The panellists emphasised, however, that the focus of the audit is on finding “material” misstatements within the financial reports. Some auditors thus questioned whether foreign bribery misconduct is usually significant enough to be detected in an external audit of the company.

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<sup>39</sup> ASA 240, paras. 16, 24, 25 and 28.

(c) ***Reporting of Foreign Bribery by External Auditors***

102. Phase 2 Recommendation 4(a) asked Australia to require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies. Under the ASAs, external auditors must report fraud or possible fraud to management or those charged with the company's governance "on a timely basis". They must similarly report instances of non-compliance with laws unless the non-compliance is "clearly inconsequential". If the non-compliance was intentional, then the auditor must report "as soon as practicable".<sup>40</sup> These reporting requirements focus not on foreign bribery *per se* but on fraud and non-compliance that materially impact financial statements. Nevertheless, auditors at the on-site visit stated that they would report most cases of foreign bribery to management because the possible reputational and enforcement consequences may materially impact the company's financial statements.

103. Phase 2 Recommendation 4(a) also suggested that Australia "consider requiring external auditors to report indications of a possible illegal act to the competent authorities". Australia did not address this issue in its 2008 Written Follow-up Report (para. 5). As in Phase 2, Australia presently does not oblige auditors to report foreign bribery to competent authorities. Section 311 of the Corporations Act 2001 requires auditors to report to ASIC within 28 days if he/she has reasonable grounds to suspect a "significant" contravention of the Corporations Act. Whether a contravention is "significant" depends on the penalty applicable to the contravention; the effect of the contravention on the company's overall financial position or on the adequacy of the information available about the company's overall financial position; or any other relevant matter. Reporting under Section 311 falls within an express exception to an auditor's duty of confidentiality to his/her client under Section 1317AE of the Corporations Act.

104. This reporting obligation is limited. Auditors are required to report Corporations Act contraventions (such as false accounting) but not breaches of the Criminal Code Act (such as foreign bribery). This leads to the anomalous result that violations of corporate law are reported, but criminal acts – which are generally more serious – are not. In addition, auditors at the on-site visit were of the view that the Corporations Act only mandates reporting of contraventions committed by the audited company and not its subsidiary or joint venture partner.

***Commentary***

***The lead examiners remain concerned that Australian external auditors are not required to report foreign bribery to competent authorities. At present, auditors are already required to report breaches of the Corporations Act to ASIC. The lead examiners therefore recommend that Australia extend this reporting obligation to cover foreign bribery, including foreign bribery committed by an audited company's subsidiary or joint venture partner. To allow such reporting, the exception to an auditor's duty of confidentiality in Section 1317AE of the Corporations Act would need to be extended accordingly.***

(d) ***Corporate Compliance, Internal Controls and Ethics Programmes***

105. The Australian government has made efforts to promote corporate compliance measures to prevent and detect foreign bribery. ATO guidelines suggest measures such as an effective code of conduct, and the monitoring third-party agents and intermediaries. The ATO has trained SMEs on bribery and facilitation payments. The ATO explained that such training programmes help companies to implement stronger controls, thereby leading to better compliance with tax laws. No government body has promoted

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<sup>40</sup> ASA 240, paras. 40-42; ASA 250, paras. 22-23.

the Good Practice Guidance in Annex II of the 2009 Anti-Bribery Recommendation,<sup>41</sup> and companies at the on-site visit had not specifically heard of the Guidance.

106. Non-governmental participants at the on-site visit broadly agreed that Australian multinational companies had become more aware of foreign bribery risks in the last five years. Improvements in awareness and corporate compliance programmes have been largely driven by enforcement concerns in the US and UK rather than those in Australia. Recent studies by law and accounting firms corroborate this view.<sup>42</sup> Australia states that the increased awareness is also due to highly publicised enforcement efforts by Australia.

107. Even so, awareness and corporate compliance programmes remain inadequate in much of the Australian business sector. One study found that 73% of Australian companies perceived only a moderate or low risk of corruption; yet, according to another study, 75% of the top 100 listed companies operate in high-risk or high-risk industries or jurisdictions.<sup>43</sup> Compared to their American and British counterparts, few Australian companies have measures to manage bribery risks.<sup>44</sup> On-site visit participants added that only some of the largest Australian companies have developed anti-corruption compliance programmes. Large pharmaceutical and shipping companies were cited as examples. The situation with SMEs is even more serious. Most of these enterprises may either be unaware of or are unable to address foreign bribery risks. A lack of practical guidance on what is expected of corporate compliance programmes is of particular concern.

#### *Commentary*

*The lead examiners recommend that Australia continue to raise awareness among companies of the importance of developing and implementing anti-bribery corporate compliance programmes. These efforts should include promoting the Good Practice Guidance in the 2009 Anti-Bribery Recommendation. They should target companies – particularly SMEs – that conduct business abroad. The lead examiners note that corporate compliance programmes among SMEs is a horizontal issue that affects many other Parties to the Convention. Finally, efforts to promote corporate compliance should be co-ordinated with those undertaken by the AFP.*

### **8. Tax Measures for Combating Bribery**

108. This section considers the tax deductibility of facilitation payments (a follow-up issue from Phase 2) and recent developments on sharing tax information and detection. Efforts by the Australian Taxation Office to promote corporate compliance are considered in the previous section beginning at p. 33.

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<sup>41</sup> The website of the Australian National Contact Point for the OECD Guidelines for Multinational Enterprises contains the official commentaries to the Guidelines. These commentaries briefly refer to but do not reproduce the Good Practice Guidance. The ATO stated that it promotes the Good Practice Guidance but did not provide supporting information.

<sup>42</sup> Baker & McKenzie (2011), “Bribery: Do Australian Companies Take It Seriously?” p. vi, 12; Ernst & Young, “Driving Ethical Growth – New Markets, New Challenges: 11<sup>th</sup> Global Fraud Survey”, p. 5; ACSI (2011), “Anti-Corruption and Bribery Practices in Corporate Australia”, p. 27.

<sup>43</sup> Baker & McKenzie (2011), “Bribery: Do Australian Companies Take It Seriously?” pp. 20-21; ACSI (2011), “Anti-Corruption and Bribery Practices in Corporate Australia”, p. 20.

<sup>44</sup> ACSI (2011), “Anti-Corruption and Bribery Practices in Corporate Australia”, pp. 13 and 27; Baker & McKenzie (2011), “Bribery: Do Australian Companies Take It Seriously?” p. vi.

**(a) Tax Deductibility of Bribes and Facilitation Payments**

109. Section 26-52 of the Income Tax Assessment Act (ITAA) 1997 prohibits the tax deduction of bribes paid to foreign public officials. Like the Criminal Code Act, the ITAA 1997 Section 26-52(4) also provides an exception for facilitation payments. A payment to a foreign official is tax deductible if “the value of the benefit is of a minor nature” and “the amount is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature”. The Working Group has decided to follow up the operation of this provision (Phase 2 Follow-Up Issue 8(b)).

110. The record-keeping requirements for facilitation payments in the ITAA 1997 differ from those in the Criminal Code Act. To deduct a facilitation payment from income tax, a taxpayer need only “keep records that record and explain all transactions and other acts engaged in by the person that are relevant for any purpose of this Act” (ITAA 1936 Section 262A). Unlike under the Criminal Code Act, a taxpayer need not obtain the payer’s signature. He/she also may not need to record the identity of the foreign public official, or the particulars of the routine government action that was sought (Phase 2 Report para. 87). The tax legislation also differs by not requiring a record to be made “as soon as practicable” after the facilitation payment is made. The end result, as Australia openly acknowledges, is that “a failure to maintain records in the form required under the Criminal Code Act will not necessarily mean the person cannot claim a tax deduction.”<sup>45</sup>

111. Australia explains that this discrepancy is warranted because the purpose of the tax system is to identify and verify details of a tax deduction. The requirements to deduct a facilitation payment are identical to those for any other business deduction; a taxpayer is not required to specifically justify the circumstances of a deduction. Australia also states that requiring different record-keeping for deducting facilitation payments than for other deductions would cause confusion and increase compliance costs for taxpayers. However, concerns remain that, without aligning the record-keeping requirements for facilitation payments in the ITAA 1997 with those in the Criminal Code Act, some bribe payments that could be found illegal pursuant to the latter could nonetheless be tax deductible.

***Commentary***

***The lead examiners recommend that Australia align the record-keeping requirements for deducting a facilitation payment under the ITAA 1997 with those for the facilitation payment defence under the Criminal Code Act.***

**(b) Detection and Awareness-Raising**

112. The ATO is responsible for the administration of taxes in Australia and the enforcement of the non-tax deductibility of bribes. The ATO stated that it would re-assess the tax returns of a taxpayer convicted of foreign bribery to determine whether bribes had been deducted. There is no time limit to re-open a tax return in cases where the taxpayer intended to evade taxes, which would be the case in foreign bribery cases, according to the ATO.<sup>46</sup> However, it is unclear whether or how the ATO would learn of a conviction of foreign bribery. The AFP stated that its new Panel of Experts would ensure that the ATO is informed of foreign bribery convictions.

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<sup>45</sup> ATO (3 April 2009), “The Taxation Office Guidelines for Understanding and Dealing with the Bribery of Australian and Foreign Public Officials” ([www.ato.gov.au](http://www.ato.gov.au)).

<sup>46</sup> In the absence of fraud or evasion, the ATO has up to four years to re-open the tax return of a large business, and two years for an individual or small business.

113. Australia has issued guidelines to tax auditors on how to identify bribes, including red flag indicators, practical examples, and investigative techniques. The ATO explained that it trains its officers on the non-tax deductibility of bribes and the definition of facilitation payments. As a result, its tax auditors would consider the risk of bribery based upon the characteristics of the company.

114. The ATO publishes an annual Compliance Programme that describes the most pressing tax compliance risks and efforts to address these risks. At the Working Group's suggestion (Phase 2 Recommendation 3(a)), the ATO added foreign bribery and facilitation payments as compliance risks to the 2006-2007 Programme. Since then, while other topics have re-appeared in the Programme periodically, bribery and facilitation payments have not. The ATO maintained that bribery remains a compliance priority, but taxpayers looking to the Programme may reach the contrary conclusion. Given recent developments in foreign bribery law and enforcement, the Programme should include foreign bribery.

### *Commentary*

***The lead examiners recommend that the AFP promptly inform the ATO of foreign bribery-related convictions so that the ATO may verify whether bribes were impermissibly deducted. The Working Group should also follow up on whether the ATO re-assesses the tax returns of taxpayers convicted of foreign bribery. The lead examiners also recommend that ATO consider including periodically bribery and facilitation payments in its Compliance Programme.***

### **(c) Reporting Foreign Bribery and Sharing Tax Information**

115. The ATO has undertaken to report all foreign bribery cases to the AFP. Legislation allows but does not oblige the ATO to report foreign bribery discovered through tax audits to competent authorities. ATO guidelines state that authorised officers would “seek to disseminate” information to the AFP “within the requirements of the legislation”.<sup>47</sup> At the on-site visit, however, the ATO indicated a tax auditor is obliged to refer suspected cases of foreign bribery to the Serious Non-Compliance Area for assessment. If confirmed, all cases of foreign bribery would then be referred to the AFP. Additional ATO guidelines to taxpayers also state that “where warranted”, the ATO “will pass on information” to the AFP.<sup>48</sup> In practice, the ATO has not referred any foreign bribery cases to the AFP for investigation.

116. The ATO cannot be compelled by any entity, including a court, to disclose information unless it is necessary for “carrying into effect the provisions of a taxation law”.<sup>49</sup> The ATO has an administrative process to allow Australian competent authorities to seek information. At the on-site visit, the AFP stated that it did not have difficulties obtaining information from the ATO.

117. Regarding sharing of tax information with foreign authorities, Australia stated that its bilateral tax treaties incorporate language from the OECD Model Tax Convention allowing tax information to be shared for criminal investigations, including foreign bribery. Australia ratified the Convention on Mutual Administrative Assistance in Tax Matters and the amending Protocol on 21 August 2012.<sup>50</sup> This development is welcomed.

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<sup>47</sup> ATO (3 April 2009), “The Taxation Office Guidelines for Understanding and Dealing with the Bribery of Australian and Foreign Public Officials” ([www.ato.gov.au](http://www.ato.gov.au)).

<sup>48</sup> ATO (27 August 2008), “Bribes and Facilitation Payments: A Guide to Managing Your Tax Obligations” ([www.ato.gov.au/content/00104079.htm](http://www.ato.gov.au/content/00104079.htm)).

<sup>49</sup> Tax Administration Act 1953, Sections 355-25 and 355-70.

<sup>50</sup> The Convention's signatures and ratifications can be found at [www.oecd.org/ctp/eoi/mutual](http://www.oecd.org/ctp/eoi/mutual).

## *Commentary*

*The 2009 Tax Recommendation asks Parties to the Convention “to establish an effective legal and administrative framework and provide guidance to facilitate reporting by tax authorities of suspicions of foreign bribery arising out of the performance of their duties, to the appropriate domestic law enforcement authorities.” The ATO has undertaken to report all foreign bribery cases to the AFP, but have yet to refer any cases in practice. The lead examiners therefore recommend that the Working Group follow up this issue as practice develops.*

## **9. International Co-operation**

### **(a) Mutual Legal Assistance Generally**

118. Since Phase 2, there have not been changes to Australia’s framework for mutual legal assistance in criminal matters (MLA) that would significantly impact foreign bribery cases. Australia has 29 bilateral MLA treaties. It is also party to multilateral conventions that could provide MLA in foreign bribery cases, such as the UN Convention against Corruption (UNCAC).

119. The Mutual Assistance in Criminal Matters Act 1987 (MACMA) governs MLA. Australia may seek and provide MLA with or without an applicable treaty. The lack of dual criminality is a discretionary ground for refusing MLA under MACMA. The AG may also exercise its general discretion to refuse an MLA request if the condition of reciprocity is not met. The types of assistance available include document production, obtaining testimony, search and seizure, and asset tracing, freezing and confiscation. Legislation that entered into force in September 2012 made available additional types of MLA such as the use of surveillance devices, and registration of foreign non-conviction based proceeds of crime orders.

120. The International Crime Cooperation Central Authority (ICCCA) within the AGD is the central authority for MLA requests. The ICCCA monitors all outgoing requests. The AFP also seeks and provides police-level assistance, including through its International Liaison Network (see p. 21). The AFP has MOUs with its foreign counterparts to exchange information.

121. Australia has sought and provided MLA in foreign bribery cases. Since Phase 2 in 2005, it has received 11 MLA requests relating to foreign bribery from 6 other Parties to the Convention. None of the requests was rejected. The time required for executing the requests varied significantly depending on the type of assistance sought, volume of information requested, complexity of the request, and the procedural requirements of the requesting state. Four of the incoming requests concerned the *Securrency/NPA* case and were executed between 3-14 months. Since 2005, Australia has also received 34 MLA requests related to corruption and extortion unrelated to foreign bribery. Since 2003, Australia has sent 24 MLA requests related to foreign bribery, of which 5 were sent to other Parties to the Convention. Nine of these requests remain active, while two were withdrawn because of a lack of progress. Some foreign bribery cases in Australia have been hampered because of an inability to obtain a large amount of evidence overseas. Australia also made MLA requests to 8 foreign countries in the *Australian Wheat Board* case. Evidence in 5 of these requests were received in 6-16 months.

122. Two of the above-mentioned incoming MLA requests sought material that the AFP had already obtained lawfully in a multi-jurisdictional foreign bribery investigation. The two requests were executed in 12 and 14 months respectively. The material in these two requests was sent to the foreign state along with additional requested evidence that was not previously in the AFP’s possession. While Australia noted the benefit of providing material in tranches where possible, it advised that this approach was not available in these two matters. Extensive liaison and significant resources were required to identify the relevant material, given the very significant volume of evidence collected by the AFP in its investigation.

123. Australia has two means of sharing assets with foreign countries. Under the “equitable sharing programme”, Australia may share a proportion of confiscated proceeds of crime with a foreign country that has made a significant contribution to the recovery of those proceeds. Australia may also share proceeds of crime seized under a foreign confiscation order that has been registered in Australia. Fines imposed in foreign bribery cases cannot be shared.

**(b) Providing MLA in Non-Criminal Proceedings**

124. The Phase 2 Report (para. 173) questioned Australia’s ability to provide MLA to a foreign country that has commenced non-criminal proceedings for foreign bribery. Under MACMA, Australia can seek and provide MLA in criminal matters against natural and legal persons. Several Parties to the Convention (e.g. Germany and Italy) can only institute civil or administrative proceedings against legal persons for foreign bribery. MACMA only provides for MLA in *criminal* matters and thus cannot be used in these cases. MLA in civil or administrative proceedings must instead rely on the Mutual Assistance in Business Regulation Act 1992 (MABRA). Under MABRA, certain information can be obtained on behalf of a foreign country’s regulatory authority, including through some coercive powers, for use in foreign administrative and civil proceedings. The main form of assistance available is obtaining information, documents and evidence (MABRA Section 6).<sup>51</sup> However, MABRA is more limited than MACMA because it does not provide for search and seizure, or the tracing, seizure and confiscation of proceeds of crime.<sup>52</sup> The Working Group accordingly decided to follow up this issue (Follow-up Issue 8(e)).

125. Australia provided further information in Phase 3. MACMA remains unavailable for providing MLA in civil or administrative proceedings against a company for foreign bribery. In some cases, however, the requesting state may also request MLA in a related criminal proceeding, e.g. in a criminal prosecution against the company’s officers. Australia may decide to allow the evidence gathered in the criminal proceeding under MACMA to also be used in related civil or administrative proceedings against the company. In making this decision, Australia would consider factors such as whether there is a clear nexus between the criminal and civil proceedings, the nature of the evidence in question, the powers used to obtain it, the seriousness of the offence, limitations on disclosure and use under Australian legislation, and the views of the agency that originally obtained the material.

126. Australia has received one request from a foreign country that has commenced related civil and criminal foreign bribery investigations. Assistance under MABRA and MACMA was sought for the civil and criminal aspects of the case respectively. Australia has not, to date, been requested to consent to the alternate or further use of material provided pursuant to MACMA in this case or in any other foreign bribery matter.

**Commentary**

***Article 9 of the Convention states that each Party “shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for [...] non-criminal proceedings within the scope of this Convention brought by a Party against a legal person.” The object of MACMA is to regulate the provision by Australia of international assistance in criminal matters. When a foreign country may only***

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<sup>51</sup> The maximum penalty for failing to comply with a requirement under the MABRA to give information, documents or evidence without reasonable excuse is two years’ imprisonment (MABRA Section 13).

<sup>52</sup> The Australian authorities state that they can take action under the MACMA in criminal matters to identify proceeds of crime located in Australia or register foreign orders or, in certain circumstances, consider domestic action under the Commonwealth Proceeds of Crime Act 2002.

*bring civil or administrative proceedings against legal persons for foreign bribery, Australia cannot provide MLA under MACMA involving search and seizure, and the tracing, seizure and confiscation of proceeds of crime, to the foreign country in those proceedings. Australia may permit evidence gathered in a criminal proceeding to be used in a related civil or administrative proceeding. But this alleviates the concerns only partially, since permission is not necessarily granted. There may also be instances when a requesting state has not or cannot commence related criminal proceedings.*

*The lead examiners therefore recommend that Australia take reasonable measures to ensure that a broad range of MLA, including search and seizure, and the tracing, seizure and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons. They also note that this is a horizontal issue among Parties to the Convention.*

**(c) Extradition**

127. Since Phase 2, there have not been changes to Australia's legislative framework for extradition that would significantly impact foreign bribery cases. Foreign bribery is deemed to be an extradition offence under the Extradition Act 1988 by virtue of the Extradition (Bribery of Foreign Public Officials Regulations 1999). Unlike MLA, Australia can only extradite individuals to countries with which it has a treaty or which has been designated as "extradition countries". Australia has 38 bilateral extradition treaties, 17 inherited treaty agreements, and 31 designated extradition countries. Australia also has extradition relations with a number of other countries under the London Scheme for Extradition within the Commonwealth of Nations. Parties to the Anti-Bribery Convention and UNCAC have been declared extradition countries. The ICCCA is the Central Authority for extradition requests (except for requests involving New Zealand, which uses a warrant-endorsement system).

128. Australia has surrendered one individual in a foreign bribery case. An Australian national was arrested in October 2011 and extradited to the UK in February 2012.<sup>53</sup> Australia has also requested the extradition of two individuals in foreign bribery cases. A former NPA sales executive was arrested in Germany in July 2011 and surrendered to Australia in September 2011. A second extradition request in an unnamed case was made in 2012 to a country that is not Party to the Convention. This request is on-going.

**(d) Co-operation through ASIC and the AFP**

129. Co-operation is also available outside of formal MLA based on treaties and/or MACMA. ASIC has signed bilateral MOUs and the IOSCO Multilateral Memorandum of Understanding (MMOU). The exchange of information under such MOUs is subject to confidentiality. As mentioned at p. 21, the AFP International Liaison Network has officers stationed in 30 countries who can facilitate police-to-police level assistance as well as formal extradition and MLA requests.

**10. Public Awareness and the Reporting of Foreign Bribery**

130. The 2009 Recommendation III.i asks Parties to the Convention to take concrete and meaningful steps in conformity with its jurisdictional and other basic legal principles to examine or further examine awareness-raising initiatives in the public and private sector for the purpose of preventing and detecting foreign bribery. This section discusses outstanding Phase 2 recommendations and new developments on

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<sup>53</sup> UK Serious Fraud Office Press Release (15 February 2012) ([www.sfo.gov.uk](http://www.sfo.gov.uk)).



public awareness, reporting and whistleblowing. It also covers Austrade's practice of referring agents, a matter of recent controversy. Efforts by ATO, AusAID and EFIC are described at pp. 35, 45 and 46 respectively.

*(a) Efforts to Raise Awareness of Foreign Bribery*

131. Phase 2 Recommendations 1(b) and (c) asked Australia to raise awareness of the private sector, especially among SMEs. Since 2007, DFAT has spoken annually to businesses in State and Territory capitals about the risks of foreign bribery, and the government's opposition to and discouragement of facilitation payments. These presentations are intended to help companies resist solicitation for bribes and facilitation payments. Austrade has also developed anti-bribery training materials which are available on its website, and provides advice regarding foreign bribery as part of its standard services. In addition, the AGD has distributed the Foreign Bribery Information and Awareness Pack ("Awareness Pack") to industry bodies. The Australian National Contact Point for the OECD Guidelines for Multinational Enterprises meets regularly with companies to raise awareness of the Guidelines, which include anti-bribery provisions.

132. There has also been training and awareness-raising in the public sector. New DFAT employees receive fraud and ethics training that includes foreign bribery. This training is repeated when DFAT employees are posted overseas and every three years for employees already abroad. The Awareness Pack has been disseminated to government agencies including AUSTRAC and Austrade, Australia's trade promotion agency. Austrade's induction and pre-posting training includes ethics and anti-bribery. Specific anti-bribery training and annual governance refresher is also provided for all staff. Austrade also recently strengthened its anti-foreign bribery compliance programme in light of the *Securrency/NPA* case. It updated its policies and client documentation to reinforce that Austrade cannot assist firms that pay bribes. Its website stipulates a zero-tolerance policy toward foreign bribery and states that Austrade officers should not make or arrange facilitation payments. The Department of Industry, Innovation, Science, Research and Tertiary Education provides training on foreign bribery to staff who are posted overseas, which includes a fact sheet explaining the foreign bribery offence.

133. However, there is neither a lead agency responsible for awareness-raising, nor a clear delineation of responsibilities and co-ordination among the agencies involved. This has resulted in gaps. For example, many large enterprises and most SMEs have not been targeted for awareness-raising and thus may not appreciate their exposure to foreign bribery (see p. 34). There is also a lack of awareness in parts of the public sector. For example, the Department of Defence (DoD) stated at the on-site visit that Australian defence procurements are not considered at high risk of foreign bribery despite being aware of the high risk profile of the industry in general. A lack of co-ordination also may result in inconsistent government messages regarding foreign bribery. The AGD, AFP, and DFAT each has a "mailbox" to provide guidance on foreign bribery issues. But it is unclear whether the guidance they provide is consistent and is based on input from the appropriate agencies. Some key agencies also have not made efforts to raise awareness among the private sector. These include ASIC and the Department of Industry, Innovation, Science, Research and Tertiary Education, which interacts with SMEs. The AFP had generally been involved only when requested by other agencies, though this may have slightly changed recently (see p. 41 **Error! Bookmark not defined.**).

134. Whether Australia's first National Anti-Corruption Plan (the Plan) would resolve these issues is unclear. The Plan is expected to be adopted by December 2012. It aims to create a "whole-of-government approach" to corruption, and to position Australia to better deliver a co-ordinated approach to fighting corruption. The Plan will likely outline existing Commonwealth anti-corruption arrangements; analyse current and emerging corruption risks; and devise a framework to address these risks. At the time of the

on-site visit, the Plan appeared to address co-ordination only in the context of investigation and enforcement, not awareness-raising.

*Commentary*

***The lead examiners are concerned that Australia’s efforts to raise awareness of foreign bribery are not sufficiently co-ordinated and coherent across agencies. They therefore recommend that Australia adopt a “whole-of-government” strategy to this issue.***

***Australia should also further raise awareness in the private sector. Particular focus should be given to SMEs, which is a horizontal issue among Parties to the Convention.***

**(b) *Hospitality, Promotional Expenditure and Charitable Donations***

135. Australian legislation does not expressly explain the circumstances under which hospitality, promotional expenditure, and charitable donations may amount to bribes. The Australian authorities have not issued guidance on these topics. Private sector representatives at the on-site visit expressed a wish to see more clarity on these difficult issues. The AFP has begun to discuss these matters with the private sector in general terms.<sup>54</sup> It stated expenses such as hospitality, promotional expenditure and charitable donations would be assessed “on the basis of legislation and context, including the amount, timing and the actual records maintained.” The AFP has not formally publicised its position, such as by issuing written guidance. However, Australia explains that Australian authorities as a matter of policy do not issue guidance on issues of criminal law.

*Commentary*

***The AFP has begun discussing with the private sector on when hospitality, promotional expenditure, and charitable donations may amount to bribes. The lead examiners recommend that the appropriate Australian authority consider summarising publicly available information on when hospitality, promotional expenditure, and charitable donations may amount to bribes.***

**(c) *Reporting of Foreign Bribery***

136. The Australian Public Service (APS) is encouraged but not obliged to report suspicions of foreign bribery. The APS Code of Conduct (APS Code), provided for under statute, contains general principles to which APS employees must adhere. The APS Values and Code of Conduct in Practice (APS Guide) provides guidance to implement the APS Code. The APS Guide asks civil servants to report foreign bribery committed by another civil servant “in accordance with their agency’s instructions”. If the information relates to foreign bribery committed by a non-civil servant, an APS employee “should discuss the matter with an appropriate senior person in their agency to determine the most appropriate course of action, including reporting the matter to the Australian Federal Police”.

137. The APS Guide contains a separate section for civil servants overseas. Overseas officials must report foreign bribery committed by “another Australian who is not an APS employee” to a senior person within the agency who should “consider the most appropriate course of action, including reporting to local law enforcement authorities or the Australian Federal Police” [emphasis added]. Australia indicates that its employees are trained to report all allegations of foreign bribery to the AFP, and to local authorities as

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<sup>54</sup> Freehills Mining Insights (10 July 2012), “AFP Gives Insight on Australian Anti-Bribery Laws”.

appropriate. On its face, however, the guideline allows for reporting to local law enforcement authorities in lieu of the AFP.

138. The reporting requirements in the APS Code and APS Guide do not cover officials of independent Commonwealth authorities like the Reserve Bank of Australia (RBA), Australia's central bank. These officials may instead be subject to reporting obligations under State laws, such as Section 316 of the New South Wales (NSW) Crimes Act 1900.<sup>55</sup> According to Australia, these laws require the reporting of State offences. As foreign bribery is an offence under the criminal law of NSW and other States (see p. 26), officials and employees of independent Commonwealth authorities would thus be required to report foreign bribery under State law. Nevertheless, there are concerns that foreign bribery allegations reported under these State-level provisions may not necessarily be referred to the AFP (see p. 26). These State-level laws may also be less demanding than the APS Code and Guide. For example, Section 316 of the NSW Crimes Act requires reporting if someone "knows or believes" a crime has been committed; reporting is not required if a crime is only suspected.

139. Government agencies may develop additional rules on reporting. DFAT requires employees to report allegations of bribery to a senior official which are then passed on to the AFP.<sup>56</sup> DFAT has referred several foreign bribery allegations to the AFP. Austrade officials must report suspicions of foreign bribery to a senior official. Allegations are then "assessed and referred to the AFP".<sup>57</sup> An exception is an allegation received from a third party that an Australian who is not an Austrade client has committed foreign bribery. Austrade officials do not have to report these matters, and are advised to ask the complainant to report the matter directly to the AFP.

140. It remains to be seen whether these policies are effective in practice. Recent media reports concerning the *Securrency/NPA* case suggest that senior officials of the RBA and Austrade (Australia's trade promotion agency) may have been aware of foreign bribery allegations involving Securrency and NPA before the AFP investigation began, but did not notify the AFP.<sup>58</sup> Based on other media articles, this may not have been an isolated incident.<sup>59</sup> Austrade disputes these inferences and rejects the suggestion that it knew of these allegations and did not notify the AFP. The AFP stated that Austrade strongly supported its investigation.

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<sup>55</sup> Section 316(1) reads, "If a person has committed a serious indictable offence and another person who knows or believes that the offence has been committed and that he or she has information which might be of material assistance in securing the apprehension of the offender or the prosecution or conviction of the offender for it fails without reasonable excuse to bring that information to the attention of a member of the Police Force or other appropriate authority, that other person is liable to imprisonment for 2 years."

<sup>56</sup> DFAT Code of Conduct for Overseas Service, para. 10.6; DFAT Administrative Circular No. N543/09, "Australian Extraterritorial Offences and the Responsibility to Report" (18 February 2009).

<sup>57</sup> Austrade Anti-Bribery Policy, paras. 6 and 7.1.

<sup>58</sup> The Age (4 July 2011), "Bribe Scandal Extends to Vietnam Spy Colonel"; The Age (1 December 2011), "Austrade Officials in Scandal Spotlight"; Sydney Morning Herald (2 December 2011), "Securrency's Taint Just Keeps on Spreading"; Canberra Times (13 August 2012), "Envoy's Link with Viet Spy Revealed"; NewsNine (14 August 2012), "Banknote Bribe Accused Face Court"; WA Today (25 August 2012), "Bank Chiefs Knew of Bribe Claims"; Canberra Times (25 August 2012), "Senior RBA Staff Knew of 'Bribery Memo'"; Dunya News (22 August 2012), "Reserve Bank of Australia Covered Up 'Bribery Evidence'".

<sup>59</sup> Sydney Morning Herald (30 August 2012), "Australia Post Paid to Secure Deals, Court Told".

### *Commentary*

*The lead examiners recommend that Australia align the APS Guide with its practice of requiring Australian civil servants who work overseas to report suspicions of foreign bribery to the AFP in all cases. The lead examiners further recommend that Australia ensure that Australian public servants, and officials and employees of independent statutory authorities, are subject to equivalent reporting requirements. Finally, the Working Group should follow up the issue of foreign bribery reporting by Australian officials in the Securrency/NPA matter when Australian authorities are at liberty to discuss this issue.*

#### **(d) Austrade’s Practice of Introducing Agents**

141. The Australian Trade Commission (“Austrade”) is a statutory agency whose role is to advance Australia’s international trade, investment, and education interests by providing information, advice, and services.<sup>60</sup> Austrade provides a paid service of introducing foreign agents to Australian companies. At the on-site visit, Austrade stated that its local staff prepare lists of potential agents based on a cursory background check that draws on “in-country intelligence and other information”. Staff are expected to reject agents that “have a track record of corruption”. Austrade makes clear to companies that it does not conduct due diligence on these listed agents and that companies should do so before selecting an agent. In addition, Austrade advises companies that they should continually monitor their relationships with intermediaries to ensure compliance with appropriate standards and legal requirements.

142. As described at p. 29, Austrade introduced to Securrency a consultant with close ties to the foreign government. This intermediary allegedly funnelled bribes to foreign officials. Austrade was unable to comment on this as the *Securrency/NPA* case was ongoing but confirmed that it continues to refer agents using the procedure described above.

### *Commentary*

*The lead examiners are concerned that Austrade’s practice of agent referral may expose Austrade and its clients to risks resulting from a referred agent being involved in foreign bribery. They therefore recommend that Austrade consider taking concrete steps to encourage companies, in the strongest terms, to conduct due diligence on agents, including those referred to them by Austrade. The lead examiners also recognise that the practice of agent referrals may be a horizontal issue among other Working Group members.*

#### **(e) Whistleblowing and Whistleblower Protection**

143. A patchwork of laws at the Commonwealth level provides some whistleblower protection in foreign bribery cases.<sup>61</sup> Section 16 of the Public Service Act 1999 prohibits victimisation or discrimination against a civil servant as a consequence of having “reported breaches (or alleged breaches) of the Code of Conduct”. To qualify for protection, the disclosure must be made to a senior official; external disclosures (e.g. to media or law enforcement) are not protected. The Section also does not protect disclosures of misconduct committed by non-Australian civil servants. This raises concerns because employees of agencies such as AusAID and Austrade regularly work in high-risk situations with individuals who are not civil servants. These employees are encouraged or required to report foreign bribery but are not protected

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<sup>60</sup> Australian Trade Commission Act, Sections 8 and 60; [www.austrade.gov.au/About-Austrade/default.aspx](http://www.austrade.gov.au/About-Austrade/default.aspx).

<sup>61</sup> Whistleblower protection in States and Territories are not discussed in this report as they relate mainly to protection for State-level public sector workers.

under Section 16. Australia also indicated that a Public Interest Disclosure Bill is being developed to enhance whistleblower protection in the Commonwealth public sector. According to Australia, the Bill would cover reporting of illegal conduct, including foreign bribery. The bill would provide protection to a wide range of persons in, or connected to, the public sector, including Australian and foreign nationals who are engaged overseas.

144. Regarding private sector whistleblowers, laws cited by the Australian authorities are insufficient or irrelevant to foreign bribery. Section 317A of the Corporations Act protects officers, employees and contractors of Australian companies who disclose violations of the Corporations Act to ASIC. This covers disclosure of foreign bribery-related false accounting, but not foreign bribery *per se*. Whistleblower laws that apply only to financial institutions are not so restricted and cover disclosures about any misconduct, including foreign bribery.<sup>62</sup> None of these laws, however, protects disclosures to law enforcement or the media. The Fair Work Act 2009 applies if reprisals impact a whistleblower's "workplace right", which includes exercising collective bargaining rights, settlement of employment disputes, and processes under "a workplace law or workplace instrument".<sup>63</sup>

145. Despite inadequate protection, some whistleblowing does occur. Some participants at the on-site visit believed that whistleblowing in the private sector has been useful in detecting misconduct such as foreign bribery. In the *Securrency/NPA* case, one whistleblower reported wrongdoing to the company and the AFP, while a second disclosed allegations to the media. The case, however, may also highlight the need to better protect whistleblowers, as two Securrency employees claim to have been dismissed after raising bribery concerns.<sup>64</sup> Commentators believe that better whistleblower protection could lead to a higher level of foreign bribery enforcement.<sup>65</sup>

### *Commentary*

***The lead examiners recommend that Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable grounds from discriminatory or disciplinary action. The Working Group should also follow up the enactment and implementation of the Public Interest Disclosure Bill.***

## **11. Public Advantages**

146. This section deals with Phase 2 Recommendation 6(b), which asked Australia to consider introducing a policy and "formal rules" for denying or terminating public advantages against individuals involved in foreign bribery. This includes denial of export credits, procurement contracts and contracts funded by official development assistance (ODA). These agencies' additional anti-foreign bribery measures are also considered.

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<sup>62</sup> Banking Act 1959, Part VIA, Division 1; Insurance Act 1973, Part IIIA, Division 4, Subdivision A; Life Insurance Act 1973, Part IIIA, Division 4, Subdivision A; Superannuation Industry (Supervision) Act, Part 29A, Division 1.

<sup>63</sup> Fair Work Act 2009, Section 341(1) and (2).

<sup>64</sup> Sydney Morning Herald (14 August 2012), "Feds Fail to Suppress Details of Bribery Case"; Sydney Morning Herald (24 August 2012), "Salesman Doubted Securrency over Agent Payments".

<sup>65</sup> Davids, C. and Schubert, G. (2011), "Criminalising Foreign Bribery: Is Australia's Bark Louder than Its Bite?" 35 Crim. L.J. 98, p. 115; Barker, C. (7 February 2012), "Australia's Implementation of the OECD Anti-Bribery Convention", Parliamentary Library Background Note, p. 16.

**(a) Public Procurement**

147. The Department of Finance and Deregulation (DFD) is responsible for accountability in government spending and procurement policy.<sup>66</sup> Even so, the procurement regime is decentralised, and the Chief Executive of each agency has a duty to oversee procurement decisions. Procurement by Commonwealth agencies follows the 2012 Commonwealth Procurement Rules (2012 CPR) which replaced earlier guidelines (2008 CPG) on 1 July 2012.

148. Australia states that its public procurement agencies have discretion to debar companies based on domestic or foreign bribery, and that it is a matter for individual agencies to develop their own policies on how this form of bribery is investigated and managed. Australia stated that it has not clarified government-wide rules on debarment based on foreign bribery because it is inappropriate “to specify particular offences as grounds for termination” (Phase 2 Written Follow-up Report p. 22). However, it appears that Australia does specify some grounds for debarment.<sup>67</sup>

149. Concerns remain 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.

**Commentary**

***The lead examiners reiterate Phase 2 Recommendation 6(b) and recommend 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.***

**(b) Official Development Assistance (ODA)**

150. The Australian Agency for International Development (AusAID) administers Australia’s ODA.<sup>68</sup> To reduce fraud and increase controls over contractors, AusAID conducts due diligence of its contractors when assessing a tender bid. Commercial contract provisions allow AusAID to investigate contractors upon allegations of fraud. AusAID provides fraud awareness training to all contractors and partner non-governmental organisations (NGOs), which includes anti-bribery. If a contractor commits fraud or foreign bribery, AusAID has the right to terminate the contract. All AusAID employees are required to undergo fraud training, which includes foreign bribery. The training is also repeated before employees are posted overseas. In the 2011-12 financial year, AusAID provided fraud training to 879 AusAID and implementing partner employees.

151. AusAID has committed to reporting all allegations of foreign bribery committed by an Australian to the AFP. AusAID’s current Fraud Control Policy requires its employees to report foreign bribery to a senior AusAID official “for consideration of referral to the [AFP] or other relevant law enforcement agencies as appropriate”.

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<sup>66</sup> DFD has succeeded the Department of Finance and Administration since Phase 2.

<sup>67</sup> For example, “suppliers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not paid the claim” are excluded (2012 CPR, para. 6.8; 2008 CPG, para. 6.21).

<sup>68</sup> Australia committed AUD 4.8 billion (EUR 4.01 billion) to ODA in 2011-2012, representing 0.35% of its Gross National Income (GNI), with plans to increase to 0.5% of GNI by 2015 (Summary of Australia’s Overseas Aid Program 2011-2012 ([www.ausaid.gov.au](http://www.ausaid.gov.au))).

152. Like other procuring agencies, AusAID may debar companies that have been involved in foreign bribery from ODA-funded procurement contracts. AusAID follows the 2012 CPRs and has not issued further guidance concerning debarment, though it is currently revising its due diligence framework. AusAID consults debarment lists of MDBs when considering applicants.

### *Commentary*

*The lead examiners recommend that AusAID expressly require that all foreign bribery allegations involving Australian nationals, residents and companies are always reported to the AFP, and that AusAID train its employees on this reporting obligation and procedure.*

#### *(c) Officially Supported Export Credits*

153. The Export Finance and Insurance Corporation (EFIC) is Australia's officially supported export credit and insurance agency. In 2010-11, over 50% of the support signed by EFIC were in the construction and mining industries. EFIC's website includes a section on its anti-corruption initiatives and links to the AGD's foreign bribery webpage. The website also refers to the 2011 OECD MNE Guidelines.

154. When EFIC provides support for agent commission fees that are less than 5% of the contract value, it only requires disclosure of the amounts to be paid. For commissions above this threshold, EFIC requests additional information (e.g. the purpose of the payments) and evaluates the commissions' "commercial reasonableness." EFIC explains that the 5% threshold is based upon "historical experience" and does not preclude EFIC from deciding to undertake enhanced due diligence below the threshold.

155. In July 2012, EFIC revised its policies to require exporters to disclose the names and addresses of all agents, including those paid commissions of less than 5%. EFIC also checks whether an agent has been involved in corrupt activity by checking a commercial listing. Senior management is informed of any negative findings. While this is an improvement, merely checking for past corrupt activity is inadequate to detect bribery risks. However, because commissions below 5% may still be of large absolute value, such commissions should not be presumptively deemed appropriate and should be subject to additional due diligence.

156. EFIC does not necessarily report all foreign bribery allegations to competent authorities. EFIC assesses the "seriousness" of an allegation based on factors such as the potential consequence on EFIC; the nature, clarity and source of the allegation; and the location of the alleged wrongdoing. Cases determined to be of a low level of seriousness are not referred to an external authority. For cases of a medium or high level seriousness, EFIC decides whether to report the matter to the AFP by applying the CCPM (see p. 19).<sup>69</sup> This may be inappropriate since the CCPM requires consideration of matters that EFIC may know little about, such as the AFP's resources and priorities.

157. Phase 2 Recommendation 6(b) asked Australia to consider issuing a policy or rules to deny or terminate export credits to entities convicted of foreign bribery. EFIC informs its clients (including in application forms) of the legal consequences of bribery. Applicants must declare whether they or anyone acting on their behalf have engaged, been charged or convicted of foreign bribery. At the on-site visit, EFIC stated that it checks MDB debarment lists, and that there is a "strong likelihood" an applicant on such a list would also be excluded by EFIC. Whether an applicant is excluded also depends on enhanced due diligence conducted by EFIC, which includes reviewing whether the exporter had taken appropriate internal corrective and preventive measures. If bribery is proven after support is granted, EFIC may seek

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<sup>69</sup> EFIC (14 February 2012), Corruption Allegations Procedure, pp. 9-14.

recourse such as invalidating support and seeking sums already paid. In July 2012, EFIC updated its Anti-Bribery and Corruption Procedures. However, they do not set forth criteria to withdraw support due to corruption. They state that the matter “will be dealt with in accordance with” EFIC’s Corruption and Allegation Procedures, which do not include guidelines for withdrawing support.

158. Despite these policies, EFIC has granted support in two transactions that subsequently became the subject of current foreign bribery investigations. In January 2010, EFIC learned of the first investigation which involved a defence contract in 2001-2002.<sup>70</sup> In March 2012, EFIC confirmed that it had granted two performance bonds in January 2011 in a second transaction that is also under investigation.<sup>71</sup> At the on-site visit, EFIC stated that it has since revised its policies. These changes occurred as a result of EFIC’s efforts to enhance its procedures from time to time. They were not designed to correct deficiencies relating to the two transactions referred to above. EFIC did not explain why its due diligence measures and policies failed to detect these foreign bribery allegations, and whether EFIC would terminate existing support or deny future support against the two companies concerned. EFIC was unable to discuss these cases in detail while investigations were on-going.

### ***Commentary***

***The lead examiners recommend that EFIC conduct due diligence on agent commission fees below 5% of large absolute value to ensure that funds are not being provided as bribes. They further recommend that EFIC report all credible allegations of foreign bribery involving Australian nationals, residents and companies to the AFP, and not consider the CCPM when deciding whether to report these cases. Finally, EFIC should reduce to writing its criteria and guidelines for terminating support to entities involved in foreign bribery.***

***Since EFIC is unable to discuss its role in the two on-going investigations that involve EFIC support, the lead examiners recommend that the Working Group follow up the application of EFIC’s procedures in these two cases.***

## **C. RECOMMENDATIONS AND ISSUES FOR FOLLOW-UP**

159. While the Working Group on Bribery welcomes Australia’s recent efforts, it notes 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 authorities, 21 have been concluded without charges. Australia recently began strengthening its enforcement efforts, such as by establishing a Foreign Bribery Panel of Experts to advise AFP investigation teams. The Working Group encourages Australia to continue these efforts, and looks forward to evaluating the impact of these developments on Australia’s enforcement of its foreign bribery laws.

160. Regarding outstanding recommendations from previous evaluations, since its Phase 2 Written Follow-Up Reports, Australia has fully implemented Phase 2 Recommendations 2(a), 5(c), and 6(a). Australia has partially implemented Recommendations 1(b), 1(c), 2(b), 2(e), 4(a), and 6(b). Recommendation 1(d) has not been implemented.

161. In conclusion, based on the findings in this report on Australia’s implementation of the Anti-Bribery Convention, the 2009 Anti-Bribery Recommendation and related OECD anti-bribery instruments,

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<sup>70</sup> The Age (7 March 2012), “Defence Firm Faces Defence Probe”.

<sup>71</sup> SmartMoney (8 March 2012), “Australia’s Export Credit Agency Backed Leighton Iraq Work”.



the Working Group: (1) makes the following recommendations to enhance implementation of these instruments in Part 1; and (2) will follow up the issues identified in Part 2. The Working Group invites Australia to report orally on the implementation of recommendations 6 and 8(a) within one year (i.e., by October 2013). The Working Group invites Australia to submit a written follow-up report on all recommendations and follow-up issues within two years (i.e., by October 2014).

162. In addition, the Working Group will continue to monitor Australia's foreign bribery enforcement efforts. This should include, if possible, exploration of the relevant issues in the *Securrency/NPA* case that could not be discussed in this evaluation because of suppression orders and on-going investigations. Australia is also invited to provide information on its foreign bribery-related enforcement actions when it reports orally in October 2013 and in writing in October 2014.

## **1. Recommendations of the Working Group**

### ***Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery***

1. The Working Group recommends that Australia review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials (Convention Article 1, 5; 2009 Recommendation V).

2. With respect to the foreign bribery offence, the Working Group recommends that Australia:

- (a) Continue to raise awareness of the distinction between facilitation payments and bribes, 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 (2009 Recommendation VI.ii);
- (b) Take appropriate steps to clarify that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery offence (Convention Article 1);

3. Regarding the liability of legal persons, the Working Group recommends that Australia take steps to enhance the usage of the corporate liability provisions, including those on corporate culture, where appropriate, and provide on-going training to law enforcement authorities relating to the enforcement of corporate liability in foreign bribery cases (Convention Article 2).

4. Regarding the false accounting offence, the Working Group recommends that Australia:

- (a) Increase the maximum sanctions against legal persons for false accounting under Commonwealth legislation to a level that is effective, proportionate and dissuasive within the meaning of Article 8(2) of the Convention, commensurate with Australia's legal framework; or increase the maximum sanctions and broaden the scope of liability of legal persons for false accounting offences at the State level (Convention Article 8(2));
- (b) Vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (Convention Article 8(1)).

5. Regarding confiscation, the Working Group recommends that Australia take further concrete steps (such as providing guidance and training) to ensure that its law enforcement authorities routinely considers confiscation in foreign bribery cases (Convention Article 3(3)).

6. Regarding the Australian Securities and Investment Commission (ASIC), the Working Group recommends that Australia take steps to ensure that ASIC's experience and expertise in investigating corporate economic crimes are used to assist the AFP to prevent, detect and investigate foreign bribery where appropriate (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

7. With respect to co-ordination and information-sharing, the Working Group recommends that:

- (a) The AFP, ASIC, and APRA set out in writing with greater precision, following consultations with one another, their complementary roles and responsibilities in foreign bribery and related cases, and written rules for case referral and information sharing (Convention Article 5; 2009 Recommendation IX.ii);
- (b) Australia establish clear guidelines as to when each State and Territorial authority would refer foreign bribery cases to the AFP or commence its own investigations (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

8. With respect to investigations of foreign bribery, the Working Group recommends that:

- (a) The AFP (i) take sufficient steps to ensure that foreign bribery allegations are not prematurely closed; (ii) be more proactive in gathering information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations; (iii) take steps to ensure that it explores all avenues for exercising jurisdiction over related legal persons in foreign bribery cases; (iv) as a matter of policy and practice, continue to systematically consider whether it would be appropriate to conduct concurrent or joint investigations with other Australian and foreign law enforcement agencies, especially when foreign bribery is allegedly committed by a company that has its headquarters or substantial operations in Australia; and (v) routinely consider investigations of foreign bribery-related charges such as false accounting and money laundering, especially in cases where a substantive charge of foreign bribery cannot be proven (Convention Articles 2, 5, 7 and 8; Commentary 27; 2009 Recommendation Annex I.C and I.D);
- (b) The AFP Foreign Bribery Panel of Experts consider the Working Group's recommendations to the AFP (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

9. Regarding plea bargaining and self-reporting, the Working Group recommends that Australia develop a clear framework that addresses matters such as the nature and degree of co-operation 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 co-operation; measures to monitor the company's compliance with a plea agreement; and the prosecution of natural persons related to the company (Convention Articles 3 and 5; Commentary 27; 2009 Recommendation Annex I.D).

10. With respect to resources and priority, the Working Group recommends that:

- (a) The AFP continue to provide its officers with additional training in foreign bribery, and training to law enforcement officials to implement the Cybercrime Legislation Amendment Act 2012 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);
- (b) Australia take steps to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);
- (c) The AFP and other bodies involved in foreign bribery investigations and prosecutions take measures (such by issuing written guidance or policy) to continue to ensure that they are not

impermissibly influenced by factors listed in Article 5 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).

11. With respect to mutual legal assistance (MLA), the Working Group recommends that Australia take reasonable measures to ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons (Convention Article 9(1); 2009 Recommendation XIII.iv).

***Recommendations for ensuring effective prevention, detection, and reporting of foreign bribery***

12. With respect to awareness-raising, the Working Group recommends that Australia:

- (a) Raise awareness of the foreign bribery offence among State-level law enforcement authorities involved in investigating economic crime (2009 Recommendation III.i);
- (b) Continue to raise awareness among the private sector of the foreign bribery offence and the importance of developing and implementing anti-bribery corporate compliance programmes, including by (i) promoting Annex II of the 2009 Recommendation, (ii) targeting companies (particularly SMEs) that conduct business abroad, and (iii) co-ordinating efforts to promote corporate compliance, including those undertaken by the AFP (2009 Recommendation III.i, III.v, X.C and Annex II);
- (c) Consider summarising publicly available information on when hospitality, promotional expenditure, and charitable donations may amount to bribes (2009 Recommendation III.i and X.C);
- (d) Adopt a “whole-of-government” approach to raise awareness of foreign bribery (2009 Recommendation III.i).

13. With respect to anti-money laundering measures, the Working Group recommends that Australia further raise awareness of foreign bribery as a predicate offence, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies (2009 Recommendation III.i).

14. With respect to tax-related measures, the Working Group recommends that:

- (a) Australia align the record-keeping requirements for deducting a facilitation payment under the ITAA 1997 with those for the facilitation payment defence under the Criminal Code Act (2009 Recommendation VI.ii, VIII.i; 2009 Tax Recommendation I.i);
- (b) The AFP promptly inform the ATO of foreign bribery-related convictions so that the ATO may verify whether bribes were impermissibly deducted (2009 Recommendation VIII.i; 2009 Tax Recommendation I.i);
- (c) The ATO consider including periodically bribery and facilitation payments in its Compliance Programme (2009 Recommendation III.i, VIII.i; 2009 Tax Recommendation I.ii).

15. With respect to prevention, detection and reporting, the Working Group recommends that:
- (a) Australia extend the reporting obligation of external auditors under the Commonwealth Corporations Act to cover the reporting of foreign bribery, including foreign bribery committed by an audited company's subsidiary or joint venture partner (2009 Recommendation III.iv, X.B.v);
  - (b) Australia align the APS Guide with its practice of requiring Australian civil servants who work overseas to report suspicions of foreign bribery to the AFP in all cases (2009 Recommendation IX.ii);
  - (c) Australia ensure that Australian public servants, and officials and employees of independent statutory authorities are subject to equivalent reporting requirements (2009 Recommendation IX.ii);
  - (d) Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable grounds from discriminatory or disciplinary action (2009 Recommendation IX.iii);
  - (e) AusAID expressly require that all foreign bribery allegations involving Australian nationals, residents and companies are always reported to the AFP; and train its employees on this reporting obligation and procedure (2009 Recommendation IX.ii);
  - (f) Austrade consider taking concrete steps to encourage companies, in the strongest terms, to conduct due diligence on agents, including those referred to them by Austrade (2009 Recommendation X.C.i).
16. With respect to public advantages, the Working Group recommends that:
- (a) 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 (Convention Article 3(4); 2009 Recommendation XI.i);
  - (b) EFIC (i) conduct due diligence on agent commission fees below 5% of large absolute value to ensure funds are not being provided as bribes; (ii) report all credible allegations of foreign bribery involving Australian nationals, residents and companies to the AFP, and not consider the CCPM when deciding whether to report these cases; and (iii) reduce to writing its criteria and guidelines for terminating support to entities involved in foreign bribery (2009 Recommendation XII.ii; 2006 Export Credit Recommendation).

## **2. Follow-up by the Working Group**

17. The Working Group will follow up the issues below as case law and practice develop:
- (a) Outcome of Australia's public consultation on the facilitation payment defence and foreign bribery offence (Convention Article 1);
  - (b) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code (Convention Article 1; Commentary 9);

- (c) Whether the foreign bribery offence requires the proof of an intention to bribe a particular foreign public official (Convention Article 1);
- (d) Whether effective, proportionate and dissuasive sanctions (including confiscation) are imposed against natural and legal persons for (i) foreign bribery, and (ii) false accounting in connection with foreign bribery (Convention Articles 3(1), 3(3), 8(2));
- (e) Choice of proceeding in foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive (Convention Articles 3, 5);
- (f) Work of the AFP Foreign Bribery Panel of Experts, including the implementation of recommendations that the AFP (i) be more proactive in gathering information from diverse sources at the pre-investigative stage; (ii) ensure that future foreign bribery investigations consistently consider the involvement of related legal persons, and alternate charges such as money laundering and false accounting; and (iii) the implementation of the *aide mémoire* (Convention Articles 2, 5, 7, 8; 2009 Recommendation Annex I.C, I.D);
- (g) AFP's statement to the Working Group in 2008 that they were "willing to undertake evaluations on suspected foreign bribery instances based on credible media reports, publicly available documents from foreign courts or mutual legal assistance requests" (Convention, Article 5; Commentary 27; 2009 Recommendation Annex I.D);
- (h) Whether the ATO re-assesses the tax returns of taxpayers convicted of foreign bribery (2009 Recommendation VIII.i; 2009 Tax Recommendation);
- (i) Reporting of foreign bribery cases by the ATO to the AFP (2009 Recommendation IX.ii);
- (j) Enactment and implementation of the Public Interest Disclosure Bill (2009 Recommendation IX.iii);
- (k) Application of EFIC's procedures in two cases that involve EFIC support and which is the subject of on-going foreign bribery investigations (2009 Recommendation XII.ii).

**ANNEX 1 PREVIOUS WORKING GROUP RECOMMENDATIONS TO AUSTRALIA AND  
WORKING GROUP ASSESSMENT OF THEIR IMPLEMENTATION**

<i>Phase 2 Recommendation</i>	<i>2008 Working Group Evaluation</i>
<b><i>Recommendations for ensuring effective measures for preventing and detecting bribery of foreign public officials</i></b>	
1. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by:	
(a) further promoting awareness within the Commonwealth public service,	Fully implemented
(b) continuing efforts to raise the awareness of the private sector, including the distinction between bribery and facilitation payments and the record-keeping requirement for the defence of facilitation payments,	Partially implemented
(c) paying special attention to raising the awareness of SMEs through, for instance, Australian diplomatic and trade missions in foreign countries, and	Partially implemented
(d) raising the awareness of cash dealers of the foreign bribery offence as a predicate offence for the offence of money laundering, and providing them with guidance on identifying suspicious transactions.	Not implemented
2. Concerning the <u>detection and investigation</u> of the offence of bribing a foreign public official by the <u>Australian Federal Police (AFP)</u> , the Working Group recommends that:	
(a) it is clarified in the publicly available explanatory document on the Case Categorisations Prioritisation Model (CCPM), that implementation of the Convention is to be given “high priority”;	Partially implemented
(b) the AFP undertakes evaluations where appropriate of the veracity of allegations of foreign bribery involving Australian nationals and companies contained in (i) media reports from credible sources, (ii) publicly available court documents filed in foreign countries, and (iii) requests to Australia from foreign countries for mutual legal assistance;	Partially implemented
(c) Australia clarify that all cases of foreign bribery be referred to the AFP by Commonwealth agencies;	Fully implemented
(d) the process be revised under the National Guidelines for Referring Politically Sensitive Matters to the AFP so that referrals of politically sensitive cases of foreign bribery to the AFP are not potentially delayed by notification to the Minister of Justice and Customs, and	Fully implemented
(e) the AFP take the following steps to ensure the effective transmission of information to it about foreign bribery cases: (i) enter into a formalized agreement with the Australian Prudential Regulation Authority (APRA) concerning areas of overlapping jurisdiction respecting foreign bribery, and (ii) consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territorial police and anti-corruption bodies to the AFP even where a State or Territorial law establishes a bribery offence broad enough to cover foreign bribery. (Convention, Art. 5; Commentary 27; Revised Recommendation I, II)	Partially implemented
3. Concerning the prevention and detection of foreign bribery through <u>measures for disallowing the tax deductibility of bribe payments to foreign public officials</u> , the Working Group recommends that the Australian Taxation Office (ATO):	
(a) consider revising its Compliance Program to specifically include bribe payments to foreign public officials in their risk profile; and	Fully implemented

(b) issue as soon as possible the bribery awareness audit guidelines that it is currently drafting on identifying bribe payments to foreign public officials and determining whether a particular payment meets one of the defences, and include within the bribery awareness audit guidelines a requirement that tax auditors report all information regarding foreign bribery to the Serious Non Compliance Business Line (SNC). (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)	Fully implemented
4. Concerning <u>other measures for preventing and detecting foreign bribery</u> , the Working Group recommends that Australia:	
(a) should require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies, and consider requiring external auditors to report indications of a possible illegal act to the competent authorities; (Revised Recommendation V.B.iii, iv)	Partially implemented
(b) consider taking appropriate measures to ensure that members of the Australian Public Service who come into contact with companies involved in international business understand that the Australian Public Service Code of Conduct requires Commonwealth officials to report to the AFP credible evidence of foreign bribery offences that they uncover in the course of performing their duties, encourage and facilitate such reporting, and consider strengthening reporting provisions, such as those included in the Department of Foreign Affairs and Trade (DFAT) Overseas Code and Export Finance and Insurance Corporation (EFIC) internal rules; (Revised Recommendation I)	Fully implemented
(c) ensure that AusAID staff are aware of the policy for responding to indications of foreign bribery in relation to ODA contacts, including the reporting of such indications to the AFP, amend the standard contract with AusAID to clarify that the Contractor shall not engage in foreign bribery in relation to the execution of the contract, and ensure that contracts with subcontractors contain a similar prohibition; (Revised Recommendation I, VI. iii) and	Fully implemented
(d) consider reviewing the Commonwealth whistleblower provisions in the context of the ongoing review on this subject to ensure effective whistleblower protections for Commonwealth officials and staff of Commonwealth agencies who report suspicions of foreign bribery, and consider introducing stronger whistleblower protections for private sector employees who report suspicions of foreign bribery. (Revised Recommendation I)	Fully implemented
<b><i>Recommendations for Ensuring Effective Prosecution and Sanction of Foreign Bribery and related Offences</i></b>	
5. Concerning the <u>implementation of the offence of bribing a foreign public official</u> under the Commonwealth Criminal Code, the Working Group recommends that Australia:	
(a) clarify that the foreign bribery offence applies regardless of the results of the conduct or the alleged necessity of the payment; (Convention, Art. 1; Commentary 7)	Fully implemented
(b) carry out its undertaking to amend as soon as possible the defence for conduct that is “lawful” in the foreign public official’s country to ensure consistency with Commentary 8 on the Convention; (Convention, Art. 1; Commentary 8) and	Fully implemented
(c) carry out the undertaking to revise the existing publicly available guidance document on the foreign bribery offence as soon as possible to clarify the defence of facilitation payments. (Convention, Art. 1; Commentary 9)	Partially implemented
6. Concerning the <u>sanctions</u> for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:	
(a) increase the fine for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia; (Convention, Art. 3.1)	Not implemented

(b) with respect to companies that have been convicted of foreign bribery (i) consider introducing formal rules on the imposition of civil or administrative sanctions upon legal persons and individuals convicted of foreign bribery, so that public subsidies, licenses, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied or terminated, including through the provisions of the relevant contracts, as a sanction for foreign bribery in appropriate cases, and include provisions for the termination of such contracts in appropriate cases; and (ii) consider establishing a policy for denying access to contracting opportunities with public agencies, such as the public procurement agencies, EFIC and AusAID, as well as including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after entering the contract; (Convention, Art. 3.4; Revised Recommendation II.v, VI ii) and	Partially implemented
(c) continue compiling statistics on the offence of money laundering, including the level of sanctions and the confiscation of proceeds of crime. (Convention, Art. 7)	Fully implemented
7. Concerning the <u>discretion to prosecute the offence of bribing a foreign public official</u> , the Working Group recommends that Australia clarify that the Guidelines on the Prosecution Policy of the Commonwealth prohibits consideration of the factors listed in Article 5 of the Convention. (Convention, Art. 5)	Fully implemented
<b><i>Follow-up by the Working Group</i></b>	
8. The Working Group will follow-up the following issues once there has been sufficient practice:	
(a) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code; (Convention, Art. 1; Commentary 9)	Continue to follow up
(b) the application of the tax deduction for facilitation payments; (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)	Continue to follow up
(c) application of the criminal liability of legal persons for the bribery of foreign public officials; (Convention, Art. 2)	Continue to follow up
(d) the choice of proceeding with foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive, as well as the sanctions imposed on natural persons for foreign bribery, to determine whether monetary sanctions, including fine penalties and confiscation, are imposed where appropriate; (Convention, Art. 3.1, 5)	Continue to follow up
(e) whether in practice Australia's capacity to provide mutual legal assistance in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence (The Working Group notes that this is a horizontal issue affecting many Parties.); (Convention, Art. 9.1) and	Continue to follow up
(f) the use of false accounting offences under the Corporations Act, including the level of sanctions. (Convention, Art. 8.1, 8.2)	Continue to follow up



## ANNEX 2 PARTICIPANTS AT THE ON-SITE VISIT

### Commonwealth Government Departments and Bodies

- Attorney-General's Department
- Australian Federal Police
- Commonwealth Director of Public Prosecutions
- Australian Securities and Investments Commission
- Australian Taxation Office
- Department of Foreign Affairs and Trade
- Australian Trade Commission
- AusAID
- Australian Prudential Regulation Authority
- Australian Crime Commission
- AUSTRAC
- Department of Industry, Innovation, Science, Research and Tertiary Education
- Australian Public Service Commission
- Department of Finance and Deregulation
- Department of Defence
- Export Finance and Insurance Corporation
- Department of Prime Minister and Cabinet
- Treasury

### State-Level Government Departments and Bodies

- New South Wales Police
- New South Wales Independent Commission Against Corruption
- Victoria Department of Justice
- Victoria Department of Premier and Cabinet
- Victoria Police

### Judiciary

- Chief Justice, Supreme Court of New South Wales
- Chief Judge at Common Law, Supreme Court of New South Wales

### Legislature

- The Hon. Nicola Roxon MP, Attorney-General of Australia

### Private Sector

#### *Private enterprises*

- BHP Billiton
- C4i
- Commonwealth Bank
- CSL Ltd.
- Macquarie Bank
- Paladin Energy Ltd
- Sebel Furniture
- Woodside

#### *Business associations*

- ACI
- Australia-Africa Mining Group (AAMIG)
- Australian Industry Group
- Australian Institute of Company Directors
- International Trade Advisors

#### *Legal profession and academics*

- Baker McKenzie
- Clayton Utz
- DLA Piper
- Freehills
- International Anti-Corruption Consultants Australia
- Johnson Winter Slattery
- Law Council of Australia
- Middletons
- Professor Ross Buckley, University of New South Wales

*Accounting and auditing profession*

- CPA Australia
- Deloitte
- Ernst & Young
- Korda Mentha
- KPMG
- McGrath Nicol
- PWC

Civil Society

- Transparency International Australia
- Corporate Analysis, Enhanced Responsibility
- The Age Newspaper

### ANNEX 3 LIST OF ABBREVIATIONS AND ACRONYMS

AASB	Australian Accounting Standards Boards
ACC	Australian Crime Commission
ACSI	Australian Council of Super Investors
AFP	Australian Federal Police
AG	Attorney-General
AGD	Attorney-General's Department
AML	anti-money laundering
APRA	Australian Prudential Regulation Authority
APS	Australian Public Service
APS Code	APS Code of Conduct
APS Guide	APS Values and Code of Conduct in Practice
ASA	Australian Auditing Standard
ASIC	Australian Securities and Investments Commission
ATC	Australian Trade Commission
ATO	Australian Taxation Office
AUD	Australian dollar
AusAID	Australian Agency for International Development
CACTF	Criminal Assets Confiscation Taskforce
CCPM	Case Categorisation and Prioritisation Model
CDPP	Commonwealth Director of Public Prosecutions
CPG	Commonwealth Procurement Guidelines
DFAT	Department of Foreign Affairs and Trade
DFD	Department of Finance and Deregulation
EFIC	Export Finance and Insurance Corporation
EU	European Union
EUR	euro
FATF	Financial Action Task Force
ICCCA	International Crime Cooperation Central Authority (Australia)
IOSCO MMOU	International Organization of Securities Commissions Multilateral Memorandum of Understanding
MABRA	Mutual Assistance in Business Regulation Act 1992
MACMA	Mutual Assistance in Criminal Matters Act 1987
MDB	multilateral development bank
MER	mutual evaluation report (FATF)
MLA	mutual legal assistance
MOU	memorandum of understanding
NGO	non-governmental organisation
NSW	New South Wales
ODA	official development assistance
POCA	Proceeds of Crime Act 2002
SME	small- and medium-sized enterprise
SRT	Special References Team (Australian Federal Police)
STR	suspicious transaction report
UNCAC	United Nations Convention against Corruption

## ANNEX 4 SUMMARIES OF AUSTRALIAN FOREIGN BRIBERY ENFORCEMENT ACTIONS

The following are anonymised descriptions of certain terminated, finalised or ongoing investigations by Australian authorities. This list is not exhaustive and represents the cases considered by the evaluation team. As discussed in the Report at p. 7, the Australian Federal Police (AFP) has received 28 allegations of foreign bribery involving Australian companies and individuals (including the *Securrency/NPA* case). 12 of these cases have been evaluated, rejected for investigation, and “terminated”, while 9 cases were accepted for investigation but have been “finalised” without resulting in charges because of insufficient evidence. There currently 7 cases are on-going.

### Terminated Cases

#### *Mining Pit Case*

In 2005, an Australian company operating a mining pit in a foreign country allegedly provided support to the army of the foreign government to quell a rebellion, which resulted in the cancellation of the mining pit contract. The AFP looked into the allegations, but concluded that it did not have enough evidence to open an investigation. One international Mutual Assistance Request (MAR) was made by the AFP to facilitate interviews with witnesses outside Australia. The AFP also sought assistance at a police-to-police level outside the formal MAR process from two other countries. The AFP obtained a number of statements from possible witnesses, including from Non-Governmental Organisations; however, no statements obtained provided evidence to support the allegations.

#### *Iron Ore Case*

An Australian, who is an executive of an Australian mining company, was alleged to have stolen confidential documents from a foreign government. The information obtained allegedly could have given the Australian mining company an advantage in its annual iron ore price negotiations with Chinese steel mills. Australian authorities did not open an investigation and reported that, “no evidence has been presented to support these allegations” and were not pursued by the foreign government.

#### *Casino Foreign Bribery Case*

In 2009, authorities in a foreign country brought charges against one of their officials for domestic bribery and listed two projects by an Australian casino company as “suspect projects” in the indictment. According to media reports, indications of bribery included the fact that the casinos were granted land that was originally planned for the construction of a university, and construction began before formal rezoning procedures were completed and recorded. Australia reported to the Working Group that the AFP supported investigations by the foreign authorities, but did not start a domestic investigation.

#### *Joint Venture Buyout Case*

In 2009, media reports indicated that an Australian company bought out its joint venture partner’s stake in a gold mine in a foreign country. To facilitate the transaction, part of the proceeds of the buy-out were allegedly channelled to board members of the joint venture partner. These board members reportedly were closely related to public officials of the foreign country, thus raising the prospect that these officials were the ultimate beneficiaries of the buy-out proceeds. The AFP declined to open an investigation because it 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.

### *Mining Company Case*

In 2010, a multinational mining company with headquarters in Australia and management offices overseas announced that it had disclosed to the US authorities evidence that it had uncovered regarding possible foreign bribery. The AFP reacted following a referral from the Australian Attorney-General's Department, which in turn had received information from the US authorities. Based on material received from the US, the AFP identified suspicious transactions that had been recorded as legitimate business payments. After consulting the US authorities and ASIC, the AFP referred the case to ASIC without conducting an investigation. ASIC also ultimately did not commence proceedings because the company had documented the suspicious payments and disclosed them to the market.

### **Finalised Cases**

#### *Petroleum Case*

A publicly listed Australian petroleum exploration and production company entered a contract to invest in a project in a foreign country. The contract was subsequently amended by an authoritarian leader in the foreign country and, two years after the amendments, the foreign government denounced the contract [for bribery. In June 2006, the Australian Federal Police began investigating the Australian company for allegations of bribery and corruption. In May 2008, the AFP officially cleared the company of any wrongdoing, stating that "there is no evidence to support a charge of foreign bribery." Before the Working Group, Australia explained that the company and the foreign government resolved the legal and contractual issues and that the contract in dispute was re-executed.

#### *Banking Case*

In a government tender to privatise a bank in a foreign country, it was alleged that the prime minister of the foreign country improperly exerted his influence to favour a consortium of companies that included interests by an Australian individual. The AFP closed the investigation after a visit by two policemen from the foreign country in May 2007 who advised the AFP that time that their investigations into this matter have been finalised and there was no evidence pointing to bribery by Australian citizens. Investigations by the foreign government into domestic bribery were also closed.

#### *Gold Mining Case*

A gold mining company listed in Australia, Canada, and New Zealand, was alleged to have bribed officials in a foreign country to secure development rights in a gold and copper mine. An NGO referred the allegations to the Australian Federal Police to investigate the allegations in October 2007. In 2008, the AFP finalised the investigation, because the alleged conduct took place before 1999 and the AFP received legal advice that there is no retrospective operation of the Australian foreign bribery offence.

#### *Wheat Board Case*

Two unnamed former employees of an Australian grain marketing organisation were alleged to have bribed officials in three foreign countries during the 1990s, and that payments in two foreign countries continued in 2000 after enactment of anti-bribery laws. The AFP closed an investigation into corruption in three foreign countries for lack of evidence, based on the legal advice received from independent Queen's Counsel that there was no reasonable prospect of conviction and that it was unclear whether breach of UN sanctions was a crime in Australia. The AFP has assisted in civil proceedings by ASIC against six former directors and officers of the Australian organisation. As of June 2012, two directors of the grain marketing organisation have been found to have contravened the Corporations Act.

### *Property Development Case*

A property development company based in Australia accused a state-backed company in a foreign country of defrauding the company into paying a consultancy fee to facilitate a waterfront property purchase. In 2009, authorities in the foreign country charged two Australian individuals with fraud against the property development company. The AFP assisted foreign authorities in their investigation, but did not open an investigation because it considered that the citizens were charged with fraud-related offences rather than bribery-related offences. The AFP also concluded that there was insufficient evidence to substantiate allegations of foreign bribery by Australian companies or citizens.

### **Ongoing Cases**

#### *Anonymous Case*

In 2009, AFP received a referral from an Australian company that another Australian company committed bribery in relation to contracts with an enforcement agency in a foreign country. The AFP has executed search warrants on 3 premises and 2 business premise, and sent MLA requests to the foreign country. The AFP has identified 8 individuals in Australia and the foreign country who either caused bribery or conspired to cause bribery. The case is being referred to the CDPP for consideration before charges are laid.

#### *Phosphate Mining Case*

A company allegedly bribed parliamentarians in a foreign country to obtain a phosphate mining permit. The company includes two corporate entities: one incorporated in a third country and one incorporated in Australia. Only the entity incorporated in a third country was implicated in the allegations. The AFP interviewed two complainants regarding the allegations, but concluded that the investigation could not continue for lack of jurisdiction. However, in the course of investigation, a number of unrelated financial transactions by the company were identified as suspicious. These transactions were passed to AUSTRAC, who conducted a financial analysis that enabled the AFP to establish a separate evaluation into other possible foreign bribery offences, which is ongoing.

#### *Construction Case*

In February 2012, An Australian construction company self-reported allegations that a foreign subsidiary may have made improper payments to facilitate a wharf construction in a third country. EFIC has announced that it provided two “performance bonds” to the construction company to cover projects in Southern Iraq. The AFP is currently conducting an ongoing investigation.

#### *Engineering Case*

In 2009, the Australian subsidiary of a foreign defence firm referred allegations to the AFP that an Australian engineering and infrastructure firm was allegedly paying bribes to win contracts in several foreign countries. It is alleged that the Australian firm enlisted serving and former government officials and hired intermediaries close to government officials to facilitate deals. The AFP is currently investigating up to five deals by the Australian firm.

#### *Securrency/NPA Case*

Securrency is a Melbourne-based company jointly owned by a UK company and the Reserve Bank of Australia (RBA), Australia’s central bank. RBA appointed half of the board of directors, and from its appointees, it appointed Securrency’s chairman. Note Printing Australia (NPA) is wholly-owned subsidiary

of RBA. The allegations concern bribery of foreign public officials in Vietnam, Indonesia, Nepal and Malaysia in 1999-2005 to secure contracts to produce bank notes. Securency, NPA, and nine former executives and sales agents of the two companies have been charged with foreign bribery, conspiracy to commit foreign bribery, and/or false accounting. One former executive pleaded guilty to false accounting in July 2012. At the time of this report, a court hearing was also being held to determine whether several of the accused should be committed to trial. Information about the hearing that has been made public is not subject to the suppression order, however, and is referred to in various parts of this report. Criminal investigations in the case are also on-going.

## ANNEX 5 EXCERPTS OF RELEVANT LEGISLATION

### Commonwealth Criminal Code Act Division 70 - Bribery of Foreign Public Officials

#### 70.1 Definitions

In this Division:

*benefit* includes any advantage and is not limited to property.

*business advantage* means an advantage in the conduct of business.

*control*, in relation to a company, body or association, includes control as a result of, or by means of, trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights.

*duty*, in relation to a foreign public official, means any authority, duty, function or power that:

- (a) is conferred on the official; or
- (b) that the official holds himself or herself out as having.

*foreign government* body means:

- (a) the government of a foreign country or of part of a foreign country; or
- (b) an authority of the government of a foreign country; or
- (c) an authority of the government of part of a foreign country; or
- (d) a foreign local government body or foreign regional government body; or
- (e) a foreign public enterprise.

*foreign public enterprise* means a company or any other body or association where:

- (a) in the case of a company—one of the following applies:
  - (i) the government of a foreign country or of part of a foreign country holds more than 50% of the issued share capital of the company;
  - (ii) the government of a foreign country or of part of a foreign country holds more than 50% of the voting power in the company;
  - (iii) the government of a foreign country or of part of a foreign country is in a position to appoint more than 50% of the company's board of directors;
  - (iv) the directors (however described) of the company are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country;
  - (v) the government of a foreign country or of part of a foreign country is in a position to exercise control over the company; and
- (b) in the case of any other body or association—either of the following applies:
  - (i) the members of the executive committee (however described) of the body or association are accustomed or under an obligation (whether formal or informal) to act in accordance with the directions, instructions or wishes of the government of a foreign country or of part of a foreign country;
  - (ii) the government of a foreign country or of part of a foreign country is in a position to exercise control over the body or association; and
- (c) the company, body or association:
  - (i) enjoys special legal rights or a special legal status under a law of a foreign country or of part of a foreign country; or
  - (ii) enjoys special benefits or privileges under a law of a foreign country or of part of a foreign country;

because of the relationship of the company, body or association with the government of the foreign country or of the part of the foreign country, as the case may be.



***foreign public official*** means:

- (a) an employee or official of a foreign government body; or
- (b) an individual who performs work for a foreign government body under a contract; or
- (c) an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country; or
- (d) an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country; or
- (e) an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force); or
- (f) a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country; or
- (g) an employee of a public international organisation; or
- (h) an individual who performs work for a public international organisation under a contract; or
- (i) an individual who holds or performs the duties of an office or position in a public international organisation; or
- (j) an individual who is otherwise in the service of a public international organisation; or
- (k) a member or officer of the legislature of a foreign country or of part of a foreign country; or
- (l) an individual who:
  - (i) is an authorised intermediary of a foreign public official covered by any of the above paragraphs; or
  - (ii) holds himself or herself out to be the authorised intermediary of a foreign public official covered by any of the above paragraphs.

***public international organisation*** means:

- (a) an organisation:
  - (i) of which 2 or more countries, or the governments of 2 or more countries, are members; or
  - (ii) that is constituted by persons representing 2 or more countries, or representing the governments of 2 or more countries; or
- (b) an organisation established by, or a group of organisations constituted by:
  - (i) organisations of which 2 or more countries, or the governments of 2 or more countries, are members; or
  - (ii) organisations that are constituted by the representatives of 2 or more countries, or the governments of 2 or more countries; or
- (c) an organisation that is:
  - (i) an organ of, or office within, an organisation described in paragraph (a) or (b); or
  - (ii) a commission, council or other body established by an organisation so described or such an organ; or
  - (iii) a committee, or subcommittee of a committee, of an organisation described in paragraph (a) or (b), or of such an organ, council or body.

***share*** includes stock.

## **70.2 Bribing a foreign public official**

- (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).

Note: For defences see sections 70.3 and 70.4.

- (1A) In a prosecution for an offence under subsection (1), it is not necessary to prove that business, or a business advantage, was actually obtained or retained.

*Benefit that is not legitimately due*

- (2) For the purposes of this section, in working out if a benefit is **not legitimately due** to a person in a particular situation, disregard the following:
  - (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;
  - (b) the value of the benefit;
  - (c) any official tolerance of the benefit.

*Business advantage that is not legitimately due*

- (3) For the purposes of this section, in working out if a business advantage is **not legitimately due** to a person in a particular situation, disregard the following:
  - (a) the fact that the business advantage may be customary, or perceived to be customary, in the situation;
  - (b) the value of the business advantage;
  - (c) any official tolerance of the business advantage.

*Penalty for individual*

- (4) An offence against subsection (1) committed by an individual is punishable on conviction by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units, or both.

*Penalty for body corporate*

- (5) An offence against subsection (1) committed by a body corporate is punishable on conviction by a fine not more than the greatest of the following:
  - (a) 100,000 penalty units;
  - (b) if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit;
  - (c) if the court cannot determine the value of that benefit—10% of the annual turnover of the body corporate during the period (the **turnover period**) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.
- (6) For the purposes of this section, the **annual turnover** of a body corporate, during the turnover period, is the sum of the values of all the supplies that the body corporate, and any body corporate related to the body corporate, have made, or are likely to make, during that period, other than the following supplies:
  - (a) supplies made from any of those bodies corporate to any other of those bodies corporate;
  - (b) supplies that are input taxed;

- (c) supplies that are not for consideration (and are not taxable supplies under section 72-5 of the *A New Tax System (Goods and Services Tax) Act 1999*);
- (d) supplies that are not made in connection with an enterprise that the body corporate carries on.
- (7) Expressions used in subsection (6) that are also used in the *A New Tax System (Goods and Services Tax) Act 1999* have the same meaning in that subsection as they have in that Act.
- (8) The question whether 2 bodies corporate are related to each other is to be determined for the purposes of this section in the same way as for the purposes of the *Corporations Act 2001*.

### 70.3 Defence—conduct lawful in foreign public official’s country

- (1) A person is not guilty of an offence against section 70.2 in the cases set out in the following table:

<b>Defence of lawful conduct</b>			
<b>Item</b>	<b>In a case where the person’s conduct occurred in relation to this kind of foreign public official...</b>	<b>and if it were assumed that the person’s conduct had occurred wholly...</b>	<b>this written law requires or permits the provision of the benefit ...</b>
1	an employee or official of a foreign government body	in the place where the central administration of the body is located	a written law in force in that place
2	an individual who performs work for a foreign government body under a contract	in the place where the central administration of the body is located	a written law in force in that place
3	an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be
4	an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be
5	an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force)	in the place where the central administration of the body is located	a written law in force in that place
6	a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be

<b>Defence of lawful conduct</b>			
<b>Item</b>	<b>In a case where the person's conduct occurred in relation to this kind of foreign public official...</b>	<b>and if it were assumed that the person's conduct had occurred wholly...</b>	<b>this written law requires or permits the provision of the benefit ...</b>
7	an employee of a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
8	an individual who performs work for a public international organisation under a contract	in the place where the headquarters of the organisation is located	a written law in force in that place
9	an individual who holds or performs the duties of a public office or position in a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
10	an individual who is otherwise in the service of a public international organisation	in the place where the headquarters of the organisation is located	a written law in force in that place
11	a member or officer of the legislature of a foreign country or of part of a foreign country	in the foreign country or in the part of the foreign country, as the case may be	a written law in force in the foreign country or in the part of the foreign country, as the case may be

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

- (2) A person is not guilty of an offence against section 70.2 if:
- (a) the person's conduct occurred in relation to a foreign public official covered by paragraph (1) of the definition of *foreign public official* in section 70.1 (which deals with intermediaries of foreign public officials covered by other paragraphs of that definition); and
  - (b) assuming that the first-mentioned person's conduct had occurred instead in relation to:
    - (i) the other foreign public official of whom the first-mentioned foreign public official was an authorised intermediary; or
    - (ii) the other foreign public official in relation to whom the first-mentioned foreign public official held himself or herself out to be an authorised intermediary;
subsubsection (1) would have applied in relation to the first-mentioned person.

Note: A defendant bears an evidential burden in relation to the matter in subsection (2). See subsection 13.3(3).

- (3) To avoid doubt, if:
- (a) a person's conduct occurred in relation to a foreign public official covered by 2 or more paragraphs of the definition of *foreign public official* in section 70.1; and
  - (b) at least one of the corresponding items in subsection (1) is applicable to the conduct of the first-mentioned person;
- subsubsection (1) applies to the conduct of the first-mentioned person.

#### **70.4 Defence—facilitation payments**

- (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
  - (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.

Note: A defendant bears an evidential burden in relation to the matter in subsection (1). See subsection 13.3(3).

#### *Routine government action*

- (2) For the purposes of this section, a 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.

#### *Content of records*

- (3) A record of particular conduct engaged in by a person complies with this subsection if the record sets out:
  - (a) the value of the benefit concerned; and
  - (b) the date on which the conduct occurred; and
  - (c) the identity of the foreign public official in relation to whom the conduct occurred; and

- (d) if that foreign public official is not the other person mentioned in paragraph 70.2(1)(a)—the identity of that other person; and
- (e) particulars of the routine government action that was sought to be expedited or secured by the conduct; and
- (f) the person’s signature or some other means of verifying the person’s identity.

### **70.5 Territorial and nationality requirements**

- (1) A person does not commit an offence against section 70.2 unless:
  - (a) the conduct constituting the alleged offence occurs:
    - (i) wholly or partly in Australia; or
    - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
  - (b) the conduct constituting the alleged offence occurs wholly outside Australia and:
    - (i) at the time of the alleged offence, the person is an Australian citizen; or
    - (ii) at the time of the alleged offence, the person is a resident of Australia; or
    - (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.

Note: The expression *offence against section 70.2* is given an extended meaning by subsections 11.2(1), 11.2A(1) and 11.6(2).

- (2) Proceedings for an offence against section 70.2 must not be commenced without the Attorney-General’s written consent if:
  - (a) the conduct constituting the alleged offence occurs wholly outside Australia; and
  - (b) at the time of the alleged offence, the person alleged to have committed the offence is:
    - (i) a resident of Australia; and
    - (ii) not an Australian citizen.
- (3) However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence against section 70.2 before the necessary consent has been given.

### **70.6 Saving of other laws**

This Division is not intended to exclude or limit the operation of any other law of the Commonwealth or any law of a State or Territory.

## **Commonwealth Criminal Code Act Division 12 - Corporate Criminal Responsibility**

### **12.1 General principles**

- (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.

Note: Section 4B of the *Crimes Act 1914* enables a fine to be imposed for offences that only specify imprisonment as a penalty.

### **12.2 Physical elements**

If a physical element of an offence is committed by an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, the physical element must also be attributed to the body corporate.

### **12.3 Fault elements other than negligence**

- (1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

- (2) The means by which such an authorisation or permission may be established include:
- (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.
- (3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.
- (4) Factors relevant to the application of paragraph (2)(c) or (d) include:
- (a) whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
  - (b) whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.
- (5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.
- (6) In this section:
- board of directors** means the body (by whatever name called) exercising the executive authority of the body corporate.
- corporate culture** means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.
- high managerial agent** means 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.

#### 12.4 Negligence

- (1) The test of negligence for a body corporate is that set out in section 5.5.
- (2) If:
- (a) negligence is a fault element in relation to a physical element of an offence; and
  - (b) no individual employee, agent or officer of the body corporate has that fault element;
- that fault element may exist on the part of the body corporate if the body corporate's conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
- (3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
- (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

#### 12.5 Mistake of fact (strict liability)

- (1) A body corporate can only rely on section 9.2 (mistake of fact (strict liability)) in respect of conduct that would, apart from this section, constitute an offence on its part if:
- (a) the employee, agent or officer of the body corporate who carried out the conduct was under a mistaken but reasonable belief about facts that, had they existed, would have meant that the conduct would not have constituted an offence; and

- (b) the body corporate proves that it exercised due diligence to prevent the conduct.
- (2) A failure to exercise due diligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
  - (a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
  - (b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

#### **12.6 Intervening conduct or event**

A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.