



AUSTRALIA: PHASE 2

FOLLOW-UP REPORT ON THE IMPLEMENTATION OF THE PHASE 2 RECOMMENDATIONS

APPLICATION OF THE CONVENTION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN INTERNATIONAL BUSINESS TRANSACTIONS AND THE 1997 REVISED RECOMMENDATION ON COMBATING BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 29 August 2008.

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SUMMARY AND CONCLUSIONS BY THE WORKING GROUP ON BRIBERY

a) *Summary of Findings*

1. In June 2008, Australia presented its written follow-up report, outlining its responses to the Recommendations adopted by the Working Group on Bribery at the time of Australia's Phase 2 Examination in 2005. The Working Group welcomed the information provided by the Australian authorities in the course of this exercise and recognised Australia's significant efforts to implement the Recommendations made by the Working Group. The Working Group deems that Australia has fully implemented 12 out of the 22 Recommendations made during the Phase 2 examination, while 10 Recommendations have either been partially implemented or not implemented.

2. Although no foreign bribery cases have yet been brought before the Australian Courts, increased awareness of the foreign bribery offence, as well as significant changes to the legislative provisions governing foreign bribery will contribute to providing a more effective framework for the investigation and prosecution of such cases. Indeed, as of June 2008, Australia reported that the Australian Federal Police are conducting investigations into six foreign bribery cases.

3. Australia has taken a number of initiatives to raise awareness and improve training on the foreign bribery offence. In particular, Australia has developed a very comprehensive Foreign Bribery Information and Awareness Pack, which has been broadly distributed within the public administration as well as the private sector. Training has been provided to Australian officials departing on overseas missions. Information is also available on a number of high profile and regularly visited government websites. The Working Group welcomes the initiatives taken by Australia to improve awareness of the foreign bribery offence in the public and private sector, but regrets that only limited information relating to foreign bribery is available on the website of the Australian trade promotion agencies, such as AusTrade, which represent a key resource through which the private sector, including SMEs, can obtain information. Furthermore, this information is difficult to access. The Working Group also expects Australia to provide additional information regarding awareness raising activities provided by AUSTRAC.

4. With regard to the Working Group Recommendations to improve the reporting and detection of foreign bribery, Australia has taken important steps to improve reporting of suspected foreign bribery within the Australian civil service. The Australian Taxation Office (ATO) has published Guidelines for Tax Auditors which include an obligation to report suspected foreign bribery to their Serious Non-Compliance business line, and from there to the Australian Federal Police (AFP). The Australian Public Service Code of Conduct has been amended to include an obligation to report suspected foreign bribery instances to their superior and subsequently to the AFP. The Code is applicable to all agents in Commonwealth agencies, including staff in AusAid, Australia's official development aid agency. As of June 2008, Guideline 4.20 of the Commonwealth Fraud Control Guidelines does not however clearly reflect this reporting obligation where foreign bribery is concerned, and only refers to "bribery, corruption or attempted bribery or corruption of a Commonwealth employee or contractor to a Commonwealth agency". Consequently, the Working Group welcomed and encouraged Australia's expressed intent to clarify this in the Commonwealth Fraud Control Guidelines at the earliest opportunity.

5. Regarding steps taken to improve reporting more broadly, including in the private sector,

Australia reported that it was currently considering possible reforms to legislation protecting whistleblowers. As concerns specific reporting obligations applicable to external auditors of companies, Australia did not report any specific action to require auditors to report to management indications of possible acts of bribery. Nor did Australia address the issue of reporting of such suspected bribery to the law enforcement authorities, although it should be noted that this is a horizontal issue for many Parties to the Convention.

6. In the specific area of the non tax deductibility of bribes and its effective application, the ATO has included bribe payments to foreign public officials on the risk profile included in the Compliance Programme 2006-2007.¹ Furthermore, as noted above, the ATO has developed Guidelines to Tax Auditors, which provide a summary of legislative provisions in place and assistance to tax auditors in understanding and dealing with bribery. These Guidelines rely largely on information contained in the OECD Bribery Awareness Handbook for Tax Examiners.

7. Australia has also taken important steps as regards the effective investigation of foreign bribery. The AFP has amended its Case Categorisation Prioritisation Model to include in the “high” category “corruption by a public official (including within Australia and bribery of a foreign official in other countries)”. The Working Group appreciates this modification and welcomes Australia’s expressed intent to further clarify the wording to ensure that all types of foreign bribery are considered a high priority, regardless of whether it is committed by a public official. Although the written answers to the follow-up report were not explicit in this respect, the Working Group welcomed explanations provided orally by the AFP before the Working Group that they are 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. A significant measure taken by Australia to allow efficient investigations into foreign bribery cases is amending the National Guidelines for Referring Politically Sensitive Matters and the Commonwealth Fraud Control Guidelines to allow matters to be reported simultaneously to the AFP and to the Minister for Justice (rather than subsequently, as was previously the case).² One area where it was felt that further progress could be achieved concerns cooperation with other law enforcement agencies, and clarifying that the AFP is the competent authority for dealing with foreign bribery. The Working Group acknowledges steps taken in the form of letters to the heads of other federal, state and territorial authorities and discussion of the matter in the context of the HOCOLEA (Heads of Commonwealth Operation Law Enforcement Agencies) forum. Nevertheless, the Working Group considers that this is not fully in line with the Phase 2 Recommendation to enter into formalised agreements with other law enforcement agencies, and encourages Australia to adopt additional measures to ensure that information concerning the need to refer foreign bribery cases to the AFP is available at all levels within the different law enforcement agencies.

8. As concerns effective prosecution, in September 2006, the Commonwealth Director of Public Prosecutions (CDPP) issued a formal Direction which clarifies that decisions to prosecute for foreign bribery should not be influenced by considerations of economic interest, the potential effect upon the relations with another State, or the identity of the natural or legal persons involved. Prosecutors are

¹ As noted in the Phase 2 Report, the Compliance Programme describes the existing risks under the system of self-assessment, and how the ATO manages these risks by balancing its resources and structuring itself accordingly to ensure that taxpayers meet their obligations

² The written answers provided by Australia in its follow-up report (attached hereafter) in advance of the June 2008 Working Group meetings only indicate that consideration was being given to modifying the language. However, by June 2008, Australia had made the necessary changes to effectively amend the National Guidelines for Referring Politically Sensitive Matters and the Commonwealth Fraud Control Guidelines, available on-line at

http://www.ag.gov.au/www/agd/agd.nsf/Page/Fraudcontrol_CommonwealthFraudControlGuidelines-May2002

required to comply with such formal Directions issued by the CDPP.

9. Australia has amended its foreign bribery offence, through legislative changes made under the International Trade Integrity Act 2007, such that section 70.2(2)(a) of the Criminal Code Act 1995 (Cth) now provides that any perception that a benefit is customary, necessary or required is to be disregarded when assessing a possible offence. The Act also amended the Criminal Code to ensure the offence applies regardless of the results of the alleged conduct, and to ensure the defense under section 70.3 to a charge of bribing a foreign public official is only available where the advantage given or offered to a foreign public official is expressly permitted or required by written law, consistent with Commentary 8 on the Convention. While Australia has revised its publicly available guidance documentation on the foreign bribery offence to make more explicit mention of small facilitation payments, it was noted that definitions of small facilitation payments remain problematic. First, the language of the “Fact Sheet” and ATO guidance focuses on government actions “of a minor nature”, rather than payments of a minor value. Furthermore, the examples given in these documents include those which may not, depending upon the circumstances, be considered small facilitation payments (such as “granting a permit, license or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country”).

10. As for sanctions, it was noted that Australia is undertaking a broader review of Commonwealth criminal penalties and that this review will assess existing penalty-setting mechanisms, and that there is likely to be an increase in almost all penalties. While the Working Group was encouraged by this news, it expressed its disappointment in the lack of actual progress in increasing the fine available for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive. The Working Group was also disappointed to learn that, although Australia had considered the introduction of civil or administrative sanctions upon legal persons, and the exclusion from public procurement opportunities for contractors convicted of foreign bribery offences, it had decided not to change its law or policy in this regard. The Working Group was grateful, however, for Australia’s continued compilation of statistics on the offence of money laundering, and for its undertaking to compile these statistics in a way which identifies the predicate offence for such convictions.

b) *Conclusions*

11. Based on the findings of the Working Group on Bribery with respect to Australia’s implementation of its Phase 2 Recommendations, the Working Group concluded that Australia has fully implemented Recommendations 1(a), 2(c), 2(d), 3(a), 3(b), 4(b), 4(c), 4(d), 5(a), 5(b), 6(c), and 7; that Australia has partially implemented Recommendations 1(b), 1(c), 2(a), 2(b), 2(e), 4(a), 5(c), and 6(b); that Recommendation 1(d) has not (yet) been implemented; and that Recommendation 6(a) has not been implemented.

12. The Working Group invited Australia to report orally, within one year after the written follow-up examination, i.e. by June 2009, on the implementation of the Recommendations that the Group considers to be not yet fully implemented. In particular, the Working Group expressed its expectation to hear of progress by Australia concerning Recommendations 1(d) and 6(a), and follow-up issue 8(c).

WRITTEN FOLLOW-UP TO PHASE 2 REPORT

Name of country: Australia

Date of approval of Phase 2 Report: January 2006

Date of information: February 2008

Part I. Recommendations for Action

Text of recommendation:

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;

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government is continuing its awareness raising campaign within the Commonwealth public sector.

This campaign includes Government-wide distribution of publications about the foreign bribery offence (including to missions of the Department of Foreign Affairs and Trade and the Australian Trade Commission (Austrade)), inclusion of information about the offence on Government websites, and training and information sessions to brief Australian Government officials about the offence, including pre-departure training for officials undertaking overseas postings or travel. The Department of Foreign Affairs and Trade presents pre-departure training on foreign bribery, detailing the offence and obligation to report any instances of foreign bribery for posted officers. This program has been developed over the last two years and, since August 2007, all posted officers receive this training.

A Foreign Bribery Information and Awareness Pack was distributed widely throughout the public sector in 2007. Copies of the pack have been provided to the head of every Commonwealth Department, to every Commonwealth Senator and Member of Parliament and to Government agencies such as the Australian Transaction Reports and Analysis Centre (AUSTRAC), Austrade and the Australian Agency for International Development (AusAID). The information pack contains a number of fact sheets with information on the foreign bribery offence and attendant obligations, the distinction between a bribe

and a facilitation payment, as well as a PowerPoint presentation, brochures and posters for training purposes.

This pack is actively publicised in training and information sessions and is also available on the internet. The pack will be reviewed and updated as necessary.

In July 2006 the Australian Public Service Commissioner (the Commissioner) reviewed and amended the material in chapters 10 and 14 of the *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and Agency heads* (the Guide), which provide guidance on gifts and benefits and aspects of working overseas. These chapters now explicitly refer to foreign bribery and the obligation for Australian Public Service (APS) employees to report any instances of bribery that they observe in the course of their employment, particularly when working overseas. The Guide strongly reinforces the requirement under the Public Service Act 1999 that APS employees observe the highest standards of ethical behaviours. It makes it clear that, whether in Australia or overseas, APS employees should report suspected breaches of the APS Code of Conduct in accordance with agency guidelines. It also emphasises that where an APS employee becomes aware of criminal misconduct, such as bribery, by another Australian who is not an APS employee, the employee should report that to management and to the AFP. The Commissioner wrote to agency heads in July 2006, drawing their attention to the revised material.

The updated Guide can be accessed at www.apsc.gov.au/values/conductguidelines.htm.

Text of recommendation:

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:

- (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;

Actions taken as of the date of the follow-up report to implement this recommendation:

The Commonwealth Attorney-General's Department has contacted a range of private organisations and individuals to raise awareness of the foreign bribery offence, including:

- Ministerial letters to the CEOs of Australia's top 100 public companies informing them of the foreign bribery offence and requesting their assistance in raising awareness about the offence,
- Ministerial letters to the former Minister for Local Government, Territories and Roads and the Chief Minister of Norfolk Island seeking their assistance in distributing the foreign bribery awareness pack to the residents of Australia's external territories, the Cocos (Keeling) Islands, Christmas Islands and Norfolk Island,

- Departmental letters to key industry representative groups advising of the foreign bribery offence and enclosing copies of the Foreign Bribery Information and Awareness pack.

The Foreign Bribery Information and Awareness pack has been distributed widely throughout the private sector, with packs sent to 40 peak industry bodies (such as the Australasian Institute of Mining and Metallurgy and the International Banks & Securities Association of Australia), the CEOs of Australia's top 100 companies and Australia's top 14 accounting firms, Law Societies in each State and Territory, the Group of 100 (Inc), more than 800 individual enterprises and Transparency International Australia. The Department of Foreign Affairs and Trade has also publicised the Information and Awareness Pack and the offence of foreign bribery at meetings with industry representatives in all Australian State and Territory capitals. The Pack details the difference between bribes and facilitation payments and the record-keeping requirements for the defence of facilitation payments.

A pamphlet providing information on the offence of foreign bribery is available at Passport Offices and further information is available at <www.smarttraveller.gov.au>. The Australian Government has also ensured that information relating to foreign bribery is available on the internet and easily accessible via links on high profile and regularly visited Government websites such as <www.ag.gov.au> and <www.australia.gov.au>.

The Australian Taxation Office (ATO) has finalised a guide which sets out ATO responsibilities in the area of bribes and facilitation payments and provides practical guidance for small, medium and large business to help minimise their level of risk in this area.

The guide, which is available online, discusses initiatives that company boards can put in place and offers suggestions to help business meet their obligations under the law, including:

- having a code of conduct across the business relating to bribes
- having a strong internal audit function and audit committee oversight, and
- acting to rectify any relevant internal control weaknesses identified and reported to the board by external auditors.

Finally, the Australian National Contact Point (ANCP) for the OECD Guidelines for Multinational Enterprises provides a one-stop contact point for all businesses subject to these Guidelines. The ANCP provides information on the Guidelines, specific information on bribery, and links to useful documents including risk awareness tools for weak governance zones. The Department of Foreign Affairs and Trade has actively publicised the OECD Guidelines and the ANCP at meetings in Australia's national, State and Territory capitals.

Text of recommendation:

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:

- (c) paying special attention to raising the awareness of SMEs through, for instance, Australian diplomatic and trade missions in foreign countries, and

Actions taken as of the date of the follow-up report to implement this recommendation:

The Attorney-General's Department has sent letters to approximately 800 small and medium enterprises enclosing the Foreign Bribery Information and Awareness Pack. The Pack has also been provided to peak industry bodies representing small and medium enterprises, including the Council of Small Business Organisations of Australia, the Small Enterprise Association of Australia and New Zealand, and Tourism Australia.

The Pack has also been provided to Austrade for distribution through the Austrade network around the world. The Department of Foreign Affairs and Trade is conducting seminars for Australian expatriate business communities in key regional centres which include content relating to bribery of foreign public officials.

Text of recommendation:

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:

13. (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.

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government has been involved in an ongoing campaign to raise the awareness of cash dealers of the foreign bribery offence since 2004, including AUSTRAC Information Circular No. 42, 'Bribery of Foreign Public Officials', highlighted in Australia's Phase 2 Report. The Information Circular is maintained on the AUSTRAC website to provide guidance on foreign bribery issues.

AUSTRAC is continuing to educate cash dealers around the country about the new Financial Transaction Report (FTR) legislation (the *FTR Amendment Act 2006*), the *Anti-Money Laundering / Counter Terrorism Financing Act 2006 (AML/CTF Act)* and the related *AML/CTF Transitional Provisions and Consequential Amendments Act 2006*.

As part of this education / awareness raising process, AUSTRAC officials continue to educate cash dealers, where relevant, in relation to:

- the AUSTRAC Information Circular No. 42 'Bribery of Foreign Public Officials',
- AGD Fact Sheet 5 – 'Identification of suspicious transactions, notification requirements', which is included in the Foreign Bribery Awareness Information Pack,
- the Attorney-General's Department website,

- the Australian Government's pamphlet on Foreign Bribery, and foreign bribery-related typologies.

Text of recommendation:

14. 2. Concerning the **detection and investigation** of the offence of bribing a foreign public official by the Australian Federal Police (AFP), 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”;

Actions taken as of the date of the follow-up report to implement this recommendation:

The AFP has amended the CCPM to include corruption as a ‘high impact’ issue and obligations under international treaties as an ‘essential priority’ issue. This places corruption in a higher rating category than the previous model and foreign bribery is specifically referred to under the category of ‘corruption’. The AFP’s public CCPM document can be found on the AFP website at www.afp.gov.au/services/operational_priorities.html.

Text of recommendation:

15. 2. Concerning the **detection and investigation** of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (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;

Actions taken as of the date of the follow-up report to implement this recommendation:

The AFP will evaluate allegations of foreign bribery, including those disclosed by media reports and publicly available court documents filed in foreign countries, where they contain sufficient sources and/or corroborating material of jurisdiction and offence to enable evaluation. In the case of foreign information, including court documents, the AFP would need to be made aware of their existence before an evaluation could be considered. The AFP will likewise evaluate allegations of foreign bribery by Australians disclosed in requests for mutual legal assistance.

Text of recommendation:

2. Concerning the detection and investigation of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (c) Australia clarify that all cases of foreign bribery be referred to the AFP by Commonwealth agencies;

Actions taken as of the date of the follow-up report to implement this recommendation:

In July 2006, chapters 10 and 14 of the *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and agency heads* (the Guide) were amended to refer to foreign bribery and clarify that APS employees should report any instances of bribery that they observe in the course of their employment, particularly when working overseas. The Guide makes it clear that, whether in Australia or overseas, APS employees should report suspected breaches of the APS Code in accordance with their respective agency's instructions on reporting breaches. Under the Commonwealth Fraud Control Guidelines all Australian Government agencies are required to maintain instructions on handling fraud matters that come to the agency's attention. As the AFP has responsibility for investigating all Commonwealth criminal offences, agency guidelines will provide for referring fraud matters to the AFP.

In June 2006, the AFP reminded members of the Heads of Commonwealth Operational Law Enforcement Agencies (HOCOLEA) forum of their responsibilities to refer all foreign bribery matters to the AFP. The foreign bribery information and awareness pack also includes a fact sheet detailing how to report suspected foreign bribery. The fact sheet clearly states that all allegations of foreign bribery are to be reported to the AFP. The information pack has been provided to all Australian Government Departments.

Text of recommendation:

2. Concerning the detection and investigation of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (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

Actions taken as of the date of the follow-up report to implement this recommendation:

The process under the National Guidelines for Referring Politically Sensitive Matters to the AFP does not

delay referral to the AFP, although the drafting of the Guidelines does not make this clear. The Australian Government is considering amendments to these Guidelines, and the Commonwealth Fraud Control Guidelines, to make it clear that referral to the AFP of politically sensitive matters may occur concurrently with advising the Minister.

The National Guidelines for Referring Politically Sensitive Matters to the AFP state:

‘A Department, Agency or Minister seeking the AFP’s assistance to investigate criminal activity likely to be politically sensitive should first raise the request with the Minister for [Home Affairs]. The purpose of this procedure is to ensure that there is a coherent, consistent approach from both a law enforcement and a Government perspective.

On completion of the investigation, the Minister for [Home Affairs] should be briefed on the outcome.

These procedures are incorporated in the Memoranda of Understanding entered into by the AFP and various Departments and Agencies.’

Commonwealth Fraud Control Guideline 4.9 provides further detail, stating:

‘All matters of a politically sensitive nature, not limited to fraud, requiring the assistance of the AFP are raised with the Minister responsible for the AFP by the relevant Minister or Department in the first instance, rather than being referred directly by them to the AFP. This enables the Government to be informed at the earliest juncture of potentially politically contentious matters that may require AFP investigation. Under present arrangements, the Minister for [Home Affairs] is responsible for the AFP. The procedure exists only to enable the Minister for [Home Affairs] to be informed of significant matters affecting the Minister’s responsibility for the AFP. The Minister for [Home Affairs] does not have the power or function of deciding what particular allegations the AFP will investigate. The decision to seek an AFP investigation will, unless the matter affects other portfolios, remain that of the complainant agency or Minister.’

This process is for information only and does not give the Minister any power to intervene in an investigation. As such, there is no reason that referral to the AFP could not occur simultaneously to the Minister being notified. The Australian Government will clarify this procedure.

Text of recommendation:

2. Concerning the **detection and investigation** of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

- (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).

(i) enter into a formalized agreement with the Australian Prudential Regulation Authority (APRA) concerning areas of overlapping jurisdiction respecting foreign bribery

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government has carefully considered this recommendation and concludes that a documented relationship between the AFP and APRA is not necessary beyond that established by the Commonwealth Fraud Control Guidelines, the *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and agency heads* (the Guide) and current practice.

APRA, and all other Australian Government agencies, are subject to the Commonwealth Fraud Control Guidelines (the Guidelines). The Guidelines require all agencies to maintain fraud control policies detailing how the agency will deal with reports of fraud, that is, conduct indicating a dishonestly obtained benefit. These internal guidelines will direct matters to the AFP as the agency responsible for investigating Commonwealth criminal offences. APRA will refer to the AFP all foreign bribery matters that come to its attention.

APRA is a member of HOCOLEA and that forum endorsed the process of referring foreign bribery matters to the AFP at the June 2006 meeting.

In light of the efforts of the AFP to raise awareness of its role in investigating foreign bribery matters and APRA's internal guidelines and commitment to refer all such matters to the AFP, Australia considers these arrangements are sufficient for dealing appropriately with allegations of foreign bribery that come to the attention of APRA.

(ii) consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territory police and anti-corruption bodies to the AFP even where a State or Territory law establishes a bribery offence broad enough to cover foreign bribery

Actions taken as of the date of the follow-up report to implement this recommendation:

The AFP has provided advice to all Commonwealth, State and Territory law enforcement bodies about its role in investigating the Commonwealth offence of foreign bribery and sought their support in referring such matters to the AFP. The matter has also been raised at the HOCOLEA forum, meaning that all State, Territory and Commonwealth law enforcement agencies are aware of the AFP's responsibility for investigating foreign bribery matters.

To date, no States or Territories have enacted foreign bribery offences. Australia acknowledges the concern of the examiners that, if a State does establish such a law or conclude an existing law is broad enough to cover the circumstances, State prosecutors may have different priorities to Commonwealth prosecutors. However, the Australian Government considers that, due to the nature of the offence, foreign bribery cases will most likely be raised with the AFP in the course of investigation, before decisions are made as to prosecution. This is because the need to gather evidence off shore in foreign bribery offences, if a State or Territory police agency received such an allegation, would require the State law enforcement to raise the matter with the AFP and the Minister responsible for the AFP in order to

progress mutual assistance requests.

Having carefully considered this recommendation, the Australian Government concludes the AFP's offshore role and arrangements with other law enforcement agencies are sufficient to ensure referral of foreign bribery matters to the AFP, without need for formal MOU's.

Text of recommendation:

3. Concerning the prevention and detection of foreign bribery through **measures for disallowing the tax deductibility of bribe payments to foreign public officials**, 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

Actions taken as of the date of the follow-up report to implement this recommendation:

The revised ATO Compliance Program 2006-07 was published in August 2006 and information on the risks associated with bribes and facilitation payments was specifically included in this publication. Bribery and facilitation payment information is found within chapters relating to Large Businesses, Small to Medium Enterprises, and International tax issues. The full document is available at the following link: www.ato.gov.au/content/downloads/ARL_77362_n7769-8-2006_w.pdf.

Text of recommendation:

3. Concerning the prevention and detection of foreign bribery through **measures for disallowing the tax deductibility of bribe payments to foreign public officials**, the Working Group recommends that the Australian Taxation Office (ATO):

- (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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The ATO has issued the bribery awareness audit guidelines to its staff and made them accessible to staff through the ATO intranet. As recommended, the auditor guidelines contain a requirement for tax auditors to report a transaction they suspect may be a bribe, at the earliest opportunity, to the Serious

Non-Compliance business line. The guidelines also provide practical information to help auditors identify the ways in which bribe payments may be concealed and information on the legislative defences to a charge of foreign bribery.

Where the information is relevant to:

- (a) establishing whether a serious offence has been, or is being, committed; or
 - (b) the making, or possible making, of a proceeds of crime order,
- an authorised officer from within the Serious Non-Compliance business line will the pass the information to the Australian Federal Police under to section 3E of the *Taxation Administration Act 1953*.

These guidelines have also been published on the ATO public website to provide guidance to the community.

The guidelines are available at <www.ato.gov.au/corporate/content.asp?doc=/content/81899.htm>.

Text of recommendation:

4. Concerning **other measures for preventing and detecting foreign bribery**, 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).

If no action has been taken to implement recommendation 1, please specify in the space below the measures you intend to take to comply with the recommendation and the timing of such measures or the reasons why no action will be taken:

Having reviewed this recommendation the Australian Government concludes the current legislative obligations, which require external auditors to report possible illegal acts to management and to the appropriate authority, are sufficient.

All disclosing entities, public companies, large proprietary companies and registered schemes are required to prepare audited financial reports and directors' reports for each financial year, under section 292 of the *Corporations Act 2001*.

Section 311 of the Corporations Act requires an auditor to report indications of possible breaches of the Act, any attempt to unduly influence someone involved in the conduct of the audit, or an attempt to otherwise interfere with the proper conduct of the audit to management of the audited company and to the Australian Securities and Investment Commission (ASIC). ASIC has the power to prosecute any breach of the Act and may refer to the Australian Federal Police any indications of criminal offences that do not fall within its mandate.

The Corporations Act contains principled offence provisions that are intended to prevent corporate misconduct generally, rather than specific offences such as bribery or money laundering. Conduct that may constitute a breach of the Corporations Act and also relate to foreign bribery includes failure to act in good faith and for proper purposes, making false or misleading statements or giving false information in relation to the affairs of the company, falsifying company books, or failing to abide by record keeping requirements. The Australian Government considers it is within the expertise of auditors to ascertain this type of conduct, whereas potential criminal offences such as foreign bribery require consideration of matters that fall outside an auditor's expertise.

The Australian Government considers the existing measures allow for an appropriate obligation on auditors and ensures they report to the law enforcement agency with the appropriate business expertise.

Text of recommendation:

4. Concerning **other measures for preventing and detecting foreign bribery**, the Working Group recommends that Australia:

- (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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The amended *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and agency heads* (the Guide) and the Foreign Bribery Information and Awareness Pack have been circulated to Government agencies and Departments and included in training for APS employees. These documents specifically highlight the obligation and procedures for APS employees to report instances of foreign bribery uncovered in the course of their duties.

The Australian Public Service Commissioner wrote to Agency Heads in July 2006 drawing their attention to the revised Guide, which has also been posted on the Commissioner's website.

Having considered the reporting provisions within Commonwealth and agency-specific guidelines, the Australian Government considers the existing guidelines provide a sufficiently strong reporting regime. The Guide has been amended to specifically highlight officers' obligations to report foreign bribery. In addition to this, all Commonwealth agencies are required to maintain internal guidelines on how to deal with indications of fraud, that is, any indication a person has dishonestly obtained a benefit, through deception or otherwise. Internal guidelines will direct agencies to report indications of criminal conduct to the AFP, as the law enforcement agency with responsibility for investigating all offences against

Commonwealth law.

Text of recommendation:

4. Concerning **other measures for preventing and detecting foreign bribery**, the Working Group recommends that Australia:

- (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

Actions taken as of the date of the follow-up report to implement this recommendation:

AusAID has included in training courses for all staff the policy guidelines for dealing with suspected bribery, in relation to ODA contracts or otherwise witnessed in the course of duty. AusAID staff have also benefited from the broader awareness raising measures outlined previously, including the Foreign Bribery Information and Awareness Pack and pre-departure training conducted by the Department of Foreign Affairs and Trade.

The Australian Government amended the AusAID standard contractual documentation, which now explicitly prohibits contractors from engaging in foreign bribery. The standard contract also obliges contractors to ensure that contractor personnel, including subcontractors, do not engage in foreign bribery and to include equivalent anti-bribery provisions in sub-contracts.

Text of recommendation:

4. Concerning **other measures for preventing and detecting foreign bribery**, the Working Group recommends that Australia:

- (d) consider reviewing the Commonwealth whistleblower provisions in the context of the on-going 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government is committed to protections for whistleblowers and to appropriately protecting public interest disclosures within the Commonwealth Government sector. The Government

favours public interest disclosures where they would not jeopardise law enforcement, national intelligence or security, military operations or diplomatic relations. The Government is currently exploring options for progressing appropriate reforms.

Griffith University is leading an evaluation of legislative regimes for whistleblower protection across Australia, particularly those serving the Queensland, New South Wales, Western Australia and Commonwealth Governments. The Project is known as 'Whistling While They Work': Enhancing the Theory and Practice of Internal Witness Management in Public Sector Organisations and a draft report was released for comment in October 2007. A final report is due to be published in mid-2008 and this report will inform Australia's further consideration of the recommendation and Commonwealth whistleblower provisions.

In the meantime, Australia has included information about whistleblower protection in the Foreign Bribery Information and Awareness Pack and amended the *APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and agency heads* to clarify the requirement for employees to report any instances of bribery that they observe in the course of their employment, particularly when working overseas.

Legislative protection for corporate sector whistleblowers is provided under Part 9.44 of the *Corporations Act 2001*. There is a standard for whistleblower protection schemes in both public and private sector entities, set in Australian Standard 8004-2003 *Whistleblower Protection Programs for Entities* (AS 8004-2003). AS 8004-2003 sets a standard for the structural, operational and maintenance elements that a whistleblower protection program entity must meet. The standard is voluntary for private sector entities but APS agencies are required by the *Public Service Act 1999* to have procedures in place to investigate reports and provide protection to APS employees making whistleblowing reports.

Text of recommendation:

5. Concerning the **implementation of the offence of bribing a foreign public official** 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

On 24 September 2007, the *International Trade Integrity Act 2007* received Royal Assent. The Act amended paragraph 70.2(2)(a) of the *Criminal Code Act 1995* (Cth) to provide that any perception that a benefit is customary, necessary or required is to be disregarded when assessing a possible offence. The Act also amended the Criminal Code to ensure the offence applies regardless of the results of the alleged conduct.

Text of recommendation:

5. Concerning the **implementation of the offence of bribing a foreign public official** under the Commonwealth Criminal Code, the Working Group recommends that Australia:

- (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

Actions taken as of the date of the follow-up report to implement this recommendation:

On 24 September 2007, the *International Trade Integrity Act 2007* received Royal Assent. The Act amended the *Criminal Code Act 1995* (Cth) to ensure the defence under section 70.3 to a charge of bribing a foreign public official is only available where the advantage given or offered to a foreign public official is expressly permitted or required by written law, consistent with Commentary 8 on the Convention.

Text of recommendation:

5. Concerning the **implementation of the offence of bribing a foreign public official** under the Commonwealth Criminal Code, the Working Group recommends that Australia:

- (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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The publicly available information was amended to clarify the defence of facilitation payments in 2006 and has since been updated to account for the amendments contained in the *International Trade Integrity Act 2007*.

Text of recommendation:

6. Concerning the **sanctions** 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

Australia is considering the recommendation to increase penalties for these offences as part of a broader review of Commonwealth criminal penalties that is currently underway. The outcome of the review will inform Australia's response to this recommendation.

The Terms of Reference for the review are available on the Attorney-General's Department website <www.ag.gov.au>. The review will assess existing penalty-setting mechanisms, assess the appropriateness of Commonwealth criminal penalties in light of comparable penalties in other jurisdictions, and gauge community expectations about penalising criminal offences.

The *International Trade Integrity Act 2007* increased penalties in the *Charter of the United Nations Act 1945* and the *Customs Act 1901* for offences of contravening United Nations sanctions, importing or exporting restricted goods without permission, or for providing false information in relation to UN sanctions or restricted goods. Offences for contravening UN sanctions or importing/exporting without permission attract a penalty of \$275,000 for an individual and \$1.1 million for a body corporate, or three times the value of the offending transaction, whichever is the greatest. Offences for providing false or misleading information attract a penalty for an individual of up to ten years imprisonment, and/or a fine of up to \$275,000, or a fine of up to \$1.375 million for a body corporate.

Text of recommendation:

6. Concerning the sanctions 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:

- (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

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government has made a strong commitment to improved accountability and transparency in public administration.

The financial framework underpins the appropriation, expenditure and use of money and resources. It is an important feature of an accountable and transparent public sector and informs the daily work of

Australian Government agencies, office holders and their employees.

The *Financial Management and Accountability Act 1997* (FMA Act) and Regulations encompass Australian Government Department and Agencies and the *Commonwealth Authorities and Companies Act 1997* encompasses Australian Government Authorities and Companies.

Before a commitment to spend public money may be lawfully entered into, the Regulations require that persons approving funding must be satisfied, after making appropriate and reasonable inquiries, that the proposed expenditure is in accordance with the policies of the Commonwealth and will make efficient, effective use of the public money. These requirements apply to Ministers as well as to officials.

Appropriate due diligence inquiries and consideration of an organisation's governance arrangements are a fundamental part of approval and procurement processes. The Regulations also enable agencies to include termination provisions in contract or grants procedures.

The Government does not think it appropriate to specify particular offences as grounds for termination as this might have the effect of unintentionally excluding other offences or circumstances which might appropriately lead to termination.

The Australian Government's procurement framework allows for an application or contract to be excluded on grounds such as bankruptcy, insolvency, false declarations, or significant deficiencies in performance of any substantive requirements or obligation under a contract, and this may include conviction for a criminal offence as grounds for exclusion.

Text of recommendation:

6. Concerning the sanctions 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:

- (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).

Actions taken as of the date of the follow-up report to implement this recommendation:

The Australian Government continues to compile statistics on the offence of money laundering, including the level of sanctions and the confiscation of the proceeds of crime. The Attorney-General's Department maintains statistics on proceeds of crime confiscated and the Commonwealth Director of Public Prosecutions maintains statistics on the number of money laundering matters and the outcomes of these cases.

Text of recommendation:

7. Concerning the discretion to prosecute the offence of bribing a foreign public official, 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).

Actions taken as of the date of the follow-up report to implement this recommendation:

On 11 September 2006, the CDPP issued a direction to all prosecutors instructing them that when deciding whether to prosecute a person for bribing a foreign public official under Division 70 of the Criminal Code, the prosecutor should 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.

This is a formal direction issued by the CDPP. Prosecutors are required to comply with the direction.

Part II. Issues for Follow-up by the Working Group

Text of issue for follow-up:

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).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The facilitation payment defence has not been used in response to a foreign bribery prosecution as there have been no foreign bribery prosecutions. Australia will monitor application of the defence and compliance with record-keeping requirements as it arises in practice.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:
- (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).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The ATO has improved its compliance strategy to meet the risk posed by instances of suspected bribery and will monitor the application of the tax deduction for facilitation payments as it arises in practice. Deductibility of facilitation payments will be checked in reviews and audits of companies with trade or relationships in jurisdictions or activities where there is a significant risk of corruption. These jurisdictions will be identified with the Transparency International Corruption Perception Index. Questionnaires on bribery and facilitation payments have also been developed and used during reviews with Australia's top 100 companies and adapted for use in other market segments of the ATO. The Tax Office guidelines for understanding and dealing with the bribery of Australian and foreign public officials

have been published on the ATO website. Guidelines have also been developed to provide practical guidance for businesses to help minimise their level of risk in the area of bribes and facilitation payments.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:

- (c) application of the criminal liability of legal persons for the bribery of foreign public officials; (Convention, Art. 2).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

As yet, no legal person has been found criminally liable for the offence of foreign bribery as there have been no foreign bribery prosecutions. Investigations into possible foreign bribery are underway in several cases and Australia will monitor the issue as it arises in practice.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:

- (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).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

To date, there have been no prosecutions, therefore it has not been necessary to determine whether to proceed summarily or upon indictment.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:

(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.); and (Convention, Art. 9.1) .

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

Australia has not received a mutual legal assistance request from a Party that has established non-criminal liability of legal persons for the foreign bribery offence.

Text of issue for follow-up:

8. The Working Group will follow-up the following issues once there has been sufficient practice:

(f) the use of false accounting offences under the Corporations Act, including the level of sanctions. (Convention, Art. 8.1, 8.2).

With regard to the issue identified above, describe any new case law, legislative, administrative, doctrinal or other relevant developments since the adoption of the report. Please provide relevant statistics as appropriate:

The Corporations Act creates an obligation for companies to keep financial records and introduces offences for failing to abide by record-keeping requirements (s286 & s344(2)). However, matters relating to false accounting have been conducted under the broader offences established by the following sections:

- Section 1307 - falsification of books, which provides that it is an offence for an officer/former officer to, amongst other things, falsify any books relating to affairs of the company
- Section 1308 - false or misleading documents, which provides that it is an offence for a person to make or authorise a false or misleading statement in a document required for the purposes of the Corporations Act, and
- Section 1309 - false information, which provides that knowingly providing false information in certain circumstances is an offence.

Since January 2006, the Australian Securities and Investments Commission (ASIC) has taken the following number of enforcement actions in relation to these offences:

- Section 1307: two matters have been finalised, resulting in one conviction and one acquittal;
- Section 1308: one matter has been finalised, resulting in a conviction, with another two matters currently before the court; and

- Section 1309: two matters have been finalised, resulting in convictions.

It must be noted these sections have much broader application than false accounting or foreign bribery and the conduct in these cases does not relate directly to foreign bribery.

SUPPLEMENTARY INFORMATION

Preliminary Comments

Summary AWB

As the Working Group on Bribery (WGB) is aware from reports by Australian officials at Tour de Table discussions, the AWB case has been the subject of both a Royal Commission and investigations by a Task Force comprising officers of the Australian Federal Police, the Australian Securities and Investment Commission and the Victoria Police. Royal Commissions are commissions of inquiry with the power to compel the production of evidence and to summon witnesses to give evidence. Royal Commissions are major inquiries which are quite rare and involve a comprehensive investigation into a matter. The summary of the findings of the Cole Inquiry, comprising pages lxxxi and lxxxii of Volume 1 of the Report, are **Attachment A**.

Australia has also responded legislatively following the Cole Inquiry with the *International Trade Integrity Act 2007* (ITI Act).

The ITI Act made the following changes:

- Applicants for licences to import or export under United Nations sanctions are required to provide information to the Government (with criminal penalties for giving false or misleading information).
- A new offence has been created for breaching UN sanctions.
- Government agencies have the power to obtain evidence about suspected evasion of sanctions, so these suspected evasions can be referred to law enforcement agencies.
- Laws regarding the bribery of foreign officials have been strengthened.
- Tax laws are now consistent with foreign bribery laws.

The ITI Act also included specific foreign bribery and tax amendments which:

- tightened the Foreign Bribery offence in the *Criminal Code Act 1995* (Criminal Code) to clarify that the defence in section 70.3 applies only where the law of the foreign country states that the advantage in question is permitted or required; and that the offence can be made out regardless of the results of the payment or the alleged necessity of the payment, and

- amended the *Income Tax Assessment Act 1997* to align the definition of facilitation payments to the definition in the Criminal Code to allow deductibility only for minor facilitation payments.

As the WGB is also aware and has recorded in its case matrix, Commissioner Cole found the offence of foreign bribery had no application to dealings by AWB Limited with the Government of Iraq, instead suggesting a range of other offences that AWB or AWB directors might have committed. As the WGB was advised at the meeting in March 2008, legal proceedings against six former directors commenced on 19 December 2007 and investigations into additional charges continue. Please find attached the relevant media release (**Attachment B**).

Questions

1. **Rec. 1(a) - Please Comment on whether and how the AWB case has been used to raise awareness of the public and private sectors in Australia about the risks of foreign bribery.**

The Australian Government has not relied on any one case in its efforts to raise awareness of foreign bribery, referring instead to the offence and the consequences of bribery for Australia's trade and reputation. Further, as stated in the Cole Inquiry Report, the AWB case did not constitute bribery under Australian laws so this case is not well suited to the Government's campaign to raise awareness of the foreign bribery offence.

However, the Government publicly commented on the serious and detrimental effects of this case on Australia's trade and reputation. It is also accurate to say that media attention to the AWB case, the subsequent and highly publicised Inquiry, investigations and legal proceedings have raised awareness throughout Australia of the risks of unethical business conduct.

2. **Rec 2(b) - that the AFP undertakes evaluations where appropriate of the veracity of allegations contained in (i) media reports; (ii) publicly available court documents; and (iii) MLA requests: Please provide supporting information, such as policy directives, information about relevant training initiatives, etc. regarding AFP's use of media reports, publicly available court documents and MLA requests in investigations.**

The process of evaluating referrals is core to the business of the AFP across all types of crime investigated. All relevant material is sought for this purpose including material supplied by a complainant, material already held by the AFP, publicly available documents and media reports.

The AFP has an extensive training regime for its own officers and for other law enforcement agencies in Australia and the region. It is not practical to attach the AFP's complete internal and external training programs to this document, nor would this add value to assurances the AFP appropriately utilises information when investigating foreign bribery matters, but further information on AFP training resources may be found on the AFP website at http://www.afp.gov.au/about/AFP_resources.html.

3. **Rec 2(c) - It is stated that an information pack has been provided to all Australian Government Departments with a fact sheet stated that all allegations of foreign bribery are to be reported to the AFP. It would be useful to provide (i) the relevant excerpts of the information pack; and (ii) information about how the pack is distributed within each Australian Government Department.**

- i) Fact sheet three of the foreign bribery pack is **Attachment C**. Please note, fact sheet three is being amended to update information. The following http address on page two will be deleted:

<[http://www.afp.gov.au/business/reporting_crime/reporting_national_crime/refs from other gov agencies](http://www.afp.gov.au/business/reporting_crime/reporting_national_crime/refs_from_other_gov_agencies)>.

The following http address will appear in its place:

<[http://www.afp.gov.au/national/reporting_national_crime/refs from other gov agencies.html](http://www.afp.gov.au/national/reporting_national_crime/refs_from_other_gov_agencies.html)>

This amendment had not been published on the internet at the time of writing.

- ii) As stated in Australia's Phase 2 written response, the information pack has been provided to every Commonwealth Department. In addition, the *Guide to APS Values and Code of Conduct in practice: Guide to official conduct for APS employees and Agency heads* has been amended to refer to the offence of foreign bribery. This document is included in training for all APS employees.

Under sections 44 and 45 of the *Financial Management and Accountability Act 1997*, the CEO of each Commonwealth agency is responsible for promoting the efficient, effective and ethical use of Commonwealth resources and implementing fraud control strategies for that agency. This responsibility is also highlighted in the *Commonwealth Fraud Control Guidelines*. It is not appropriate to micro-manage the ways in which CEOs discharge this responsibility within individual agencies and enquire as to how each CEO disseminated the Foreign Bribery Information and Awareness Pack.

4. Rec 2(d) - It is stated that the Australian Government is considering amendments to the National Guidelines to make it clear that referral to the AFP of politically sensitive matters may occur concurrently with advising the Minister. This raises the following questions that should be addressed: (i) How are these amendments being considered? (ii) Who is considering these amendments? (iii) What is the timeline for making a decision on this issue? (iv) Why would concurrent reporting be discretionary (i.e. "may occur concurrently") rather than mandatory for all politically sensitive matters? (v) If concurrent reporting is not mandatory for all cases, when would such reporting be required?

- i) Australia is not considering whether to amend the National Guidelines but is considering the wording of amendments to make it clear that notice to the Minister occurs concurrently with referral to the AFP.
- ii) The decision has been made to amend the Guidelines to clarify concurrent reporting. All that remains is to settle the wording of the new policy, which will occur over the coming months.
- iii) The language of the written response is not intended to reflect the language of the amendment to the National Guidelines. Australia will clarify on the face of the National Guidelines that the practice of notifying the Minister of politically sensitive matters occurs concurrently with referring matters to the AFP. Australia will notify the working group of the wording of the amended policy in due course.

iv) See above.

5. Rec 2(e) - i) It is stated that the AFP has provided advice to all Commonwealth, State and Territory law enforcement bodies about its role in investigating the foreign bribery offence under the Commonwealth Penal Code. How has the AFP transmitted this advice to State and Territorial police and anti-corruption bodies? Excerpts from relevant documents should be provided as well as any other information such as training seminars. (ii) The response to this issue states that no States or Territories have enacted foreign bribery offences. However, the Working Group has noted that some States/Territories have offences of bribing that are broad enough to cover the bribery of foreign public officials (e.g. bribery of any “agent”). Therefore, the issue still remains about what concrete steps have been taken by the Commonwealth Government to ensure that where a foreign bribery case is covered by an offence at the State/Territorial level and Commonwealth level it is referred to the AFP. For instance, why doesn’t Australia put such an instruction in the Commonwealth Fraud Guidelines?

i) The AFP Deputy Commissioner of Police wrote to the Deputy Commissioners of all appropriate authorities within Australia. He outlined in the letter the AFP interest in allegations of bribing foreign officials and in the referral of these matters to the AFP. He also outlined the AFP’s interest in joint investigations to be undertaken where a State interest also exists.

It is worth noting that an MoU does not have the force of law and provides only a written statement of intent to cooperate. As such, an MoU would have no greater force than an agreement reached through exchanging letters as has been undertaken.

The actual details of communications between agencies and the content of training sessions are matters for the agencies involved and do not add value to assurances from the Australian Government that adequate policy and mechanisms are in place.

ii) The concrete steps taken to ensure foreign bribery cases are referred to the AFP are stated on pages nine and ten of the written response. Australia has raised this issue with Commonwealth, State and Territory law enforcement agencies and requested their assistance referring cases to the AFP. The nature of the offence will also require any investigation of foreign bribery to be brought to the attention of the AFP, the Commonwealth Director of Public Prosecutions and the Attorney-Generals’ Department in the course of obtaining offshore evidence.

As regards the Commonwealth Fraud Control Guidelines, there would appear to be little value including instructions for State and Territory agencies in Commonwealth guidelines that do not apply to those States and Territories.

6. Rec 3(a) - The response simply refers to the link to the Compliance Programme. A summary of the relevant parts of the document should be provided.

A summary of the relevant parts of the Compliance Program 2006-07 is included as **Attachment D**.

7. Rec 4(c) - Please provide copies of the relevant provisions from the amended AusAID standard contractual documentation.

A copy of the revised anti-corruption provisions is **Attachment E**.

8. Rec 4(d) - Please provide the information on whistleblower protections in the *Foreign Bribery Information and Awareness Pack* and the relevant provisions in the *APS Values and Code of Conduct in Practice*

Whistleblower protection is discussed on page 2 of the information paper on Australia's Approach to Fighting Corruption and is **Attachment F**. Chapter 15 of the Guide is **Attachment G**.

9. Rec 5(a) - i) Please provide a copy of the International Trade Integrity Act 2007 ii) Please explain whether the AWB case was not investigated and prosecuted because the Australian authorities considered that the payments made in the OFFP were "lawful" in Iraq. Please also comment on what the Cole Inquiry says in this respect.

i) International Trade Integrity Act 2007 is **Attachment H**. Please note, the International Trade Integrity Act 2007 is an amending Act and does not stand alone. Please find attached a copy of the amended sections of the Customs Act 1901, Income Tax Assessment Act 1997, and the Criminal Code Act 1995 and a copy of the revised Charter of the United Nations Act 1945 (**Attachments I, J, K and L** respectively).

ii) The WGB has been kept informed of the Royal Commission into the AWB matter, the subsequent investigation by the AFP, Victoria Police and the Australian Securities and Investment Commission and the legal proceedings that have commenced. The OECD case matrix accurately records Commissioner Cole's findings that there is no reasonable basis for concluding that a foreign bribery offence may have been committed, as AWB would not have been guilty of an offence under Iraqi law.

10. Rec 5(c) - i) Please provide a copy of the amended guidance document, which clarifies the defence of facilitation payments ii) Please discuss the issue of facilitation payments in relation to the AWB case and the findings of the Cole Inquiry.

i) The brochure titled Bribing a Foreign Public Official is a Crime is **Attachment M**. It has been amended to remove reference to facilitation payments to avoid the potential confusion anticipated in the Phase 2 Report. Information on facilitation payments is now available in fact sheet four of the foreign bribery pack (**Attachment N**) and on the Australian Taxation Office (ATO) website (**Attachment O**). Please note fact sheet four is being amended to clarify that references to facilitation payments are references to payments of minor value. These amendments had not been published on the internet at the time of writing.

ii) Commissioner Cole made no findings on the tax treatment of AWB payments. Commissioner Cole also found the foreign bribery offence had no application to the AWB case. The Cole Inquiry did not make any findings on facilitation payments.

11. Rec 6(c) - Please provide these statistics for the two years since the Phase 2 examination.

The total value of assets confiscated under Commonwealth proceeds of crime legislation in 2005-06 was \$18,420,566 and \$19,147,112 in 2006-07.

12. Rec 7 - Please provide a copy of the direction in the CDPP instructing prosecutors on what factors shall not influence their discretion.

This direction is publicly available on the CDPP website. A copy is included as **Attachment P**.

13. Follow-Up Issue 8(a) - i) Please comment on the allegations in the press that AWB claimed tax deductions for almost \$300 million in kickbacks paid to the Iraqi Government in the OFFP as facilitation payments, and comment on the Cole Inquiry's findings on this issue. (ii) Please comment on whether the AWB case was not investigated and prosecuted because the Australian authorities considered that the payments made in the OFFP were "facilitation payments" in accordance with the Commonwealth Penal Code (iii) Please comment on whether these facilitation payments were taken in accordance with the record-keeping requirements in section 70.4(3) of the Commonwealth Penal Code.

- i) Australia is aware of media allegations that AWB claimed tax deductions for payments made to Iraq between 1999 and 2003. Various media reports allege deductions ranging from \$70 million to \$300 million. Commissioner Cole made no findings about the tax treatment of AWB payments. Under section 16 of the *Income Tax Assessment Act 1936*, the ATO is unable to comment on the affairs of individual taxpayers. However, a copy of the media release by AWB on 20 December 2006 is included as **Attachment Q**.
- ii) The AWB case was extensively investigated by Commissioner Cole. A Task Force has been established to investigate civil and criminal offences. As reported at the Tour de Table in March 2008, legal proceedings against six former directors of AWB commenced on 19 December 2007.
- iii) Commissioner Cole concluded the offence of foreign bribery had no application to the AWB case. The issues of the application of the defence of facilitation payments and compliance with the accompanying record keeping requirements did not arise.

14. Follow-Up issue 8(b)

- i) Please comment on whether the Australian Taxation Office accepted AWB's claim for tax deductions for \$300 million in kickbacks paid to the Iraqi Government in the OFFP.**

Under section 16 of the *Income Tax Assessment Act 1936*, the ATO is unable to comment on the affairs of individual taxpayers.

- ii) Please explain whether the ATO considers such kickbacks as facilitation payments.**

Australia cannot give a broad policy answer in relation to a specific case. Australia will assess any claims for tax deductions in accordance with Australian law.

- iii) Please comment on whether ATO considered whether the kickbacks were documented in accordance with the record-keeping requirements in 70.4(3) of the Commonwealth Penal Code.**

Under section 16 of the *Income Tax Assessment Act 1936*, the ATO is unable to comment on the affairs of individual taxpayers. All taxpayers are required to maintain sufficient records to justify any taxation claim.

- iv) **Please comment on whether the Australian Taxation Office reported to the AFP suspicions of bribery due to AWB's claim for tax deductions for kickbacks paid to the Iraqi Government in the OFFP.**

Under section 16 of the *Income Tax Assessment Act 1936*, the ATO is unable to comment on the affairs of individual taxpayers. Commissioner Cole found the payments to the Iraqi Government could not constitute foreign bribery under Australian laws.

- v) **Please explain whether the ATO has amended or plans to amend its policy on facilitation payments since AWB's claim for deductions for kickbacks.**

The *International Trade Integrity Act 2007* amended subsection 26-52(4) of the *Income Tax Assessment Act 1997* to the effect that a benefit to an official is not a bribe if 'the value of the benefit is of minor nature' and it is given for the purpose of securing a routine government action of a minor nature. Previously, the Act did not refer to the value of a benefit.

- vi) **Regarding the announcement in October 2006 that the ATO issued guidelines for tax auditors on facilitation payments, can these guidelines be shared with the WGB? If not, please summarise them.**

These guidelines are publicly available on the ATO website. A copy is included as **Attachment R**.

- vii) **Regarding the report in October 2006 that "for the first time" companies will be required to reveal in their tax returns whether they paid facilitation payments to foreign public officials, how is this question phrased. Have any companies taken a deduction for facilitation payments since inserting this item in tax returns? Have any of these companies been reported to the AFP for suspicions of foreign bribery?**

Australia understands these comments were made in an article 'AWB fallout: Tax Office cracks down on kickbacks', *Australian Financial Review* 4 October 2006. Rather than require identification of facilitation payments in tax returns, the ATO has improved its compliance strategy to meet the risk posed by instances of suspected bribery. The ATO considers that compliance will be better achieved through audit and review processes and regular meetings with large companies rather than a label on the company tax return. As yet there have been no companies reported to the AFP for suspicions of foreign bribery.

- viii) **Please explain whether the Australian Government is considering amendments to the availability of tax deductions for facilitation payments since the AWB case.**

The Australian Government is strongly committed to combating corruption in international business transactions. To this end, the Australian Government has introduced tax legislation consistent with the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. Australian laws, as amended by the *International Trade Integrity Act 2007*, allow deductions for legitimate facilitation payments.

This is consistent with the commentary on Article 1 of the OECD Convention that states 'small' facilitation payments are not an offence. Tax legislation primarily serves economic objectives but supports the goals of the Criminal Code by denying deductions for the illegal activity of

bribery of foreign public officials. Tax legislation is not an appropriate instrument for discouraging 'facilitation' payments which are lawful under the terms of the Convention.

- ix) What was the content of the proposed amendment to the Income Tax Act to eliminate tax deductions for facilitation payments submitted to Parliament in March 2006? Why was the proposed amendment voted down? Did the Government inform Parliament that the WGB was concerned about the availability of this deduction? If so, what was Parliament's reaction?**

The content of the amendment to the *Income Tax Assessment Act 1997* proposed by the then opposition Labour party in March 2006 was as follows:

50A Subsection 26-52(4)

Repeal the subsection, substitute

(4) An amount is not a bribe to a foreign public official if

- (a) it is incurred for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature, and
- (b) the value of the benefit was of a minor nature, and
- (c) as soon as practicable after the loss or outgoing was incurred, the person made a record of the loss or outgoing and the record complies with subsection 70.4(3) of the Criminal Code Act 1995.

A similar amendment was passed by the *International Trade Integrity Act 2007*, introducing the requirement that the value of a payment be 'of minor nature' in order to be a deductible facilitation payment. The Government did not inform the Parliament that the WGB was concerned about the availability of a tax deduction for facilitation payments, which are lawful under both Australian law and the Convention.

- x) Given that the Cole Inquiry did not have the technical and resource capacity to look at the tax treatment of payments made by the AWB to Iraq, has this issue been picked up in some other government forum?**

No comment can be provided on the specific treatment of AWB's payments. The implications and recommendations for tax policy of the Cole Inquiry were considered by the Treasury and the Australian Government. The Australian Government's legislative response to the Cole Inquiry was implemented by the *International Trade Integrity Act 2007*.

ATTACHMENTS

Attachment A. Cole Inquiry Findings

Findings

The Letters Patent require that I inquire into and report on whether any decision, action, conduct, payment or writing of AWB Limited, Alkaloids of Australia Pty Limited, Rhine Ruhr Pty Limited, BHP Limited or The Tigris Petroleum Corporation Limited or persons associated with them *might* have constituted a breach of any law of the Commonwealth, a State or Territory and, if so, whether the question of commencing proceedings should be referred to the relevant Commonwealth, State or Territory agency.

I am of the view on the material before me that the following breaches of laws *might* have occurred:

- Acts, conduct and payments by AWB Limited and AWB (International) Limited *might* have constituted a breach of
 - ss. 29D, 29A and 29B of the *Crimes Act 1914*
 - ss. 135.1(7) and 136.1 of the Criminal Code
 - ss. 82 of the *Crimes Act 1958* (Vic)
 - ss. 5 of the Banking (Foreign Exchange) Regulations.
- Acts and conduct by the following persons *might* have constituted them accessories to the offences AWB Limited or AWB (International) Limited *might* have committed
 - Mr Emons
 - Mr Flugge
 - Mr Geary
 - Mr Hogan
 - Mr Ingleby
 - Mr Long
 - Mr Officer
 - Mr Rogers
 - Mr Stott
 - Mr Watson
- Acts and conduct of the following persons *might* have constituted a breach of ss. 180, 181, 182, 184 or 1309 of the *Corporations Act 2001*
 - Mr Cooper
 - Mr Emons
 - Mr Flugge
 - Mr Geary
 - Mr Hogan

- Mr Ingleby
- Mr Long
- Mr Officer
- Mr Rogers
- Mr Stott
- Mr Watson.

- Mr Davidson Kelly *might* have conspired with or aided and abetted AWB or AWB (International) in the commission of an offence against s. 82 of the *Crimes Act 1958* (Vic).

I recommend that each of these matters be referred to the appropriate authority for consideration whether proceedings should be commenced for breach of the law referred to. I recommend that there be established a joint Task Force comprising the Australian Federal Police, Victoria Police, and the Australian Securities and Investments Commission to consider possible prosecutions in consultation with the Commonwealth Director of Public Prosecutions and the Victorian Director of Public Prosecutions. Administrative responsibility for the conduct of the Task Force should reside with the Commonwealth Attorney-General.

I make no other findings of possible breaches of the laws by any company or person.

Attachment B. ASIC media release regarding charges against former AWB directors

07-332 ASIC launches civil penalty action against former officers of AWB

Wednesday 19 December 2007

ASIC has commenced civil penalty proceedings in the Supreme Court of Victoria against six former directors and officers of AWB Limited (AWB).

ASIC alleges that the defendants contravened section 180 of the Corporations Act, which requires company officers to act with care and diligence, and section 181, which requires company officers to discharge their duties in good faith and for a proper purpose.

ASIC is asking the Court for declarations that each defendant has breached the law, the imposition of pecuniary penalties (for each breach a maximum of \$200,000), and disqualification of each defendant from managing a corporation.

These actions arise out of investigations following Cole Inquiry. The structure of those investigations is as follows:

- (a) The AFP and Victoria Police are investigating criminal breaches of both Commonwealth and Victorian law (which investigations continue).
- (b) ASIC is responsible for investigations under the ASIC Act, possible civil and criminal breaches of the Corporations Act.

Investigations into civil penalty proceedings was given more priority by ASIC because of the statute of limitation periods which apply to those actions and which do not apply to possible criminal proceedings (which investigations by ASIC continue). Commissioner Cole examined 27 contracts between AWB and the Iraqi Grain Board (IGB). The Corporations Act limits the time for the commencement of civil penalty proceedings to six years. The time limit had expired for 20 of the contracts when the Cole Inquiry concluded in November 2006 and two expired in February and June 2007.

The contracts covered by ASIC's proceedings were entered into between 20 December 2001 and 11 December 2002 and involved the payment of AUD\$126.3 million in breach of UN sanctions.

The defendants in the ASIC actions are:

- Andrew Lindberg, the former Managing Director of AWB;
- Trevor Flugge, the former Chairman of AWB;
- Peter Geary, the former Group General Manager Trading of AWB;
- Paul Ingleby, the former Chief Financial Officer of AWB;
- Michael Long, the former General Manager of International Sales and Marketing for AWB (2001-2006); and
- Charles Stott, the former General Manager of International Sales and Marketing for AWB (2000-2001).

ASIC alleges that these officers breached their duties under the Corporations Act in connection with AWB's contracts with the IGB under the United Nations (UN) Oil-for-Food Program, which contained payments for purported inland transportation fees (ITF). The ITF payments were made to Alia, a Jordanian company partly owned by the Iraqi Ministry of Transport.

ASIC alleges that Messrs Long, Geary and Stott were officers of AWB who:

- knew of and implemented various AWB contracts that included the purported inland transportation
- fees;
- were aware or ought to have been aware that the fees were not genuine; and
- knew or ought to have known that the fees were, or were likely to be, contraventions of the UN
- sanctions upon trade with Iraq.
- ASIC alleges that Messrs Lindberg, Flugge and Ingleby:

- knew, or ought to have known, about the AWB contracts that included the purported inland transportation fees;
- had obligations to make reasonable inquiries to ensure that AWB complied with obligations under UN sanctions upon trade with Iraq;
- were aware, or ought to have been aware, that the fees were not genuine; and
- knew, or ought to have known, that the fees were, or were likely to be, contraventions of the UN sanctions.

The regulator further alleges that all defendants caused harm to AWB through their conduct. ASIC Chairman, Tony D'Aloisio said 'We have commenced these actions as we believe that the conduct of the directors and officers in these circumstances fell short of what the law requires in relation to the management and supervision of corporations'.

Background

ASIC alleges the payment of the inland transportation fees were in breach of UN Sanctions on Trade with Iraq, in particular Resolution 661, which prevented member states from making any payments that resulted in funds being made available to the Government of Iraq.

The regulator also believes Resolution 986 was breached. This resolution required funds from the UN Oil-for-Food program to be used exclusively to meet the humanitarian needs of the Iraqi population.

Attachment C. Fact sheet three, Foreign Bribery Information and Awareness pack

FOREIGN BRIBERY FACT SHEET 3

How to Report Suspected Foreign Bribery? Who should I report to?

All incidents of suspected foreign bribery should be reported to the Australian Federal Police (AFP). The AFP has offices in all Australian capital cities (over page).

The AFP is separate from State and Territory police forces. Every effort should be made to provide information directly to the AFP.

What information should I report?

All information relating to incidents of suspected foreign bribery should be communicated to the AFP, either orally or in writing.

Information you provide may supplement other information provided to the AFP and assist an investigation.

You may be asked to provide the following information, if available:

- advice as to whether the alleged criminal activity is ongoing or has ceased
- details of the suspected offender(s) – name, date of birth, location (where known)
- a chronological account of the information known about the suspected criminal activities
- if the suspect(s) is aware of the allegation
- details of witnesses
- the action being requested of the AFP
- criminal history, if known, and information relating to the circumstances where the person(s) has previously come to attention
- the significance or impact of the matter on the agency, company or individual
- value of the revenue loss or potential loss at risk, if any, to the agency, company or individual
- a summary of any enquiries already undertaken
- details regarding how the alleged criminal activity is suspected of breaching the Criminal Code Act 1995 (Cth)
- copies of any relevant documentation, and
- copies of any relevant legal advice, sought and provided, to the party contacting the AFP.
-

If information is provided over the telephone you may be asked to **provide any relevant documentation as soon as possible**, subject to availability.

What happens if my suspicions are incorrect?

There is no offence for reporting suspected criminal activity to the AFP. However, it is important that you do not make a report which is vindictive or malicious, knowing that what you are alleging is incorrect, as there are offences that may relate to reports made under these circumstances.

The AFP will not provide details of who made an allegation to the alleged offender. In the event of the matter coming before a court, the Commonwealth Director of Public Prosecutions is required to provide the full brief of evidence to the defence counsel, which will contain this information. You may be required to give evidence in court relating to your knowledge of the facts.

Commonwealth agencies – reporting suspected foreign bribery to the AFP

Information on referrals by Commonwealth agencies can be found at: www.afp.gov.au/business/reporting_crime/reporting_national_crime/refs_from_other_gov_agencies.

Commonwealth agencies should consider using the generic ‘Referral to the AFP’ form which can be found at: www.afp.gov.au/_data/assets/pdf_file/3904/annexure_b_afp_referral_form.pdf

Commonwealth agencies are asked to read this fact-sheet in conjunction with the Commonwealth Fraud Control Guidelines and any agency-specific information in relation to reporting suspected foreign bribery.

(The Commonwealth Fraud Control Guidelines can be found at: www.ag.gov.au/www/agd/agd.nsf/Page/RWPA3AE7FADD0992544CA2571A10009A8DC).

The Public Service Act 1999 (Cth) provides protection against victimisation and discrimination for any Commonwealth Public Service employee who reports breaches.

Where do I send the referral?

Referrals should be directed to the AFP Operations Monitoring Centre (OMC) in the State or Territory where the suspected offence occurred or the offender resides.

Contact details for AFP OMCs:

[...]

Can I report these matters to the AFP overseas?

Yes – The AFP has an extensive global presence with Liaison Posts in many countries. If a report is not able to be referred to an AFP OMC, AFP liaison officers are able to receive this information. For further details on the location of AFP liaison posts, please refer to the AFP web site www.afp.gov.au.

Information can also be provided to Australian embassies in foreign countries which will then be passed on to the AFP and actioned accordingly.

Attachment D. Summary of Australian Tax Office Compliance Program 2006-07

Excerpt from Compliance Program 2006-07

Small to medium enterprises [page 28]

International tax issues

We are working to improve compliance by educating and helping small to medium enterprises understand and comply with their international tax obligations. We are also continuing to check that businesses are:

- properly declaring foreign source income
- accurately reporting international transactions by lodging appropriate schedules with their returns
- claiming only legitimate expenses relating to overseas transactions, and
- maintaining appropriate systems to detect international facilitation payments so that deductions for expenses and input tax credits are properly claimed.

Large business

Headline issues [page 34]

New and expanded priorities

In 2006–07 we are placing more emphasis on:

- checking that businesses have appropriate systems in place to detect international facilitation payments, so that deductions for expenses and input tax credits are properly claimed

Reporting correct information [page 36]

Bribes and facilitation payments

To ensure that only legitimate expenses are claimed as deductions and legitimate input tax credits are claimed, this year we are:

- reviewing significant, one-off, regular or embedded payments by Australian businesses to entities in jurisdictions where bribes or facilitation payments are said to be ‘part of doing business’
- checking that businesses with particular international trade profiles have appropriate codes of conduct and systems in place to detect bribes and international facilitation payments, and
- reviewing organisations that do not have appropriate systems in place.

International tax issues

Facilitation payments [page 58]

We are also checking that businesses have sound systems in place to detect international facilitation payments, so that deductions for expenses and input tax credits are properly claimed

Attachment E. AusAID standard contractual terms

Anti-Corruption

- 35.4 The Contractor warrants that the Contractor shall not make or cause to be made, nor shall the Contractor receive or seek to receive, any offer, gift or payment, consideration or benefit of any kind, which would or could be construed as an illegal or corrupt act, either directly or indirectly to any party, as an inducement or reward in relation to the execution of this Contract. In addition, the Contractor shall not bribe public officials and shall ensure that all Contractor Personnel comply with this provision. Any breach of this clause shall be grounds for immediate termination of this Contract under Standard Conditions **Clause** Error! Reference source not found. (Termination for Contractor Default) by notice from AusAID.

Please note that in our contract Contractor Personnel is defined as follows:

"**Contractor Personnel**" means personnel either employed by the Contractor or Associates, engaged by the Contractor or Associates on a sub-contract basis, including the Specified Personnel, or agents of the Contractor or Associates engaged in the provision of the Services.

11. SUB-CONTRACTING

The Contractor may not sub-contract the whole of the Services. The sub-contracting of parts or elements of the performance of the Services is subject to compliance with the following requirements:

- (c) the Contractor must ensure that sub-contracts include equivalent provisions regarding the Contractor's relevant obligations under this Contract. In particular sub-contractors must:
- (iii) be bound by the same obligations regarding **Clauses** Error! Reference source not found. (Accounts and Records), Error! Reference source not found. (Audits), Error! Reference source not found. (Access to Premises), Error! Reference source not found. (Privacy), and **35.4** (Anti-corruption) **below** and as required by Project Specific Conditions **Clause 3** (Accounts and Records) as the Contractor; and

Attachment F. Australia's Approach to Fighting Corruption

FOREIGN BRIBERY

AUSTRALIA'S APPROACH TO FIGHTING CORRUPTION

Introduction

The Australian Government recognises the destructive effects that corruption can have on a society. Corruption undermines democracy and the rule of law, distorts market forces and facilitates activities such as organized crime and terrorism. A culture of bribery and corruption is often linked to a lack of respect for human rights.

Australia consistently performs well on international corruption surveys. Australia is routinely placed among the top ten least corrupt countries in the world by Transparency International's Corruption Perceptions Index. We are proud of this success, but recognise that the fight against corruption is an ongoing battle, and we remain committed to the fight.

This paper outlines Australia's approach to fighting corruption, which is based on:

- Australia's anti-corruption system including combating existing problems in international anti-corruption cooperation, and
- the legal framework for asset recovery, extradition and denial of safe haven.

Australia's Anti-Corruption System

Australia has a wide-ranging anti-corruption system. We signed the United Nations Convention against Corruption (UNCAC) on 9 December 2003 and ratified it on 7 December 2005. Since then Australia has implemented the mandatory requirements, and some non-mandatory requirements, prescribed in the provisions of UNCAC. The Australian Government believes UNCAC is an important step in combating corruption.

Australia's approach to fighting corruption is based on four key elements:

- constitutional safeguards
- accountability and transparency
- criminalisation of corruption, and
- international cooperation and technical assistance.

Constitutional safeguards

Australia's constitutional democracy (based on the Westminster system) provides the checks and balances needed to guard against corruption. The separation of powers and the rule of law within that system help to safeguard Australia from corruption and provides fundamental protections for human rights. Australia has a federal system with three layers of government; Federal, State and local. This paper focuses on the federal level of government.

The Westminster system provides for responsible government. Under the Westminster system, Ministers are elected officials who are answerable to Parliament. Australian Government Ministers are constitutionally responsible for the departments of state and statutory authorities within their portfolio and are also answerable to Parliament for abuses which may occur within their areas of responsibility.

A key principle in the Australian Constitution is the separation of powers. Under the Constitution the three types of government power (legislative, executive and judicial) are divided between three separate branches of government (legislature, executive and judiciary). Legislative power is the power to make laws, Executive power is the power to administer laws and carry out the business of government through such bodies as government departments, statutory authorities and the defence force and Judicial power is the power to hear and determine disputes according to law.

Under the Australian Constitution, each of these powers is allocated to a separate branch of government. This separation of power ensures that no one body has a concentration of power. By distributing the power each branch of government acts as a check and balance on the other. This helps to prevent individuals or

groups from ignoring the will of the people and / or manipulating government for personal gain.

Another important feature of the Australian Constitution is the implied freedom of political communication. This freedom prevents the making of laws which would hinder the Press in investigating and reporting on bribery and corruption, among other things.

The democratic system also makes governments accountable to the people. At least every three years citizens have the opportunity to vote on whether they would like the current government to remain in power. The Australian Electoral Commission is the independent statutory authority responsible for conducting federal elections, any referendums on constitutional questions and for maintaining the Commonwealth electoral roll.

The rule of law underpins Australia's system of government. It is the principle that subjects every person, regardless of their rank, status or office, to the same legal and judicial processes. All people and bodies, including governments, can have the lawfulness of their actions scrutinised in a court of law and can be held accountable for any activity determined to be inconsistent with the law.

Together, these constitutional safeguards form a strong basis for preventing and addressing corruption in Australia.

Accountability and transparency

The Australian Government's approach to preventing corruption is based on the idea that no single body should be responsible for corruption. Instead, the strong constitutional foundation is enhanced by a range of bodies and government initiatives that promote accountability and transparency. This strategy addresses corruption in both the private and public sectors.

We see this distribution of responsibility as a great strength in Australia's approach to corruption because it creates a strong system of checks and balances.

Many aspects of the private sector are regulated at the federal level. Key pieces of legislation include the Corporations Act 2001, which governs the way in which corporations can operate, and the Australian Securities and Investments Commission Act 2001, which establishes the Australian Securities and Investments Commission (ASIC). ASIC is an independent government body that is specifically tasked to enforce and regulate company laws. The Australian Prudential Regulation Authority Act 1998 establishes the Australian Prudential Regulation Authority (APRA), which oversees the Australian financial services industry. The Australian Taxation Office also plays an important role in regulating the private sector.

Regulation of the public sector is shared between the Federal and State / Territory governments. Several States have independent anti-corruption commissions or police integrity bodies (New South Wales, Queensland, Victoria, South Australia and Western Australia). The Australian Government has established an independent Australian Commission for Law Enforcement Integrity that has jurisdiction over the Australian Federal Police (AFP) and the Australian Crime Commission (ACC). The AFP and the ACC investigate serious crimes and have important roles in the fight against corruption.

Australia has a comprehensive system of administrative law that allows the public to scrutinise government decisions. There are rights to seek review of administrative decisions in various pieces of legislation, including the Australian Constitution. Federal tribunals and other bodies have been established to deal with the review of administrative decisions and actions taken by government officials and the States and Territories have also established bodies to review decisions made by their government officials. Some of these bodies are specialised and deal with a limited range of decisions, while others have a more general jurisdiction. Each jurisdiction has an independent ombudsman.

The establishment of administrative review bodies is complemented by the Freedom of Information Act 1982 (FOI Act) which extends, as far as possible, the Australian community's right to access information that is in the possession of the Federal Government. The FOI Act imposes a legal duty on federal agencies to provide members of the public with access to government information, including the official documents of Ministers, unless those documents fall within defined classes of exemption. This allows the public to scrutinise government decisions and encourages government accountability and transparency.

The Australian Government has established a financial framework containing requirements about financial

governance, financial management and accountability. The management and accountability of public money is addressed through the Financial Management and Accountability Act 1997 (FMA Act). The FMA Act provides a framework for the proper management of public money and public property, including regulating the way in which public officials spend public money. The Commonwealth Authorities and Companies Act 1997 (CAC Act) regulates the Commonwealth authorities and companies who are legally and financially separate from the Commonwealth. For Commonwealth authorities, the CAC Act contains detailed rules on reporting and accountability and deals with matters such as banking, investment and the conduct of officers.

For Commonwealth companies, the CAC Act contains reporting and other requirements in addition to the requirements of the Corporations Act.

One of Australia's key strategies in the prevention of corruption is the requirement that public officials behave appropriately and are held accountable for their actions. Each State and Territory, as well as the Australian Government, has its own public service with its own code of conduct.

Australia's approach is to promote ethical conduct rather than legislate detailed rules for compliance. The Public Service Act 1999 (PS Act) establishes the Australian Public Service (APS) and sets out guidelines for its management. The PS Act, which establishes the APS Values, articulates the culture and operating ethos of the APS and provides a philosophical underpinning. Agency heads must uphold and promote the APS Values and have systems in place to ensure that employees understand and apply them. Leadership is important in articulating the role of the Values and how they complement the agency's vision and organisational goals. The PS Act also sets out the APS Code of Conduct. The Code of Conduct specifies the standard of conduct that is required of all APS employees. Agency heads and statutory office holders are also bound by it. The heads of agencies play a key role in promoting and enforcing the Code of Conduct and must put in place measures directed at ensuring employees are aware of the consequences of breaching it. If an employee does breach the Code of Conduct, they can be subject to sanctions ranging from a reprimand to reduction in salary or even dismissal. Some breaches of the Code of Conduct may also be crimes which will attract criminal penalties. The heads of agencies play a key role in promoting and enforcing the Code of Conduct. Agency heads must put in place measures directed at ensuring that employees are aware of the Code of Conduct and of the consequences of breaching it. Agency heads must establish procedures to determine when a breach has occurred. There are also whistleblower provisions in the PS Act that prohibit the victimisation of, or discrimination against, any employee who reports a suspected breach of the Code of Conduct.

The Australian Public Service Commission is the government agency responsible for the future capability and sustainability of the APS. The Public Service Commissioner's functions include:

- promoting the APS Values and Code of Conduct
- conducting inquiries, evaluations and reviews of people-management practices
- supporting and coordinating APS-wide training and career-development opportunities in the APS
- contributing to, and fostering leadership in, the APS, and
- reporting annually to Parliament on the state of the Service.

As this brief survey shows, there is a wide range of bodies and initiatives to promote accountability and transparency. This is a key element in Australia's anti-corruption strategy.

Criminalisation of corruption

Australia has a strong legislative regime criminalising corrupt behaviour. Australia also has strategies in place to ensure that these laws are understood and enforced.

Corruption offences cover a very broad range of crimes, including bribery, embezzlement, nepotism and extortion. For this reason Australia's corruption offences are not contained in any single Act of Parliament. Instead, different types of corruption are dealt with in different pieces of State / Territory and federal legislation.

At the federal level, for example:

- domestic bribery and foreign bribery offences are contained in the Criminal Code Act 1995
- dealing in proceeds of crime is an offence under the Criminal Code Act 1995
- obstruction of justice is criminalised in the Crimes Act 1914

- offences for improperly dealing with public money are covered by the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997, and
- breach of duties as a director of a company is dealt with by the Corporations Act 2001.

Responsibility for investigating corruption offences is divided between State and Territory police forces, the AFP and specialised bodies such as the ACC and ASIC.

During the period 1 July 2004 to 30 June 2005, 54 corruption matters were reported to the AFP. This figure is comparable to the previous year when 32 corruption matters were reported to the AFP.

Once an investigating body completes an investigation of a corruption offence it refers the case to the relevant Director of Public Prosecutions (DPP). The DPP then makes an independent assessment on whether to prosecute the case.

An effective criminal justice system must be responsive to changing circumstances and be receptive to strategies for improvement. Australia's experience with foreign bribery provides a good example.

Australia ratified the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions in 1999. In order to comply with the OECD Convention, Australia introduced a new offence into the Criminal Code Act 1995. Division 70 of the Criminal Code creates the offence of bribing a foreign public official. Any person or company who commits the offence when in Australia can be prosecuted in Australia, and any Australian citizen, resident or company incorporated in Australia who commits the offence, whether or not the offence is committed in Australia, can also be prosecuted in Australia.

In 2003, after the offence had been in place for four years, there had not been one investigation of the offence.

Australia identified this as a potential area for improvement and embarked on a campaign to:

- raise public awareness that foreign bribery is a criminal offence with significant penalties
- encourage organisations to implement policies and procedures for reporting allegations of bribery, and
- increase the level of reporting of allegations of foreign bribery.

The key messages of the public awareness campaign are that:

- bribing a foreign public official is a crime with serious consequences
- bribery damages the global economy, and
- allegations of foreign bribery should be reported to the AFP.

The campaign targets government and non-government organisations, including large companies, small- and medium-sized enterprises and professional bodies, and is disseminating information through various means, including:

- distributing a leaflet entitled 'Bribing a Foreign Public Official is a Crime'. This leaflet explains the foreign bribery offence and the penalties associated with it. It also explains the obligation on companies to create and maintain a corporate culture that requires compliance with the law, including an obligation to take reasonable steps to ensure that their employees do not commit the foreign bribery offence. The leaflet has also been distributed within government, with a particular focus on agencies that are involved in law enforcement or have links to international trade, eg the AFP, AusTrade, the DPP, Australian Customs Service, the Departments of Foreign Affairs and Trade (DFAT) and Finance and Administration and the Treasury
- publishing articles on foreign bribery in government newsletters such as the DFAT News and industry newsletters
- raising awareness amongst Australian Government employees by training officers before they are posted overseas and by alerting officers who are already posted overseas. The foreign bribery leaflet has also been forwarded to overseas posts
- promoting the Attorney-General's Department's foreign bribery web site which sets out information about the foreign bribery offence. A number of government and nongovernment organisations have posted links to this web site (eg Australian Customs Service, DFAT and AusAID), and
- conducting a survey of Australia's Top 100 public companies, peak industry bodies and professional bodies requesting information on the initiatives in place in those organisations for raising awareness of the foreign bribery offence. The responses received have been positive. The initial results of the campaign

appear to be positive also, with an increased level of awareness of the foreign bribery offence in both government and non-government sectors.

Ensuring there are comprehensive and appropriate laws against corruption, and that the laws are effectively enforced, is an ongoing challenge.

International cooperation and technical assistance

Corruption is a form of transnational crime that has no respect for, or loyalty to, nations, boundaries or sovereignty and is a critical restraint on development that affects countries throughout the Asia – Pacific region.

For these reasons, Australia recognises that corruption cannot be dealt with in isolation—a collaborative approach to developing domestic and international techniques to combat corruption is required.

Through AusAID's, 'good governance' activities, Australia is actively involved in assisting countries in the

Asia – Pacific region combat corruption. Promoting 'good governance' means promoting democratic, accountable government and effective administration. In 2005–06, AusAID directly funded approximately \$897 million of governance activities (36 per cent of Australia's total Overseas Development Assistance program).

Examples of Australia's activities in our region include:

- providing assistance to Asia – Pacific countries to combat money laundering by facilitating the implementation of international best practice in regulation and good governance
- assisting Thailand to oversee and regulate relevant activities (Ombudsman, competition regulator, financial intelligence)
- working to strengthen public expenditure management in Vanuatu, Samoa, Kiribati, Tuvalu, Solomon Islands and Papua New Guinea, and
- assisting to build the capacity of the police, ombudsman and audit offices, judiciary and prison services in Indonesia, Cambodia, East Timor, Papua New Guinea, Solomon Islands, Nauru and the Philippines.

International legal cooperation ensures that corrupt individuals will not be able to exploit international boundaries to avoid prosecution. The Mutual Assistance in Criminal Matters Act 1987, the Mutual Assistance in

Business Regulation Act 1992, the Extradition Act 1988 and the Proceeds of Crime Act 2002 enable Australia to

cooperate with other countries to prevent, investigate and prosecute offenders. Australia facilitates cooperation

through the AFP International Liaison Network, which consists of 61 officers in 31 posts in 26 countries.

Australia is working to improve its mutual assistance and extradition relationships with other countries in the Asia – Pacific region. The Pacific Legal Knowledge Program is one of the ways Australia is improving its relationships. The Program involves the presentation of a series of workshops to law and justice sector officers from 14 Pacific Island Forum countries, with a focus on both building capacity and developing regional cooperative networks.

The first international criminal justice cooperation workshop, focusing on mutual assistance, extradition and proceeds of crime, was held in Vanuatu in December 2005 and was attended by Pacific Island country officers who are responsible for processing these matters. A second, follow up workshop was held in 2006 and had a practical focus, covering some of the investigative and prosecutorial aspects of these matters.

Australia recognises that corruption is not just one country's problem and, in recognition of this, is an active participant in international initiatives, including:

- ratifying UNCAC on 7 December 2005
- ratifying the United Nations Convention against Transnational Organized Crime on 27 May 2004
- ratifying the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions on 18 October 1999 and participating in the Asian Development Bank OECD Anti-

Corruption Initiative for the Asia – Pacific

- participating in the Asia – Pacific Economic Cooperation Anti-Corruption and Transparency Experts Task

Force (APEC ACT), and

- participating in monitoring exercises operated by both the G8 Financial Action Task Force on Money Laundering and the Commonwealth Secretariat on anti-money laundering measures.

Australia is committed to sharing technical expertise and improving our legal cooperation relationships with other countries to strengthen the fight against corruption, both in Australia and throughout the Asia – Pacific region.

Legal framework for asset recovery, extradition and denial of safe haven

Australia has a comprehensive legal framework for asset recovery, extradition and denial of safe haven.

Asset recovery

Australia supports the prompt return of illicitly acquired assets. Chapter V of UNCAC requires States Parties to return assets obtained through corruption to the country from which they were stolen. This is the first international agreement to do so. Australia complies with the provisions of Chapter V through the Proceeds of Crime Act 2002, the Mutual Assistance in Criminal Matters Act 1987 and the Mutual Assistance in Business Regulation Act 1992.

The Proceeds of Crime Act 2002 provides a scheme to trace, restrain and confiscate the proceeds of crime against Commonwealth law. Any person (including a foreign State) can initiate civil proceedings in Australian courts (where the offence falls within Australia's jurisdiction).

The Proceeds of Crime Act 2002 establishes an 'equitable sharing program', which gives the Minister for Justice and Customs the discretion to return the proceeds of crime to a foreign State. The foreign State may then use that money to pay compensation to the victims.

The Mutual Assistance in Criminal Matters Act 1987 establishes procedures for Australia to assist foreign States to deprive persons of the proceeds of crime that are reasonably suspected of being in Australia and provides mechanisms to register and enforce foreign forfeiture orders, obtain restraining orders, and obtain production and monitoring orders.

The Act provides for conviction-based forfeiture of assets. That is, assets may only be recovered from a person convicted of an offence in the foreign State and the conviction must not be subject to further appeal. An alternative forfeiture process also exists under the Act, which does not require the person from whom the assets are recovered to have been convicted of an offence (ie civil forfeiture). However, this alternative forfeiture process only applies to requests from specified countries (currently the US, Ireland, South Africa, UK and Canada).

A foreign forfeiture order registered under the Act can be enforced as if it were a forfeiture order made under the Proceeds of Crime Act 2002.

The Mutual Assistance in Business Regulation Act 1992 establishes procedures for Commonwealth regulators, such as ASIC and APRA, to provide assistance to foreign regulators in the administration or enforcement of foreign business laws by obtaining relevant information, documents and evidence from persons in Australia and transmitting that information and evidence and copies of those documents to foreign regulators. This Act however cannot be used to obtain evidence for use in criminal proceedings (the Mutual Assistance in Criminal Matters Act 1987 must be used for this purpose).

Australia's anti-money laundering regulator and specialist financial intelligence unit, Australian Transaction Reports and Analysis Centre (AUSTRAC), assists in tracing the proceeds of crime. Banks and financial institutions have an obligation to report suspect transactions and 'significant cash transactions' to AUSTRAC, who then shares the information it collects with specified law enforcement, security and revenue agencies within Australia.

AUSTRAC, the AFP and the Australian Security Intelligence Organisation cooperate with overseas authorities to share financial intelligence (subject to appropriate safeguards as to confidentiality and use).

Extradition and denial of safe haven

The Mutual Assistance in Criminal Matters Act 1987, the Extradition Act 1988 and the Proceeds of Crime

Act 2002 all provide for international cooperation in the prevention, investigation and prosecution of offenders as required by UNCAC.

Australia has made regulations that apply the Extradition Act 1988 and Mutual Assistance in Criminal Matters Act 1987 to those countries that are a party to UNCAC. The regulations extend mutual assistance and extradition to offences contained in UNCAC.

Australia has numerous programs which cooperate internationally on law enforcement, including:

- the AFP Law Enforcement Cooperation Program, which facilitates cooperation and capacity-building activities agreed by Australia and the receiving (developing) country as priorities for both countries
- the AFP International Network of Liaison Officers (a total of 61 officers in 31 posts in 26 countries), which facilitates information-sharing and good operational working relationships between the AFP and foreign law enforcement agencies
- agency-to-agency Memoranda of Understanding (eg MOUs between the AFP and priority partner law enforcement agencies, particularly in Australia's immediate region)
- cooperation with Interpol, which enables Australia to send and receive information on various law enforcement operations and associated policy, data and analytical issues
- participating in joint investigations (eg with the Indonesian National Police after the terrorist bombings in 2002, 2004 and 2005), and
- providing technical assistance to investigations of serious crime conducted by foreign law enforcement partners.

Conclusion

There is no one solution to the problem of corruption. Domestically, Australia uses a range of strategies to prevent, detect and address corruption and believes the key elements in an effective anti corruption strategy are:

- constitutional safeguards
- accountability and transparency
- criminalisation of corruption, and
- international cooperation and technical assistance.

International cooperation is paramount in the fight against corruption.

International cooperation and technical assistance, combined with strong political will at the domestic level, will serve to further increase each country's capacity to fight corruption and win.

Attachment G. Chapter 15, APS Values and Code of Conduct in Practice

APS Values and Code of Conduct in practice

Useful references

Public Service Act 1999

APS Values

Code of Conduct

Employment policy and advice

Frequently asked questions

Section 4: Personal behaviour

Chapter 15: Whistleblowing

Relevant Values and elements of the Code of Conduct

APS Values

(d) The APS has the highest ethical standards.

APS Code of Conduct

(6) An APS employee must maintain appropriate confidentiality about dealings that the employee has with any Minister or Minister's member of staff.

Public Service Act provisions

Whistleblowing refers to the reporting, in the public interest, of information which alleges a breach of the APS Code of Conduct by an employee or employees within an agency. Section 16 of the PS Act provides legislative protection for whistleblowers³³ within the APS.

Regulation 2.4(1) requires Agency Heads to establish procedures to manage whistleblowing reports that must meet the minimum requirements set out in regulation 2.4(2).

The Public Service Commissioner's Direction 2.5, which relates to the APS having the highest ethical standards (s10(1)(d)), reinforces the requirement for Agency Heads to ensure that procedures are in place to manage whistleblowing disclosures. The direction also requires Agency Heads to put in place measures to ensure that APS employees are aware of the procedures and are encouraged to make appropriate disclosures.

Avenues for whistleblowing

The whistleblowing scheme is based on the expectation that most whistleblowing reports will be made and investigated within the relevant agency.

However, whistleblowers who are not satisfied with the outcome of an investigation conducted by their agency can refer the matter to the Public Service Commissioner or the Merit Protection Commissioner (regulation 2.4(2)(g)).

A disclosure made by an APS employee directly to the Public Service or the Merit Protection Commissioners would only be considered where the Commissioner agrees that the matter is so sensitive that it would be inappropriate to report it to the relevant Agency Head. For example, the employee may allege the Agency Head personally breached or was complicit in another person breaching the APS Code (regulation 2.4(2)(c)). In all other cases, a report should be made in the first instance to the Agency Head or a person nominated by the Agency Head.

³³ For the purposes of the PS Act a whistleblower is an APS employee who reports a breach (or alleged breach) of the code of Conduct to an authorised person.

Protection of whistleblowers

Section 16 of the PS Act provides that a person performing functions in or for an agency must not victimise or discriminate against an APS employee because the APS employee has reported breaches (or alleged breaches) of the Code to an authorised person.

Because the PS Act prohibits victimisation and discrimination by persons performing functions '*in or for an Agency*', contractors as well as APS employees are prohibited from taking retaliatory action against whistleblowers.

The whistleblower scheme is not designed to resolve personal grievances about employment decisions, which are the subject of other agency review processes and promotion review committees.

Although there is no specific reference to whistleblowers, the Workplace Relations Act and the OH&S (CE) Act also provide some protection.

Paragraph 170CK (2)(e) of the Workplace Relations Act states that employment cannot be terminated for: *'the filing of a complaint, or the participation in proceedings, against an employer involving alleged violation of laws or regulations or recourse to competent administrative authorities.'*

The OH&S (CE) Act includes a similar provision where an employee who complains about a workrelated health, safety or welfare matter cannot be dismissed (s. 76).

Unauthorised disclosures

Public Service Regulation 2.1 creates a duty for the purposes of section 70 of the *Crimes Act 1914*, which makes it an offence for an APS employee to publish or communicate information, obtained in the course of their duties, that they have a duty not to disclose. However, a public interest disclosure that is made in accordance with the PS Act and regulations (that is, to the relevant Agency Head, the Public Service Commissioner, the Merit Protection Commissioner or persons authorised by them) is not considered an unauthorised disclosure of information or an offence under s. 70 of the Crimes Act.

In addition, the Code (s. 13(6)) requires APS employees to maintain appropriate confidentiality about dealings with any Minister or Minister's member of staff. This is an important obligation. Because there are various processes in the APS for raising concerns, including the whistleblower scheme, there is no justification for employees to 'leak' information, which can only undermine the essential relationship of trust, particularly with Ministers and the Government.

Confidential and anonymous disclosures

Sometimes people may not wish to disclose their identity when they report a breach of the Code. An anonymous disclosure, supported by sufficient evidence to justify an investigation, should be dealt with in accordance with the agency's whistleblowing procedures.

Under the Privacy Act, a whistleblower's identity is considered 'personal information' and therefore protected. 'Personal information' can only be disclosed without the individual's consent in certain circumstances prescribed under the Privacy Act, such as to protect public revenue or enforce criminal law.

However, the person or agency to which the personal information is disclosed shall not use it for a purpose other than that for which it was provided.

The Agency Head, the Public Service Commissioner or the Merit Protection Commissioner may refer information provided by a whistleblower to another appropriate agency, such as the Australian Federal Police, the State Police, or the Commonwealth Director of Public Prosecutions, should they consider it necessary. If this occurs, it is likely that the substance of the whistleblower's complaint, and so perhaps their identity, will become public. The Agency Head, and Public Service or Merit Protection Commissioners cannot direct or control how other agencies may investigate the complaint. However, the whistleblower remains protected under s. 16 of the PS Act.

Defamation

The regulations do not protect a whistleblower from liability for defamation. Common law protection applies, as modified by state or territory legislation where applicable. At common law, the defence of qualified privilege applies to a whistleblower sued for defamation by the person who has allegedly breached the Code, as long as the statements alleged to be defamatory were made in good faith and to an authorised person.

It should be emphasised that the protection of qualified privilege is unlikely to be available if the disclosure is made to the media.

As mentioned above, a public interest disclosure that is made in accordance with the PS Act and regulations is not considered an unauthorised disclosure of information or an offence under s. 70 of the Crimes Act.

Frivolous or vexatious allegations

Agency Heads, the Public Service or Merit Commissioners or other authorised persons do not have to investigate reports that are considered frivolous or vexatious.

The Commonwealth Ombudsman

Whistleblowing provisions do not affect an APS employee's right to complain to the Commonwealth Ombudsman about actions taken or decisions made by an agency. However, the Commonwealth Ombudsman cannot investigate complaints about actions taken or decisions made by:

politicians

private individuals or companies

courts or tribunals

state or local governments government Ministers

some government business enterprises or

employment related matters, except in certain cases in the Australian Defence Force.

More information about the Commonwealth Ombudsman's functions can be found on the website at:

<http://www.comb.gov.au>.

Inspector-General of Intelligence and Security

The Inspector-General of Intelligence and Security oversees activities of the Australian Security Intelligence Organisation (ASIO), Australian Secret Intelligence Service (ASIS), Defence Signals Directorate (DSD), Defence Intelligence Organisation (DIO), the Office of National Assessments (ONA) and Defence Imagery and Geospatial Organisation (DIGO). Complaints relating to illegality or impropriety by employees in these agencies may be referred to the Office of the Inspector-General.

Attachment H. International Trade Integrity Act 2007

International Trade Integrity Act 2007 No. 147, 2007

Note: An electronic version of this Act is available in ComLaw

([http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/43C34CE521706650CA25742B000F8491/\\$file/1472007.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/Act1.nsf/0/43C34CE521706650CA25742B000F8491/$file/1472007.pdf))

An Act to implement the Australian Government's response to recommendations made by the Inquiry into Certain Australian Companies in relation to the United Nations Oil-for-Food Programme, and for other purposes

International Trade Integrity Act 2007 No. 147, 2007

Contents

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Customs Act 1901

Schedule 2—Bribery of foreign officials

Criminal Code Act 1995

Income Tax Assessment Act 1997

International Trade Integrity Act 2007 No. 147, 2007

An Act to implement the Australian Government's response to recommendations made by the Inquiry into Certain Australian Companies in relation to the United Nations Oil-for-Food Programme, and for other purposes

[Assented to 24 September 2007]

The Parliament of Australia enacts:

1 Short title

This Act may be cited as the *International Trade Integrity Act 2007*.

2 Commencement

- (1) Each provision of this Act specified in column 1 of the table commences, or is taken to have commenced, in accordance with column 2 of the table. Any other statement in column 2 has effect according to its terms.

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
1. Sections 1 to 3 and anything in this Act not elsewhere covered by this table	The day on which this Act receives the Royal Assent.	24 September 2007

Commencement information		
Column 1	Column 2	Column 3
Provision(s)	Commencement	Date/Details
2. Schedule 1	A single day to be fixed by Proclamation. However, if any of the provision(s) do not commence within the period of 6 months beginning on the day on which this Act receives the Royal Assent, they commence on the first day after the end of that period.	24 March 2008
3. Schedule 2	The day after this Act receives the Royal Assent.	25 September 2007

Note: This table relates only to the provisions of this Act as originally passed by both Houses of the Parliament and assented to. It will not be expanded to deal with provisions inserted in this Act after assent.

- (2) Column 3 of the table contains additional information that is not part of this Act. Information in this column may be added to or edited in any published version of this Act.

3 Schedule(s)

Each Act that is specified in a Schedule to this Act is amended or repealed as set out in the applicable items in the Schedule concerned, and any other item in a Schedule to this Act has effect according to its terms.

Schedule 1—Enforcing UN sanctions

Charter of the United Nations Act 1945

1 Section 2

Repeal the section, substitute:

2 Definitions

In this Act:

asset means:

- (a) an asset of any kind or property of any kind, whether tangible or intangible, movable or immovable, however acquired; and
- (b) a legal document or instrument in any form, including electronic or digital, evidencing title to, or interest in, such an asset or such property, including, but not limited to, bank credits, travellers cheques, bank cheques, money orders, shares, securities, bonds, debt instruments, drafts and letters of credit.

CEO, in relation to a Commonwealth entity, means the chief executive officer (however described) of that entity.

Charter of the United Nations means the Charter of the United Nations, done at San Francisco on 26 June 1945 [1945] ATS 1.

Note: The text of the Charter of the United Nations is set out in Australian Treaty Series 1945 No. 1. In 2007, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII Internet site (www.austlii.edu.au).

Commonwealth entity means:

- (a) an agency (within the meaning of the *Financial Management and Accountability Act 1997*); or
- (b) a Commonwealth authority (within the meaning of the *Commonwealth Authorities and Companies Act 1997*).

designated Commonwealth entity means a Commonwealth entity that is specified in an instrument under section 2A.

foreign government entity 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.

officer of a Commonwealth entity includes:

- (a) the CEO of the Commonwealth entity; and
- (b) an employee of the Commonwealth entity; and
- (c) any other person engaged by the Commonwealth entity, under contract or otherwise, to exercise powers, or perform duties or functions, of the Commonwealth entity.

public international organisation has the meaning given by section 70.1 of the *Criminal Code*.

State or Territory entity means:

- (a) a State or Territory; or
- (b) an authority of a State or Territory.

UN sanction enforcement law means a provision that is specified in an instrument under subsection 2B(1).

2 After section 2

Insert:

2A Meaning of *designated Commonwealth entity*

The Minister may, by legislative instrument, specify a Commonwealth entity as a **designated Commonwealth entity**.

2B Meaning of *UN sanction enforcement law*

- (1) The Minister may, by legislative instrument, specify a provision of a law of the Commonwealth as a **UN sanction enforcement law**.
- (2) The Minister may specify a provision in relation to particular circumstances.
- (3) The Minister may only specify a provision to the extent that it gives effect to a decision that:
 - (a) the Security Council has made under Chapter VII of the Charter of the United Nations; and
 - (b) Article 25 of the Charter requires Australia to carry out;in so far as that decision requires Australia to apply measures not involving the use of armed force.

Note: Articles 39 and 41 of the Charter provide for the Security Council to decide what measures not involving the use of armed force are to be taken to maintain or restore international peace and security.

- (4) A provision may be specified whether or not the provision is made for the sole purpose of giving effect to a decision of the Security Council.
- (5) A provision ceases to be a **UN sanction enforcement law** to a particular extent if:
 - (a) Article 25 of the Charter of the United Nations ceases to require Australia to carry out a decision referred to in subsection (3); and
 - (b) the provision gave effect to that decision to that extent; and
 - (c) the provision does not give effect to any other decision referred to in subsection (3) to that extent.

3 Section 6

Before “The Governor-General”, insert “(1)”.

4 Paragraph 6(a)

Omit “has made”, substitute “makes”.

5 At the end of section 6

Add:

- (2) Without limiting subsection (1), the regulations may give effect to a decision of the Security Council by any or all of the following means:
- (a) proscribing persons or entities;
 - (b) restricting or preventing uses of, dealings with, and making available, assets;
 - (c) restricting or preventing the supply, sale or transfer of goods or services;
 - (d) restricting or preventing the procurement of goods or services;
 - (e) providing for indemnities for acting in compliance or purported compliance with those regulations;
 - (f) providing for compensation for owners of assets;
 - (g) authorising the making of legislative instruments.
- (3) Despite subsection 14(2) of the *Legislative Instruments Act 2003*, regulations made for the purposes of subsection (1) may make provision in relation to a matter by applying, adopting or incorporating any matter contained in an instrument or other writing as in force or existing from time to time.

6 At the end of Division 2 of Part 3

Add:

13A Invalidation of permission, authorisations etc.

A licence, permission, consent, approval or authorisation granted under the regulations (a *relevant authorisation*) is taken never to have been granted if information contained in, or information or a document accompanying, the application for the relevant authorisation:

- (a) is false or misleading in a material particular; or
- (b) omits any matter or thing without which the information or document is misleading in a material particular.

7 Application

Section 13A of the *Charter of the United Nations Act 1945*, as in force after the commencement of this item, applies in relation to a relevant authorisation granted in respect of an application made on or after that commencement.

8 Part 4 (heading)

Repeal the heading, substitute:

Part 4—Security Council decisions that relate to terrorism and dealings with assets

9 Section 14 (definition of *asset*)

Repeal the definition.

10 Subsection 20(1)

Omit “A person”, substitute “An individual”.

Note: The following heading to subsection 20(1) is inserted “*Offence for individuals*”.

11 Paragraphs 20(1)(a) and (b)

Omit “person”, substitute “individual”.

12 Subsection 20(1) (penalty)

Repeal the penalty.

13 At the end of subsection 20(2)

Add:

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

14 Subsection 20(3)

Omit “person”, substitute “individual”.

15 At the end of subsection 20(3)

Add:

Note: The individual bears a legal burden in relation to a matter in subsection (3) (see section 13.4 of the *Criminal Code*).

16 After subsection 20(3)

Insert:

Penalty for individuals

(3A) An offence under subsection (1) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (3B), or both.

(3B) For the purposes of subsection (3A), the amount is:

- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 2,500 penalty units; or
- (b) otherwise—2,500 penalty units.

Offence for bodies corporate

(3C) A body corporate commits an offence if:

- (a) the body corporate holds an asset; and
- (b) the body corporate:
 - (i) uses or deals with the asset; or
 - (ii) allows the asset to be used or dealt with; or
 - (iii) facilitates the use of the asset or dealing with the asset; and
- (c) the asset is a freezable asset; and
- (d) the use or dealing is not in accordance with a notice under section 22.

(3D) An offence under subsection (3C) is an offence of strict liability.

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

(3E) It is a defence if the body corporate proves that:

- (a) the use or dealing was solely for the purpose of preserving the value of the asset; or
- (b) the body corporate took reasonable precautions, and exercised due diligence, to avoid contravening subsection (3C).

Note: The body corporate bears a legal burden in relation to a matter in subsection (3E) (see section 13.4 of the *Criminal Code*).

Penalty for bodies corporate

(3F) An offence under subsection (3C) is punishable on conviction by a fine not exceeding:

- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 10,000 penalty units; or
- (b) otherwise—10,000 penalty units.

17 Subsection 20(4)

After “subsection (1)”, insert “or (3C)”.

18 Subsection 21(1)

Omit “A person”, substitute “An individual”.

Note: The following heading to subsection 21(1) is inserted “*Offence for individuals*”.

19 Paragraph 21(1)(a)

Omit “person” (first occurring), substitute “individual”.

20 Subsection 21(1) (penalty)

Repeal the penalty.

21 At the end of subsection 21(2)

Add:

Note: For *strict liability*, see section 6.1 of the *Criminal Code*.

22 After subsection 21(2)

Insert:

Penalty for individuals

(2A) An offence under subsection (1) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (2B), or both.

(2B) For the purposes of subsection (2A), the amount is:

- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 2,500 penalty units; or
- (b) otherwise—2,500 penalty units.

Offence for bodies corporate

- (2C) A body corporate commits an offence if:
- (a) the body corporate, directly or indirectly, makes an asset available to a person or entity; and
 - (b) the person or entity to whom the asset is made available is a proscribed person or entity; and
 - (c) the making available of the asset is not in accordance with a notice under section 22.
- (2D) An offence under subsection (2C) is an offence of strict liability.
 Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (2E) It is a defence if the body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravening subsection (2C).
 Note: The body corporate bears a legal burden in relation to a matter in subsection (2E) (see section 13.4 of the *Criminal Code*).

Penalty for bodies corporate

- (2F) An offence under subsection (2C) is punishable on conviction by a fine not exceeding:
- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 10,000 penalty units; or
 - (b) otherwise—10,000 penalty units.

23 Subsection 21(3)

After “subsection (1)”, insert “or (2C)”.

24 After section 22A

Insert:

22B Invalidation of notice for false or misleading information

A notice under section 22 is taken never to have been made if information contained in, or information or a document accompanying, the application for the notice:

- (a) is false or misleading in a material particular; or
- (b) omits any matter or thing without which the information or document is misleading in a material particular.

25 Application

Section 22B of the *Charter of the United Nations Act 1945*, as in force after the commencement of this item, applies in relation to a notice made in respect of an application made on or after that commencement.

26 After Part 4

Insert:

Part 5—Offences relating to UN sanctions

27 Offence—Contravening a UN sanction enforcement law

Individuals

- (1) An individual commits an offence if:
 - (a) the individual engages in conduct; and
 - (b) the conduct contravenes a UN sanction enforcement law.
- (2) An individual commits an offence if:
 - (a) the individual engages in conduct; and
 - (b) the conduct contravenes a condition of a licence, permission, consent, authorisation or approval (however described) under a UN sanction enforcement law.

- (3) An offence under subsection (1) or (2) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (4), or both.
- (4) For the purposes of subsection (3), the amount is:
- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 2,500 penalty units; or
 - (b) otherwise—2,500 penalty units.

Bodies corporate

- (5) A body corporate commits an offence if:
- (a) the body corporate engages in conduct; and
 - (b) the conduct contravenes a UN sanction enforcement law.
- (6) A body corporate commits an offence if:
- (a) the body corporate engages in conduct; and
 - (b) the conduct contravenes a condition of a licence, permission, consent, authorisation or approval (however described) under a UN sanction enforcement law.
- (7) Subsection (5) or (6) does not apply if the body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravening that subsection.
- Note: The body corporate bears a legal burden in relation to a matter in subsection (7) (see section 13.4 of the *Criminal Code*).
- (8) An offence under subsection (5) or (6) is an offence of strict liability.
- Note: For *strict liability*, see section 6.1 of the *Criminal Code*.
- (9) An offence under subsection (5) or (6) is punishable on conviction by a fine not exceeding:
- (a) if the contravention involves a transaction or transactions the value of which the court can determine—whichever is the greater of the following:
 - (i) 3 times the value of the transaction or transactions;
 - (ii) 10,000 penalty units; or
 - (b) otherwise—10,000 penalty units.

Definitions

- (10) In this section:
- engage in conduct*** means:
- (a) do an act; or
 - (b) omit to perform an act.

28 Offence—False or misleading information given in connection with a UN sanction enforcement law

- (1) A person commits an offence if:
- (a) the person gives information or a document to a Commonwealth entity; and
 - (b) the information or document is given in connection with the administration of a UN sanction enforcement law; and
 - (c) the information or document:
 - (i) is false or misleading; or
 - (ii) omits any matter or thing without which the information or document is misleading.

Penalty: Imprisonment for 10 years or 2,500 penalty units, or both.

- (2) A person (the ***first person***) commits an offence if:
- (a) the first person gives information or a document to another person; and
 - (b) the first person is reckless as to whether the other person or someone else will give the information or document to a Commonwealth entity in connection with the administration of a UN sanction enforcement law; and
 - (c) the information or document:

- (i) is false or misleading; or
- (ii) omits any matter or thing without which the information or document is misleading.

Penalty: Imprisonment for 10 years or 2,500 penalty units, or both.

- (3) Subsection (1) or (2) does not apply:
 - (a) as a result of subparagraph (1)(c)(i) or (2)(c)(i)—if the information or document is not false or misleading in a material particular; or
 - (b) as a result of subparagraph (1)(c)(ii) or (2)(c)(ii)—if the information or document did not omit any matter or thing without which the information or document is misleading in a material particular.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

Geographical application of offences

- (4) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (1) or (2).

Part 6—Information relating to UN sanctions

29 CEO of Commonwealth entity may give information or document

- (1) The CEO of a Commonwealth entity may give any information or document to the CEO of a designated Commonwealth entity for a purpose in connection with the administration of a UN sanction enforcement law.
- (2) Subsection (1) applies despite any other law of the Commonwealth, a State or a Territory.

30 Power to require information or documents to be given

- (1) The CEO of a designated Commonwealth entity may, for the purpose of determining whether a UN sanction enforcement law has been or is being complied with, give a person a written notice requiring the person to do either or both of the following:
 - (a) to give the CEO information of the kind, by the time and in any manner or form, specified in the notice;
 - (b) to give the CEO documents of the kind, by the time and in any manner, specified in the notice.
- (2) The person must comply with the notice despite any other law of the Commonwealth, a State or a Territory.
- (3) The time specified in the notice must be reasonable, having regard to all the circumstances.
- (4) The person may, before the time specified in the notice, request the CEO to extend the time by which the information or documents must be given.
- (5) The CEO may, by written notice given to the person, vary the notice under subsection (1) to specify a later time by which the information or documents must be given.
- (6) Subsection (5) does not limit the application of subsection 33(3) of the *Acts Interpretation Act 1901* in relation to a notice under subsection (1).

Note: Subsection 33(3) of the *Acts Interpretation Act 1901* deals with revocation and variation etc. of instruments.

- (7) Subsection (1) does not apply if:
 - (a) the person is the Commonwealth or a Commonwealth entity; or
 - (b) the person:
 - (i) is, or has at any time been, an officer of a Commonwealth entity; and
 - (ii) obtained or generated the information or document in the course of carrying out his or her duties as an officer of the Commonwealth entity.

31 Information may be required to be given on oath

- (1) The CEO may require the information to be verified by, or given on, oath or affirmation.
- (2) The oath or affirmation is an oath or affirmation that the information is true.

32 Offence for failure to comply with requirement

- (1) A person commits an offence if:

- (a) the person has been given a notice under section 30; and
- (b) the person does not comply with the notice.

Penalty: Imprisonment for 12 months.

- (2) Section 15.1 of the *Criminal Code* (extended geographical jurisdiction—category A) applies to an offence against subsection (1).

33 Self-incrimination not an excuse

- (1) An individual is not excused from giving information or a document under section 30 on the ground that the information, or the giving of the document, might tend to incriminate the individual or otherwise expose the individual to a penalty or other liability.
- (2) However, neither the information given nor the giving of the document is admissible in evidence against the individual in any criminal proceedings, or in any proceedings that would expose the individual to a penalty, other than proceedings for an offence against:
 - (a) section 28 (false or misleading information given in connection with a UN sanction enforcement law); or
 - (b) section 32 (failure to comply with requirement to give information or document).

34 CEO may copy documents

If a person gives a document to the CEO of a designated Commonwealth entity under section 30, the CEO:

- (a) may take and keep a copy of the document; and
- (b) must return the document to the person within a reasonable time.

35 Further disclosure and use of information and documents

Disclosure and use of information etc. within entity

- (1) An officer of a designated Commonwealth entity may do any of the following for a purpose in connection with the administration of a UN sanction enforcement law or with a decision of the Security Council referred to in section 6:
 - (a) copy, make a record of or use, any information or document;
 - (b) disclose any information, or give any document, to another officer of that entity.

Disclosure outside of entity

- (2) A CEO of a designated Commonwealth entity may disclose any information or give any document to any of the following for a purpose in connection with the administration of a UN sanction enforcement law or with a decision of the Security Council referred to in section 6:
 - (a) a Minister of the Commonwealth, a State or a Territory;
 - (b) the CEO of another Commonwealth entity;
 - (c) a State or Territory entity;
 - (d) a foreign government entity;
 - (e) a public international organisation;
 - (f) a person specified in an instrument under subsection (3).
- (3) The Minister may, by legislative instrument, specify a person for the purposes of paragraph (2)(f).
- (4) Subsections (1) and (2) apply despite any other law of the Commonwealth, a State or a Territory.

36 Protection from liability

- (1) A person who, in good faith, gives, discloses, copies, makes a record of or uses information or a document under section 29, 30, 34 or 35 is not liable:
 - (a) to any proceedings for contravening any other law because of that conduct; or
 - (b) to civil proceedings for loss, damage or injury of any kind suffered by another person because of that conduct.
- (2) Subsection (1) does not prevent the person from being liable to a proceeding for conduct of the person that is revealed by the information or document.

37 Retention of records and documents

- (1) A person who applies for a licence, permission, consent, authorisation or approval under a UN sanction enforcement law (a *relevant authorisation*) must retain any records or documents relating to that application for the period of 5 years beginning on:
 - (a) if the relevant authorisation was granted—the last day on which an action to which the relevant authorisation relates was done; or
 - (b) if the relevant authorisation was not granted—the day on which the application was made.
- (2) A person who is granted a licence, permission, consent, authorisation or approval under a UN sanction enforcement law (a *relevant authorisation*) must retain any records or documents relating to the person's compliance with any conditions to which the relevant authorisation is subject for the period of 5 years beginning on the last day on which an action to which the relevant authorisation relates was done.

Note: A person may commit an offence if the person fails to give under section 30 a record or document that is required to be retained under this section: see section 32.

38 Delegation

- (1) The CEO of a Commonwealth entity may, by written instrument, delegate all or any of his or her powers or functions under this Part to:
 - (a) an SES employee or acting SES employee of the entity; or
 - (b) an employee of the entity of equivalent rank to an SES employee.
- (2) In exercising powers or performing functions delegated under subsection (1), the delegate must comply with any directions of the CEO.

Part 7—Miscellaneous

39 Regulations

The Governor-General may make regulations prescribing matters:

- (a) required or permitted by this Act to be prescribed; or
- (b) necessary or convenient to be prescribed for carrying out or giving effect to this Act.

Customs Act 1901

27 Subsection 4(1)

Insert:

Charter of the United Nations means the Charter of the United Nations, done at San Francisco on 26 June 1945 [1945] ATS 1.

Note: The text of the Charter of the United Nations is set out in Australian Treaty Series 1945 No. 1. In 2007, the text of a Convention in the Australian Treaty Series was accessible through the Australian Treaties Library on the AustLII Internet site (www.austlii.edu.au).

28 Subsection 4(1)

Insert:

UN-sanctioned goods means goods that are prescribed as UN-sanctioned goods under subsection 233BABAA(1).

29 At the end of Division 1 of Part IV

Add:

52 Invalidation of licence, permission etc. for false or misleading information

A licence, permission, consent or approval granted in respect of the importation of UN-sanctioned goods is taken never to have been granted if:

- (a) an application for the licence, permission, consent or approval was made in an approved form; and
- (b) information contained in, or information or a document accompanying, the form:
 - (i) was false or misleading in a material particular; or

- (ii) omitted any matter or thing without which the information or document is misleading in a material particular.

30 Application

Section 52 of the *Customs Act 1901*, as in force after the commencement of this item, applies in relation to a licence, permission, consent or approval granted in respect of an application made on or after that commencement.

31 At the end of Division 1 of Part VI

Add:

112B Invalidation of licence, permission etc. for false or misleading information

A licence, permission, consent or approval granted in respect of the exportation of UN-sanctioned goods is taken never to have been granted if:

- (a) an application for the licence, permission, consent or approval was made in an approved form; and
- (b) information contained in, or information or a document accompanying, the form:
 - (i) was false or misleading in a material particular; or
 - (ii) omitted any matter or thing without which the information or document is misleading in a material particular.

32 Application

Section 112B of the *Customs Act 1901*, as in force after the commencement of this item, applies in relation to a licence, permission, consent or approval granted in respect of an application made on or after that commencement.

33 Paragraph 210(1)(b)

Omit “or 233BAB(5) or (6)”, substitute “, 233BAB(5) or (6), 233BABAB(1) or 233BABAC(1)”.

34 After section 233BAB

Insert:

233BABAA UN-sanctioned goods

- (1) The regulations may prescribe specified goods as UN-sanctioned goods.
 - (2) Regulations made for the purposes of subsection (1) may provide that specified goods are only UN-sanctioned goods if:
 - (a) they are imported from, or exported to, a specified place; or
 - (b) the origin, or the final destination, of the goods is a specified place; or
 - (c) other specified circumstances apply in relation to the goods.
 - (3) The regulations must not prescribe goods for the purposes of subsection (1) unless:
 - (a) either:
 - (i) the importation of the goods is prohibited, either absolutely or on condition, by the *Customs (Prohibited Imports) Regulations 1956*; or
 - (ii) the exportation of the goods is prohibited, either absolutely or on condition, by the *Customs (Prohibited Exports) Regulations 1958*; and
 - (b) the regulation under which that importation or exportation is prohibited gives effect to a decision that:
 - (i) the Security Council has made under Chapter VII of the Charter of the United Nations; and
 - (ii) Article 25 of the Charter requires Australia to carry out;in so far as that decision requires Australia to apply measures not involving the use of armed force.
- Note: Articles 39 and 41 of the Charter provide for the Security Council to decide what measures not involving the use of armed force are to be taken to maintain or restore international peace and security.
- (4) For the purposes of paragraph (3)(b), a regulation may be taken to give effect to a decision:
 - (a) whether or not it is made for the sole purpose of giving effect to the decision; and
 - (b) whether or not it has any effect in addition to giving effect to the decision.

233BABAB Special offences for importation of UN-sanctioned goods

Offence for individuals

- (1) An individual commits an offence if:
 - (a) the individual intentionally imported goods; and
 - (b) the goods were UN-sanctioned goods and the individual was reckless as to that fact; and
 - (c) their importation:
 - (i) was prohibited under this Act absolutely; or
 - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.
- (2) Subject to subsection (3), absolute liability applies to paragraph (1)(c).
Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (3) For the purposes of an offence against subsection (1), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (1)(c)(ii) had not been obtained at the time of the importation.
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Penalty for individuals

- (4) An offence under subsection (1) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (5), or both.
- (5) For the purposes of subsection (4), the amount is:
 - (a) if the Court can determine the value of the goods to which the offence relates—whichever is the greater of the following:
 - (i) 3 times the value of the goods; or
 - (ii) 2,500 penalty units;
 - (b) if the Court cannot determine the value of those goods—2,500 penalty units.

Offence for bodies corporate

- (6) A body corporate commits an offence if:
 - (a) the body corporate imported goods; and
 - (b) the goods were UN-sanctioned goods; and
 - (c) their importation:
 - (i) was prohibited under this Act absolutely; or
 - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the importation, that approval had not been obtained.
- (7) Subsection (6) does not apply if the body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravening that subsection.
Note: The body corporate bears a legal burden in relation to a matter in subsection (7) (see section 13.4 of the *Criminal Code*).
- (8) Strict liability applies to paragraphs (6)(a) and (b).
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.
- (9) Subject to subsection (10), absolute liability applies to paragraph (6)(c).
Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (10) For the purposes of an offence against subsection (6), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (6)(c)(ii) had not been obtained at the time of the importation.
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Penalty for bodies corporate

- (11) An offence under subsection (6) is punishable on conviction by a fine not exceeding:
 - (a) if the Court can determine the value of the goods to which the offence relates—whichever is the greater of the following:
 - (i) 3 times the value of the goods;
 - (ii) 10,000 penalty units; or
 - (b) if the Court cannot determine the value of those goods—10,000 penalty units.

Person not liable to other proceedings

- (12) A person convicted or acquitted of an offence against subsection (1) or (6) in respect of particular conduct is not liable to proceedings under section 233 in respect of that conduct.

233BABAC Special offences for exportation of UN-sanctioned goods

Offence for individuals

- (1) An individual commits an offence if:
- (a) the individual intentionally exported goods; and
 - (b) the goods were UN-sanctioned goods and the individual was reckless as to that fact; and
 - (c) their exportation:
 - (i) was prohibited under this Act absolutely; or
 - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the exportation, that approval had not been obtained.
- (2) Subject to subsection (3), absolute liability applies to paragraph (1)(c).
Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (3) For the purposes of an offence against subsection (1), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (1)(c)(ii) had not been obtained at the time of the exportation.
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Penalty for individuals

- (4) An offence under subsection (1) is punishable on conviction by imprisonment for not more than 10 years or a fine not exceeding the amount worked out under subsection (5), or both.
- (5) For the purposes of subsection (4), the amount is:
- (a) if the Court can determine the value of the goods to which the offence relates—whichever is the greater of the following:
 - (i) 3 times the value of the goods;
 - (ii) 2,500 penalty units; or
 - (b) if the Court cannot determine the value of those goods—2,500 penalty units.

Offence for bodies corporate

- (6) A body corporate commits an offence if:
- (a) the body corporate exported goods; and
 - (b) the goods were UN-sanctioned goods; and
 - (c) their exportation:
 - (i) was prohibited under this Act absolutely; or
 - (ii) was prohibited under this Act unless the approval of a particular person had been obtained and, at the time of the exportation, that approval had not been obtained.
- (7) Subsection (6) does not apply if the body corporate proves that it took reasonable precautions, and exercised due diligence, to avoid contravening that subsection.
Note: The body corporate bears a legal burden in relation to a matter in subsection (7) (see section 13.4 of the *Criminal Code*).
- (8) Strict liability applies to paragraphs (6)(a) and (b).
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.
- (9) Subject to subsection (10), absolute liability applies to paragraph (6)(c).
Note: For **absolute liability**, see section 6.2 of the *Criminal Code*.
- (10) For the purposes of an offence against subsection (6), strict liability applies to the physical element of circumstance of the offence, that an approval referred to in subparagraph (6)(c)(ii) had not been obtained at the time of the exportation.
Note: For **strict liability**, see section 6.1 of the *Criminal Code*.

Penalty for bodies corporate

- (11) An offence under subsection (6) is punishable on conviction by a fine not exceeding:
- (a) if the Court can determine the value of the goods to which the offence relates—whichever is the greater of the following:

- (i) 3 times the value of the goods;
 - (ii) 10,000 penalty units; or
 - (b) if the Court cannot determine the value of those goods—10,000 penalty units.
- Person not liable to other proceedings*
- (12) A person convicted or acquitted of an offence against subsection (1) or (6) in respect of particular conduct is not liable to proceedings under section 233 in respect of that conduct.

35 Subsection 233BAC(1)

Omit “or 233BAB(5) or (6)”, substitute “, 233BAB(5) or (6), 233BABAB(1) or (4) or 233BABAC(1) or (4)”.

36 Subsection 233BA(2)

After “section 233BAB”, insert “, 233BABAB or 233BABAC”.

37 After section 233BA

Insert:

233C Offence for giving false or misleading information in relation to UN-sanctioned goods

Individuals

- (1) An individual commits an offence if:
- (a) an application is made in respect of UN-sanctioned goods under:
 - (i) the *Customs (Prohibited Imports) Regulations 1956*; or
 - (ii) the *Customs (Prohibited Exports) Regulations 1958*; and
 - (b) the application is made in an approved form; and
 - (c) the individual signed the form; and
 - (d) information contained in, or information or a document accompanying, the form:
 - (i) is false or misleading; or
 - (ii) omits any matter or thing without which the information or document is misleading.

Penalty: Imprisonment for 10 years or 2,500 penalty units, or both.

Bodies corporate

- (2) A body corporate commits an offence if:
- (a) an application is made by or on behalf of the body corporate; and
 - (b) the application is in an approved form; and
 - (c) the application is made in respect of UN-sanctioned goods under:
 - (i) the *Customs (Prohibited Imports) Regulations 1956*; or
 - (ii) the *Customs (Prohibited Exports) Regulations 1958*; and
 - (d) information contained in, or information or a document accompanying, the form:
 - (i) is false or misleading; or
 - (ii) omits any matter or thing without which the information or document is misleading.

Penalty: 12,500 penalty units.

- (3) Subsection (1) or (2) does not apply:
- (a) as a result of subparagraph (1)(d)(i) or (2)(d)(i)—if the information or document is not false or misleading in a material particular; or
 - (b) as a result of subparagraph (1)(d)(ii) or (2)(d)(ii)—if the information or document did not omit any matter or thing without which the information or document is misleading in a material particular.

Note: A defendant bears an evidential burden in relation to the matter in subsection (3) (see subsection 13.3(3) of the *Criminal Code*).

Schedule 2—Bribery of foreign officials

Criminal Code Act 1995

1 After subsection 70.2(1) of the *Criminal Code*

Insert:

(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.

2 Paragraph 70.2(2)(a) of the *Criminal Code*

Repeal the paragraph, substitute:

(a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;

3 Subsection 70.3(1) of the *Criminal Code* (table, heading to column 4)

Omit “the person would not have been guilty of an offence against...”, substitute “this written law requires or permits the provision of the benefit ...”.

4 Subsection 70.3(1) of the *Criminal Code* (table)

Before “law in” (wherever occurring), insert “written”.

Income Tax Assessment Act 1997

5 After subsection 26-52(2)

Insert:

(2A) For the purposes of subsection (2), disregard whether business, or a business advantage, was actually obtained or retained.

6 Subsection 26-52(3)

Repeal the subsection (including the heading), substitute:

Payments that written law of foreign public official’s country requires or permits

(3) An amount is not a ***bribe to a foreign public official*** if, assuming the benefit had been provided, and all related acts had been done, in the *foreign public official’s country, a written law of that country would have required or permitted the provision of the benefit.

7 Subsection 26-52(4)

Repeal the subsection (not including the heading), substitute:

(4) An amount is not a ***bribe to a foreign public official*** if:

(a) the value of the benefit is of a minor nature; and

(b) 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.

8 Paragraph 26-52(6)(a)

Repeal the paragraph, substitute:

(a) the fact that the benefit may be, or be perceived to be, customary, necessary or required in the situation;

9 Application

The amendments of the *Income Tax Assessment Act 1997* made by this Schedule apply to a loss or outgoing incurred on or after the commencement of this Schedule.

[*Minister’s second reading speech made in—
House of Representatives on 14 June 2007
Senate on 17 August 2007*]

Attachment I. Customs Act 1901 [hyperlink]

**Customs Act 1901
Act No. 6 of 1901 as amended**

Available at

[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/61BBCD2969B4E2D2CA2574120005F8DF/\\$file/Customs01Vol1.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/61BBCD2969B4E2D2CA2574120005F8DF/$file/Customs01Vol1.pdf)

See notably Part I – Introductory and Part VI – The Exportation of Goods

Attachment J. Extracts – Income Tax Assessment Act 1997

Income Tax Assessment Act 1997

Act No. 38 of 1997 as amended

This compilation was prepared on 1 January 2008 taking into account amendments up to Act No. 184 of 2007

Volume 1 includes: Table of Contents Sections 1-1 to 36-55

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Volume 2 includes: Table of Contents Sections 40-1 to 55-10

Volume 3 includes: Table of Contents Sections 58-1 to 122-205

Volume 4 includes: Table of Contents Sections 124-1 to 152-430

Volume 5 includes: Table of Contents Sections 164-1 to 220-800

Volume 6 includes: Table of Contents Sections 240-1 to 410-5

Volume 7 includes: Table of Contents Sections 700-1 to 727-910

Volume 8 includes: Table of Contents Sections 768-100 to 995-1

Volume 9 includes: Note 1

Table of Acts

Act Notes

Table of Amendments

Notes 2–9

Table A

Prepared by the Office of Legislative Drafting and Publishing,
Attorney-General's Department, Canberra

26-52 Bribes to foreign public officials

(1) You cannot deduct under this Act a loss or outgoing you incur that is a *bribe to a foreign public official.

(2) An amount is a *bribe to a foreign public official* to the extent that:

(a) you incur the amount in, or in connection with:

(i) providing a benefit to another person; or

(ii) causing a benefit to be provided to another person; or

(iii) offering to provide, or promising to provide, a benefit to another person; or

(iv) causing 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 (see subsection (6)); and

(c) you incur the amount with the intention of influencing a *foreign public official (who may or may not be the other person) in the exercise of the official's duties as a foreign public official in order to:

(i) obtain or retain business; or

(ii) obtain or retain an advantage in the conduct of business that is not legitimately due to you, or another person, as the recipient, or intended recipient, of the advantage in the conduct of business (see subsection (7)).

The benefit may be any advantage and is not limited to property.

(2A) For the purposes of subsection (2), disregard whether business, or a business advantage, was actually obtained or retained.

Payments that written law of foreign public official's country requires or permits

(3) An amount is not a *bribe to a foreign public official* if, assuming the benefit had been provided, and all related acts had been done, in the *foreign public official's country, a written law of that country would have required or permitted the provision of the benefit.

Facilitation payments

- (4) An amount is not a *bribe to a foreign public official* if:
- (a) the value of the benefit is of a minor nature; and
 - (b) 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.
- (5) 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.
- Benefit not legitimately due*
- (6) In working out if a benefit is not legitimately due to another 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.
- Advantage in the conduct of business that is not legitimately due*
- (7) In working out if an advantage in the conduct of business is not legitimately due in a particular situation, disregard the following:
- (a) the fact that the advantage may be customary, or perceived to be customary, in the situation;
 - (b) the value of the advantage;
 - (c) any official tolerance of the advantage.
- Duties of foreign public official*
- (8) The duties of a *foreign public official are any authorities, duties, functions or powers that:
- (a) are conferred on the official; or
 - (b) the official holds himself or herself out as having.

Attachment K. Extracts – Criminal Code Act 1995

Criminal Code Act 1995

Act No. 12 of 1995 as amended

This compilation was prepared on 20 January 2008 taking into account amendments up to Act No. 177 of 2007

The text of any of those amendments not in force on that date is appended in the Notes section

The operation of amendments that have been incorporated may be affected by application provisions that are set out in the Notes section

Prepared by the Office of Legislative Drafting and Publishing, Attorney-General's Department, Canberra

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 organization 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 organization 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).

Penalty: Imprisonment for 10 years.

Note 1: For defences, see sections 70.3 and 70.4.

Note 2: Section 4B of the *Crimes Act 1914* allows a court to impose a fine instead of imprisonment or in addition to imprisonment.

(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.

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:

Defence of lawful conduct			
Item	In a case where the person's conduct occurred in relation to this kind of foreign public official...	and if it were assumed that the person's conduct had occurred wholly...	this written law requires or permits the provision of the benefit ...
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

Defence of lawful conduct			
Item	In a case where the person's conduct occurred in relation to this kind of foreign public official..	and if it were assumed that the person's conduct had occurred wholly...	this written law requires or permits the provision of the benefit ...
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
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 authorized intermediary; subsection (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; subsection (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) 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.

Attachment L. Charter of the United Nations Act 1945 *[hyperlink]*

Act No. 32 of 1945 as amended

Available

at

[http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D1AC9CB30DA619EDCA257412001254D0/\\$file/CharteroftheUnitedNations1945_WD02.pdf](http://www.comlaw.gov.au/ComLaw/Legislation/ActCompilation1.nsf/0/D1AC9CB30DA619EDCA257412001254D0/$file/CharteroftheUnitedNations1945_WD02.pdf)

Attachment M. Foreign bribery brochure

BRIBING A FOREIGN PUBLIC OFFICIAL IS A CRIME

It is a criminal offence to bribe a foreign public official.

The offence applies to:

- Individuals or companies, whether or not they are Australian, who bribe or attempt to bribe a foreign public official while in Australia, and
- Australian citizens, Australian residents or companies incorporated in Australia who bribe or attempt to bribe a foreign public official while overseas.

Individuals or companies that commit the offence can be prosecuted in an Australian court.

Australian law provides for up to 10 years imprisonment for persons found guilty of bribing a foreign public official. A court can also impose a fine instead of, or in addition to, imprisonment.

Proceeds of this criminal activity can also be forfeited to the Australian Government.

The high penalties for foreign bribery reflect the seriousness of the offence. Corruption shrinks the global market for Australian exports and investment. It undermines fair competition, and can have disastrous consequences for developing economies.

The law applies to both individuals and companies

Companies can be found guilty of the foreign bribery offence and can be held criminally responsible for the acts of their agents.

Companies must create and maintain a corporate culture that requires compliance with the law. They must take reasonable steps to ensure that their employees do not commit foreign bribery offences.

Companies should also ensure that they have appropriate channels for reporting suspected breaches of the law, and that people who do report breaches are protected from persecution within the company.

What is bribing a foreign public official?

The definition of 'foreign bribery' is very broad. It includes providing or offering a benefit to another person, or causing a benefit to be provided or offered to another person, where the benefit is not legitimately due.

The benefit must be intended to influence a foreign public official in the exercise of his or her official duties for the purpose of obtaining business or a business advantage.

A 'benefit' can be a non-monetary or non-tangible inducement.

It does not need to be provided or offered to the foreign public official (that is, it can be provided or offered to another person). It can also be provided or offered by an agent.

Who are foreign public officials?

The definition of 'foreign public official' is also very broad. It includes:

- employees, officials or contractors of a foreign government body
- individuals performing the duties of an appointment, office or position under a law of a foreign country
- individuals holding or performing the duties of an appointment, office or position created by custom or convention of a foreign country
- individuals in the service of a foreign government body (including service as a member of a military force or police force)
- members of the executive, judiciary, magistracy or legislature of a foreign country
- employees, contractors and individuals who perform the duties of an office or position, or are otherwise in the service of a public international organisation (such as the United Nations)
- individuals who hold themselves out to be an authorized intermediary of a foreign public official.

If you suspect that an individual or company has bribed or attempted to bribe a foreign public official, please report the matter to Crime Stoppers on 1800 333 000 or write to:

Australian Federal Police [...]

Alternatively, write to the Australian Federal Police in your capital city.

For more information, visit www.ag.gov.au/foreignbribery

Produced by the Australian Government Attorney-General's Department.

Attachment N. Fact Sheet 4, Foreign Bribery Information and Awareness Pack

FOREIGN BRIBERY – FACT SHEET 4

Taxation Implications of Foreign Bribery

Bribery of public officials in Australia or overseas is a criminal offence and is not tax deductible.

This fact sheet outlines the difference between a bribe and a facilitation payment for tax purposes, and provides guidance to taxpayers and businesses that have dealings with foreign public officials.

It is important that businesses who operate in jurisdictions where bribes or facilitation payments may occur:

- understand the relevant Australian laws, including what constitutes a bribe or facilitation payment
- have systems in place to report facilitation payments
- implement assurance processes to minimise their risk of breaking the law, and
- are aware of the Australian Taxation Office (ATO) compliance activities in this area.

The ATO is working to ensure that bribes to foreign public officials cannot be claimed as tax deductions and only legitimate facilitation payments will be allowed.

What is a bribe?

For tax purposes, a bribe is generally a benefit provided or promised to another person that is:

- not legitimately due to the other person
- provided with the intent to influence a foreign public official (who may or may not be the recipient of the benefit), and
- provided to obtain or retain business, or a business advantage, that is not legitimately due.

The benefit may be any advantage and is not limited to property.

What is a facilitation payment?

A facilitation payment is a payment to a foreign public official for the sole, or dominant, purpose of expediting or securing the performance of a routine government action of a minor nature.

A facilitation payment is not regarded as a bribe and may be tax deductible.

Examples of routine government actions of a minor nature include the following:

- 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
- processing government papers such as a visa or work permit
- providing police protection or mail collection or delivery
- scheduling inspections associated with contract performance or related to the transit of goods
- providing telecommunications services, power or water
- loading and unloading cargo, and / or
- protecting perishable products, or commodities, from deterioration.

The above, and any action of a similar nature, must not involve a decision (or involve encouraging a decision) about whether to award new business, continue existing business with a particular person, or change the terms of new or existing business.

What should taxpayers do?

Your business or organisation should make sure any employees, representatives, agents or intermediaries who conduct business with foreign public officials understand this law. This may include:

- putting in place board-endorsed systems and processes which are tested and reviewed to assure the integrity of processes, payments and people
- implementing a code of conduct that sets out expectations for the behaviour of employees, agents and intermediaries
- monitoring the reputation and suitability of representatives, agents or intermediaries engaged to act on behalf of your business to engage with foreign public officials
- putting in place an independent, confidential and impartial reporting function for staff and others to alert senior management or Australian government authorities of possible criminal conduct, and

- ensuring that accounting systems can identify facilitation payments.

Accounting systems and working papers should be able to identify and report facilitation payments for review by internal and external auditors.

The Criminal Code Act 1995 (Cth) imposes record keeping requirements with respect to facilitation payments and compliance with them needs to be considered by companies who wish to make facilitation payments.

Accurate records should be kept for financial reporting and any review of internal controls and tax compliance processes, detailing:

- a description of the benefit secured and the circumstances which led to your company seeking the benefit—was it a routine government action?
- the date(s) the benefit was secured
- the amount(s) paid or the gift(s) given and its value
- the entity paying for the benefit
- the country in which the benefit was secured
- the method of payment
- the date the benefit was granted to your company
- the identity and position of the foreign public official or other person the payment was made to, and
- either your company's authorising officer's signature or some other means of identification.

These records should be available for audit and the accuracy of the particulars should meet the standard set by sound audit processes. Audit reports should be reviewed and, if necessary, acted on by audit committees.

What is the Australian Taxation Office doing?

The ATO is focusing on compliance in the area of bribes and facilitation payments. In the Commissioner of Taxation's Compliance Program 2006–07, the ATO undertook to ensure that only legitimate expenses are claimed as deductions (and that only legitimate input tax credits are claimed), by:

- reviewing significant, one-off, regular or embedded payments by Australian businesses to entities in jurisdictions where bribes or facilitation payments are said to be 'part of doing business'
- checking that businesses with particular international trade profiles have appropriate codes of conduct and systems in place to detect bribes and international facilitation payments, and
- reviewing organisations that do not have appropriate systems in place.

The ATO also encourages people who may have information about businesses they suspect of paying bribes to contact them directly on 1800 060 062. People who call this number will also be asked to inform the Australian Federal Police of their suspicions.

Which laws target bribery of foreign public officials?

Australia's obligations are outlined in the Organisation for Economic Cooperation and Development (OECD) Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, and include making foreign bribery a criminal offence and ensuring bribes to foreign public officials are not tax deductible.

The Income Tax Assessment Act 1997 (Cth) also denies taxpayers a deduction for bribes to foreign public officials (sections 26 – 52) but may allow deductions for facilitation payments (subsections 26 – 52(3) – (5)).

Penalties for incorrect claims can be substantial.

Section 70.2 of the Criminal Code Act 1995 (Cth) makes it a criminal offence to bribe or attempt to bribe a foreign public official, whether in Australia or elsewhere. This means that Australian citizens and corporations can be prosecuted for actions undertaken overseas.

Penalties for bribery include imprisonment and substantial fines.

Attachment O. ATO advice on facilitation payments

Commissioner's foreword

We are committed to providing a world-class tax administration for Australian business. Our objective is to administer the tax laws fairly and efficiently for all taxpayers.

In supporting the competitiveness of Australian business we look for ways to reduce compliance costs and make compliance as easy as possible, as well as providing avenues for certainty on contentious tax issues. Our aim is to smooth the way for business prosperity while maintaining a level playing field for all businesses.

As part of our commitment to business we have developed this publication. It provides practical guidance to help businesses manage their tax obligations in the area of bribes and facilitation payments.

We suggest initiatives that company boards can put in place and offer suggestions to help businesses meet their obligations under the law. We strongly recommend that businesses:

- have a code of conduct across the business relating to bribes
- have a strong internal audit function and audit committee, and
- act to rectify any relevant internal control weaknesses identified and reported to the board by external auditors.

In preparing this document we consulted with key stakeholders, including the Business Council of Australia, the Corporate Tax Association, the Taxation Institute of Australia, Transparency International, Australian Stock Exchange and Standards Australia. I thank everyone for their valuable contribution.

This publication complements the Organisation for Economic Cooperation and Development publication, *OECD bribery awareness handbook for tax examiners*, and builds on advice from Transparency International.

The cornerstone of our work with business is boosting self regulation and enhancing governance processes that help identify risks before they eventuate.

Michael D'Ascenzo

Commissioner of Taxation

Introduction

Making payments to bribe public officials in Australia or overseas is a serious criminal offence which attracts significant

penalties for both a company and its employees. Bribes are not tax deductible.

A facilitation payment is not regarded as a bribe and may be tax deductible. This is a payment to a foreign public official to perform routine government actions of a minor nature.

The Tax Office is focusing on this area to ensure that claims for tax deductions and GST credits are legitimate, and that businesses have appropriate assurance processes in place.

Businesses that operate in jurisdictions where bribes and facilitation payments may occur may wish to consider their exposure to risk and act to:

- understand the relevant Australian laws, including the difference between a bribe and a facilitation payment
- implement assurance processes to minimise their risk of offending, and
- be aware of our compliance activities in this area.

What is the Tax Office doing?

We are focusing on bribes and facilitation payments in our compliance activities with the intention of ensuring that only legitimate expenses are claimed as deductions (and that only legitimate GST credits are claimed). We will:

- review significant, one-off, regular or embedded payments by Australian businesses to entities in jurisdictions
- where bribes and facilitation payments are known to be 'part of doing business'

- check that businesses with particular international trade profiles have appropriate codes of conduct and systems in
- place to detect bribes and confirm facilitation payments, and
- review organisations that do not have appropriate systems in place.

We will pay particular attention to all businesses that have significant trading activities in countries that are given a low rating on Transparency International's corruption perception index. In addition, as part of our senior tax officer visits to the top 100 companies twice a year, we will discuss bribes and facilitation payments and seek confirmation that the companies have assurance processes in place to minimise the risk of bribes occurring.

We have also issued guidelines for staff on the treatment of bribes and facilitation payments, *Guidelines for Tax Office auditors – understanding and dealing with bribery*.

These guidelines are modelled on the *OECD bribery awareness handbook for tax examiners*.

In identifying and dealing with deductions being claimed for bribe payments we are primarily concerned with protecting the revenue and maintaining community confidence in our administration. However, we also have an important role to play in the whole-of-government effort to combat corruption and bribery. We fulfil this role by referring information on suspected or actual bribe transactions to the Australian Federal Police for potential criminal investigation and/or prosecution.

Where warranted, and within the requirements of legislation, we will pass on information to the Australian Federal Police

pursuant to section 3E of the *Taxation Administration Act 1953*.

What laws affect bribery and facilitation payments?

In 1999 Australia became a party to the OECD's Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The Australian Government subsequently introduced changes to the relevant tax and criminal legislation.

Sections 26-52 and 26-53 of the *Income Tax Assessment Act 1997* (ITAA) deny taxpayers a deduction for bribes paid to foreign or domestic public officials. Deductions may be allowable for facilitation payments to foreign public officials (subsections 26-52(4)-(5)).

The Commonwealth *Criminal Code Act 1995* (Criminal Code) makes it a criminal offence to bribe a foreign public official, whether in Australia or elsewhere. This means that Australian citizens and corporations can be prosecuted for actions undertaken overseas. The penalties for bribery include up to 10 years imprisonment and substantial fines. For further information see Division 70 of the Criminal Code.

Due to the similarity of the relevant laws, a payment which is considered a bribe for the tax law is also likely to be referred for criminal investigation.

What constitutes a bribe?

For tax purposes, a **bribe** is generally a benefit provided to another person that is:

- not legitimately due to that person
- provided with the intention of influencing a public official (who may or may not be the direct recipient of the benefit)
- provided to obtain or retain a business advantage.

For example, a payment to a foreign trade official to secure or maintain foreign trade.

What constitutes a facilitation payment?

A **facilitation payment** is a payment to a foreign public official to perform a routine government action of a minor nature, such as granting a permit or licence, providing utility services, or loading or unloading cargo. The action must be ordinarily and commonly performed by the official and must not involve a decision about awarding new business or continuing existing business. Facilitation payments are defined in subsections 26-52(4)-(5).

For example, on arriving in a foreign country, a business person is informed that their visa is invalid. The business person, who is entitled to a visa, pays a fee to a foreign public official for the sole purpose of expediting the issue of a new visa.

For tax purposes, facilitation payments are not bribes and may be deductible.

What can taxpayers do to meet their obligations?

To meet your business's tax obligations, you can put assurance processes in place to ensure that your employees, agents or intermediaries who conduct business with government officials understand the law. These may be board-endorsed systems and processes that are tested and reviewed to assure the board that its processes, payments and people have integrity.

Assurance processes may include:

- implementing a code of conduct that sets out expectations for the behaviour of employees, agents and
- intermediaries, including those acting for subsidiaries and joint ventures
- ensuring internal auditors and audit committees have clear guidelines for the identification and escalation of risk
- having external auditors assess your internal controls relating to bribery for risk
- implementing an effective monitoring process to check the reputation and suitability of the agents or intermediaries
- you engage to act for your business in dealings with government officials
- implementing an independent, confidential and impartial issues reporting function for staff and others to report
- possible criminal conduct to your senior management or government authorities
- ensuring that company records can identify and substantiate facilitation payments.

We acknowledge that some businesses have already recognised and implemented the better practices needed to prevent the payment of bribes, including those outlined in Standards Australia International's standard AS 8001-2003 titled *Fraud and Corruption Control*.

The level of assurance processes you implement will vary depending on whether your business is a large listed multinational or a smaller, closely-managed business with limited international dealings.

Code of conduct

Codes of conduct are designed to influence the behaviour of directors, key executives and employees.

The existence of a code of conduct helps assure us, taxpayers and the broad community that tax deductions claimed in Australia are in accordance with our tax laws. Establishing a code of conduct can also help to minimise your tax risk by ensuring that bribes to public officials are not paid in the first place.

The ASX Corporate Governance Council recommends that companies establish and disclose a code of conduct (Recommendation 3.1 of the Council's *Principles of Good Corporate Governance and Best Practice Recommendations*

[ASX Principles]).

Proposed amendments to the ASX Principles include a list of suggestions for the content of a code of conduct, including:

Describe the company's approach to business courtesies, bribes, facilitation payments, inducements and commissions. This might include how the company regulates the giving and accepting of business courtesies and facilitation payments and prevents the offering and acceptance of bribes, inducements and commissions and the misuse of company assets and resources.

Our position is that an effective code of conduct should provide clear guidance on your business's policies and expectations regarding the behaviour of employees, agents and intermediaries in relation to bribes and facilitation payments.

A comprehensive code will:

- explain that your business does not countenance illicit payments to induce government officials to make
- favourable business decisions
- outline the law in Australia relating to bribery of foreign public officials

- offer guidance on what constitutes an acceptable facilitation payment or gift and what will be considered a bribe
- make clear that an internal audit process will follow if there are any concerns about payment that appear to be bribes.

For greater assurance, a business could implement a process for reporting any payments or gifts made to government officials to senior management and for involving senior management in situations where doubt exists.

We recommend you take steps to ensure that all staff, including those working for subsidiaries and joint ventures, and company agents and representatives are aware of the expectations contained in the code of conduct.

You may also need to check if your business needs to comply with the provisions of the (US) *Foreign Corrupt Practices Act*. You may find it useful to refer to the requirements of this legislation when considering the assurance practices you should implement in Australia.

Internal auditors and audit committees

The board of directors has an important role to play in ensuring that proper governance processes are in place to manage the risk of incurring significant penalties for both the company and its employees as a result of employees bribing public officials.

To minimise the business's tax risk, the board of directors can establish clear guidelines for its audit committee that set parameters for the identification and escalation of risk.

The audit committee's role is to monitor the scope of the internal audit and review internal audit reports and management responses.

The internal audit function plays a significant role in evaluating and monitoring the adequacy and effectiveness of internal control systems. It plays a vital role in managing risks generally, including checking that bribes are not paid. The independence of these auditors is paramount, and direct reporting by the internal audit function to the audit committee would be an important control.

External auditors

In auditing company financial reports, auditors make risk assessments by, among other things, reviewing the company's internal controls.

External auditors conduct audits in accordance with Australian Auditing Standards. Under these standards, auditors are required to identify any material weaknesses in the design or implementation of internal controls over financial reporting that come to their attention, and to report these to the company's board of directors. We expect this would include any material weaknesses in internal controls relating to bribery.

Monitoring agents and intermediaries

Your business should carefully check the reputation, qualifications and history of business practices of potential agents or intermediaries. Fees paid for the services these representatives provide should be reasonable and in line with what would

be paid locally for similar services – in particular, the level of remuneration should not provide any incentive to act improperly.

Your can implement a number of processes to provide greater assurance for your business. These include:

- executing a formal agreement with agents or intermediaries that they will act in accordance with your business's
- code of conduct
- undertaking periodic contract monitoring to ensure your expectations around business conduct and performance
- are met, and
having a clear process for reporting and dealing with any improper conduct by an agent or intermediary – in

particular, provision for timely termination of the agreement if any improper conduct occurs.

Staff concerns

You can initiate processes to protect employees who wish to report possible criminal conduct to senior management. If employees have some level of comfort that they can report conduct they suspect does not comply with the law, your business has greater assurance that corrupt practices will be minimised.

Such processes need to:

- be independent and provide staff with the confidentiality they need to raise issues that affect them or the business
- have three vital functions: complaint resolution (including interventions), analysis and reporting, and education;

and

- have standards of practice that enable the process to fulfil its role with integrity.

Standards Australia International has issued AS 8004-2003 *Whistleblowing Programs for Entities*, which you may find Bribes and facilitation payments: A guide to managing your tax obligations Page 4 of 6 file://H:\OECD%20supplementary%20questions\Bribes%20and%20facilitation%20pa... 04/04/2008 useful in establishing an appropriate reporting mechanism.

Company records

Implementing record-keeping processes to give the board information that identifies the size and nature of payments made to government officials would provide additional assurance. This would be particularly true of records that identify and report facilitation payments for review by internal and external auditors.

For the purpose of income tax law, the question is whether the person has kept records in a way that complies with section 262A of the *Income Tax Assessment Act 1936*. This section requires that records be kept for all transactions and that those records are adequate to explain the transactions. (Section 382-5 of Schedule 1 to the *Taxation Administration*

Act 1953 sets out the record-keeping requirements for the claiming of GST credits.)

For facilitation payments, the Commonwealth *Criminal Code Act 1995* sets out the following record making and retention requirements (Division 70):

Failure to maintain records in this form may have important consequences if a person is prosecuted for bribing a foreign public official under the Criminal Code. The person will not be able to rely on a defence that the payments were facilitation payments, even if the defence would otherwise be available, if they have not kept the required records.

A failure to maintain records in the form required under the Criminal Code will not necessarily mean the person cannot claim a tax deduction.

These records should be available for audit and the accuracy of the particulars tested by following sound audit processes.

Audit reports should be reviewed and, if necessary, acted on by audit committees.

References

ASX Corporate Governance Council's *Principles of Good Corporate Governance and Best Practice Recommendations*

AS 8004-2003 *Whistleblowing Programs for Entities*

Compliance Program 2006-07

Criminal Code Act 1995 – Section 70.1 Definitions

Criminal Code Act 1995 – Division 70 – Bribery of foreign public officials

Criminal Code Act 1995 – Division 141 – Bribery

Criminal Code Act 1995 – Division 142 – Offences relating to bribery

Income Tax Assessment Act 1997 – Section 26–52 – Bribes to foreign public officials

Income Tax Assessment Act 1997 – Section 26-53 Bribes to public officials

Income Tax Assessment Act 1997- Division 995 Definitions

Income Tax Assessment Act 1936 – Section 262A Keeping of records

Taxation Administration Act 1953 – Section 3E Use of tax information by law enforcement agencies and eligible Royal

Commissions etc.

- 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(10(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.

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Taxation Administration Act 1953 – Section 382-5 Keeping records of indirect tax transactions

(US) Foreign Corrupt Practices Act

OECD bribery awareness handbook for tax examiners

Standards Australia International’s standard AS 8001-2003, *Fraud and Corruption Control*

Guidelines for Tax Officers – understanding and dealing with bribery

Transparency International’s corruption perception index

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Attachment P. CDPP direction to prosecutors

Note on prosecutions for the bribery of foreign public officials under Division 70 of the Criminal Code

At paragraph 2.13 the Prosecution Policy of the Commonwealth states that a decision whether or not to prosecute must clearly not be influenced by:

- a. the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender or any other person involved;
 - b. personal feelings concerning the alleged offender or the victim;
 - c. possible political advantage or disadvantage to the Government or any political group or party;
- or
- d. the possible effect of the decision on the personal or professional circumstances of those responsible for the prosecution decision.

The Director of Public Prosecutions has issued the following to prosecutors to clarify this in relation to prosecutions for foreign bribery.

Assessing matters involving allegations of foreign bribery contrary to section 70.2 of the Criminal Code

When deciding whether to prosecute a person for bribing a foreign public official under Division 70 of the Criminal Code, the prosecutor should 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.

This is because the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions, which Australia implemented in 1999, provides at Article 5 that:

“Article 5 – Enforcement 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.”

Attachment Q. AWB media release

ATO finalises AWB tax audit (20/12/2006)

AWB has received written confirmation today from the Australian Taxation Office (ATO) stating that the ATO has finalised the AWB Group business audit for the years ended 30 September 2000 to 2004 inclusive in relation to payments under the Oil-for-Food programme. The ATO accepts that for the reasons set out in the Cole Inquiry report payments made by AWB under the United Nations Oil-for-Food programme do not constitute bribes to foreign public officials for the purposes of the Income Tax Assessment Act 1997.

Media contact: Peter McBride, 03 9209 2174 or 0417 662 451

Attachment R. ATO Guidelines for tax auditors

Guidelines for Tax Office auditors – understanding and dealing with bribery

At the November 2006 Senate Estimates hearings the Commissioner undertook to make our *Guidelines for Tax Office auditors - understanding and dealing with bribery* available on the Tax Office website.

These guidelines were developed for our auditors and are intended to:

- set out the key aspects of the law in this area
- provide some practical ways to identify and deal with concealment of bribes
- provide advice on record-keeping and audit techniques where bribery is suspected
- give guidance on how to refer cases where bribery is suspected, and
- provide direction on how to obtain information from our treaty partners.

These guidelines draw heavily from the Organisation for Economic Cooperation and Development publication *OECD bribery awareness handbook for tax examiners*.

We consulted with key stakeholders before finalising these guidelines and their feedback has been included.

Input from key stakeholders and the community is important in developing working documents which complement effective administration of the law and enhance our compliance work in this important area.

Constructive suggestions from interested parties can be sent to snccommunications@ato.gov.au.

In consultation with key external stakeholders we have prepared *Bribes and facilitation payments: A guide to managing your tax obligations* to help businesses manage their tax obligations in this important area.

Proposed legislative changes relating to foreign bribery and tax deductions have been introduced to the Australian Parliament. Please go to the Attorney-General's Department website for further information.

If you have any information on tax issues relating to possible bribes to Australian and foreign public officials please contact the Tax Office on:

Phone: **1800 060 062**, 8.00am to 6.00pm, Monday to Friday, excluding national public holidays

Fax: **1800 804 544**

Post: Tax Evasion

Locked Bag 6050

Dandenong Vic 3175

Web: Information is available at www.ato.gov.au/reportevasion

Tax Office Guidelines for Understanding and Dealing with the Bribery of Australian and Foreign Public Officials

Purpose

These guidelines, which draw heavily on the OECD Bribery Awareness Handbook for Tax Examiners, are designed to provide tax officers with:

- increased awareness of the legislative provisions disallowing a deduction for a loss or outgoing that is a bribe to
- an Australian or foreign public official
- practical ways to identify how a taxpayer may be concealing bribe transactions to an Australian or foreign public
- official
- advice on record keeping and audit techniques where bribery is suspected
- guidance for the referral of information to the Serious Non-Compliance business line where it is suspected that
- bribe payments may or have been made, and
- information on how to obtain information from our tax treaty partners.

If tax officers hold any doubts on interpretation in relation to the application of these guidelines advice

should be sought from the Tax Counsel Network.

Background

The Australian government, as a signatory to the Organisation for Economic Cooperation and Development (OECD) convention on combating bribery of foreign public officials in international business transactions (the convention), is committed to a whole of government approach to addressing the incidence of bribes to foreign public officials in business transactions. The convention also allows for the OECD to review the implementation of the convention by signatory countries.

Phase 1 of the OECD review occurred in 1999 and amongst other outcomes, resulted in the enactment of section 26–52 ‘Bribes to foreign public officials’ of the *Income Tax Assessment Act 1997* (ITAA 1997). Section 26–53 ‘Bribes to public officials’ of the ITAA 1997 was also enacted via government initiative at a similar time. These provisions specifically disallow deductions for any loss or outgoing determined to be a bribe to a public official and became effective from the 1999/2000 income year.

Phase 2 of the OECD review was completed in January 2006. Included in the Phase 2 report was a recommendation that the Tax Office prepare these guidelines to assist tax officers in identifying non-deductible amounts that have been claimed for bribes to foreign public officials by:

better understanding how they can be concealed

- identifying bribe payments to foreign public officials
- highlighting the legislative provisions denying deductibility for bribe payments, and
- including a requirement that tax officers report all information (intelligence, suspicions or actual) of bribery of foreign public officials to the Serious Non-Compliance (SNC) business line.

Although the convention is only concerned with combating bribery of foreign public officials, these guidelines also have application to bribes made to Australian public officials.

Legislative provisions

The relevant legislative provisions in respect of bribes are sections 26–52 (bribes to foreign public officials) and 26–53 (bribes to public officials) of the ITAA 1997.

Section 26–52 of the *Income Tax Assessment Act 1997* – Bribes to foreign public officials

Section 26–52 of the ITAA 1997 specifically denies deductibility to a taxpayer for a loss or outgoing that is determined to be a bribe to a foreign public official. The full text of section 26–52 ITAA 1997 is as follows:

26-52(1) You cannot deduct under this Act a loss or outgoing you incur that is a *bribe to a foreign public official.

26-52(2) An amount is a *bribe to a foreign public official* to the extent that:

(a) you incur the amount in, or in connection with:

(i) providing a benefit to another person; or

(ii) causing a benefit to be provided to another person; or

(iii) offering to provide, or promising to provide, a benefit to another person; or

(iv) causing 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 (see subsection (6)); and

(c) you incur the amount with the intention of influencing a *foreign public official (who may or may not be the other

person) in the exercise of the official's duties as a foreign public official in order to:

(i) obtain or retain business; or

(ii) obtain or retain an advantage in the conduct of business that is not legitimately due to you, or another person, as the recipient, or intended recipient, of the advantage in the conduct of business (see subsection (7)).

The benefit may be any advantage and is not limited to property.

26-52(2A) For the purposes of subsection (2), disregard whether business, or a business advantage, was actually obtained or retained.

Payments that written law of foreign public official's country requires or permits

26-52(3) An amount is not a *bribe to a foreign public official* if, assuming the benefit had been provided, and all related acts had been done, in the *foreign public official's country, a written law of that country would have required or permitted the provision of the benefit.

Facilitation payments

26-52(4) An amount is not a *bribe to a foreign public official* if:

- (a) the value of the benefit is of a minor nature; and
- (b) 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.

26-52(5) 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.

Benefit not legitimately due

26-52(6) In working out if a benefit is not legitimately due to another 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.

Advantage in the conduct of business that is not legitimately due

26-52(7) In working out if an advantage in the conduct of business is not legitimately due in a particular situation, disregard the following:

- (a) the fact that the advantage may be customary, or perceived to be customary, in the situation;
- (b) the value of the advantage;
- (c) any official tolerance of the advantage.

Duties of foreign public official

26-52(8) The duties of a *foreign public official are any authorities, duties, functions or powers that:

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

Definitions:

Division 995 of the ITAA 1997 adopts the definition of foreign public official under section 70.1 of the Criminal Code 1995. The full text of the definition of foreign public official in section 70.1 of the Criminal Code 1995 is as follows:

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.

Note: A foreign public official can only be a natural person. However, the benefit may be provided to another natural person, another entity or a government body with the intention of influencing that foreign public official. If tax officers hold any doubts on interpretation in relation to the application of these guidelines advice should be sought from the Tax Counsel Network.

Record keeping requirements

Tax officers should expect that taxpayers would have appropriate records. Taxpayers require these records for corporate governance purposes including tax risk management. External and internal auditors also have expectations that entities will keep appropriate records.

For tax purposes, section 262A of the *Income Tax Assessment Act 1936 (ITAA 1936)* requires that records are kept for all transactions and that those records are adequate to explain the transactions.

For facilitation payments, the Criminal Code 1995 in Division 70 also sets out particular record making and retention obligations in certain circumstances for records to set 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.

Failure to maintain records in that form may have important consequences if a person is prosecuted for an offence of bribing a foreign public official under the Criminal Code. The person will not be able to rely on a defence that the payments, even if the defence would otherwise be available, if the person has not kept the required records. However, a failure to maintain records in the form required under the Criminal Code will not necessarily mean the person cannot claim a tax deduction. For the purpose of taxation law, the

question is whether the person has kept records in a way that complies with section 262A.

Links:

- *Income Tax Assessment Act 1997* – Section 26–52 – Bribes to foreign public officials
- *Income Tax Assessment Act 1936* – Section 262A Keeping of records
- *Income Tax Assessment Act 1997*- Definitions Division 995
- *Criminal Code Act 1995* – section 70.1 Definitions
- *Criminal Code Act 1995* – Division 70

Section 26–53 of the *Income Tax Assessment Act 1997* – Bribes to public officials

Section 26–53 of the ITAA 1997 specifically denies deductibility to a taxpayer for a loss or outgoing that is determined to be a bribe to a public official. The full text of section 26–53 ITAA 1997 is as follows:

26-53(1) You cannot deduct under this Act a loss or outgoing you incur that is a bribe to a public official.

26-53(2) An amount is a bribe to a public official to the extent that:

(a) you incur the amount in, or in connection with:

- (i) providing a benefit to another person; or
- (ii) causing a benefit to be provided to another person; or
- (iii) offering to provide, or promising to provide, a benefit to another person; or
- (iv) causing 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 (see subsection (3)); and

(c) you incur the amount with the intention of influencing a public official (who may or may not be the other person) in the exercise of the official’s duties as a public official in order to:

- (i) obtain or retain business; or
- (ii) obtain or retain an advantage in the conduct of business that is not legitimately due to you, or another person, as the recipient, or intended recipient, of the advantage in the conduct of business (see subsection (4)).

The benefit may be any advantage and is not limited to property.

Benefit not legitimately due

26-53(3) In working out if a benefit is not legitimately due to another person in a particular situation, disregard the following:

- (a) the fact that the benefit may be customary, or perceived to be customary, in the situation;
- (b) the value of the benefit;
- (c) any official tolerance of the benefit.

Advantage in the conduct of business that is not legitimately due

26-53(4) In working out if an advantage in the conduct of business is not legitimately due in a particular situation, disregard the following:

- (a) the fact that the advantage may be customary, or perceived to be customary, in the situation;
- (b) the value of the advantage;
- (c) any official tolerance of the advantage.

Duties of public official

26-53(5) The duties of a public official are any authorities, duties, functions or powers that:

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

Definitions

Division 995 of the ITAA 1997 defines public official as follows:

‘Means an employee or official of an Australian Government Agency or of a local governing body.’

Division 995 of the ITAA 1997 defines Australian government agency as follows:

‘Means

- (a) the Commonwealth, a State or a Territory; or
- (b) an authority of the Commonwealth or of a State or a Territory.’

Links

- Income Tax Assessment Act 1997- Definitions Division 995
- *Income Tax Assessment Act 1997* – Section 26-53 Bribes to public officials

Bribery is also a criminal offence

Division 70 of the Criminal Code 1995 includes provisions making the bribery of foreign public officials a criminal offence.

Divisions 141 and 142 of the Criminal Code 1995 include provisions making the bribery of Commonwealth public officials a criminal offence. These provisions can be found at the following links:

- *Criminal Code Act 1995* – Division 70 – Bribery of Foreign Public Officials
- *Criminal Code Act 1995* – Division 141 – Bribery of a Commonwealth Public Official
- *Criminal Code Act 1995* – Division 142 – Offences relating to bribery

Whilst this should not influence decisions made by tax officers in the furtherance of compliance action, it should be borne in mind that the actions and observations of the tax officer(s) may later be used as evidence in criminal proceedings.

Practical examples

Practical examples of how to identify bribes that may be concealed in business transactions

Since 1986–87 Australia has operated under a system of self assessment under which the Tax Office accepts returns on face value. In addition, section 8-1 of the ITAA 1997 is a general deduction provision allowing taxpayers to deduct from their assessable income any loss or outgoing to the extent that it is incurred in gaining or producing assessable income, or it is necessarily incurred in carrying on a business for the purpose of gaining or producing assessable income. Our system of self assessment and the broad nature of section 8–1 ITAA 1997 can be abused by unscrupulous taxpayers to conceal bribes in a large variety of business transactions making the identification of bribe payments difficult.

In order to conceal bribes, taxpayers will generally use the same techniques they use to conceal income. Tax officers will therefore have to look for evidence of bribery in the same way as they look for evidence of evasion. Taxpayers who knowingly understate their tax liability often leave evidence in the form of identifying indicators. It is also acknowledged that obtaining relevant information from overseas sources may sometimes prove problematic, especially where there is no double tax agreement in place to facilitate the exchange of information.

Indicators of evasion can consist of one or more acts of intentional wrongdoing on the part of the taxpayer with the specific purpose of evading tax. Indicators of evasion may be divided into two categories: ‘affirmative indications’ and ‘affirmative acts’. No evasion can be found in any case unless affirmative acts are present. Affirmative indications serve as a sign or symptom, or signify that actions may have been done for the purpose of deceit, concealment or to make things seem other than what they are. Indications in and of themselves do not establish that a particular process was done; affirmative acts also need to be present.

Affirmative acts are those actions that establish that a particular process was deliberately done for the purpose of deceit, subterfuge, camouflage, concealment, some attempt to colour or obscure events, or make things seem other than what they are. Examples include omissions of specific items where similar items are included, concealment of bank accounts, failure to deposit receipts to business accounts, and covering up sources of receipts. The indicators of evasion presented below are also relevant to identifying bribes. These practical examples have been sourced from the Indicators of Fraud or Bribery within the *OECD Bribery Awareness Handbook for Tax Examiners*.

Expenses or deductions

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

Indicators of bribery may take the form of overstatement of deductions or claiming fictitious deductions.

Methods of payment

Some methods employed to channel currency to Australian or foreign public officials are presented below. These methods are by no means new, nor do they represent more than a small fraction of the methods employed, but are identified to emphasise the need for innovative forensic audit techniques to uncover instances of bribes to public officials.

- Exchange of funds through a legitimate business: A firm controlled by a public official pays a large sum of money to an unrelated corporation in return for fictitious invoices for alleged consulting fees. That corporation in turn makes cheques payable to one of its corporate officers who then cash the cheques with the aid of a bank officer. The cash is returned to the first corporation's officers who include the public official.
- Transfer of funds through a spurious business: A bank account is opened in a fictitious name as a conduit for converting cheques to cash. Invoices printed in the fictitious business name are prepared as evidence of purchases. Cheques issued to the fictitious business are deposited and then currency withdrawn.
- Payment of campaign expense: One example of making indirect political contributions is where the campaign committee or candidate provides an unpaid bill for some campaign expense, such as for the hiring of venues or for the printing of handbills, posters, etc.
- Indirect payments to public officials: One method of indirect payments to public officials is by way of making payments to a law firm. In this instance, the lawyer acts merely as a conduit to which cheques are issued for ostensible legal services rendered. The payments are deposited to the lawyer's trust accounts and disbursements made from those accounts to the public official. This method is also used through public relations, advertising, or accounting firms.
- Another indirect bribe payment method is via a request of donation for a non-profit entity that is not founded for the purpose of the carrying on of a business activity by an official who is the member of top management of this non-profit entity.
- Invoicing the client for an inflated amount as compared to the actual market price: The difference between the amount received and the normal price is then paid to an intermediary without the profit of the business being affected (difficulties lie in the identification of the intermediary who is rarely identified as such in the books of the company and in finding details of the actual market price).
- An expense borne by a company and invoiced as an expense for the custody of goods, transport of the company's goods or installation in the country where the market is realised.
- The intervention of consultants for the installation or development of local infrastructures for an enterprise where the related payments are made to accounts located in tax havens.
- Royalty receipts may be recorded as a liability on the books of a company instead of income. The payment of the alleged liability is made before the end of the company's tax year. The payment is made to a management company located in a tax haven that allegedly earned the royalty income. Not recording the royalty as income or the payment to the management company as an expense on the company's books, nor having a liability at year-end, can make detection of a payment to a public official more difficult.
- Traditional audit techniques can be used to discover bribe payments. A careful scrutiny of the various accounts is required to ascertain the validity of the individual expenses and consider what specific items might lend themselves to concealment. Are there really services being performed for certain payments; and, if so, are the services commensurate with the payments being made for them? What is important to remember is that disbursements are not always what they seem to be. An effective audit calls for more analysis to determine if the disbursement is a valid one and not

just a mere conduit or means through which cash can be filtered through with the ultimate payee being a public official.

Professional services

All source documents behind amounts charged to professional service providers should be examined carefully for adequacy of description and explanations of services performed, as well as any unusual increases. One practice found to exist is that many firms exaggerate the amount of fees charged relative to projects and specific cases over and above what the normal billing would have been for the actual work performed. This excess billing would then be used to recover prearranged political payments or payments to public officials by the firms on behalf of the taxpayer. An indicator may also be the existence of large payments to consultant companies where the invoices are not very specific.

Travel and entertainment expenses

Illegal payments may be deducted under the guise of travel and entertainment. Employee expense accounts and correspondence can be used to develop an itinerary of selected employees. Correspondence, as well as the Board of Directors' expense vouchers can be carefully examined to determine political events, functions and travel to make political contributions. All the above sources can be used to identify a date, time and place that the taxpayer was involved in business transactions involving bribes. All travel expenses connected with each particular event can be selected from source documents supplied by the taxpayer. The following categories are usually the prime sources used to disguise illegal payments:

- executive travel expenses;
- charter air travel – whether by the taxpayer's employees or paid directly for travel by a political candidate;
- taxpayer's private aircraft pilots expenses; and
- expenses relating to various selected employees, including direct credit card charges.

Fictitious employees

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

Payrolls may be inflated for numerous reasons including bribery. The purpose is usually the same: to get funds out of a business in the form of a deduction without the recipient paying income tax on the income. This method is commonly used where the paying enterprise is in the type of business which does not deal in cash and where money can only be taken out by cheque. This method could be used to enable the taxpayer to obtain funds needed for bribes.

Another way to inflate the payroll is to have political party workers on the payroll even though the employee performs no services for the income. The same technique may be used for public officials.

To detect indications of fictitious employees, tax officers should focus on payroll records. The following circumstances require special attention:

- if there is a suspicion or knowledge that fictitious employees are being used, then the negotiation of the cheque
- should be pursued. If cheques are cashed in the same bank or through other parties, the payee may be known
- at the bank or by the re-endorsers
- if the company provides or assists in insurance coverage pension plans, etc, employee termination records
- should be tested to determine whether the employee was also withdrawn from the payroll
- a company may continue issuing cheques to an employee who has left. Tax officers should randomly select
- employees and compare endorsements at various times during the year, or
- key employees or officers may be loaned to political parties to perform various services while being paid their salary by their employer. Tax officers should attempt to determine where the

employees' services were performed during the payroll periods in question. An examination of expense reimbursement reports would be of assistance in determining the geographical location of the employee at a particular time. This information may serve as a basis for a follow-up interview of the employee.

Some foreign public officials have few legitimate sources of income, therefore some of them may be tempted to subsidise their income through illegal activities. These individuals will find a business willing to put them on the payroll and issue them regular payroll cheques, even though they perform no services.

The tax officer should extend the examination to the suspected public official and trace their payroll cheques to determine if any of the money was returned to the corporation. When the entity being examined is suspected of being used as a salary haven by a public official, the tax officer should look for certain indications to support the suspicion, such as:

- determining if cheques are cashed by the employer
- establishing whether the employee has the qualifications to perform the function for which he/she receives the salary
- ascertaining if records indicate the employee is still on the payroll at the time of audit. The tax officer should attempt to establish whether they are actually present on the premises, and
- ascertain if the employee holds a position as an outside salesman. The tax officer should determine who the customers are and establish whether the employee actually contacts these customers.

The tax officer may need to request information from overseas when the fictitious employee is a foreign public official, although this may prove to be problematic (see 'Information available from tax treaty partners').

Books and records

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

In order to detect bribes the tax officer should look for traditional methods of manipulating books and records, such as:

- keeping two sets of books or no books
- false entries or alterations made on the books and records, back-dated or post-dated documents, false invoices,
- false applications, statements, other false documents or applications, and
- failure to keep adequate records, concealment of records, or refusal to make certain records available.

Conduct of taxpayer

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

An assessment of the behaviour of the taxpayer may also be useful to determine the existence of bribes. Examples include:

attempts to hinder the examination; for example, failure to answer pertinent questions repeated cancellations of appointments, or refusal to provide records statements by employees concerning irregular business practices by the taxpayer destruction of books and records, especially if it occurred soon after the examination commenced payment of improper expenses by or for officials or trustees back-dating of applications and related documents, and attempts to bribe a tax officer.

Methods of concealment

[Sourced from the *OECD Bribery Awareness Handbook for Tax Examiners*]

A number of methods of concealment may be used to conceal bribes, such as transactions not in the usual course of business, transactions surrounded by secrecy, false entries in books of transferor or transferee, use of secret bank accounts for income, deposits into bank accounts under nominee names and conduct of business transactions in false names.

Australian transaction reports and analysis centre (AUSTRAC) data

AUSTRAC maintains a database of:

- suspect transactions: any transaction that arouses suspicions with the cash dealer due to either the monies or entities involved in the transaction
- significant cash transactions: any transaction involving a cash component of AUD\$10,000 or more, or the equivalent in foreign currency must be reported by a cash dealer and solicitor
- international funds transfer instructions: any instruction transmitted electronically for the transfer of funds either into or out of Australia
- international currency transfers: a report of physical currency (cash) of AUD\$10,000 or more, or the foreign equivalent, leaving or entering Australia by carriage, mailing or shipping.

AUSTRAC data is a valuable source of information for international funds transfers into and out of Australia and domestic cash transactions over \$10,000.

However, in relation to bribery of Australian or foreign public officials, AUSTRAC data probably cannot be used on its own to determine whether or not bribery is involved. When combined with other information it can be very useful in building a picture of money flows to and from people of interest.

Foreign country profiles

International organisations have compiled a profile of countries where bribes and facilitation fees are more likely to be paid to establish or maintain ongoing trade.

In the risk review or audit of taxpayers, especially multinational companies, where auditors become aware of significant trade with entities in jurisdictions where bribes or facilitation fees seem to be a way of "doing business", they need to make additional enquiries to understand if bribe or non-deductible facilitation fee payments have been claimed as deductions in Australia.

Auditors of multinational companies will need to identify and understand the safeguards and internal controls which boards of directors and senior management have put in place to minimise the risk that bribes are paid to Australian and foreign public officials.

At times, large corporate taxpayers and senior tax officers will meet to gain a detailed understanding of these safeguards as part of a broader discussion about taxpayer approaches to tax risk management.

Some corporates have been very proactive to ensure that bribes are not paid because of the risk to their own reputation and brand image.

At the start of a risk review or an audit, auditors should ask for, review and understand:

- A company's code of conduct or similar document and the extent to which there is an explicit policy of not paying bribes however described in the taxpayer's accounts;
- How that code of conduct has been implemented and enforced at a practical level including how the board of directors, audit committee and internal audit gain assurances that there is compliance with a code which prohibits the payment of bribes;
- Other internal controls and safeguards implemented to minimise the risk that bribes are paid to public officials.

An understanding of these implemented internal controls and safeguards will influence the extent to which auditors may need to make further enquiries and verify if transactions, invoices, agreements and payments are correctly described and characterised for accounting and tax purposes.

If the Tax Office has received specific intelligence regarding the payment of a bribe to public officials this will also influence the extent to which we make enquiries and review specific company records.

Other audit processes may be necessary to conclude these sorts of enquiries.

These additional enquiries and audit processes may include the following:

- Has the company engaged a forensic accountant or other analyst or investigator (internal or otherwise) to establish if bribes or non-deductible facilitation fees have been paid? Auditors will need to establish if this has occurred, when the checks were undertaken and gain a copy of the report filed on completion of the audit or investigation to check if any bribes or non-deductible facilitation fees paid have been claimed as deductions.

- If the taxpayer has no code of conduct or similar policy in place or no checks have been made to test if bribes or non-deductible facilitation fees have been paid and significant trade has commenced or is underway with an entity in a jurisdiction where bribes and facilitation fees are more likely than not, auditors need to review a sample of significant contracts and invoices with entities in those jurisdictions. In particular, auditors should check significant payments made around the time of establishing contracts and all significant components of contract and invoice prices agreed to between the parties. Auditors need to enquire as to why the significant price and invoice costs are appropriate and seek to gain information to confirm that the prices agreed would be appropriate between arm's length parties and contain no significant elements which could be bribes or nondeductible facilitation fees.
- Where taxpayers cannot satisfy auditors that the fees, prices or on-costs are appropriate and would be paid between arm's length parties, auditors need to consider as next steps, the disallowance of the relevant deductions according to the tax laws including section 26-52 of the ITAA 1997.

Record keeping and audit techniques

The purpose of this section is to provide guidelines that may be used in conducting an effective audit where bribery is suspected.

Ensure due diligence in record keeping, corroboration and security

Due diligence in record keeping, corroboration and the security of evidentiary material uncovered during compliance activities is important to ensure the integrity of evidence both for the audit and any subsequent criminal proceedings.

Following are suggestions to enhance the integrity of any evidence collected for the purpose of the audit and also to increase the likelihood that the evidence will also be admitted during possible subsequent criminal proceedings:

- keep contemporaneous notes of all communications and activities associated with the audit
- where possible have another tax officer corroborate communications and/or actions and evidence this corroboration by endorsing a single set of written or electronic notes or by preparing individual sets of written or electronic notes
- keep all original notes notwithstanding that they may have been transferred into an electronic format
- when recording conversations, particularly conversations with the taxpayer suspected to have entered into a bribery transaction, record the conversation in the 'I said, he said' format, and
- keep all documentary and other evidence associated with the audit secure, preferably only accessible by one person in order to maintain the continuity and integrity of the evidence.

Examination plan and compliance checks

During the planning phase and conduct of audits of tax returns, the team leader of the tax officer and the tax officers themselves should be alert to situations that lend themselves to the creation of illegal or improper payments, such as bribes. When deemed appropriate and necessary, the audit plans should include consideration of the following compliance checks:

- examination of internal audit reports, minutes and related working papers to determine if any reference is made to the creation of any secret or hidden corporate fund
- review copies of taxpayer's reports submitted to the Australian Securities and Investment Commission, financial institutions, insurers and other regulatory bodies, and
- give appropriate consideration to any foreign entities, operations, contractual or pricing arrangements, fund transfers, and use of tax haven locations.

Methods for accumulating evidence particularly relevant to identifying bribes

These methods include:

- Analytical Tests – such as analysis of balance sheet items to identify large, unusual, or questionable accounts.
- Analytical tests using comparisons and relationships to isolate accounts and transactions that should be further examined or determine whether further inquiry is needed.
- Documentation - such as examining the taxpayer's books and records to determine the content, accuracy, and to substantiate items claimed on the tax return.
- Inquiry – such as interviewing the taxpayer or third parties. Information from independent third parties can confirm or verify the accuracy of information presented by the taxpayer.
- Testing – such as tracing transactions to determine if they are correctly recorded and summarised in the taxpayer's books and records.

Information gathering – access, notices and interviewing

Access and notices

There are access provisions in many of the Acts administered by the Commissioner of Taxation. Most of these provisions give the Commissioner, or any tax officer he authorises, the right to enter and remain on premises and to have full and free access to documents for any purpose of the applicable Act. Access provisions in most Acts also confer on authorised officers the right of reasonable assistance and facilities. The Access Manual refers to these rights as access powers. Provisions granting access powers are to be distinguished from other provisions governing information and evidence gathering that require the service of a notice. The notice provisions are dealt with separately in the access manual.

The Access Manual

The access manual should be consulted in all cases regarding the application of Tax Office access powers or notice provisions (including offshore information notices) at the following link:

- [Access and information gathering manual](#)

Interviewing

The access manual also provides guidance to tax officers when undertaking formal interviews. The following information provides further guidance in respect to interviewing techniques.

- Who to interview

Interviews to detect the payment of bribes should always be held with the persons having the most knowledge concerning the total financial picture and history of the person or entity being examined, such as the chief executive officer, chief financial officer, officer in charge of international operations, officer in charge of governmental activities, directors who are not corporate officers but who serve on audit committees or have similar responsibilities, and others, as appropriate.

- Interview techniques

Special attention should be given to interview techniques. It is important that the tax officers always maintain control of the interview and even more so when he has suspicion of bribes. Tax officers should establish the pace and direction of the interview. It is also important to continually assess whether the taxpayer is leading to pertinent information or providing little useful information.

- Question construction

When interviewing a taxpayer four types of questions can be asked: open-ended, closed, probing and leading questions. It will be up to the tax officer to decide which type of questions are the most appropriate in order to detect bribes.

- Open-ended questions

Questions are framed to require a narrative answer. They are designed to obtain a history, a sequence of events or a description. Ask open-ended questions about the taxpayer's business. The advantage of this type of question is that it provides a general overview of some aspect of the taxpayer's history. The disadvantage is that this type of question can lead to rambling.

- Closed questions

Questions are more appropriate for identifying definitive information such as dates, names, and amounts. These questions are specific and direct. Ask closed questions for background information such as payments to public officials.

Closed questions are useful when the taxpayer has difficulty giving a precise answer. They are also useful to clarify a response to an open-ended question. The disadvantage to closed questions is that the response is limited to exactly what is asked and can make the taxpayer uncomfortable.

- Probing questions

Probing questions combine the elements of open and closed-ended questions. They are used to pursue an issue more deeply. For example, when questioning a taxpayer's consulting expense, ask, 'What is the business purpose of this expense?' The advantage of this type of question is that the taxpayer's response is directed but not restricted.

- Leading questions

Leading questions suggest that the interviewer has already drawn a conclusion or indicate what the interviewer wants to hear. The use of leading questions should be limited. Use them when looking for confirmation, since the answer is stated in the form of a question. For example: 'So you did not keep invoices for your consulting expenses?'

- Suggested interview question structure

The following interview questions provide guidance in respect of the structure of questions that can be put to a taxpayer at interview who are suspected of having deducted a loss or outgoing that is a bribe.

- During the period from to , did the corporation, any corporate officer or employee, or any other person acting on behalf of the corporation, make, directly or indirectly, any bribe, kickback, or other payment of a similar or comparable nature, whether lawful or not, to any person or entity, private or public, domestic or foreign, regardless of form, whether in money, property, or services, to obtain favourable treatment in securing business or to obtain special concessions, or to pay for favourable treatment for business secured or for special concessions already obtained?
- During the period from XX to XX, were corporate funds, or corporate property of any kind, donated, loaned, or made available, directly or indirectly, for the benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, political candidate, or political committee, whether domestic or foreign?
- During the period from XX to XX, was any corporate officer, employee, contractor, or agent compensated, directly or indirectly, by the corporation, for time spent or expenses incurred in performing services, for the benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, political candidate, or political committee, whether domestic or foreign?
- During the period from XX to XX, did the corporation make any loan, donation, or other disbursement, directly or indirectly, to any corporate officer or employee, or any other person, for contributions made or to be made, directly or indirectly, for the benefit of, or for the purpose of opposing, any government or subdivision thereof, political party, political candidate, or political committee, whether domestic or foreign?
- During the period from XX to XX, did the corporation, or any other person or entity acting on its behalf, maintain a bank account, or any other account of any kind, whether domestic or foreign, which account was not reflected in the corporate books and records, or which account was not listed, titled, or identified in the name of the corporation?

Evaluating the taxpayer's internal controls

Internal controls are defined as the taxpayer's policies and procedures to identify, measure and safeguard business operations and avoid material misstatements of financial information. An evaluation of a taxpayer's internal controls is necessary to determine the reliability of the books and records which is particularly relevant when there is suspicion of bribery. It is also essential to evaluate internal controls to determine the appropriate audit techniques to be used by the tax officer during the audit.

Key steps for evaluating internal controls

The evaluation of internal controls can be described as an analysis completed by the tax officer to understand and document the entire business operation. The key steps of the evaluation process are to understand the control environment, the accounting system and the control procedures.

Control environment

The first area tax officers must understand is the control environment of the business. The control environment is made up of many factors that affect the policies and procedures of the business. Factors such as management philosophy, management operating style, organisational structure, personnel policies and external influences affecting the business all provide an indication of potential bribery. To make an assessment of the control environment, tax officers must understand, in detail, how the business operates.

Accounting system

The second key area of internal control that tax officers must understand is the accounting system. Gaining knowledge of the accounting system provides information about many of the taxpayer's transactions.

Tax officers must acquire knowledge of how the business operates on a daily basis with respect to customers, suppliers, management, sales, work performed, pricing, location, employees, assets used, production and record keeping.

Control procedures

Control procedures are the policies and procedures established by management to achieve the objectives of the business. The control procedures are the methods established to assure that the business operates as intended.

Separation of duties is the primary control procedure that should concern tax officers. If properly executed, separation of duties will reduce the opportunity for any person to perpetrate and conceal errors or irregularities made; for instance, in order to pay bribes in the normal course of their duties.

Slush funds

This section provides auditing techniques and compliance checks to help identify and examine corporate 'slush funds' or any other schemes which may be used to circumvent tax laws or pay bribes to public officials.

Definition

Corporate slush funds are accounts or groups of accounts generally created through intricate schemes outside of normal corporate internal controls for the purpose of making political contributions, bribes, kickbacks, personal expenditures by corporate officials and other such activities. Top level corporate officers are generally involved and the schemes are carried out by various transactions through the use of both domestic and foreign subsidiaries.

Examples of slush funds

- The usual practice in schemes operating in the foreign arena is for the domestic parent corporation to use a foreign subsidiary, a foreign consultant, or a foreign bank account to 'launder' funds so that cash could be generated and repatriated back to the domestic parent to provide a slush fund for payments to Australian public officials. The funds would not be repatriated of course if the payment were made to a foreign public official.
- A slush fund generated by rebates from a foreign legal consultant: The foreign legal consultant, who also
- performed legitimate consulting services for the domestic corporation, over bills the company and then transfers the money back to the corporation in cash.
- Officers and/or key employees may be paid additional compensation based on their promise that they will contribute either a percent of the bonus or the net amount (net of income taxes) as a political payment or bribe payment.
- Corporate over-capitalisation: Real or personal property may be acquired by the business entity for more than fair market value. The excess is rebated or 'kicked back' and used by the promoter of the scheme to make the contribution to the political organisation or the payment to the public official.

- Contributions may be paid to law firms which act as conduits by depositing the funds in trustee accounts from which they are disbursed to the political campaign committee designated by officers of the contributing corporation or to a public official.

Referral of instances of suspected bribery

The Tax Office is primarily concerned with the protection of the revenue and maintaining community confidence in its administration by identifying and dealing with deductions that are bribe payments. However, the Tax Office also has an important part to play in the whole of government effort to combat corruption and bribery by referring information on suspected or actual bribe transactions to the Australian Federal Police for potential criminal investigation and /or prosecution.

□ If a tax officer encounters a transaction they suspect may be a bribe to an Australian or foreign public official, it is imperative that the information be referred, at the earliest opportunity, to the Serious Non-Compliance business line.

Within the requirements of the legislation, an authorised officer from within the Serious Non-Compliance business line will seek to disseminate the information to the Australian Federal Police pursuant to section 3E of the *Taxation*

Administration Act 1953.

Information available

Other government agencies

During the planning and examination of corporate entities, tax officers should consider what information, if any, could be requested from other Government agencies.

Tax treaty partners

In some cases involving foreign bribery, tax officers may be able to obtain information from Australia's tax treaty partners.

Tax treaties are signed by sovereign states, are binding at international law and set out each party's rights and obligations. These treaties are titled either Agreements or Conventions, and they direct that the parties shall perform certain actions or give effect to certain undertakings. Australia's tax treaties are given the force of law by the *International Tax Agreements Act 1953*. The following information is provided to assist tax officers in obtaining relevant information from tax treaty partners.

Treaty partners

Australia has entered into 42 tax treaties with other countries to prevent double taxation and allow cooperation between Australia and overseas tax authorities in enforcing their respective tax laws. In addition, there is a special treaty with East Timor (Timor Sea Treaty) which contains exchange of information provisions. The full list of our tax treaties can be found at CCH 2004 edition, Volume 4, page 779.

The exchange of information unit

The exchange of information (EOI) unit of international strategy and operations (ISO) administers the Australian competent authority function, via which the Tax Office can exchange taxpayer specific information with other tax agencies. The EOI unit receives requests from business lines for information from our treaty partners and also receives requests from our treaty partners which are sent to business lines for investigation and response. The EOI unit issues competent authority letters based on the information that tax officers request or provide.

The competent authority

Under Australia's tax agreements, the competent authority is the Commissioner of Taxation or an authorized representative. The Commissioner has delegated this function to the Second Assistant Commissioner of ISO and the Assistant Commissioner of the Transfer Pricing Practice within ISO. For practical purposes several other senior officers within ISO have also been authorised to sign on behalf of the Competent Authority. All our major treaty partners have a similar central administration for administering and authorising exchanges of information.

In special circumstances, which could include complex tax investigations in which the bribery of foreign public officials is a feature, our Competent Authority may authorise officers to directly liaise with similarly authorised representatives of the foreign tax administration.

Contact for exchange of information

If you need to request information from or provide information to an overseas tax authority, or need to liaise directly on a complex case, please contact the EOI unit directly by email to:

AustralianCompetentAuthority@ato.gov.au

Conclusion

These guidelines are only intended as a guide to tax officers undertaking compliance activities with a view to identifying and dealing with payments suspected of being bribes to Australian or foreign public officials. These guidelines provide guidance in determining whether a loss or outgoing is an allowable deduction in cases where bribery is suspected. The guidelines also identify that bribery is a criminal offence and asks that, in circumstances where bribery is suspected, there be increased due diligence and that at the earliest opportunity a referral to Serious Non-Compliance is made. The information will be directed to the Australian Federal Police who will determine whether or not to commence a criminal investigation.

These guidelines are not a definitive audit resource but rather designed to highlight the non-deductibility of bribes to Australian and foreign public officials, provide referral guidelines, identify some indicators of bribery, address offshore information gathering procedures and finally highlight some record keeping and audit techniques which may be useful when undertaking an audit where bribes have been discovered, or are suspected of having been committed.

Contact

Phone: 1800 060 062, 8.00am to 6.00pm, Monday to Friday, excluding National public holidays

Fax: 1800 804 544

Post: Tax Evasion

Locked Bag 6050

Dandenong Vic 3175

Web: Information is available at www.ato.gov.au/reportevasion

Note:

The Tax Office acknowledges the contribution to these guidelines by the OECD Centre for Tax, Policy and Administration from their 'OECD Bribery Awareness Handbook for Tax Examiners' (CTPA/CFA(2005)36).