



IMPLEMENTING THE OECD ANTI-BRIBERY CONVENTION



PHASE 4 REPORT: **Australia**

This Phase 4 Report on Australia by the OECD Working Group on Bribery evaluates and makes recommendations on Australia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions. It was adopted by the 44 members of the OECD Working Group on Bribery on 15 December 2017.

The report is part of the OECD Working Group on Bribery's fourth phase of monitoring, launched in 2016. Phase 4 looks at the evaluated country's particular challenges and positive achievements. It also explores issues such as detection, enforcement, corporate liability, and international cooperation, as well as covering unresolved issues from prior reports.

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

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Executive Summary

This Phase 4 report by the OECD Working Group on Bribery in International Business Transactions evaluates and makes recommendations on Australia's implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related OECD anti-bribery instruments. The report examines Australia's implementation of these instruments since its Phase 3 evaluation in October 2012, including its achievements and the challenges that remain. The evaluation process demonstrated that Australia has undertaken a number of legislative and institutional reforms to strengthen its fight against foreign bribery. The Australian authorities were highly cooperative and collaborative throughout the Phase 4 process, and took a very proactive role in identifying challenges and finding solutions, in the form of recommendations that are workable and will maximise results within Australia's legal and institutional framework.

Australia's enforcement of its foreign bribery offence has increased markedly since Phase 3. Australia is now able to report its first successful foreign bribery prosecutions. As of December 2017, a total of seven offenders have been convicted of foreign bribery offences. One case involving four convictions is ongoing. The other resulted in convictions against three individuals that pleaded guilty. All three perpetrators were sentenced in September 2017 to four years' imprisonment, and fines were also imposed on two of the perpetrators. Australia also has 19 ongoing investigations and 13 referrals under evaluation, compared to seven ongoing investigations at the time of its Phase 3 two-year follow-up in December 2014. However, in view of the level of exports and outward investment by Australian companies in jurisdictions and sectors at high risk for corruption, Australia must continue to increase its level of enforcement of foreign bribery and related offences against individuals and companies. The Working Group anticipates that enforcement will further increase by the time of Australia's two-year written follow-up report, once Australia has had more time to implement recent measures to improve its institutional framework for investigating and prosecuting foreign bribery cases.

Australia has taken substantial steps to improve its framework for detecting and investigating foreign bribery cases. These measures include the creation of the Australian Federal Police (AFP) Fraud and Anti-Corruption Centre (FACC), a multi-disciplinary team composed of specialists from AFP and other relevant agencies to evaluate foreign bribery referrals, as well as expansion of the role of AFP's Foreign Bribery Panel of Experts. In April 2016, the AFP received additional funding and established two dedicated foreign bribery investigative teams in Melbourne and Sydney, and a further Fraud and Anti-Corruption investigative team in Perth. In addition, the Commonwealth Director of Public Prosecutions (CDPP) has increased its foreign bribery expertise, creating a centralised system for the referral of foreign bribery matters to two workgroups based in Melbourne and Sydney. The CDPP was also closely involved in the development of a Bill that was recently introduced into Parliament to amend Australia's foreign bribery offence, including the introduction of Deferred Prosecution Agreements and a new corporate offence of failing to prevent foreign bribery.

Recommendations in this Phase 4 report address the outstanding Phase 3 recommendations, and certain issues that came to the attention of the Working Group over the course of the Phase 4 review. The Phase 4 recommendations are intended to help Australia strengthen its foreign bribery enforcement. This includes the following key recommendations for Australia to:

- Take appropriate steps to address the risk that the proceeds of foreign bribery could be laundered through the Australian real-estate sector;
- Enhance its whistleblower protections in the private sector;
- Continue to resource AFP and CDPP at a level that ensures Australia can effectively enforce its foreign bribery offence;
- Proactively pursue criminal charges against companies for foreign bribery and related offences, such as false accounting, money laundering, and tax evasion;
- Find additional ways to encourage companies, particularly SMEs, to develop and adopt adequate internal controls, ethics, and compliance programmes, or measures for the purpose of preventing and detecting foreign bribery.

This report also identifies positive achievements and good practices. The AFP was able to detect a ‘live’ foreign bribery case; meaning they could successfully investigate the conduct as it unfolded. In addition to the institutional changes described above, Australia has taken a number of other important steps to strengthen foreign bribery enforcement and prevention. These include strengthening whistleblower protections in the Australian government public sector through the Public Interest Disclosure Act 2013, and establishing a dedicated Office of the Whistleblower within ASIC for corporate whistleblowers. Australia also recently introduced a bill to Parliament to strengthen whistleblower protections in the tax and corporate sectors. Australia amended its foreign bribery offence in 2015 to address potential weaknesses identified in Phase 3, and is proactively identifying possible barriers to the successful investigation and prosecution of the foreign bribery offence. Extensive awareness raising initiatives have taken place on the use of facilitation payments. Australia has also established false accounting offences in the Criminal Code since Phase 3. Good practices include the establishment of Fintel Alliance in March 2017 – a public-private partnership to enhance the fight against money laundering, terrorist financing, and organised crime, and the extensive use of AFP liaison officers around the globe to support foreign bribery investigations.

This report and its recommendations reflect the findings of experts from Canada and Korea, and was adopted by the Working Group on 14 December 2017. The report is based on findings by the evaluation team during its on-site to Canberra and Sydney in July 2017, which involved meetings with a range of relevant stakeholders across the public and private sectors, media, and civil society. It also reflects legislation, data, and other materials provided by Australia in response to the Phase 4 Questionnaire and independent research by the evaluation team. Australia will submit a written report to the Working Group in two years on the implementation of all recommendations and its enforcement efforts.

INTRODUCTION

1. In December 2017, the Working Group on Bribery in International Business Transactions (WGB) completed its fourth evaluation of Australia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention), the 2009 Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions (2009 Recommendation), and related anti-bribery instruments.

1. Previous evaluations of Australia by the Working Group on Bribery

2. Monitoring implementation of the Convention, the 2009 Recommendation, and related instruments, is conducted through successive phases, according to agreed-upon principles. The monitoring process is compulsory for all parties to the Convention, and on-sites are mandatory in Phases 2, 3, and 4. On-sites involve meetings with the relevant law enforcement and government authorities, as well as civil society and the private sector. The monitoring reports, which are systematically published on the OECD website, include recommendations to the evaluated country. These reports are adopted by the WGB on a 'consensus minus one' basis. This means that the evaluated party may voice its views and opinions but cannot block adoption of the final report and recommendations.

3. The Phase 3 evaluation of Australia took place in October 2012, with a two-year follow-up report discussed in December 2014 (adopted in April 2015), and an additional follow-up report discussed in June 2015. By the end of the Phase 3 review cycle, Australia had fully implemented sixteen recommendations, partially implemented seven, and not implemented ten.¹

Previous Working Group evaluations of Australia

2015: Additional Phase 3 Report

2015: Follow-up to Phase 3 Report

2012: Phase 3 Report

2008: Follow-up to Phase 2 Report

2006: Phase 2 Report

1999: Phase 1 Report

2. Phase 4 process and on-site visit

4. Phase 4 focusses on three cross-cutting themes – detection, enforcement of the evaluated party's foreign bribery offence, and corporate liability for the offence. Additionally, it addresses the party's progress with respect to previously unimplemented Phase 3 recommendations, any issues raised by changes to the party's legal and/or institutional frameworks for combating foreign bribery, as well as any new issues that come to the WGB's attention. Phase 4 considers each party's unique situation, resulting in a report and recommendations that address the specific challenges and achievements of each party in a more targeted manner than previous phases. This means that issues that were not problematic or were resolved by the end of Phase 3 may not be reflected in the Phase 4 report.

¹ See Annex 1 for a list of Australia's Phase 3 Recommendations the WGB's assessment of their implementation at the end of the Phase 3 review cycle.

5. The Phase 4 evaluation team for Australia was composed of lead examiners from Canada and Korea, and members of the OECD Anti-Corruption Division.² Pursuant to the Phase 4 procedures,³ after receiving Australia's responses to the Phase 4 Questionnaire, which included supplementary, country-specific questions, the evaluation team conducted an on-site to Australia on 18-21 July 2017. The first two days of the on-site were conducted in Sydney, and the following two days in Canberra. Eight sessions took place in Sydney. Half of the sessions in Sydney were held with non-government participants, including civil society organisations, business associations, companies, academia, and legal and accounting professionals. The other half of the sessions in Sydney were held with relevant government and law enforcement authorities about whistleblower protections and law enforcement. Eleven sessions were held in Canberra, including the official opening and closing sessions. The other nine sessions in Canberra were predominantly held with the government and law enforcement authorities.⁴ Holding the first half of the on-site in Sydney, Australia's financial and business hub, was a strategic decision by the evaluation team, which believed that information obtained from non-government actors would enhance its viewpoint for the meetings with the government actors. The Australian authorities accommodated this request, which meant moving the opening session to the second half of the on-site. They also appreciated the opportunity to respond to the opinions of the non-government participants, which is more difficult when meetings with them take place later in the on-site.

6. All the sessions were well organised and attended, and participants were open and frank about Australia's challenges and successes in combating the bribery of foreign public officials. The non-government sessions were notably dynamic and participants freely interacted with each other as well as the evaluation team. The evaluation team credits Australia's Attorney-General's Department (AGD) for its close cooperation and flexibility in organising the meetings and making every possible effort to ensure that all relevant interlocutors were present. AGD also coordinated Australia's responses to the Phase 4 Questionnaire, and provision of follow-up information requested by the evaluation team during the preparation of the Phase 4 report. Australia's responses to the Questionnaire were clear and focussed, and all the requested follow-up information was provided promptly. Moreover, throughout the Phase 4 process, Australia was collaborative and proactive in working with the evaluation team to identify solutions to the challenges that Australia faces implementing the Convention. During the opening session, the First Assistant Secretary, Criminal Justice Policy and Programmes Division, AGD, dedicated half of his opening remarks to discussing the areas of reform that Australia is contemplating to improve its implementation of the Convention – thus providing the WGB with an opportunity to weigh in on these areas. Principal Federal Prosecutors from the Commercial, Financial and Corruption Practice Group, Commonwealth Director of Public Prosecutions (CDPP) outlined areas of reform undertaken to address the unique challenges posed by foreign bribery prosecutions.

² Canada was represented by: **Ann Sheppard**, Senior Counsel, Justice Canada; and **Sgt. Brenda Makad**, Royal Canadian Mounted Police. Korea was represented by **Jeesun Moon**, Prosecutor, Seoul Central District Prosecutors' Office. The OECD was represented by **Christine Uriarte**, Coordinator of the Phase 4 evaluation of Australia and Senior Legal Analyst; and **Emma Scott**, Legal Analyst, both from the Anti-Corruption Division, Directorate for Financial and Enterprise Affairs. **Kathryn Gordon**, Senior Economist from the Anti-Corruption Division, provided guidance on preparation of Australia's foreign bribery risk in light of its economic situation and trade profile.

³ The Phase 4 procedures are provided in [OECD Anti-Bribery Convention: Phase 4 Monitoring Guide](#).

⁴ See Annex 2 for the list of participants at the on-site.

3. Australia's foreign bribery risk in light of its economic situation and trade profile

a. General overview

7. Australia's economy has enjoyed considerable success in recent decades – it just recorded its 25th consecutive year of continuous economic growth. Living standards and wellbeing are high. Australia ranks second out of 188 countries in the 2016 UN ranking based on the Human Development Index⁵ and is ranked as a high income country by the World Bank.⁶

8. This success reflects strong macroeconomic policy, structural reform, and the long commodity boom as well as abundant natural resources, an effective system of government, a well-functioning legal system and a well-managed public sector. The economy has also benefitted from a growing population that now stands at 23.2 million people.⁷

9. Australia's regulatory system is business-friendly – ranking 15th out of 190 countries in the World Bank's most recent "doing business" survey. However, the 2017 OECD Economic Survey for Australia notes that there has been some erosion in Australia's relative competitive advantage stemming from lighter regulations,⁸ because many of Australia's competitors have also reduced the regulatory burden on companies.

10. Australia's business sector comprises a variety of business types and sizes. As of March 2015, Australia was home to three companies among the top-100 global companies, ranked by market capitalisation.⁹ Small businesses make a significant contribution to the Australian economy, accounting for slightly under half of private sector industry employment and contributing approximately one third of private sector industry value added in 2010–11.¹⁰ The 30 190 small businesses exporters represented 60% of the total number of exporters, but accounted for only about 0.1% of the total value of goods exported. The most important sectors for small exporters were wholesale trade (accounting for 21% of small exporters) and manufacturing (13%) . Thus, small exporters are numerically important actors in Australia, but account for only a small percentage of total exports.

11. An active privatisation effort has left Australia with a relatively small state-owned enterprise (SOE) sector. According to the most recent OECD data, it has five majority-owned non-listed SOEs and ten statutory corporations or quasi-corporations.¹¹ These SOEs account for less than one percent of the total number of employed persons in Australia.

⁵ The Human Development Index (HDI) is a summary measure of average achievement in key dimensions of human development: a long and healthy life, being knowledgeable and have a decent standard of living. For more details, see the [2016 Human Development Report – Overview](#).

⁶ See: <https://data.worldbank.org/country/australia>

⁷ The macroeconomic analysis is adapted from [Overview of the OECD Economic Survey of Australia](#), 2017, page 2.

⁸ See [Overview of the OECD Economic Survey of Australia](#), page 31.

⁹ See PwC's [Global Top 100 Companies by market capitalisation](#) 31 March 2015 update. Page 7.

¹⁰ The Australian Bureau of Statistics . [Australian Small Business: Key Statistics and Analysis](#). December 2012, page 20.

¹¹ [The Size and Sectoral Distribution of SOEs in the OECD and in Partner Countries](#). OECD. 2014. A statutory corporation is a public enterprise brought into existence by a special legislative act. The OECD defines "quasi-corporations" as unincorporated enterprises that function as if they were corporations, and which have complete sets of accounts, including balance sheets.

b. Key sectors for the Australian economy

i. Mining

12. Australia is rich in natural resources, including the following: bauxite, coal, iron ore, copper, tin, gold, silver, uranium, nickel, tungsten, rare earth elements, mineral sands, lead, zinc, diamonds, natural gas, and petroleum. It is the world's largest net exporter of coal, accounting for 29% of global coal exports.¹² Its mining sector is characterised by extreme volatility. At the same time, it will be watching the following three strategic developments closely: 1) the Asia Infrastructure Investment Bank, which was created to fund a range of commodity intensive energy, transport, and infrastructure projects across Asia, with a capital pool starting at USD 100 billion, according to some reports; 2) China's 'One Belt One Road Program' designed to spur trade between China and its neighbouring countries along the Silk Road; and 3) China's megacity project, which aims to link Beijing, Tianjin, and Hebei into a single city of 130 million people.¹³

ii. Financial services

13. Australia does not host a global financial hub like London or New York. But it is the 14th largest economy in the world, and the largest financial centre in the South Pacific. Its nearest rival is Singapore, but it is the favoured destination for financial flows from Papua New Guinea elites, due to its geographical proximity and cultural synergies.¹⁴ Australia has a sophisticated financial services sector with deep and liquid financial markets and regional leadership in investment management as well as in such areas as infrastructure financing and structured products. It is positioned to consolidate its role as a major financial centre for the Asia Pacific region and to take advantage of emerging opportunities in the region and globally.¹⁵

iii. Agri-food

14. The Australian agri-food industry represents about 4% of Australia's GDP, but is responsible for about 13% of Australia's merchandise exports. Growth in global demand for Australia's exports is expected to be driven by Asia. The region will be responsible for around 70% of the growth in demand to 2050 and 60% of total demand. China alone will be responsible for 43% of total global growth (almost AUD 1 trillion).¹⁶

¹² Ibid, fn. 6

¹³ From [Australia Mining August 2016](#).

¹⁴ Despot's Guide to Wealth Management (Jason Sharman, Cornell University Press, Ithaca and London, 2017)

¹⁵ From the Austrade website. [Australia Industry Capabilities. Financial Services](#).

¹⁶ From [Building Australia's Comparative Advantages: A 21st Century Agri-food Sector](#) Business Council of Australia. Page 4.

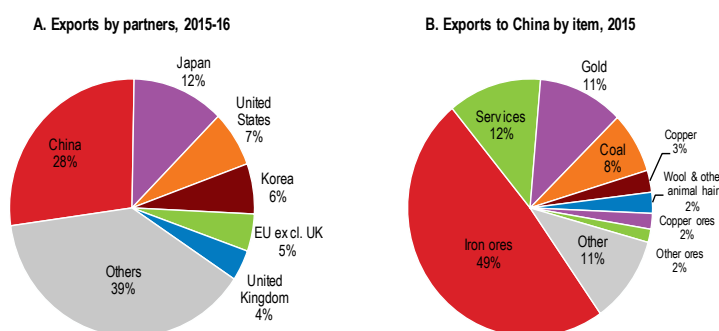
c. Australia's economy has a moderate overall export orientation, but some export markets involve high-corruption risks

15. The Australian economy's overall export orientation is somewhat lower than in other high income economies with exports accounting for 19.8% of GDP in 2015, as compared to an average for high income economies of 31.3%.¹⁷ The main destination countries for Australian exports are China (27.5%), Japan (12.2%), Korea (6.3%) and the United States.¹⁸ (See Figure 1.A). Australia benefited from a dramatic surge in trade in recent years, but this trend has reversed due to falling global commodity prices.¹⁹

16. Australia's main export products are iron ore and concentrates (15.3% of total exports of goods and services), coal (11.1%), education-related travel services (6.4%), gold (5.3%), natural gas (5.3%) and personal travel (5.3%). The pattern of exports to its main trading partner, PR China, is an example of this strong natural resources orientation (See Figure 1.B). The preponderance of natural resource exports in its export mix leaves Australia particularly exposed to the corruption risks associated with this sector.²⁰

17. Australia's free trade agreement (FTA) with China entered into force in 2015. It also has FTAs with Korea, Japan, Chile, Malaysia, New Zealand, Singapore, Thailand, and the United States, and a regional FTA with ASEAN.²¹ It is in the process of negotiating bilateral agreements with India and Indonesia, as well as with some of its Pacific neighbours and Gulf Cooperation countries. It is also currently negotiating an Asia-wide Regional Comprehensive Economic Partnership that includes the ten ASEAN countries and China, Japan, Korea, New Zealand, and India.²²

Figure 1. Australia's exports 2015-16



Source: Australian Department of Foreign Affairs and Trade.

¹⁷ See the World Bank [Exports as a percentage of GDP](#).

¹⁸ From [Australia's trade in goods and services 2015-16](#) available on the website of the Department of Foreign Affairs and Trade.

¹⁹ Ibid, World Factbook.

²⁰ [Australia Export Performance 2016](#). On line publication 16 June 2017.

²¹ See the [Ministry of Foreign Affairs webpage on Free Trade Agreements](#) for further information.

²² Ibid, World Factbook.

d. Australia's moderate-sized outward foreign direct investment position exposes investors to several high risk countries for corruption

18. Australian businesses are significant global investors, with the total value of outward foreign direct investment (FDI) from Australia passing USD 396 billion at the end of 2015. This is equivalent to 31.9% of Australian GDP, which is a bit below the OECD average of 42%. The United States, the United Kingdom and New Zealand are the three largest destinations for outwards investment, accounting for about 45% of the total. Other important destinations for Australian outwards investment are major Asian economies (China, India, Japan, Korea and all ASEAN members). Outward investment in the ASEAN region increased nearly five-fold over the 2005-2015 period.²³

e. Australian economic interests in high risk countries for corruption

19. Australia has close economic interests in a number of neighbouring countries that pose particular risks for corruption. The following countries are of particular importance because Australian companies have large investments in their extractive sectors, and Australia provides these countries with substantial official development assistance (ODA).

i. Timor-Leste

20. Timor-Leste ranks 101st out of 176 countries on Transparency International's (TI) Corruption Perceptions Index (CPI) for 2016, with a score of 35 out of 100 (0 is high perceived levels of corruption and 100 is very clean).²⁴ Australia is Timor-Leste's largest bilateral donor of development assistance, with a total ODA estimated to be \$93.4 million for 2016-17, and \$96.1 million for 2017-18. Oil and gas revenues accounting for 70% of Timor-Leste's GDP and Australia is a major partner in Timor-Leste's oil and gas industry.²⁵

ii. Papua New Guinea

21. Papua New Guinea (PNG) ranks 136th on TI's CPI for 2016, with a score of 28 out of 100.²⁶ PNG is Australia's closest neighbour and the two countries have longstanding economic and strategic ties, and signed an Economic Cooperation Treaty in March 2014.²⁷ Australia remains the largest donor of aid to PNG. The total Australian ODA is estimated to be \$547.1 million for 2016-17, and \$546.3 million for 2017-18. Australia's aid investment in infrastructure is expected to increase from 37% of the program to around 50% by 2017.²⁸

iii. Indonesia

22. Indonesia ranks 90th on TI's CPI for 2016, with a score of 37 out of 100.²⁹ The two countries have a broad partnership encompassing political, security, trade, economic and development cooperation. Indonesia is Australia's 13th biggest trading partner.³⁰ Australia's trade and investment is focussed mainly

²³ From [OECD FDI stocks statistics](#).

²⁴ [TI CPI 2016](#)

²⁵ [Overview of Australia's aid program to Timor-Leste](#) (Australian DFAT, 2017).

²⁶ [TI CPI 2016](#)

²⁷ [Overview of Australia's aid program to Papua New Guinea](#) (Australian DFAT, 2017)

²⁸ *Ibid*

²⁹ [TI CPI 2016](#).

³⁰ <http://dfat.gov.au/about-us/publications/Documents/cot-cy-2016.pdf> p.39

on the islands of Java and Sumatra, which produce around 80 per cent of Indonesia's GDP.³¹ The total Australian ODA is estimated to be \$357 million for 2016-17. Australian investment interests in Indonesia include mining and energy, financial and professional services, education, and agribusiness.

4. Allegations and foreign bribery cases in Australia

23. As of 29 August 2017, the Australian Federal Police (AFP) had received 87 foreign bribery allegations. Out of these allegations, Australia was able to report that it had laid foreign bribery charges in two cases. Proceedings are ongoing in Case #1, which has so far resulted in the conviction of four persons for foreign bribery, and one person for false accounting.³² In Case #2, three persons pleaded guilty to foreign bribery and in September 2017 were sentenced to four years imprisonment with a minimum non-parole period of two years. In addition, two of the accused were fined AUD 250 000.³³ Bribes of just under AUD 1.035 million were made to obtain construction contracts for the individuals' construction company. The company was not charged because its small size meant that two of the convicted individuals were, in effect, the company.

24. AFP had referred a further three cases to the CDPP, had 19 active investigations, 13 allegations under evaluation by AFP's Fraud and Anti-Corruption Centre (FACC), and 20 allegations that had been finalised after evaluation or investigation and closed. Thirty allegations had been rejected. These enforcement actions are reflected in Figure 2 (below).

25. Compared to December 2014, when Australia submitted its Phase 3 two-year follow-up report, enforcement has increased significantly. At that time Australia had laid charges in only one case and had just seven active investigations.

26. A horizontal analysis of information provided by Australia on enforcement actions (i.e. evaluations, investigations, and prosecutions) to date, shows important trends. The majority of actions involve the bribery of foreign public officials in the Asia-Pacific Region. However, actions involving countries in Africa are increasing. The largest number of enforcement actions involve the mining and extractives sector; a significant number of actions also involve the construction and engineering sector. The following sectors have also been the subject of enforcement actions: information technology, steel, gambling, non-profit sector and the public administration and defence sectors.

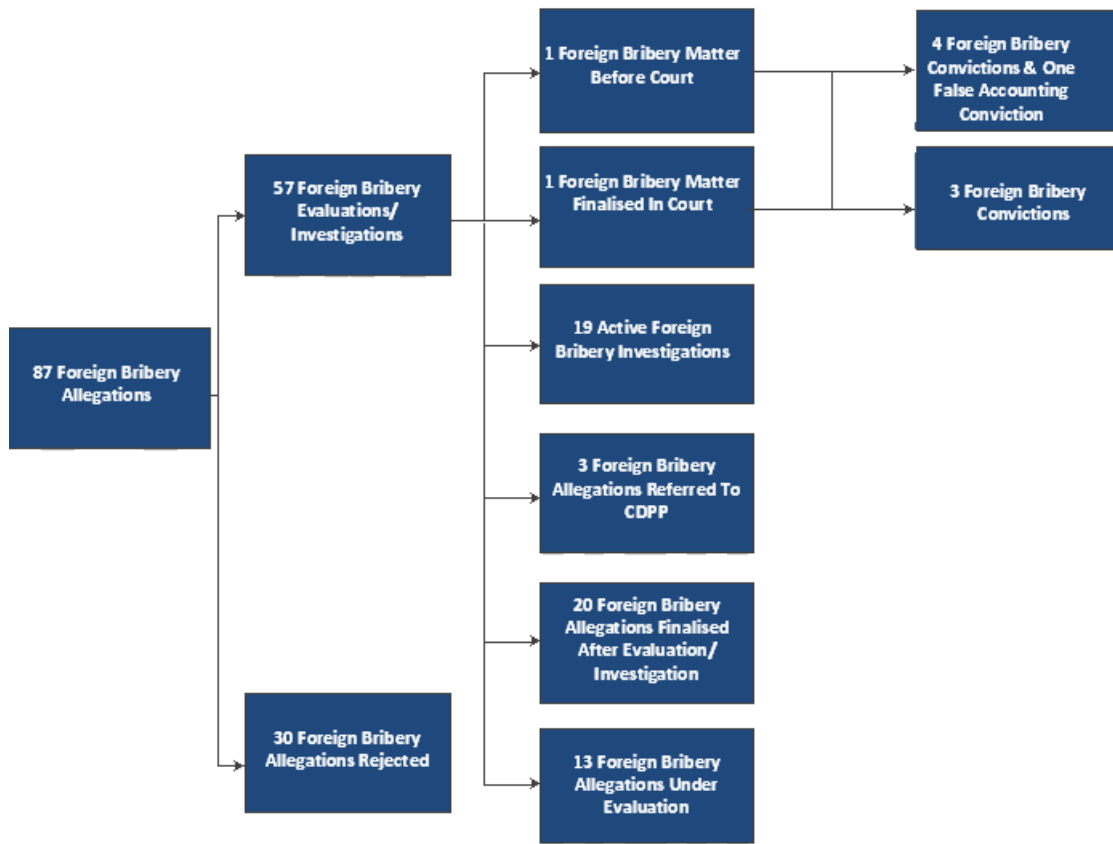
27. The Australian authorities have been very forthcoming about the challenges they have faced in evaluating, investigating, and prosecuting the 87 foreign bribery allegations. The most common challenge is obtaining evidence from abroad; for instance, due to the identity of the bribe recipients, or death penalty considerations. Other significant challenges include analysing large amounts of complex electronic data, which is a challenge across the board in foreign bribery cases. Proving that an offender 'intended to influence' a foreign public official is a specific legal and practical challenge cited by Australian prosecutors at the on-site. Most of these challenges are discussed in the report under the relevant sections.

³¹ <http://country.eiu.com/article.aspx?articleid=1903401174&Country=Indonesia&topic=Economy>. Indonesia: A look beyond Java, EIU, 4 August 2015.

³² [R v Ellery \[2012\] VSC 349](#)

³³ <https://www.caselaw.nsw.gov.au/decision/59cad2c0e4b074a7c6e18f96>

Figure 2: Flowchart of foreign bribery enforcement actions³⁴



5. Senate Inquiry into Foreign Bribery³⁵

28. On 24 June 2015, the Australian Senate referred an inquiry into foreign bribery to the Senate Economics References Committee for inquiry and report by 1 July 2016. This inquiry lapsed when the Australian Parliament was dissolved for the Federal Election on 2 July 2016. On 11 October 2016, the Senate agreed to the Committee's recommendation to re-adopt the inquiry in the new Parliament. The Committee was due to report by 30 June 2017. The Senate has granted the Committee an extension to report by 7 February 2018.

29. The Terms of Reference of the Inquiry include the effectiveness of, and any possible improvements to, existing Commonwealth legislation governing foreign bribery, including the following: effectiveness of the bodies tasked with investigating and prosecuting foreign bribery cases, including cooperation between agencies; standards of admissible evidence; range of available sanctions including debarment from government contracts and programs; statute of limitations; and range of offences. The Inquiry is also focussed on corporate criminal liability, including the liability of parent companies for the acts of subsidiaries and intermediaries, including joint ventures; private sector whistleblower protections³⁶

³⁴ All figures are since the inception of the Fraud and Anti-Corruption Centre in July 2014.

³⁵ See Australian Parliament: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreignbribery45th

³⁶ The issue of whistleblower protections is also the subject of another Senate inquiry discussed under A.7.d of the report.

and other incentives to report; the facilitation payments defence; and use of suppression orders in prosecutions.

Commentary

The lead examiners acknowledge that enforcement of the foreign bribery offence in Australia has markedly increased since Phase 3. Australia is able to report the successful prosecution of seven offenders across two cases. A further three cases have been referred to CDPP, one of which has been closed and two of which are under review, 19 cases are under AFP investigation, and 13 are under evaluation by FACC. However, the lead examiners consider that a number of factors bear on foreign bribery risk exposure for Australian companies, including the extensive presence of Australian companies in sectors and jurisdictions at high risk for corruption. As a result, this report focuses on steps Australia has taken since Phase 3 to enhance its capacity for detecting, investigating, and prosecuting foreign bribery cases, and identifying ways to further enhance this capacity. The lead examiners note that Australia has taken substantial steps to improve its institutional framework for detecting and investigating foreign bribery cases. Given that many of these steps (discussed in detail in the report) occurred following the Phase 3 evaluation, the lead examiners anticipate that enforcement will continue to increase by the time of Australia's Phase 4 two-year written follow-up report. As is standard WGB practice, at that time, it will invite a report from Australia on its foreign bribery enforcement actions, including sanctions, reasons for any acquittals, and horizontal challenges.

A. DETECTION OF THE FOREIGN BRIBERY OFFENCE

30. Australia reports detecting foreign bribery through a range of sources. These include domestic and overseas agencies, members of the public, anonymous referrals, whistleblowers and the media (including journalists proactively approaching the AFP and through media monitoring). A key source of referrals has been overseas agencies with which the AFP has developed close relationships surrounding foreign bribery related matters.

31. Since the Phase 3 report, Australia has taken steps to improve the detection of foreign bribery, including the creation of the multi-agency AFP Fraud and Anti-Corruption Centre (FACC), and enhanced inter-agency cooperation and outreach efforts. These efforts were reflected in AFP's detection of a 'live' case where foreign bribery-related activity was detected in real-time by an AFP intelligence analyst who notified the FACC which commenced an investigation into the unfolding conduct. The investigation drew on a range of resources and capabilities within AFP and resulted in the successful conviction and sanctioning of three individuals (discussed in detail in section B.5).

32. At the end of Phase 3, certain WGB recommendations to Australia regarding the detection of foreign bribery had not been fully implemented, as follows: Recommendation 13 to further raise awareness of foreign bribery as a predicate offence for the purpose of money laundering, and provide additional guidance to reporting entities, including through typologies; 14a) to align the record-keeping requirements for deducting a facilitation payment under tax legislation with those for the defence under the Criminal Code Act; 15a) to extend the reporting obligation of external auditors under the Commonwealth Corporations Act to cover foreign bribery; 15c) to ensure that Australian public servants, and officials and employees of independent statutory authorities are subject to equivalent reporting requirements; and 15d) to establish appropriate additional measures to protect public and private sector employees who report

suspicious of foreign bribery to the competent authorities. A number of these recommendation have now been implemented or are no longer regarded as relevant, as discussed in this and following chapters.

33. In Phase 4, the Evaluation Team explored further issues regarding detection, most notably around detection through Australia's AML regime. The ability of Australian authorities' to detect foreign bribery through the Australian Taxation Office (ATO), the Export Finance and Insurance Corporation (EFIC), the Department of Defence (DoD), whistleblowers, accountants, auditors, and the Australian media are also explored in this section.

A.1. Australia's ability to detect foreign bribery through its anti-money laundering system

34. In Phase 3, the WGB noted that no foreign bribery investigations had been detected through suspicious transaction reports (STRs) and recommended that Australia further raise awareness of foreign bribery as a predicate offence for the purpose of money laundering, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies (recommendation 13). This recommendation was deemed partially implemented at the time of the Phase 3 evaluation as the Australian Transaction Reports and Analysis Centre (AUSTRAC) had updated its information circular to state that foreign bribery is a predicate offence to money laundering and posted a statement to this effect on its website. However, at the time of the two-year follow-up report in 2014, AUSTRAC had only just begun the process of developing a typology on foreign bribery. This part of the report addresses the state of implementation of recommendation 13, as well as the risk of laundering the proceeds of foreign bribery in the Australian real-estate sector, and two new initiatives which could enhance the role of AUSTRAC in detecting illicit financial flows involving the proceeds of foreign bribery.

a. Foreign bribery enforcement based on information generated by Australia's AML/CFT system

35. While Australia's AML/CFT system has not directly identified a foreign bribery case that has progressed to prosecution, the financial information collected by AUSTRAC is used extensively to support the evaluation and investigation of foreign bribery, corruption and proceeds of crime matters. AUSTRAC partner agencies, including AFP, have direct online access to AUSTRAC's database which holds over 600 million transaction reports. Checks against this database are conducted as part of all evaluations of foreign bribery referrals by FACC. This can provide further lines of enquiry for both evaluation and investigative phases. During the 2016-17 financial year, 2.7 million searches were conducted.

36. AUSTRAC also proactively generates intelligence products. In 2016-2017, AUSTRAC received 68 STRs referencing possible bribery, including foreign bribery, or corruption, which resulted in ten intelligence assessments being provided to partner agencies for evaluation. AUSTRAC also exchanged information with foreign counterparts relating to bribery and corruption on a regular basis (42 exchanges in the 12-month period to July 2017). These exchanges include both requests made by Australian agencies for financial intelligence from foreign jurisdictions and vice versa.

37. During the on-site, the evaluation team explored how the Australian authorities could better utilise the potential of the AML/CFT regime to achieve foreign bribery enforcement outcomes, as discussed below.

b. Money laundering typologies where foreign bribery is predicate offence

38. In Phase 3, the WGB recommended that Australia further raise awareness of foreign bribery as a predicate offence for the purpose of money laundering, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies (recommendation 13). This recommendation was deemed partially implemented at the time of the Phase 3 evaluation. The recommendation remained partially implemented at the time of the two-year follow-up report in 2014.

39. Since Phase 3, Australian authorities have published a range of materials to raise awareness of foreign bribery as a predicate offence, and additional guidance to reporting entities regarding the detection of foreign bribery. In July 2015, AUSTRAC published a Strategic Brief titled “Politically Exposed Persons, Corruption and Bribery” to provide reporting entities with information and insights concerning money laundering methods, vulnerabilities, and indicators associated with PEPs and laundering the proceeds of corruption including foreign bribery.³⁷ AUSTRAC has also established a dedicated page on its website concerning corruption and bribery,³⁸ which directs businesses to Australian and international resources. In March 2017, AUSTRAC published an additional typology intended to provide AUSTRAC’s regulated population with insights on a matter involving foreign bribery.³⁹ Other sources of information include an AFP Fact Sheet for reporting entities and cash dealers which provides case studies⁴⁰ and an online foreign bribery module on the AGD website.⁴¹

40. As part of its supervisory and compliance efforts, AUSTRAC engages directly with its regulated population, in particular the large banking sector. AUSTRAC assesses policies, systems and controls in relation to all regulatory and reporting obligations – customer identification, transaction monitoring and reporting and record-keeping. AUSTRAC provides informal and formal feedback to the banks to ensure that they have appropriate and effective frameworks in place.

41. The lead examiners believe that Australia could provide further information about the advantage obtained from bribing, which could generate proceeds that would flow back through the Australian financial system, and which are often obtained through some form of government or other business that, on its face, appears legitimately obtained (e.g. through public procurement or a mining concession). Representatives of two major banks and an international risk consultancy expressed a desire for greater governmental guidance on foreign bribery scenarios. Discussions with AUSTRAC, AFP, and financial sector representatives at the on-site demonstrated that the Australian AML system places a greater focus on the detection of bribery through financial flows representing bribe payments. Australia notes that suspicious outgoing financial flows are the most likely means of detecting instances of foreign bribery involving Australian individuals and businesses, and that evidence of such flows would likely be necessary to prove foreign bribery had occurred. AUSTRAC and AFP have implemented actions to generate intelligence leads on proceeds of crime derived from international bribery, corruption, and foreign investment matters.

³⁷ <http://www.austrac.gov.au/peps-corruption-and-foreign-bribery>

³⁸ <http://www.austrac.gov.au/businesses/important-information-industry/corruption-and-bribery> In 2016-17 there were 2239 unique views of that page, an increase from 910 views the previous year.

³⁹ <http://www.austrac.gov.au/case-studies/banking-bribe>

⁴⁰ See: www.afp.gov.au/sites/default/files/PDF/FACForeignBriberyAndMoneyLaunderingIndicatorsFactSheet.pdf

⁴¹ https://www.ag.gov.au/CrimeAndCorruption/Foreignbribery/OnlineModule/a001_interactive_version_forms_of_bribery.html;
https://www.ag.gov.au/CrimeAndCorruption/Foreignbribery/OnlineModule/a001_interactive_version_examples_of_foreign_bribery.html

c. Inward flows of corrupt proceeds and risk of laundering in the real estate sector

42. One possible means of improving detection is through an increased focus on the proceeds of crime in financial flows back into Australia, particularly those involving the residential real estate sector.⁴² Indeed Australia's real estate sector, which is very attractive to foreign investors,⁴³ is at significant risk for money laundering, according to a number of sources, including the 2015 Financial Action Task Force (FATF) Mutual Evaluation Report of Australia.⁴⁴

43. Several participants at the on-site from civil society and the private sector also highlighted the significant risk of laundering foreign corrupt proceeds in the Australian real-estate sector, including representatives from civil society, the banking sector and an international accounting and auditing firm.⁴⁵

44. The review team noted the views of J.C. Sharman, an Australian academic and international AML/CFT and anti-corruption expert, on the Australian AML/CFT system's failure to counter the flow of corrupt proceeds from abroad into the Australian real estate sector.⁴⁶ Prof. Sharman attributes the gap to a lack of willingness to take action rather than a lack of capacity, stating that Australia has some of the most powerful AML/CFT laws in the world. He provides several examples where banks or AML/CFT authorities have failed to act on suspicious payments,⁴⁷ and information from interviews with Australian bankers that believed the Commonwealth Government did not take seriously enough the issue of inward flows of corrupt proceeds.

45. In response, Australia notes that AUSTRAC takes regulatory and enforcement responses appropriate to the circumstances. These responses range from recommendations for businesses to improve AML/CFT processes to specific requirements to remediate non-compliance with legislative requirements. In the last two years, AUSTRAC has conducted 150 compliance assessments of reporting entities, resulting in 211 recommendations to improve processes and procedures and 274 requirements in relation to non-compliance in which remediation programs have been established. In the most serious cases civil enforcement proceedings are available and have been applied against the Tabcorp group of companies which resulted in Australia's highest ever corporate civil penalty of AUD 45 million. AUSTRAC has recently commenced proceedings against a major Australian bank for alleged money laundering violations.⁴⁸

46. A further example was AUSTRAC's targeted compliance campaign conducted between January and June 2016 in relation to customer due diligence procedures. AUSTRAC conducted 28 onsite assessments of financial institutions and the inspection of 888 customer files for compliance with due

⁴² While the sector is not under AML/CFT regulation, broad coverage on such transactions is provided through the regulation of the banking and financial sectors.

⁴³ See: [2016 Australia Real Estate Market Outlook \(CBRE\)](#)

⁴⁴ See: [Anti-Money Laundering and Counter-Terrorist Financing Measures Mutual Evaluation Report: Australia](#) (FATF, Paris, 2015, p.7).

⁴⁵ TI Australia also states in its formal submission to the Phase 4 review of Australia that "the Australian property market is highly exposed to the risk of money laundering and illicit financial flows potentially gained through criminal activity, as outlined in a recent TI Report '[Doors Wide Open](#)'.

⁴⁶ *The Despot's Guide to Wealth Management: On the International Campaign against Grand Corruption* (J.C. Sharman, 2017, Cornell University Press, pp. 150-177). J.C. Sharman is the Sir Patrick Sheehy Professor of International Relations at the University of Cambridge.

⁴⁷ Examples include the following: banks willing to process payments for properties on behalf of persons facing corruption charges abroad, without checking the legality of the funds; a wire transfer that did not raise red flags even though it came with an associated message that it was for 'jihad'; and a bank that had over 90 STRs lodged regarding a certain customer, which did not result in action being taken by the bank or the AML/CFT authorities.

⁴⁸ <http://www.austrac.gov.au/media/media-releases/austrac-seeks-civil-penalty-orders-against-cba>

diligence requirements. The campaign resulted in AUSTRAC identifying deficiencies with the customer due diligence procedures in 13 institutions and those entities were issued a formal requirement to undertake remediation activity. Those entities have now finalised their remediation programs.

47. Under Australian law, real-estate agents, accountants and auditors, members of the legal profession, and other Designated Non-Financial Business Professionals (DNFBPs) are not subject to AML/CFT obligations.

48. Australia is currently considering the expansion of AML/CFT reporting obligations to real estate agents, lawyers, conveyancers, accountants, high-value dealers and trust and company service providers. This follows a statutory review of the AML/CFT regime (completed in April 2016), which recommended a cost-benefit analysis be undertaken (completed in June 2017). The Government is currently considering the report, which will inform any decision about the regulation of these sectors for AML/CFT purposes.

49. Australia's Foreign Investment Review Board (FIRB) could potentially play a greater role in detecting and reporting suspicious transactions in the real estate sector, and leverage available information from ATO, AUSTRAC and AFP to act on suspicious transactions relating to foreign investments.⁴⁹ Pursuant to the applicable legislative framework, the Treasurer is empowered to prohibit a foreign purchase of Australian property if satisfied that it would be contrary to the national interest, which includes considerations such as national security, competition, impact on the economy, and character of the investor.⁵⁰ The FIRB routinely consults with government agencies, including ASIC, AFP, and Immigration and Border Protection, about applications. The ATO also meets regularly with these agencies to ensure that a cohesive, whole of government approach, is maintained.

d. Recent organisational developments

50. Since Phase 3, there have been two significant organisational developments that could enhance Australia's ability to detect illicit flows that represent the proceeds of foreign bribery. The first development is the creation of FACC, which is housed within, and coordinated by, AFP in Canberra. FACC, which is composed of thirteen Commonwealth agencies, including AUSTRAC, was established for the purpose of strengthening law enforcement capacity to respond to serious and complex fraud, foreign bribery, corruption by Australian public servants and, complex identity crime (see extensive discussion on FACC under B.3.a). As a member of FACC, AUSTRAC is an integral part of the team that takes part in evaluating incoming allegations referred to AFP. Pursuant to AUSTRAC's Memorandum of Understanding (MOU) with FACC, AUSTRAC is authorised to exchange relevant information, subject to applicable laws. AUSTRAC's potential for sharing information about illicit flows involving the proceeds of foreign bribery has therefore been enhanced by the establishment of FACC.

51. The second development concerns the establishment of Fintel Alliance, formally launched by the Minister for Justice in March 2017.⁵¹ The Alliance is a public-private partnership to enhance the fight against money laundering, terrorist financing, and organised crime. It will also focus on developing

⁴⁹ The FIRB is supported by a secretariat in Treasury and ATO.

⁵⁰ The relevant legislative framework includes the Foreign Acquisitions and Takeovers Act 1975 and the Foreign Acquisitions and Takeovers Fees Impositions Act 2015 and their associated regulations.

⁵¹ Information about the launch of Fintel Alliance can be found here: <http://www.austrac.gov.au/fintel-alliance-launch>

‘smarter regulation’, including streamlining the AML/CFT regulatory framework for industry. The three initial joint projects of the Alliance’s Operations Hub are an examination of the Panama Papers, analysis of information reported to the Australian Cybercrime Online Reporting Network, and identification of money mules.⁵² The Alliance is also considering future projects, including the development of public-private partnership capabilities to design strategies for data collection.⁵³ At the on-site visit, a major Australian bank that is a member of the Alliance stated that it is a positive step, but so far has not addressed foreign bribery. An Australian academic specialised in AML/CFT stated that, to succeed, the Alliance needs to address the close relationship between Australian banks and the Government.

Commentary

The lead examiners consider that the steps taken by Australia since Phase 3 to provide case studies and typologies to raise awareness of foreign bribery as a predicate offence for money laundering are insufficient because they do not provide adequate information about foreign bribery methodologies, and focus too heavily on the illicit flows related to bribe payments and too little on the incoming flows that represent the proceeds of bribing foreign public officials (such as those obtained from public procurement contracts obtained through foreign bribery). The lead examiners therefore consider Phase 3 recommendation 13 only partially implemented and recommend that Australia take further steps to raise awareness of foreign bribery as a predicate offence to money laundering, including by providing additional guidance with case studies and typologies to reporting entities regarding the detection of foreign bribery predicated on money laundering (in particular, through the real estate sector)

The lead examiners further recommend that, in line with the FATF standards, Australia take appropriate steps to address the risk that the proceeds of foreign bribery will be laundered through the Australian real estate sector. These should include specific measures to ensure that the Australian financial system is not the sole gatekeeper for such transactions. The lead examiners believe that AUSTRAC’s participation in FACC could enhance its potential for detecting and sharing information about illicit flows involving the proceeds of foreign bribery. They also believe that establishing a public-private partnership through Fintel Alliance is a positive and original concept that will enhance Australia’s AML/CFT capabilities and provides an example of a good practice.

A.2. Australian Taxation Office

a. Risk of tipping off tax payers

52. The Australian Taxation Office Internal Guidelines for Understanding and Dealing with the Bribery of Australian and Foreign Public Officials (ATO Guidelines) address how tax auditors verify whether tax deductions have been taken for bribe payments.⁵⁴ The Guidelines, which are based on the OECD Bribery and Corruption Awareness Handbook for Tax Examiners and Tax Auditors provide four principal methods for ‘accumulating evidence particularly relevant to identifying bribes’ including conducting an “inquiry – such as interviewing the taxpayer or third parties.”⁵⁵ The Guidelines provide extensive information on how to conduct an inquiry, and, in line with the Handbook, require referral of suspected bribery matters for assessment as a potential criminal investigation at the earliest opportunity. However, they do not provide any specific warning to tax auditors about the risk that such an inquiry could

⁵² Ibid.

⁵³ Ibid.

⁵⁵ <http://www.oecd.org/tax/bribery-corruption-awareness-handbook.htm>

tip off the tax payer and result in the destruction of evidence. While there is no explicit warning relating to tip offs in the OECD Handbook, it does say that tax examiners should conduct further inquiries “where it is necessary and does not compromise a possible criminal case”. According to the Australian authorities, pursuant to broader ATO policy, criminal investigators instruct ATO auditors to cease any inquiries or activities that could compromise the criminal investigation, and this includes situations where audit inquiries could tip off the tax payer. The ATO representative seconded to FACC could therefore also reduce the risk of tip offs by providing early warning to ATO authorities about potential and/or ongoing foreign bribery investigations. However, in the absence of procedures and guidance to this effect, FACC may not fully exploit this capability.

53. Following the on-site, ATO informed the evaluation team that it would amend its Guidelines to incorporate a specific warning about the possibility of tip offs. ATO also queries whether the OECD Handbook should be similarly amended to include a specific warning on tip-offs to ensure international consistency.

b. Tax treatment of facilitation payments

54. In Phase 3, the WGB recommended that Australia align the record-keeping requirements for deducting a facilitation payment under the Income Tax Assessment Act 1997 (ITAA) with those for the facilitation payments defence under subsection 70.4(3) of the Criminal Code (CCA), and follow-up on the application of the defence to determine whether Australian companies conscientiously comply with the record-keeping requirements (recommendation 14a). In Phase 3, the WGB noted that the record-keeping requirements for facilitation payments in the ITAA only require a taxpayer to “keep records that explain all transactions and other acts engaged in by the person that are relevant for any purpose of this Act”. Contrary to the record-keeping requirements for facilitation payments under the CCA, a taxpayer need not obtain the payer’s signature or record the identity of the foreign public official, or the particulars of the routine government action that was sought in return for the payment. The ITAA also differs from the CCA in that it does not require a record be made “as soon as practicable” following the provision of a facilitation payment. Australia acknowledged in Phase 3 that “a failure to maintain records in the form required under the CCA will not necessarily mean the person cannot claim a tax deduction”. Australia has taken no steps since Phase 3 to address this recommendation.

55. At the on-site, representatives of ATO stated that facilitation payments are not “coming under the radar” because they are probably concealed as allowable expenses. ATO authorities stated that, if an expense is described as a facilitation payment, the ATO auditor would look at it closely to ensure that it is not in fact a bribe. Further, ATO expects that in most cases involving Australian taxpayers in foreign bribery, the bribes would relate to business carried offshore either through a subsidiary or otherwise related entity where the income of the foreign entity would be exempt from Australian tax and therefore no deductions would be allowed in Australia for any related expenses. In particularly egregious cases, the payments could also be made entirely ‘off the books’ thereby making detection very difficult without evidence from an informant. Although not stated directly, it appears that one reason Australia has not made the recommended changes to the ITAA is that taxpayers are not (at least overtly) seeking deductions for facilitation payments for fear of attracting scrutiny. It does not seem that changing the record-keeping requirements under the ITAA would encourage companies to come forth and claim such deductions. As the situation currently stands, it does not appear that the inconsistency between the record keeping requirements in the ITAA and CCA impacts on taxpayers’ willingness to record and seek tax deductions for facilitation payments. Correspondingly, it does not appear to interfere with the ATO’s ability to detect

bribe payments that are concealed as facilitation payments, since companies are not claiming deductions for facilitation payments even under the less demanding record-keeping standards in ITAA.

56. The lead examiners' overarching concern is that ATO's auditors have so far not detected even one foreign bribery case. However, this is a horizontal issue across all Working Group Members, with only 1% of foreign bribery schemes between 1999 and 2017 having been detected by tax authorities.⁵⁶ The lead examiners believe that ATO's membership in FACC (see section B.3.a) might enhance its ability to detect and report suspicions of foreign bribery to AFP, if allegations are reported to AFP for evaluation that potentially involve bribe payments that have been concealed as allowable expenses for tax purposes. The lead examiners note that AFP has not directly referred any matters to the ATO since FACC's inception, however the ATO does participate in cross-agency management of bribery cases through the FACC.

Commentary

The lead examiners believe that interviewing tax payers and third parties as recommended in the internal ATO Guidelines could result in tax-payer tip offs that could seriously compromise ongoing and future foreign bribery investigations. The lead examiners therefore recommend that Australia clarify existing guidance for minimising this risk when interviewing taxpayers and third parties to verify whether tax deductions have been taken for bribe payments, such as through appropriate coordination between ATO and AFP, and communicate these to ATO officers.

With respect to Phase 3 recommendation 14a, the lead examiners do not believe that the inconsistency between the record-keeping standards in the CCA and ITAA is impacting on the tax treatment of facilitation payments in practice. They therefore recommend that the WGB instead follow-up on whether ATO proactively detects and reports to AFP suspected bribe payments to foreign public officials.

A.3. Obligations on Australian Public Servants to Report Foreign Bribery

57. Two Phase 3 recommendations relating directly to the detection of foreign bribery by public servants remained unimplemented at the end of the Phase 3 review cycle. These are discussed below.

a. Australian Public Service Guide

58. In Phase 3, the WGB recommended that Australia amend its Australian Public Service (APS) Guide to reflect its practice of requiring Australian public servants who work overseas to report suspicions of foreign bribery to AFP in all cases (recommendation 15b). At that time, the APS Guide did not explicitly require such reporting;⁵⁷ although overseas civil servants were trained to report all foreign bribery allegations to AFP. Australia explains that in February 2016, the Australian Public Service Commission (APSC) updated its APS Values and Code of Conduct, which now states: "Suspicions of foreign bribery should be reported to the Head of Mission and the Australian Federal Police in all cases". With this clarification, Phase 3 recommendation 15b appears fully implemented.

b. Reporting by AUSTRADE

⁵⁶ The Detection of Foreign Bribery, OECD, 2017. This is available online here <http://www.oecd.org/corruption/the-detection-of-foreign-bribery.htm>

⁵⁷ The APS Guide stated that overseas civil servants must report foreign bribery committed by "another Australian who is not an APS employee" to a senior person within the agency who should "consider the most appropriate course of action, including reporting to the local law enforcement authorities or the AFP".

59. In Phase 3, the WGB also recommended that Australia ensure that Australian public servants, and officials and employees of independent statutory authorities be subject to equivalent reporting requirements (recommendation 15c). At that time both DFAT and AUSTRADE officials were required to report foreign bribery allegations to a ‘senior official’, which were then passed on to AFP. However, AUSTRADE officials were only required to report allegations involving AUSTRADE clients. AUSTRADE now requires that any allegation of bribery it receives is reported to the AFP, whether a client or otherwise.

60. Australia has not taken any specific steps to implement recommendation 15c. The Australian authorities provide that the scope of a public servant’s reporting obligation depends on whether s/he is employed under the Public Service Act (PSA) or other legislation, and that the large majority of Australian public servants, officials, and employees that are working overseas and likely to witness foreign bribery are covered by the PSA. To date, one foreign bribery allegation that proceeded to investigation was detected and reported to AFP by DFAT. However, DFAT also confirms that over the last five financial years, its Aid Risk Management and Fraud Control Branch, which deals with potential or suspected corruption and fraud committed against DFAT by external parties, has dealt with 36 matters involving suspected or alleged bribery involving public money managed by DFAT. One of these matters concerned the bribery of foreign public officials by an Australian company or individual, and was reported to AFP in March 2014. In addition, DFAT’s Transnational Crime Section, which refers all extra-territorial offences to AFP, has referred five allegations to AFP since March 2014 that did not involve public money managed by DFAT.

61. The lead examiners believe that ‘in the course of their work’, AUSTRADE officials would normally be in a position to detect foreign bribery perpetrated by client companies and that the focus of monitoring in this respect should be on ensuring that in the course of its trade facilitation role, AUSTRADE effectively detects and reports its foreign bribery suspicions that involves client companies. At the on-site, AUSTRADE stated that it has been involved in the detection and reporting to AFP of two major foreign bribery cases.

Commentary

The lead examiners consider Phase 3 recommendation 15b fully implemented following the amendment to the APS Guide clarifying that “suspicions of foreign bribery should be reported to the Head of Mission and the Australian Federal Police in all cases”. In addition, the lead examiners believe that the Working Group should follow-up on whether AUSTRADE, in the course of its trade facilitation role, effectively detects and reports to AFP foreign bribery suspicions that involve client companies.

A.4. Export Finance and Insurance Corporation

62. In response to the Phase 4 questionnaire, EFIC reports that it has declined to support transactions due to suspicions of bribery or corruption and referred to law enforcement authorities one matter of alleged foreign bribery involving an Australian company with whom EFIC has an ongoing relationship. This matter is the subject of a current evaluation. EFIC is involved in financing business transactions in high corruption-risk sectors, such as oil and gas, and high risk economies. One such example is a significant

loan made by EFIC to a project in the extractives sector in PNG. The project in question attracted substantial negative publicity due to the occurrence of numerous controversies including violence, lack of safety resulting in deaths, and corruption on a large scale.⁵⁸

63. EFIC conducts ongoing customer due diligence on an annual basis, or more frequently if circumstances warrant. The evaluation team considers ongoing due diligence of projects financed by EFIC in high risk jurisdictions and sectors a basic strategy for facilitating the detection and reporting of foreign bribery by its clients.

Commentary

The evaluation team considers that EFIC's ongoing due diligence of projects that it has financed in high risk sectors and jurisdictions is a good strategy for facilitating the detection and reporting of foreign bribery by its clients and does not see a need for further recommendations on this issue.

A.5. Defence contracting

64. The Australian Government's ten-year Defence Budget Plan to 2025-26 increases the Department of Defence's (DoD) budget from AUD 32.4 billion in 2016-17 to AUD 58.7 billion in 2025-26.⁵⁹ The Government will invest approximately AUD 195 billion in DoD's capability to 2025-26.⁶⁰ A significant part of the 2016 Defence Industry Policy Statement concerns the innovation potential of Australian defence companies. In order to harness their potential, the Government is committed to inter alia maximising opportunities for Australian defence companies, and building their export potential.⁶¹ With increased exports in the Australian defence sector, the risk of bribery of foreign public officials will also increase. To date, DoD has not played a role in detecting and reporting allegations of the bribery of foreign public officials to AFP. The Australian authorities state that while DoD has not detected incidences of alleged foreign bribery by DoD officials or contractors, there are robust and established policies, systems, and procedures for reporting these types of allegations within DoD and for formal referral by DoD to AFP.

65. During the on-site, the DoD representative was not aware that a case involving a company in the defence industry had been the subject of an enforcement action. Following the on-site, the Australian authorities confirmed that DoD had not been made aware by AFP of the allegation concerning the company and explained that, in deciding whether to request assistance from an agency such as DoD, AFP would always balance the need to protect the integrity of the investigation.

Commentary

Australia's defence export sector is expanding, thus increasing the risk of foreign bribery in relation to foreign defence contracting. The lead examiners believe that DoD may become aware of foreign bribery suspicions regarding Australian defence companies, including when conducting due diligence on its contractors and potential contractors. The lead examiners therefore recommend that the Working Group follow-up on whether DoD is reporting credible suspicions of foreign bribery involving its contractors and potential contractors to AFP in line with its policy.

A.6. Reporting by accountants and auditors

⁵⁸ [Dirty Money: How corrupt PNG cash is reaching Australia](#) (SBS News, 23 June 2015)

⁵⁹ [Australian Government Defence Industry White Paper](#) (At a Glance, Department of Defence)

⁶⁰ Ibid.

⁶¹ Ibid.

66. In Phase 3, the WGB recommended that Australia extend the reporting obligation to external auditors under the Commonwealth Corporations Act to cover the reporting of foreign bribery, including foreign bribery committed by an audited company's subsidiary or joint-venture partner (recommendation 15a). At the time of Phase 3, external auditors were not required to report suspected foreign bribery to the competent authorities. However, they were required to report any reasonable suspicions of a significant contravention of the Corporations Act to ASIC. This obligation could apply to books and records offences such as falsifying company books and records that relate to foreign bribery. In addition, in Phase 3, external auditors explained that the reporting obligation under the Corporations Act applied only to contraventions committed by the audited company, not by any subsidiaries or joint-venture partners. Such reporting was explicitly exempt from an external auditor's duty of confidentiality.

67. Paragraph X.B.(iii) of the 2009 Recommendation states that Member countries should "require" external auditors to report indications of suspected acts of foreign bribery that they discover to management, and, as, appropriate, to corporate monitoring bodies. Paragraph X.B.(v) states that Member countries should "consider requiring" the external auditor to report such acts of bribery to the "competent authorities independent of the company, such as the law enforcement or regulatory authorities". Indeed, Auditing Standard ASA 240 which has statutory force in Australia, requires external auditors to report suspected fraud (which includes foreign bribery) to the appropriate level of management.⁶² The external auditor shall also determine if there is a responsibility to report the suspicion to the regulatory or enforcement authorities; although the auditor's professional duty to maintain confidentiality of client information may preclude such reporting, the auditor's legal responsibilities may override the duty of confidentiality in some circumstances.⁶³ This obligation is in addition to the requirement under the Corporations Act discussed above to report books and records offences such as false accounting related to foreign bribery to ASIC, the relevant regulatory body in Australia.

68. At the on-site, a major organisation representing lawyers stated that it would be a breach of the Corporations Act for an external auditor to report a foreign bribery suspicion of a client company directly to the law enforcement authorities. A major global accounting and auditing firm added that the focus of an audit is identifying 'material misstatements' in companies' books and records, and most bribe payments would not meet the materiality threshold.

69. The evaluation team therefore considers that the WGB should focus on external auditors' reporting obligations under the Corporations Act and ASA 240. It is known that at least five of the 57 cases of foreign bribery that had been the subject of enforcement actions (evaluations, investigations, or prosecutions) were detected through self-reporting. This might indicate that external auditors have been active in reporting suspicions of foreign bribery to at least management or corporate monitoring bodies, which could contribute to self-reporting by the corporate, and perhaps directly to ASIC and/or AFP. AFP advises that the majority of the self-reported cases were detected through internal audit processes. A number of referrals have been received as a result of internal audits as part of due diligence and acquisition and merger activity. ASIC also advises that it has now received its first notification from an auditor since the Phase 3 follow-up in relation to suspected foreign bribery and the matter is currently being assessed. AFP has also been notified of this matter by ASIC through the FAC Centre and MoU arrangements.

⁶²"The Auditor's Responsibilities relating to Fraud in an Audit of a Financial Report": <https://www.legislation.gov.au/Details/F2009L04075>

⁶³ Ibid, section 42.

Commentary

The lead examiners believe that Australia's laws regarding reporting of suspected foreign bribery by external auditors are consistent with Paragraph X(b)(iii) of the 2009 Recommendation and that the Working Group should follow-up on the implementation of these laws in practice.

A.7. The role of whistleblowers in detecting foreign bribery

70. At the time of Phase 3, a patchwork of laws at the Commonwealth level provided some whistleblower protections in foreign bribery cases. The WGB thus recommended that Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable grounds from discriminatory or disciplinary action (recommendation 15d) This was deemed partially implemented at the time of Australia's written follow-up report in 2014 as the Government had taken steps to amend the protections afforded to *public sector* whistleblowers, but made no changes with respect to those who report in the *private sector*.

a. Public sector protections

71. Australia's Public Interest Disclosure Act 2013 (PIDA) came into force in January 2014. It protects current, former, or deemed⁶⁴ Commonwealth public officials from reprisal action and applies to disclosures about suspected or probable illegal conduct or other wrongdoing. Generally speaking, it does not apply to state/territory level public officials. The PIDA also applies to employees, officers etc. of Corporate Commonwealth entities (i.e. bodies corporate established under the Public Governance, Performance and Accountability (PGPA) Act 2013) as well as Corporations Act companies that are either majority owned or controlled by the Commonwealth – though the subsidiaries of such companies are not captured.⁶⁵ Again, employees of companies owned at the state/territory level are not captured.

72. Disclosures under PIDA are intended to be made internally (i.e. within the relevant government agency). Where it is inappropriate to make an internal disclosure, for example, if the allegation relates to the principal officer of an agency, a disclosure can be made to the Commonwealth Ombudsman or to the Inspector-General of Intelligence and Security (if the disclosure relates to an intelligence agency). There is also scope to make external disclosures (e.g. to law enforcement or media) where an internal disclosure has been handled inadequately, provided it is in the public interest.⁶⁶ In 2016, the PIDA underwent an independent review and a report making 33 recommendations for improvement was tabled in Parliament in October 2016.⁶⁷ Recommendations included the addition of positive obligations on employers to train and educate public officials on integrity and accountability and to afford witnesses the same protections offered to the actual whistleblower.

73. During the on-site, officials advised that the Government is considering these recommendations in conjunction with Parliament's wider Inquiry into whistleblower protections, discussed further below.

b. Private sector protections

⁶⁴ PIDA, s70

⁶⁵ See PIDA, s71-72 and *Public Governance, Performance and Accountability Act 2013 (PGPA)* s89.

⁶⁶ See PIDA, s26 for other requirements.

⁶⁷ <https://www.pmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf>

74. While the Government has taken some steps since Phase 3 to strengthen protections for private sector whistleblowers, the situation remains largely unchanged, although reforms are currently before Parliament (discussed at section A.7.d. below). Under the Corporations Act 2001, officers, employees, and contractors of Australian companies can make protected disclosures to ASIC in relation to “suspected contraventions” of ‘corporations legislation’ (i.e. the Australian Securities and Investments Commission (ASIC) Act 2001, Corporations Act 2001, and certain rules of Court⁶⁸). Protections for whistleblower disclosures made to ASIC are contained in Part 9.4AAA of the Corporations Act. Reports of suspected foreign bribery, money, laundering, and the new false accounting offences discussed in section B.2.a below are not covered, although such conduct would likely also constitute a breach of the directors duties provisions of the Corporations Act.⁶⁹ While whistleblower laws that apply to financial institutions cover internal disclosures about any misconduct, including foreign bribery, disclosures to law enforcement and the media are not protected.

75. In 2014, ASIC established a dedicated Office of the Whistleblower to receive protected disclosures under the corporate legislation mentioned above, and other specified Acts (for example, the Insurance Contracts Act and Life Insurance Act). ASIC may direct reports it receives to relevant agencies, including through a formal release of information under section 127 of the ASIC Act. The ASIC website contains detailed information and video clips for individuals and companies on their obligations with respect to whistleblower reports and the role of ASIC in receiving such reports.⁷⁰

76. While these are positive steps, the legislative framework for private sector whistleblowers still contains major deficiencies, and its disjointed nature makes it difficult for the public to understand the protections on offer and how they can obtain them. Australia has been pursuing reforms to address these deficiencies and in December 2017, a Bill was introduced to Parliament proposing reforms to strengthen protections for private sector whistleblowers (discussed further below at A.7.d).⁷¹

⁶⁸ Corporations Act, section 1317AA, of Part 9.4AAA,

⁶⁹ Section 1317AA Corporations Act.

⁷⁰ <http://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/>

⁷¹ Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017

(https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1120)

c. Whistleblowing in practice

77. Despite the lack of clear protections in Australian legislation, whistleblowing does occur. In 2015-16, ASIC dealt with 146 disclosures, mainly relating to corporations and corporate governance. Around 80% of disclosures were assessed as requiring no further action, often owing to insufficient evidence. Around 10% of matters were referred for compliance, surveillance, or investigation. As at May 2017, there had been no whistleblower reports to ASIC leading to the detection of foreign bribery cases. Annual reporting under the PIDA does not identify the number of disclosures involving foreign bribery. Table 1 below provides a snapshot of reporting under the Act.

Table 1: Annual reporting under the PIDA

	Reports by agencies	Number of completed investigations	Finding of 'disclosable conduct'	Percentage of disclosable conduct relating to a contravention of Australian law
2013-14	378	223	Unknown	Unknown
2014-15	639	386	99	68%
2015-16	612	391	49	16%
2016-17	684	365 (to end of Oct 17)	105	13%

78. In terms of foreign bribery whistleblowing, at least three foreign bribery enforcement actions reported by Australia appear to have been reported by whistleblowers. During the on-site, representatives from across the private sector and civil society repeated widespread media reports that whistleblowers in one foreign bribery enforcement action lost their jobs and have struggled to obtain new employment as a direct consequence of their reports to AFP.⁷² They asserted that there is a perception among the Australian public that any form of external whistleblowing will almost definitely result in reprisals. While there was general agreement among non-government representatives that the government was taking steps to improve Australia's whistleblower protections, one participant summed up the status quo as providing "no incentive for whistleblowers to speak up and no protection for them if they do." Several private sector commentators expressed the view that stronger whistleblower protections would lead to increased foreign bribery enforcement.

d. Whistleblower reforms

79. Since Phase 3, Australia has taken steps towards strengthening its whistleblower protection frameworks more generally. On 30 November 2016, the Senate referred an inquiry into whistleblower protections in the corporate, public, and not-for-profit sectors to the Joint Parliamentary Committee on Corporations and Financial Services ("the Committee"). The Government provided, that if the Committee recommended the adoption of stronger whistleblower protections in the corporate and public sectors, it

⁷² See, for example, <http://www.smh.com.au/federal-politics/political-news/after-securency-rba-whistleblower-case-highlights-calls-for-federal-icac-20160624-gpr019.html>

would establish an expert advisory panel to expedite the development of new legislation would be put to a parliamentary vote no later than June 2018.⁷³

80. The Committee reported back in September 2017 and made a suite of recommendations aimed at improving Australia's whistleblower protection frameworks, including the introduction of a rewards-based system, removing the 'good faith' requirement, and the establishment of a 'one-stop shop' Whistleblower Protection Authority that covers the public and private sectors. Notably, the Committee recommends that all private sector whistleblowing legislation be brought together in a single Act, and that this be redrafted in parallel with the public sector whistleblowing legislation (thus affording private sector whistleblowers additional protections such as anonymous reporting and covering offences under the CCA). The Committee also recommends that the Government examine options for ensuring ongoing alignment between public and private sector whistleblower frameworks, including the possibility of combining the private sector protections in a single Act and harmonising Commonwealth, States, and Territories' whistleblowing legislation. The Government is considering the Committee's recommendations and will respond in due course.

81. Separately, the Government committed to strengthening whistleblower protections in the tax and corporate sectors in Australia's first Open Government National Action Plan (December 2016) and, for the tax sector, also in the 2016-17 Budget. On 7 December 2017, the Government introduced a Bill to Parliament which proposes protections for disclosures of misconduct, 'improper state of affairs', and breaches of *any* Commonwealth legislation that carries a jail term of 12 months or more (which includes foreign bribery, false accounting and money laundering).⁷⁴ In addition to delivering on the commitments in the Open Government National Action Plan, Australia also notes that this legislation will also address many of the Committee's abovementioned recommendations. While the Working Group does not, as a matter of practice, assess draft laws, it notes that the changes in the Bill are intended to strengthen Australia's whistleblower protection regime.

Commentary

The lead examiners welcome the steps that Australia has taken since Phase 3 to strengthen its whistleblower protections, notably, amendments to the PIDA, the establishment of a dedicated Office of the Whistleblower for corporate disclosures, and the Parliamentary Inquiry into whistleblower protections in the corporate, public, and not-for-profit sectors. The lead examiners are also encouraged by the introduction of a Parliamentary Bill proposing reforms to whistleblower protections in the tax and corporate sectors, and it recommends that Australia proceed with the enactment of legislation that provides clear, comprehensive, protections for private sector whistleblowers who report foreign bribery and related offences which align (where appropriate) with the protections available for public sector whistleblowers in the PIDA. The lead examiners further recommend that Australia raise awareness of any new legislation to ensure that employees in all sectors are fully apprised of the new regime. Finally, the lead examiners recommend that the Working Group follow-up on the steps that Australia has taken to address the recommendations made by the Committee with respect to whistleblowers in both the public and private sectors.

⁷³ The Senate, Hansard, Monday 21 November 2016, at p.2745 and p.2752 (<http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22chamber/hansards/5e26e672-7115-4c74-85bb-c6d311556c93/0000%22>).

⁷⁴ <https://consult.treasury.gov.au/market-and-competition-policy-division/whistleblowers-bill-2017/>

A.8. Role of Australian media in prevention and detection

82. The media has so far played a very significant role in detecting foreign bribery cases with eight out of 57 evaluations/investigations reported by Australia detected by media sources. This makes the media the second most common source of allegations after referrals from the public sector. This includes evaluations initiated on the basis of media reports as well as cases where journalists have proactively approached AFP with allegations.

83. The evaluation team was conscious that Australia's Phase 3 Report and two-year follow-up report addressed the use of media suppression orders in relation to proceedings in politically sensitive foreign bribery cases, and wanted to determine whether the use of such orders might have a chilling effect on the media. However, there was no evidence of such an effect at the on-site, at which a major Australian media outlet even stated that the suppression order had spurred it on to report even more vigorously on foreign bribery cases.

B. ENFORCEMENT OF THE FOREIGN BRIBERY OFFENCE

B.1. Foreign bribery offence

a. Amendments since Phase 3

84. In Phase 3, the Working Group noted that Australia's foreign bribery offence could be read as requiring proof of intention to bribe a specific foreign public official and recommended that Australia take appropriate steps to clarify that this is not the case (recommendation 2b). In 2015, Australia amended section 70.2(1A)(a) of the CCA to explicitly state that there is no requirement that an offender "intend[s]] to influence a *particular* foreign public official."⁷⁵ This same amendment also clarified that any business advantage obtained from the offending conduct does not need to be obtained or retained in practice. While this had not previously been identified as an issue by the WGB, the amendment provides clarity and is welcomed by the lead examiners.

85. The maximum penalty applicable to foreign bribery increased significantly on 1 July 2017, due to changes in the value of the Commonwealth penalty unit. The maximum fines for natural persons increased from AUD 1.1m to AUD 2.1m (EUR 1.39m).⁷⁶ The maximum fine for legal persons is now whichever is greater out of AUD 21m (EUR 13.9m) (c.f AUD 11m in Phase 3); three times the value of the benefit obtained; or 10% of annual turnover where this benefit cannot be determined.⁷⁷

b. Amendments before Parliament

86. Since Phase 3, Australia has identified a number of other potential issues in its foreign bribery legislation and on 6 December 2017, following public consultations on proposed reforms, the Government

⁷⁵ Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015 (Cth)

⁷⁶ Based on exchange rate at time of drafting.

⁷⁷ See CCA, Division 70 for full description of fines.

introduced a Bill to Parliament containing measures designed to remove unnecessary barriers to the prosecution of foreign bribery.⁷⁸

87. The Bill would make a number of amendments to the existing offence, including extending the definition of “foreign public official” to include candidates for office; removing the requirement that the benefit and business advantage be “not legitimately due” and replacing it with the concept of “improperly influencing” a foreign public official; clarifying that the offence does not require the accused to have a specific business advantage in mind; clarifying that the business advantage can be obtained for someone else; extending the offence to cover bribery to obtain a personal advantage; and removing the requirement that the bribe influences the foreign public official “in the exercise of their official capacity”. The Bill would also introduce a new corporate offence of failing to prevent foreign bribery and a deferred prosecution agreement (DPA) scheme, which would apply to foreign bribery and other specified serious corporate offences (discussed further under Part C of this report).

88. During the on-site, CDPP reiterated that one of the biggest barriers to successful foreign bribery prosecutions is proving an offender’s ‘intent to influence’ a foreign public official where the suspect has been wilfully blind toward the offending. Australian authorities note that in such cases, it is challenging to show intention on the part of senior managers and directors, owing to difficulties obtaining evidence from overseas. This is important given almost all foreign bribe payments are made through third party agents or intermediaries (often based abroad). During the on-site, CDPP advised that the Government sought to address this issue through the introduction of a new offence of recklessly bribing a foreign public official. However, this proposed new offence was not ultimately included in the abovementioned Bill that was recently introduced to Parliament. Australian authorities provide that while obtaining the necessary evidence to establish intention can be particularly challenging in the context of foreign bribery, the requirement to prove intention is a necessarily high bar and a fundamental component of Australia’s legal framework. The lead examiners note that obtaining evidence from abroad is a horizontal issue that impacts on all countries and cannot identify any specific issues with the methods AFP and CDPP use to obtain evidence from abroad.

Commentary

The lead examiners welcome the 2015 amendments to Australia’s foreign bribery offence, and consider that the revised legislation fully implements Phase 3 recommendation 2. They also welcome Australia’s proactive approach toward identifying other potential legislative issues. While as a matter of practice, the WGB does not assess proposed legislation, the lead examiners acknowledge that the amendments introduced into the Australian Parliament in December 2017 are intended to clarify and strengthen Australia’s foreign bribery offence. In light of CDPP’s statement that proving an offender’s ‘intent to influence’ is one of the biggest barriers to successful prosecutions (owing to issues obtaining evidence from abroad), the lead examiners recommend that the Working Group follow-up on whether there are any specific issues impacting on CDPP’s ability to prove intent.

c. Defence for facilitation payments

89. In Phase 3, the WGB recommended that Australia continue to raise awareness of the distinction between facilitation payments and bribes. Recognising that such payments must in all cases be accurately accounted for in companies’ books and financial records it also recommended that Australia encourage

⁷⁸ Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017
(https://www.aph.gov.au/Parliamentary_Business/Bills_Legislation/Bills_Search_Results/Result?bId=s1108)

companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics, and compliance programmes or measures (recommendation 2a). Under section 70.4 of the CCA, it is a full defence to the foreign bribery offence if the payment in question constitutes a ‘facilitation payment’ (defined therein) provided specific record-keeping requirements are met. Australia’s Phase 3 report noted comments from representatives of civil society and the accounting and auditing profession that there was “general confusion about the defence”. At that point, the review team perceived there was a lack of understanding as to companies’ recording obligations.⁷⁹

90. In response to the Phase 4 Questionnaire, Australia highlights a number of initiatives taken since Phase 3 to implement Recommendation 2a. For instance, all AFP outreach activities now address the distinction between facilitation payments and bribes, including the criteria for applying the defence, and highlight the obligation on companies to record such payments. Since 2012, AUSTRADE has included the distinction between facilitation payments and bribes in all relevant training for its staff, and in all of its outreach activities to Australian companies. DFAT policies targeted at its delivery partners now make it clear that DFAT funds cannot be used to make facilitation payments. In addition, the distinction is drawn in AGD’s online learning module on foreign bribery for companies. In 2015, the Secretary of the AGD wrote to heads of industry and business associations representing small business and exporting companies encouraging them to incorporate the learning module in their training activities (see section A.2.b above for discussion on the tax implications of facilitation payments.).

91. In November 2011, the Australian Government issued a public consultation paper seeking views on whether the facilitation payments defence should be repealed. Of the fifteen submissions received, nine favoured repeal and six opposed it. Those in favour of retaining the defence included companies from the mining sector operating in Central Africa and Asia-Pacific, which argued that it was not possible to conduct business in those regions without making such payments. In the years following this consultation, the Government has taken no steps to repeal or amend the offence. Officials advise that no reforms to the defence were included as part of the Government’s recent consultation on the foreign bribery offence as it has not presented as an issue in enforcing the offence. However, the Senate Inquiry on foreign bribery that was ongoing at the time of the on-site was considering whether to retain the defence and Australia provides that it will continue to review the operation of the defence as required under the 2009 Recommendation.

92. At the on-site, the treatment of facilitation payments under the law and in practice was a major recurring issue. The majority of participants from civil society and the private sector took the position that the defence should not be maintained. A major civil society organisation that provides support to exporting companies stated that the defence is a grey area and causes confusion. Its representative felt that the confusion caused by the defence is a deterrent for entering certain markets. Another major non-governmental organisation that promotes accountability in the public and private sectors stated that facilitation payments in the oil and gas industry are particularly pervasive, and that the prevalence of joint ventures in this industry means that such payments are commonly disguised as joint venture expenses. A transportation company stated that facilitation payments are one of the ‘darkest areas’ of doing business, and in order to prevent their use it no longer employs third parties. One mining company underlined that facilitation payments harm developing countries and another said that while it is large enough to say ‘no’ to such payments, SMEs may lose business if they do not give in to pressure to make them. One of

⁷⁹ Australia Phase 3 report, p10.

Australia's largest banks stated that the facilitation payments defence should be repealed as its existence in Australian law negatively impacts Australia's reputation and moral authority. An association that represents the accounting profession stated that the defence injects uncertainty into the law.

93. In addition to the discussions at the on-site about facilitation payments, TI Australia, made a formal submission to Australia's Phase 4 review, in which it states that "the continued existence of facilitation payments as a defence" to the Australian foreign bribery offence shows that Australia is "out of step with global best practice to combat bribery and corruption, and at odds with the policy and practice of many of Australia's companies engaged in transboundary business".

94. At the on-site, representatives of the Australian government also shared their views on the facilitation payments defence. DFAT discourages the use of such payments. A representative from AUSTRADE stated that despite government efforts, many companies struggle to discern such payments from bribes. Furthermore, the AUSTRADE representative stated that, although they are aware of the legal requirement for keeping proper records about making facilitation payments, many companies appear not to be doing so in practice. The AUSTRADE representative also acknowledged that some Australian companies are clearly in favour of repealing the defence while others prefer maintaining it. The AUSTRADE representative noted that that repealing the defence might provide greater certainty for business about the operation of the law. CDPP's position is that the defence has not posed a challenge to prosecuting the matters referred to it so far.

Commentary

The lead examiners consider that Australia has now fully implemented Phase 3 recommendation 2 on facilitation payments, due to extensive awareness-raising initiatives and consultation processes on their use. However, there remains significant dissatisfaction with the existence of the defence among Australia's public and private sectors and civil society representatives, including those represented at the on-site. The lead examiners thus recommend that the WGB closely follow-up the Australian Government's ongoing review and monitoring of the defence. In particular, the WGB should follow-up on any recommendations on facilitation payments that come out of the ongoing Senate Inquiry into foreign bribery.

B.2. Offences related to foreign bribery

a. Introduction of new false accounting offences

95. In Phase 3, the Working Group recommended that Australia increase the maximum sanctions against legal persons for false accounting (recommendation 4a). At that time, false accounting was punishable as a strict liability offence under the Corporations Act, carrying a low penalty of just EUR 11 478 for legal persons. Alternatively, prosecutors could rely on state level criminal legislation, however, the fines against legal persons were still deemed too low for foreign bribery-related false accounting, given the size of the bribes and contracts involved (e.g. under the Victorian Crimes Act, legal persons convicted of false accounting were subject to a fine of EUR 705 000). To address this, on 1 March 2016, Australia enacted broad false accounting offences into the CCA, which apply to both intentional and reckless conduct.⁸⁰ The offences have extraterritorial effect and the maximum penalties available against natural and legal persons are the same as those for foreign bribery.⁸¹

⁸⁰ CCA, Division 490

b. Enforcement of false accounting offences

96. In Phase 3, concerned by the low level of enforcement of Australia's false accounting offences related to foreign bribery, the WGB also recommended that Australia vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (recommendations 4b and 8a(v)). Since October 2012, ASIC has commenced 19 prosecutions for false accounting offences. All but one prosecution resulted in conviction. The court imposed a term of imprisonment in two cases and suspended sentences in five cases. Of the ten offenders convicted under section 1307 (falsifying books), all were automatically disqualified from managing a corporation. Of the nine offenders convicted under section 286 (obligation to keep financial records), two were disqualified from managing a corporation and judicial winding up orders were imposed in four cases. Only one of 19 convictions resulted in a fine (of just AUD 3250). The maximum available penalties for false accounting have increased substantially under the new offences in the Criminal Code. The Working Group should thus continue its standard monitoring of these offences to ensure that Australia is enforcing the new laws and imposing penalties for false accounting that are effective, proportionate and dissuasive.

97. As outlined earlier in the report, in 2012, one former executive pleaded guilty to false accounting related to foreign bribery, and others continue to face false accounting charges in relation to ongoing foreign bribery proceedings. ASIC's involvement in FACC is a positive initiative that has and should continue to result in enhanced enforcement. Through its involvement in FACC, ASIC becomes aware of all foreign bribery matters, and AFP reports that it has directly referred one such matter to ASIC as a result of a criminal evaluation by FACC. In conjunction with this direct referral, a number of parallel investigations have commenced following an exchange of information and intelligence relating to allegations of foreign bribery. By way of example, ASIC has recently commenced an investigation (in parallel with an AFP investigation) in relation to potential breaches of section 1307 of the Corporations Act (falsifying books) related to suspected foreign bribery. Charges have also been laid against two former company executives for section 1307 breaches that came to light during another foreign bribery investigation – though the breaches are not related to the alleged foreign bribery.

98. The above operational examples demonstrate the closer working relationship developed between the AFP and ASIC since the Phase 3 evaluation. This bilateral relationship is indicative of a shift towards greater proactivity and early engagement by enforcement agencies in the response to combatting foreign bribery. The collaborative relationship is underpinned by an MOU designed to promote interagency cooperation information sharing in relation to foreign bribery. Under the MoU, each agency undertakes to notify the other upon receipt of a new foreign bribery referral where it can be expected that both agencies will have jurisdiction. In addition to operational coordination on evaluations and investigations, both agencies participate in joint training and outreach activities and share relevant expertise. This is evidenced by ASIC's participation in WGB Law Enforcement Network meetings in 2016-2017.

⁸¹ Natural persons who intentionally commit false accounting are subject maximum penalties of 10 years' imprisonment, a fine of 10,000 penalty units (AUD 2.1 million), or both. The maximum penalty for a legal person who intentionally commits the offence is the greater of (i) 100 000 penalty units (AUD 21 million); (ii) three times the value of the benefit obtained by the body corporate and any related body corporate from the offence, and (iii) 10% of the annual turnover of the body corporate during the 12 months ending at the end of the month during which the conduct constituting the offence occurred (where the court cannot determine the value of the benefit obtained from the offence). The penalties are halved for those that recklessly commit the offence. Penalties for natural and legal persons are halved where the offence is committed recklessly.

c. Enforcement of money laundering offence predicated on foreign bribery

99. In Phase 3, the WGB also recommended that Australia routinely consider money laundering charges, especially in cases where it cannot prove a substantive charge of foreign bribery (recommendation 8a(v)). This recommendation arose because the WGB considered that AFP had given insufficient consideration to alternative false accounting and money laundering charges in a specific foreign bribery case.

100. In response to the Phase 4 Questionnaire, Australia states that AFP routinely considers all possible alternative charges in assessing foreign bribery matters. Guidance on this approach is provided in AFP's Foreign Bribery Investigators Reference Guide, and is reinforced through training activities such as the Foreign Bribery Workshop (discussed under B.3.b) and Advanced Foreign Bribery Investigators Program. In the case in which foreign bribery convictions were obtained in September 2017 against three individuals, one of the offenders was initially charged with a money laundering offence. The charge was ultimately withdrawn as CDPP considered that the given that the seriousness of his conduct was appropriately reflected through the charge of conspiracy to commit foreign bribery.

Commentary

The lead examiners welcome the introduction of false accounting offences into the Criminal Code Act and consider that the associated sanctions fully address Phase 3 recommendation 4a. The lead examiners also note the recent cooperation between AFP and ASIC on false accounting investigations, including in a number of instances related to foreign bribery and that ASIC is routinely prosecuting accounting offences. They therefore consider that Phase 3 recommendation 4b is now fully implemented, but recommend following up whether this trend continues as practice further develops. The lead examiners commend Australia for the steps it has taken since Phase 3 to routinely consider money laundering charges and therefore consider recommendation 8a(v) fully implemented.

B.3. Investigation of foreign bribery cases

101. In Phase 3, the Working Group recommended that Australia take steps to ensure that foreign bribery investigations are not prematurely closed, be more proactive in gathering information at the pre-investigative stage, and to continue to systematically consider whether AFP should conduct concurrent or joint investigations with other Australian law enforcement agencies (recommendations 8a(i), 8a(ii), and 8a(iv)). At the time of its two year written follow-up report, the WGB remained concerned about the low levels of enforcement and asked to report back on on these recommendations in six months' time. Since Phase 3 Australia has taken substantial steps to address these concerns. These measures are outlined below.

a. Establishment of AFP Fraud and Anti-Corruption Centre

102. In 2014, the Australian Government formally launched the Fraud and Anti-Corruption Centre (FACC). FACC is designed to leverage the capabilities of a range of Commonwealth agencies to provide a coordinated, whole-of-government, operational response to serious and complex fraud and corruption, including foreign bribery. FACC is hosted by AFP in Canberra and currently includes seven members from AFP and staff seconded from ten other participating agencies: Australian Border Force (ABF), Australian Competition and Consumer Commission (ACCC); Australian Criminal Intelligence Commission (ACIC); ASIC; ATO; AUSTRAC; DoD; DFAT, Department of Human Services; Department of Social Services (DSS); and Department of Education.). FACC also engages with its two advisory agencies, AGD and CDPP, on an ad hoc basis. Australia provides that FACC enhances the enforcement of foreign bribery through its key functions, namely evaluation, quality assurance and training, and intelligence. These are discussed further below.

i. Evaluation of Referrals

103. A key strength of FACC is its ability to leverage the knowledge, capabilities, and systems of its participating agencies in evaluating serious and complex fraud and corruption referred to AFP. This includes identification of the most effective strategy for dealing with individual referrals and determination of whether or not such referrals should proceed to investigation. During the on-site, representatives of AFP emphasised that while FACC may request information to assist its evaluation, its core role is the assessment of information received and that it is not itself an investigative body.

104. All allegations involving foreign bribery fall within FACC's mandate. FACC receives referrals of alleged foreign bribery through a range of sources, including directly from another agency, through AFP's Operation Coordination Centre, and matters identified during ongoing investigations of alleged corruption or other crimes. Upon receipt, all referrals are systematically assigned to a case officer who conducts an initial evaluation and then analyses the matter with a smaller team within FACC. This process enables experts seconded from across government to identify offences within their agencies' mandates and so they can act as liaison points with their home departments to collect further information and advice as required. Where information within the referral is compelling, a decision may be taken by FACC management for the matter to proceed directly to investigation.

105. Where foreign bribery is suspected, the FACC evaluation team consults the Foreign Bribery Panel of Experts (the Panel) (discussed further below) which provides independent expert operational guidance, including on whether a referral contains sufficient information to generate suspicion of foreign bribery and thus proceed to investigation. For every evaluation, the case officer prepares a report recommending that the matter either be rejected for lack of evidence or referred to AFP or another relevant agency for investigation (e.g. ATO for tax-related crimes, ASIC for Corporations Act offences). The Panel quality assures all evaluations and subsequent recommendations before the referral proceeds to the AFP National Coordinator Anti-Corruption for endorsement and referral to appropriate AFP investigative team (based on operational capacity). The evaluation report is then presented to a Case Management Forum (CMF), comprising senior members of FACC member agencies, which meets monthly and makes the final decision on whether or not a matter proceeds to investigation. FACC's Corporate Governance Procedures provide that a decision should be made on all evaluations within 28 days. However, this can be extended upon approval of a member of the FACC management team. During the on-site, AFP representatives confirmed that this occurs regularly as some evaluations "can take months" depending on the nature and breadth of enquiries to inform the evaluation. Where the matter proceeds to investigation and the evaluation identifies a range of offences (whether Commonwealth or State), the investigations team may consult with other agencies on the possibility of conducting a parallel investigation or seconding expert staff to the AFP investigations team. A flowchart detailing the full FACC referral process is included in Annex 4.

ii. Quality assurance and training

106. In addition to its evaluation function, FACC conducts standardised quality assurance reviews on key ongoing investigations conducted by Commonwealth agencies. All foreign bribery investigations undergo a Foreign Bribery Case Review (FBCR), in addition to the usual AFP investigation reviews. The FBCR involves the case officer, team leader, Panel member, and National Coordinator Anti-Corruption. The FBCR focusses on best practice, additional lines of inquiry, international engagement, and alternate remedies for foreign bribery investigations, including the possibility of pursuing alternate offences. In the 2015-2016 financial year, 12 foreign bribery investigations were subject to this peer review process.

107. FACC also has an education function, delivering whole-of-government fraud investigations training in partnership with AFP's Learning and Development capabilities.

iii. Intelligence

108. Finally, FACC has an intelligence role which includes collecting, analysing, and disseminating data and findings arising from referrals. It also engages with existing local intelligence initiatives, and works with financial intelligence agencies such as AUSTRAC.

b. Expanded role of AFP Foreign Bribery Panel of Experts

109. As outlined in the Phase 3 Report, the Panel was established in 2012 to address the limited expertise within AFP in dealing with complex foreign bribery investigations. It consists of ten senior investigators from across the country that have had responsibility for at least one significant foreign bribery investigation and experience investigating large and complex transnational matters. The Panel's role has evolved since Phase 3 and it now has a range of operational functions to support foreign bribery evaluations and investigations.

110. As outlined above, a Panel officer provides operational guidance on each foreign bribery evaluation conducted by FACC and is integral in the development of recommendations that are considered by the Coordinator Anti-Corruption and the CMF. In addition, a Panel officer is now assigned to every foreign bribery investigation to provide expert advice and ensure consistency across investigations. Panel members are assigned to cases based on location and availability and as much as is possible, will stay on the same matter throughout the course of an evaluation and any ensuing investigation. The Panel also oversees the quality assurance reviews conducted by FACC and has developed a specific Foreign Bribery Investigators Reference Guide which provides detailed information on the range of issues that arise in the course of foreign bribery investigations. This was most recently updated in 2016.

111. In addition to assisting with evaluations and investigations, the Panel also has a detection function, including monitoring credible media sources for new allegations and collecting data from overseas law enforcement bodies to better inform its investigators. All reports involving Australian entities are referred to FACC. Seven matters have been referred to FACC based on media reporting, three of which are active investigations and four which are being evaluated. Two matters referred to FACC based on discussions with overseas law enforcement are currently under evaluation.

112. The Panel also provides input on foreign bribery-related issues to various Australian government agencies, forums, and international partners. As part of its awareness-raising function, it delivers foreign bribery specific training modules, and awareness-raising activities, and engages with financial intelligence agencies both domestically and abroad.

c. Reorganisation and funding of AFP Fraud and Anti-Corruption Business Unit

113. The Fraud and Anti-Corruption (FAC) Business Unit was established in February 2013 to combat Commonwealth offences relating to corruption, complex and serious fraud, and identity crime. One of its core focus areas is the prevention, disruption, and investigation of foreign bribery. The FAC portfolio consists of over 130 investigators based in different teams across all of Australia's major centres. Teams are constructed and funded to respond to a range of crime types, namely, general fraud and corruption (including foreign bribery), and major fraud and tax evasion (under the Serious Financial Crimes Taskforce (SFCT)). The Criminal Assets Confiscation Taskforce (CACT) is responsible for asset confiscation arising from crimes within the FAC Business Unit's mandate.

114. In April 2016, the Government announced additional funding of AUD 15 million over three years to expand the foreign bribery investigation capability of the FAC Business Unit by 26 full-time employees across three new multi-disciplinary foreign bribery teams, consisting of foreign bribery investigators, criminal asset litigators, and forensic accountants. This resulted in the establishment of two new foreign bribery investigative teams in Sydney and Melbourne and a further FAC team in Perth. During the on-site, several representatives of the private sector queried whether this is sufficient given the average length (seven years) and complexity of foreign bribery investigations. A representative of a major extractives firm suggested that AFP will not be adequately resourced until combating foreign bribery is incorporated within Australia's National Security Strategy. Australia disagrees with this, citing a combination of the above mentioned additional funding to the AFP and organisational developments within AFP and CDPP since Phase 3.

115. As outlined above, whenever FACC suspects foreign bribery, the allegation will be referred to one of the teams within the FAC Business Unit for investigation. The city to which a foreign bribery investigation is referred depends on a range of factors including where the offence took place, and the operational capacity and expertise within relevant teams at the given time. Where a dedicated foreign bribery team does not have capacity, the investigation will be allocated to one of the 'general' FAC teams, which as outlined below, are also trained and equipped for foreign bribery investigations. The lead examiners are comfortable that FAC investigators have a wide range of tools at their disposal and supporting legislation that enables them to use these tools in an effective manner in foreign bribery investigations.⁸²

d. Engagement of CDPP in foreign bribery investigations

116. During the on-site, representatives of the both CDPP and AFP emphasised CDPP's close involvement in all foreign bribery investigations. CDPP explained that it is an advisory participant (rather than a member) of FACC, as it does not have an investigative function and is thus not involved in making decisions about whether a referral proceeds to investigation. To ensure the early engagement of CDPP in foreign bribery cases, AFP now notifies CDPP at the outset of all foreign bribery investigations. Once an investigation picks up pace, a senior federal prosecutor, along with a junior lawyer, are assigned as case officers. Whether the matter is assigned to one of the foreign bribery work groups in Melbourne or Sydney, or a prosecutor from the 'network' based elsewhere in Australia, depends on available resources. Case officers assigned to a foreign bribery investigation work closely with AFP throughout the 'pre-brief' stage to ensure that the evidence brief is in good shape (e.g. contains all key evidence) before it is formally handed to CDPP for consideration of prosecution. CDPP may make further requests of AFP at any time during the brief assessment stage where it believes that further evidence is necessary before commencing a prosecution. CDPP provides that 90% of ongoing foreign bribery cases have been assigned an official case officer and that the remaining 10% still have a point of contact in one of the foreign bribery work groups.

117. During the on-site, members of AFP and CDPP were highly complementary of each other's work on foreign bribery matters. They emphasised that their relationship had come a long way in the past few years and that they have no issues with their ability to coordinate and cooperate effectively on foreign bribery investigations and prosecutions.

⁸² Australia's investigative tools have not changed since Phase 3. See paras. 90-93 of Australia's Phase 3 Report (<https://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf>)

e. AFP expertise and training

118. During the on-site, some representatives of the private sector and civil society raised concerns that AFP does not have the requisite expertise to conduct foreign bribery investigations, noting that on average, investigators only remain on foreign bribery cases for four years, which in their view is not sufficient time to accumulate the necessary expertise. They suggested that officers also tend to treat foreign bribery investigations as a stepping stone to a promotion within AFP. One academic raised concerns that investigators do not have sufficient accounting and auditing experience and a major extractives firm queried whether AFP officers are skilled enough to investigate large complex financial crimes. This was balanced by the view of other private sector representatives who acknowledged that they are not privy to the inner workings of AFP foreign bribery investigations, including the level of expertise and experience within each investigative team. A representative of a media outlet also noted the dedication that AFP officers display when working on these complex and inherently difficult cases.

119. AFP confirmed that officers tend to stay on foreign bribery investigations for around four years but noted that this is typical of complex investigations across a range of crime types (including financial crime) and strongly rebuked any suggestion that investigators are not qualified to deal with foreign bribery cases. On the weight of the information provided, and knowledge of the practice in other jurisdictions, the evaluation team is satisfied that this is the case. In the past few years, Australia has gone to great lengths to ensure that AFP has sufficient expertise and training in the area of complex financial crimes, and foreign bribery in particular. As one AFP investigator noted, “it’s hard to think of an issue that has been given more attention or priority in recent years.” AFP runs internal basic and advanced foreign bribery courses each year for investigators within the FAC Business Unit. These courses are conducted for a week and include presentations from the Panel of Experts and representatives of other agencies such as CDPP, AGD, ASIC, and DFAT as well as the private sector. AFP also invites foreign law enforcement agencies to participate and members of the International Foreign Bribery Taskforce have agreed that AFP’s training should be used as a model in their respective countries.

120. AFP has also recently created a Legal Professional Privilege Practice Group, responsible for ensuring that all AFP investigations at risk of LPP claims are able to manage these effectively. More specifically, the Group runs an internal training programme for all investigators who may face LPP issues, ensuring that they can manage these through comprehensive strategies and well informed negotiations. A member of the Group also acts an ‘LPP coordinator’ as required throughout an investigation.

121. During the on-site, AFP emphasised that its FAC investigators have a range of backgrounds and skills. Foreign bribery investigative teams are also able to draw upon support from AFP investigative teams from other portfolios (e.g. Organised Crime) to expand their capacity for short periods of high activity as required. They can also utilise the capability of other specialist units (e.g. Surveillance, Telecommunications Interception Division, Police Technical Team, Digital Forensics) to support investigations. As outlined above, AFP can run parallel investigations as necessary and second staff from other government agencies to work on a specific investigation. Finally, during the on-site, participants from a range of other agencies, including CDPP, AUSTRAC, and ASIC spoke highly of the current level of expertise within AFP in addition to its commitment to combating foreign bribery. Indeed, while a number of private sector commentators remain sceptical of AFP’s commitment to foreign bribery and the effectiveness of these new bodies, several noted that there has been a marked improvement in recent years and that it is only a matter of time before this translates into concrete cases.

f. AFP liaison officers

122. AFP's International Operations incorporates liaison officers, police advisors, and missions. It consists of five regions, each with a regional manager that is responsible for overseeing and providing strategic leadership and guidance for senior liaison officers and advisors. The posts within each region have responsibility for a number of countries within that region. Globally, AFP has representatives in 33 countries working in partnership with foreign law enforcement agencies, including in the United States, Thailand, China, Sri Lanka, Vietnam, Hong Kong, India, Philippines, Singapore, and South Africa.

123. At the on-site, the evaluation team met with the manager of AFP's International Engagement and spoke by teleconference with the officer seconded to the International Anti-Corruption and Coordination Centre based in London⁸³ and the senior liaison officer in Singapore. AFP's liaison officers are routinely involved in foreign bribery investigations at an early stage. They can be a direct point of contact for suspicious activities, help ensure the smooth exchange of intelligence, and play a foreign bribery detection role by reporting on open source media. Liaison officers also have an important role in facilitating outgoing Mutual Legal Assistance (MLA) (i.e. requests sent by Australia to a foreign jurisdiction). For instance, a liaison officer may directly engage with the MLA authorities in their region or help facilitate access to witnesses. Liaison officers also help ensure that evidence obtained from foreign countries satisfies Australia's evidentiary and continuity requirements. Regarding incoming MLA requests (i.e. those Australia receives from foreign jurisdictions), liaison officers are responsible for the requesting countries obtain information about whether the person identified in the MLA request might face inhumane treatment including the death penalty in the requesting country. This is a major issue in South-East Asia, where a number of countries provide for the death penalty for corruption offences. AFP's liaison officers help build trust between the AFP and its counterparts in foreign jurisdictions. For instance, they proactively share typologies on matters such as asset recovery. They also work with Australian companies abroad to assist them understand their vulnerabilities to corruption.

Commentary

The evaluation team is impressed by the substantial steps Australia has taken since Phase 3 to enhance its capacity to investigate foreign bribery cases. Australia's commitment in this regard is evidenced through the creation of FACC, the enhanced role of the Panel of Experts, establishment of three dedicated foreign bribery investigative teams, ongoing training provided to all investigators with AFP's FAC Business Unit, and the development of the Foreign Bribery Investigators Reference Guide. On this basis, the lead examiners are satisfied that Phase 3 recommendations 8a(i), 8a(ii), and 8a(iv) are now fully implemented. The lead examiners consider that the way AFP's liaison officers are actively supporting foreign bribery enforcement actions at home is a good practice that could help enhance Australia's overall levels of foreign bribery enforcement. The lead examiners are confident that AFP now has the systems in place to effectively evaluate and investigate foreign bribery referrals and recommends that the government continue to resource AFP effectively to ensure it can continue its foreign bribery enforcement efforts. In view of the low level of foreign bribery prosecutions to date, the lead examiners recommend that the Working Group follow-up on Australia's investigations into foreign bribery allegations to verify whether the increased foreign bribery investigative capacity is working in practice.

⁸³ <http://www.nationalcrimeagency.gov.uk/about-us/what-we-do/economic-crime/international-anti-corruption-coordination-centre>

B.4. Prosecution of foreign bribery cases

a. Establishment of CDPP Practice Group Model

124. In 2014, CDPP replaced its regional-based system with a new operating model consisting of six nationally-organised and run practice groups that handle different categories of crimes. Australia provides that the objective of the new operating model is to provide a more effective, efficient, and nationally consistent federal prosecution service. Each Practice Group is led by a Deputy Director who has responsibility for prosecutions conducted by that Practice Group across Australia, acts as the national liaison point in relation to that Practice Group, and oversees policy development and law reform for crimes within that Group's mandate. The Commercial, Financial & Corruption (CFC) Practice Group is responsible for foreign bribery prosecutions and in 2015, the CDPP established two 'working groups' within the CFC, one in Melbourne and one in Sydney, to serve as the central referral points for foreign bribery investigations.

125. During the on-site, some private sector representatives suggested that CDPP is risk averse when it comes to prosecuting foreign bribery cases, and that this is a key factor in the low number of cases that proceed to prosecution. CDPP vehemently denied this during the on-site, noting that it now has a specialised focus network of approximately 13 prosecutors nationally to manage foreign bribery matters. The network meets to discuss ongoing foreign bribery prosecutions every four to six weeks with the goal of centralising expertise and skill and ensuring the effective sharing of information and experience to enhance prosecutions. The Network operates under the national leadership of the CFC Leader who is a Deputy Director of CDPP.

b. CDPP expertise and resources

126. During the on-site, the evaluation team was impressed by the CDPP representatives' in-depth knowledge of the foreign bribery offence, the challenges Australia faces with respect to foreign bribery enforcement, and close involvement in the development of foreign bribery-related reforms (e.g. amendments to the offence, introduction of DPAs, self-reporting guidelines, review of whistleblower protections etc.).

127. Foreign bribery matters are currently funded within CDPP's core budget which is set to decrease slightly from AUD 88.8 million in 2015-16 to 85.9 million in 2018-2019. During the on-site, CDPP representatives stated that one of the biggest barriers to successful foreign bribery outcomes is the level of resources required at both the pre-brief and brief-assessment stages. Prosecutors were candid in their comments that they work in a resource constrained environment and that matters before the court tend to take priority. They also highlighted that there are now a large number of ongoing foreign bribery investigations, two of which are at the brief-assessment stage, and one of which is before the courts. CDPP provides that it will always find ways to resource foreign bribery trials as it is a priority offence. However, it notes that with its current level of funding, there is a risk that CDPP it may not be able to continue to provide the same level of pre-brief engagement if it is also required to resource a number of foreign bribery trials. As CDPP has no investigative function and does not control the level of referrals it receives, it will need to carefully monitor its allocation of resources to foreign bribery matters as it does for other crimes types.

128. CDPP did not receive additional funding at the time that AFP received AUD 15 million to increase its foreign bribery investigative capability. In recent years, CDPP has received substantial funding tied to a multi-agency operation to combat offshore tax evasion (Project Wickenby) as well as to counter

terrorism. In addition, between 2015 and 2019 CDPP will receive over AUD 15 million to prosecute all matters investigated by the SFCT (and outstanding Project Wickenby trials). While this money cannot be used to fund foreign bribery prosecutions, it demonstrates that the Government has invested in the CDPP's capacity to prosecute complex financial crimes and could provide tied funding for foreign bribery prosecutions in the future, if it so desired.

129. In November 2016, CDPP, AGD, and the Department of Finance finalised the development of a sustainable cost model for CDPP to ensure that it is adequately funded for changes in its workload, including changes arising through future new policy proposals. The model is intended to be flexible to accommodate changing circumstances and government priorities. The costing model will continue to be assessed and updated as appropriate.

Commentary

The Lead Examiners are impressed by recent efforts to increase the level of expertise and dedication toward combating foreign bribery within CDPP. However, they believe that the current level of resources for foreign bribery prosecutions, whilst adequate for the CDPP's current workload, will need to be carefully monitored, particularly if the level of referrals continues to increase. The lead examiners thus recommend that Australia continue to resource CDPP so it can effectively prosecute foreign bribery cases at the rate that they are expected to be generated by AFP.

B.5. Sanctions imposed in foreign bribery prosecutions

130. As outlined above, Australian authorities are able to report on sanctions imposed on three individuals following foreign bribery convictions. On 10 July 2017, approximately one week before the on-site, three individuals pleaded guilty to the bribery of foreign public officials in the New South Wales Supreme Court. On 27 September 2017, all three individuals were sentenced to four years' imprisonment with a fixed non-parole period of two years. The sentencing judge emphasised the seriousness of the offending, stating "[e]ach offender has deliberately flouted Commonwealth law and employed criminal means in the expectation of financial advantage. Their respective criminality is serious and warrants imprisonment to communicate the 'censure of society'".⁸⁴ Two of the accused were also fined AUD 250 000.⁸⁵ The imposition of both a fine and a sentence of imprisonment is unusual in Australia. The fine was applied because the accused committed the crime for commercial gain. The third offender also committed the offence for commercial gain but the court found that he would not have the means to pay a fine.⁸⁶ CACT did not confiscate the bribe, which was transmitted to officials in Iraq, or its proceeds, which were never received by the offenders, as no contracts were ultimately awarded. As such proceeds were not seized during the investigation, no confiscation orders were sought and/or made during the sentence hearing.

131. In the sentence judgment delivered on 27 September 2017, the Court found that around the same time bribe money was sent to Iraq, the offenders were involved in the submission of a tender for construction work in Iraq totalling around USD 8.5 million. Their company was also in the process of

⁸⁴ <https://www.caselaw.nsw.gov.au/decision/59cad2c0e4b074a7c6e18f96>. [313].

⁸⁵ <https://www.caselaw.nsw.gov.au/decision/59cad2c0e4b074a7c6e18f96>

⁸⁶ Section 16A of the *Crimes Act 1914* (Cth) requires a to take into account a range of factors in sentencing, including the means of the person. Section 16C further provides that, before imposing a fine, the court must take into account the financial circumstances of a person

preparing tenders for work worth up to USD 450 million and was actively engaged in seeking oil refinery contracts. In an effort to diminish the seriousness of their offending, the offenders contended that the gross value of the contracts did not reflect the expected profits to the company or the individual offenders. The Court did not accept this argument. While the Court was not able to quantify the expected net profit the offenders would have received from these contracts, it found that “the prospect of future profits was sufficiently enticing to make the [offenders] consider it to be worth their while” to send about USD 1 million in bribe money to Iraq. The company was not ultimately allocated any contracts, thus there were no ‘proceeds of bribery’ to confiscate. Australia advises that for operational reasons, no restraint action was taken against the bribe as doing so would have compromised the ongoing investigation. Once the bribe was in Iraq, it was not operationally feasible to pursue further action to confiscate the bribe. The lead examiners note that the court did not impose monetary sanctions of comparable effect. Australian authorities note that courts in Australia are required to consider a range of matters when imposing an appropriate sentence for federal offences, including the means of the offender.⁸⁷

Commentary

Australia provides that while both fines and imprisonment were imposed in the abovementioned case (Case #2), practical considerations prevented confiscation of the bribe and its proceeds. Nonetheless, the lead examiners recommend that, where appropriate, AFP and CDPP pursue confiscation of the bribe and its proceeds in all foreign bribery cases. More generally, the lead examiners recommend that the Working Group follow-up on sanctions imposed in foreign bribery cases as practice continues to develop.

B.6. Retroactive disallowance of tax deductions for bribe payments

132. In Phase 3, the WGB recommended that AFP promptly inform ATO of foreign bribery-related convictions so that ATO may verify whether bribes were impermissibly deducted (recommendation 14b). At that time it was unclear whether or how ATO would learn about a foreign bribery conviction in order to retroactively deny a tax deduction.

133. In response to the Phase 4 Questionnaire, the Australian authorities stated that a reporting framework has been put in place whereby ATO is informed of foreign bribery convictions in order to retroactively deny any tax deductions for bribes. This initiative includes the development of a specific form for ‘Reporting of Foreign Bribery related Convictions to ATO’. The Australian authorities confirm that ATO was immediately advised of the September 2017 convictions in the case discussed throughout this report.

Commentary

The lead examiners consider that Phase 3 recommendation 14b is now fully implemented due to the establishment of a reporting framework that informs ATO of all foreign bribery convictions, allowing it to retroactively disallow any tax deductions that may have been taken for the relevant bribe payments.

⁸⁷ Section 16A of the *Crimes Act 1914* (Cth)

B.7. Debarment in public procurement contracts

134. In Phase 3, the WGB recommended that Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals convicted of foreign bribery (recommendation 16a). At the time of Phase 3, Australian public procurement agencies had the discretion to debar companies convicted of domestic or foreign bribery. It was a matter for individual agencies to develop their own policies in this regard. Australia stated that it had not clarified government-wide rules on debarment for foreign bribery because it was inappropriate to “specify particular offences as grounds for termination”.

135. Australia states that, since Phase 3, it has not taken any specific steps to implement recommendation 16a. Regarding procurement contracts in relation to ODA, the evaluation team notes that in 2016, following Australia’s Phase 3 review, the OECD adopted the Recommendation of OECD Council for Development Cooperation Actors on Managing the Risk of Corruption,⁸⁸ which states that Member countries should “put in place a sanctioning regime that is effective, proportionate and dissuasive” that includes “clear and impartial processes and criteria for sanctioning, with checks and balances in decision making to reduce the possibility of bias”.

Commentary

The lead examiners consider that Phase 3 Recommendation 16a remains unimplemented and reiterate their recommendation that Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals convicted of foreign bribery.

B.8. International cooperation in foreign bribery cases

136. In Phase 3, the WGB recommended that Australia take reasonable measures to ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to Convention parties with a legal system that do not have corporate criminal liability (recommendation 11).

137. It is assumed that the WGB was referring to the provision of MLA to Parties to the Convention (not all countries) that have civil or administrative liability of legal persons for foreign bribery.⁸⁹ Recommendation 11 arose because during both Phases 2 and 3, Australia’s Mutual Assistance in Criminal Matters Act 1987 (MACMA) could not be used to provide MLA to a foreign state conducting civil or administrative proceedings against a company for foreign bribery. Moreover, the legislation governing MLA in administrative matters (Mutual Assistance in Business Regulation Act (MABRA)) did not allow Australia to apply certain coercive measures such as search and seizure, or the tracing or confiscation of assets in response to an MLA request. Australia had only limited discretion to allow evidence gathered in a

⁸⁸ The 2016 Recommendation for Development Cooperation Actors on Managing the Risk of Corruption can be found here: <http://www.oecd.org/corruption/anti-bribery/Recommendation-Development-Cooperation-Corruption.pdf>

⁸⁹ Article 9.1 of the Convention states: “Each Party shall, to the fullest extent possible under its laws and relevant treaties and arrangements, provide prompt and effective legal assistance to another Party for the purpose of criminal investigations and proceedings brought by a Party concerning offences within the scope of this Convention and for non-criminal proceedings within the scope of this Convention brought by a Party against a legal person...”

criminal proceeding against individuals under MACMA to be used in related civil or administrative proceedings against a company. Australia has not reported any changes in this regard, thus recommendation 11 remains unimplemented.

138. Australia provides that the execution of coercive powers is generally reserved for criminal proceedings and that this underpins many of Australia's bilateral mutual legal assistance treaties which specify a minimum penalty threshold requirement to be met in order to provide assistance. It asserts that its ability to provide MLA is designed to be consistent with the powers available to Australian law enforcement authorities investigating domestic criminal conduct and that it would be inconsistent with the exercise of these powers by Australian law enforcement authorities to extend the scope of the provision to non-criminal proceedings in foreign countries in circumstances where such powers are not otherwise exercisable by Australian law enforcement authorities for domestic non-criminal proceedings.

139. Australian authorities are not aware of any instance where a foreign state has sought MLA for civil or administrative proceedings against a company for foreign bribery. More broadly, they are also not aware of any instance where this has prevented Australia providing assistance to a foreign state for other crimes. If a foreign state was seeking to make request of this nature, Australian authorities would work with their counterparts to explore opportunities for Australia to provide assistance in a manner that is consistent with its legal system.

140. Pursuant to the Phase 4 Monitoring Guide, Parties to the Convention were asked to provide information on their international cooperation experience with Australia.⁹⁰ The Group received responses from four parties. Parties #1 and 2 did not make MLA requests for foreign bribery cases. Party #3 reported that Australia had not refused any of its requests and described a robust and cooperative relationship with Australia in extradition and MLA. Party #4 reported that the effectiveness of MLA from Australia depended on the nature of the assistance requested. Party #4's experiences had been positive with respect to requests for the delivery of bank documents and trade register extracts. The experience had been less positive regarding requests for measures such as the interrogation of witnesses and accused persons, house searches, arrests, and freezing orders. Party #4 stated that the level of proof in Australia for conducting these coercive measures is too high and the processing time is too long. However, due to the extremely low number of responses from the parties to the Convention, the lead examiners are reluctant to draw conclusions from the information from the four parties. In addition, Australia notes that insofar as the comments relate to the interrogation of witnesses, Australia cannot compel a suspect to give evidence or incriminate themselves in a criminal investigation. This would be inconsistent with Australia's laws. Where requests seeking evidence from a witness are received, Australian authorities approach the person to ascertain their willingness to provide assistance voluntarily, noting that if they refuse they cannot be compelled.

Commentary

The lead examiners consider that Phase 3 recommendation 11 remains unimplemented. Pursuant to Article 9 of the Convention, it is incumbent on Australia to ensure that it can provide a broad range of MLA to Parties for non-criminal proceedings against legal persons that fall within the scope of the Convention. The lead examiners therefore recommend that Australia, to the fullest extent possible

⁹⁰ <http://www.oecd.org/daf/anti-bribery/oecd-anti-bribery-convention-phase-4.htm> (See Annex 3 on pp. 62-63)

within its legal system, ensure that a broad range of MLA, can be provided to Parties to the Convention that apply civil or administrative (and not criminal) liability to legal persons for foreign bribery.

B.9. Article 5 considerations

141. In Phase 3, the WGB recommended that AFP and other bodies involved in foreign bribery investigations and prosecutions take measures (such as by issuing written guidance or policy) to continue to ensure that they are not impermissibly influenced by prohibited political factors listed in Article 5 of the Convention (recommendation 10c).⁹¹ The Commonwealth Prosecution Policy expressly prohibits prosecutors from considering Article 5 factors when making decisions about whether to prosecute a foreign bribery case and those that fail to abide by the Policy could be subject to disciplinary action. However, AFP was not bound by the Prosecution Policy and no internal AFP policies or guidelines specifically referenced Article 5.

142. In the responses to the Phase 4 Questionnaire, the Australian authorities state that the AFP Foreign Bribery Investigators Reference Guide now refers to Article 5 of the Convention, and is available within AFP's online Investigator's Toolkit. The most recent version of the Guidelines, which were issued in April 2016, include a statement about the need to ensure that foreign bribery allegations are seriously investigated and not subject to improper influence by concerns of a political nature. The Guidelines also reproduce Article 5 of the Convention. In view of the new information in AFP's Foreign Bribery Reference Guidelines, recommendation 10c is now fully implemented.

143. At the on-site, there was no suggestion by civil society or the private or public sectors that political pressure had ever been applied to Australian law enforcement authorities in foreign bribery cases. However, a major Australian media outlet and an academic with expertise on AML/CFT and anti-corruption issues perceived that law enforcement authorities may be "worried" about the political consequences of investigating and prosecuting certain politically sensitive cases and that DFAT's role in requesting judicial suppression orders in politically sensitive cases might have heightened this concern. Neither participant believed that DFAT had applied pressure in any foreign bribery case, but both questioned its significant involvement in cases involving high level foreign public officials. DFAT's membership in FACC was not perceived as a risk for political interference in foreign bribery cases and there was no suggestion from public or private sector participants that the relevant suppression orders had impacted on the ability of the law enforcement authorities to run relevant cases.

144. The Australian Government rejects any suggestion that DFAT in any way influences AFP investigations, and states that AFP conducts investigations impartially and with no regard to any potential political or foreign policy consequences. AFP does not engage with DFAT on the efficacy of any investigation, nor seek advice on proceeding with an investigation, irrespective of the potential for damage to Australia's international relations.

⁹¹ Article 5 of the Convention states: "Investigation and prosecution of the bribery of a foreign public official shall be subject to the applicable rules and principles of each Party. They shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

Commentary

The lead examiners consider Phase 3 recommendation 10c fully implemented due to the inclusion of relevant information in AFP's Foreign Bribery Investigators Reference Guide. They do not believe that political pressure has been applied in the investigation and prosecution of any foreign bribery cases in Australia. However, the lead examiners consider it important that law enforcement authorities can investigate and prosecute foreign bribery cases without worrying about political sensitivities. They therefore recommend that the WGB follow-up Australia's enforcement of foreign bribery cases that may be politically sensitive.

C. RESPONSIBILITY OF LEGAL PERSONS

C.1. Scope of liability of legal persons for foreign bribery and related offences

145. Australia's corporate liability provisions have not changed since 2001. Under Division 12 of the CCA, a legal person is liable for crimes committed by an employee, agent, or officer if the company's board or "high managerial agent" intentionally, knowingly, or recklessly committed the offence, or expressly, tacitly, or impliedly authorised or permitted the offence.⁹² In addition, a company is also liable if its "corporate culture" encouraged, tolerated, or led to the offence, or if it failed to create and maintain a "corporate culture" that required compliance with the relevant law. In Phase 3, the WGB considered that these provisions met the standard set out in Annex 1 of the 2009 Anti-Bribery Recommendation.

C.2. Enforcement of foreign bribery and related offences against legal persons

146. In Phase 3, the lead examiners raised serious concerns that no corporations had faced criminal charges for foreign bribery or related offences such as false accounting, money laundering, fraud, or tax evasion. It thus recommended that Australia take steps to enhance its enforcement against legal persons and provide ongoing training to law enforcement authorities on the enforcement of corporate liability in foreign bribery cases (recommendation 3), and explore all avenues for exercising jurisdiction over related legal persons in foreign bribery cases (recommendation 8a(iii)). These recommendations were partially implemented at the end of the Phase 3 review cycle.

147. At the time of Phase 3, only one of the 28 allegations of foreign bribery received by the Australian authorities had resulted in a charge against a legal person. To date, only one (ongoing) case has resulted in corporate charges (against two entities). As outlined above, CDPP did not pursue charges against the company in the case in which convictions against three individuals were obtained in September 2017, as it was a small company and the convicted individuals were, in effect, the company itself. There was thus no benefit in pursuing charges against the company as a separate legal entity.

148. While CDPP has successfully prosecuted companies for a diverse range of offences⁹³, prosecutions against legal persons for offences under the CCA remain extremely low. Since Division 12 came into force in 2001, CDPP has commenced just 16 prosecutions under the CCA, only nine of which

⁹² In the latter case of misconduct involving a high managerial agent, the company may escape liability if it had exercised due diligence to prevent the offence, or the authorisation or permission of the offence.

⁹³ Since its inception in 1984, the CDPP has commenced a total of 1,264 prosecutions against corporations, 971 of which resulted in at least one charge being found proven. Most of these are for regulatory offences, e.g. under the Therapeutic Goods Act 1989 (50 prosecutions commenced), Fisheries Management Act 1991 (53 prosecutions commenced), Air Navigation Act 1920, Civil Aviation Act 1988 and related regulations (42 prosecutions commenced), Agricultural and Veterinary Chemicals legislation (31 prosecutions commenced).

resulted in convictions (for at least one charge). CDPP provides that this ‘lower than usual’ success rate is partly explained by three cases; two where it determined that it was no longer in the public interest to pursue charges against the company after the responsible individual (a company director, and in one case the sole director) pleaded guilty; and another where charges were withdrawn when the company entered into liquidation. As set out in Table 2 below, since 2012, CDPP has prosecuted just three companies for domestic bribery and corruption offences and related economic offences under the CCA, resulting in two convictions and the imposition of very low fines. It has never prosecuted a company for false accounting offences.

Table 2: Prosecutions against legal persons for domestic bribery and corruption offences and related economic offences under the Criminal Code between 1 April 2012 and 31 March 2017

Criminal Code Act Offence	Maximum Penalty Unit	Prosecutions	Acquittals	Convictions	Average amount of fine imposed (AUD)	Amount of Reparation Order (AUD)
Dishonestly intending to influence a Commonwealth public official (s135.1(7))	1500 (AUD 165 000)*	2	1	1	680,000.00	-
Dishonestly intending to obtain a gain (s135.1(1))	300 (AUD 33 000)*	1	0	1	10,000.00	AUD 24,143.80

* Based on penalty unit of AUD 110 at the time of the offences in question

Commentary

The lead examiners consider that Phase 3 recommendations 3 and 8a(iii) remain partially implemented. They are concerned about the difficulties CDPP describes in attributing responsibility to companies, reflected through the fact that 16 years after Division 12 of CCA came into force, few corporations have faced charges for foreign bribery and no corporations have faced criminal charges for related offences such as false accounting, money laundering, fraud, or tax evasion. In addition, the fines imposed on the three companies convicted of domestic bribery offences were seemingly low. The lead examiners thus recommend that Australia proactively pursue criminal charges against legal persons where appropriate for foreign bribery and related offences, including where a responsible individual pleads guilty.

C.3. Guidance on voluntary reporting

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

150. Since Phase 3, CDPP and AFP have developed an external presentation for the private sector on the benefits of self-reporting, which covers the statutory framework for cooperation and plea agreements following self-reports and sets out the potential benefits of self-reporting.

151. In late 2016, AFP and CDPP released a draft Best Practice Guideline on Self-Reporting of Foreign Bribery and Related Offending by Corporations. This draft Guideline explains the principles and processes that AFP and CDPP will apply where a corporation self-reports conduct involving suspected foreign bribery. The draft Guideline aims to incentivise companies to self-report by giving them greater information about how such a report will be handled by AFP and CDPP. The draft Guideline operates within the framework of the Prosecution Policy of the Commonwealth and does not change existing policy. It describes the public interest factors that CDPP will take into account in deciding whether or not to prosecute a corporation that self-reports suspected foreign bribery; and, if a prosecution is commenced, how the self-report will be taken into account by a court when sentencing the corporation. Australia intends to finalise the Guidelines by the end of 2017. However, until it is published and Australia takes steps to raise awareness of it among the private sector, it would appear that Australian companies remain in the same situation as in Phase 3, and do not have a clear framework for voluntary reporting. Phase 3, recommendation 9 is therefore only partially implemented.

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

Commentary

The lead examiners consider Phase 3 recommendation 9 only partially implemented, and thus recommend that Australia finalise and publish the draft Best Practice Guideline on Self-Reporting of Foreign Bribery and Related Offending by Corporations, and take concrete steps to raise awareness of the Guideline amongst the private sector. The lead examiners also recommend that Australia provide clear information in the public domain about where a company should go in order to make a voluntary report of the bribery of foreign public officials.

C.4. Ongoing reform initiatives

a. Proposed new offence of failing to prevent foreign bribery

153. As noted above in section B.1, on 6 December 2017, the Australian Government introduced legislation into Parliament that proposes a new corporate offence of failing to prevent foreign bribery. Under the new Bill, a company would be automatically liable for bribery by employees, contractors, and agents (including those operating overseas), except where the company can show it had a proper system of internal controls and compliance in place to prevent the bribery from occurring. Australia provides that this reverse onus test would reduce the evidential burden on CDPP in foreign bribery prosecutions. This would be similar to the offence in section 7 of the United Kingdom Bribery Act 2010. The law, as drafted, provides that the Minister for Justice must publish guidance on the steps companies can take to help prevent its employees, agents, and contractors from engaging in foreign bribery.

154. The 2009 Anti-Bribery Recommendation Annex I.C states that "Member countries should ensure that [...] a legal person cannot avoid responsibility by using intermediaries, including related legal persons, to offer, promise, or give a bribe to a foreign public official on its behalf." CDPP has advised that under the current legislation, it has difficulties attributing responsibility to a corporation based in Australia in

circumstances where there is a group of companies operating overseas, each with a separate legal personality.⁹⁴ To address this, the proposed new offence of “failing to prevent” would also extend to situations where “an associate” of a body corporate commits foreign bribery (whether within or outside of Australia) provided they do so for the profit or gain of the body corporate.

Commentary

The lead examiners again welcome Australia’s proactive approach to identifying and addressing possible barriers to the prosecution of foreign bribery. The lead examiners acknowledge that the proposed new offence of failing to prevent foreign bribery is intended to ease the evidentiary burden for attributing responsibility to legal persons and recommend the Working Group follow-up on whether the proposed new offence is enacted.

b. Proposed introduction of deferred prosecution agreements

155. The Australian Government considers that a deferred prosecution agreement (DPA) scheme would encourage greater self-reporting by companies, and in 2016, the Minister for Justice released a public consultation paper on a possible scheme for DPAs for serious corporate crime. All but two of the 17 submissions endorsed or partially endorsed the scheme. In March 2017, the Minister issued a second public consultation paper seeking views on a proposed model for the scheme. Under this proposal, prosecutors would have the option to invite the company to negotiate a DPA. The terms of the DPA would typically require the company to cooperate with any investigation, pay a financial penalty (the amount of which would reflect the level of cooperation), and implement a program to improve compliance. In return, the prosecution would be deferred. The prosecutor would be required to make a written application to a retired judge seeking approval of the final terms of the DPA. Upon fulfilment of the terms of the DPA, the matter would be considered resolved without prosecution or conviction. The government is still considering whether disputes over breaches of the DPA would be referred to a retired judge, director of CDPP, or a court for consideration.

156. Of the 57 foreign bribery allegations reported by Australia that proceeded to evaluation or investigation, eight came to the attention of law enforcement authorities through self-reports by companies. During the on-site, the evaluation team queried why a DPA scheme would incentivise voluntary reporting given the Government has yet to robustly enforce the offence. Australian authorities responded that if the DPA scheme is introduced in conjunction with the above-described offence of failing to prevent foreign bribery (that would require companies to prove that they had systems in place to prevent the bribe) that they would be less likely to risk detection and prosecution, and instead opt to self-report foreign bribery with the hopes of entering into a DPA.

C.5. Engagement with the private sector

a. Engagement since Phase 3

157. In Phase 3, the Working Group noted that Australia’s efforts to raise awareness of foreign bribery were not well co-ordinated and recommended that it adopt a ‘whole-of-government’ strategy towards awareness raising and take further steps to raise awareness among the private sector, in particular, SMEs

⁹⁴ Under CCA, Division 12, a parent company may be held liable for crimes committed by a subsidiary or a joint venture if the parent is a party to the offence by aiding, abetting, counselling, procuring or inciting the commission of the offence by the subsidiary or joint venture. The parent may also be liable if it commits the offence jointly with a subsidiary or joint venture

(recommendations 12b-12d). At the time of its two year follow-up report, the Working Group was satisfied that these recommendations had been fully implemented. Since then, Australia has continued its awareness raising efforts with the private sector, providing detailed information on the outreach activities of multiple agencies, under the coordination of AGD.

158. In 2014, AGD led the development of a free online learning module on foreign bribery intended for use by the private and public sectors alike. It provides advice on Australia's anti-bribery policies, relevant laws and how they apply, and steps that businesses can take to help promote compliance.⁹⁵ In April 2017, AGD updated the Australian Government's Foreign Bribery Information and Awareness Pack which provides key information on the offence of bribing a foreign public official and steps for reporting suspected foreign bribery. In March 2017, Australia held its first ever Government Business Roundtable on Anti-Corruption. The Roundtable is intended to serve as a platform for dialogue between business and government to explore practical steps to better protect Australian business from the corrosive effects of corruption and bribery. The event was chaired by the AGD Secretary and attended by senior business representatives from a range of industry sectors and peak bodies. The AFP Commissioner, ASIC Chairman, CEO of the Business Council of Australia, and senior anti-corruption and compliance practitioners all gave presentations. The Roundtable also provided an opportunity to engage businesses on the Government's proposed anti-corruption reforms (e.g. amendments to foreign bribery offence introduction of DPAs), and to discuss how government and business can better work together to foster a culture of integrity and responsible business practice.

159. In April 2016, AFP also undertook to establish a Business Engagement Team, the purpose of which is to enhance interaction with the private sector, including the banking and financial sectors. AFP absorbed the costs of this team and its activities are coordinated by the Canberra based FACC, which has developed a business engagement outreach program. Since 1 July 2016, AFP members have presented and participated in 14 separate forums on corruption and/or foreign bribery. The audiences at these forums were varied, but included a major accounting and auditing firm and its private sector clients, MBA students, a non-profit business partnership and representatives from Australia's Big Four banks. These forums have taken place in Sydney, Melbourne, and Perth and the team has also prepared presentations for AFP's International Network to deliver in country. For example, a member of AFP's International Network presented to the Australian Chamber of Commerce in Vietnam on the application of Australia's foreign bribery laws. ASIC has also raised awareness of the importance of good culture in organisations over the past several years and participated in outreach activities with AFP.

160. Between 2014 and 2017, DFAT organised a number of private sector outreach events (including individual briefings and conferences) across the country. These events targeted a broad audience, including industry, SME, legal and accounting professionals, financial institutions, universities, and Commonwealth, state and territory governments. During these events, DFAT emphasised the importance of effective internal compliance systems and encouraged Australian businesses to contact DFAT missions abroad for any assistance. DFAT's network of overseas posts also engages with local Australian business communities and chambers of commerce on the issue of foreign bribery.

161. On 27 March 2014, the Australian Stock Exchange (ASX) Corporate Governance Council released the third edition of the ASX Corporate Governance Principles and Recommendations

⁹⁵ Available on the AGD website at www.ag.gov.au/foreignbribery.

recommending that ASX listed entities have a code of conduct and disclose that code or a summary of it (recommendation 3.1). The code should describe the organisation's anti-corruption compliance processes for preventing the offer or acceptance of bribes and other unlawful or unethical payments or inducements, as well as identify measures that the organisation follows to encourage the reporting of unlawful or unethical behaviour, including a reference to how the organisation protects whistleblowers who report in good faith.

162. During the on-site, the evaluation team met with a range of actors from across the private sector, including representatives of several multi-national enterprises (MNEs), all of whom had extensive knowledge of the foreign bribery risks facing their companies and Australia more generally. However, despite the Government's above-mentioned awareness raising efforts, private sector representatives agreed that for the most part, anti-corruption compliance is still driven by the private sector itself, and that there was very little in the way of accessible written guidance for businesses generally. One representative noted that while there has been a substantial shift in corporate culture in recent years, this was mainly due to the fear of enforcement action from other jurisdictions (e.g. the United Kingdom and United States), rather than Australia.

b. Small and medium-sized enterprises

163. While large MNEs were well represented at the on-site, regrettably, no Australian SMEs participated; although this sector was represented through business associations. Australia has around 50 000 small and medium-sized business exporters.⁹⁶ As outlined above, the one successful foreign bribery prosecution that Australia is able to report involved a very small company, and several ongoing investigations involve SMEs.

164. During the on-site, all private sector representatives were in general agreement that Australian SMEs are simply not prepared for the corruption risks they face abroad. Participants also agreed that there was still a general perception among SMEs that paying bribes was simply a cost of doing business and that the risk of getting caught was too low to outweigh the pressure to meet sales targets and justify the expense of implementing effective controls. Participants also expressed concerns that Australian SMEs lack a basic understanding of the links between foreign bribery and the devastating consequences in developing countries – viewing it more as a victimless crime. This was confirmed by an AUSTRADE representative who noted that while awareness of foreign bribery laws has improved in the past few years, there appeared to be a “disturbing lack of preparedness, particularly among SMEs, regarding the risks involved and the need for compliance programmes.” To address this, AUSTRADE provides that since 2012, it has delivered a targeted outreach program to its business clients, most of whom represent SMEs. AUSTRADE works with businesses domestically and offshore, including local suppliers, agents, and compliance agencies, to articulate the risks of bribery when conducting trade in high risk and low governance jurisdictions. The programme is delivered in-country, through AUSTRADE'S network of overseas offices in a variety of AUSTRADE-hosted events and in collaboration with local chapters of the Australian Chamber of Commerce (ACC) and partner agencies. It provides practical advice on how to respond when bribes are solicited and details the practical assistance AUSTRADE can provide businesses that are confronted with trade impediments created by corrupt foreign officials. The outreach program is supported by anti-bribery

⁹⁶ This figure is based on the annual Australian Bureau of Statistics publication, 'Characteristics of Australian Exporters' (<http://www.abs.gov.au/ausstats/abs@.nsf/mf/5368.0.55.0060>), most recently released on 28 June 2017, with exporter counts for 2015-16).

governance materials available on AUSTRADE'S website and to members via local chapters of the ACC. AUSTRADE'S website also provides SMEs with practical assistance in developing their own anti-bribery programs to help build a culture of compliance within an organisation.

165. As noted above ('Engagement since Phase 3'), a range of other agencies undertake outreach efforts aimed at reaching SMEs. In early 2015, the Secretary of the AGD wrote to heads of industry and peak bodies (including small business and exporting peak bodies) to advise them about the module and encourage them to incorporate it into their awareness-raising activities. There have been 13 027 views of AGD's foreign bribery page (which hosts the module) for the period from 1 January 2015 – 1 May 2017.

166. Despite these activities, as outlined above, there is a sense that the government should do more to provide guidance for businesses, including SMEs, on how they can develop cost-effective, risk-based anti-corruption compliance programmes. Throughout the on-site, representatives of the private sector and civil society noted that other jurisdictions had issued specific guidance for corporate compliance with foreign bribery provisions (e.g. the United Kingdom and United States) and that Australian companies would benefit from similar materials. Australia itself notes that it could do more to promote its existing guidance material, particularly to SMEs.

c. Enterprises conducting business in the resource sectors and high-risk jurisdictions

167. As outlined earlier in the report, Australia has abundant natural resources with around 300 mines across the country. The Bureau of Resources and Energy Economics estimates that from 2013-14 to 2018-19, the export revenues from Australia's extractive industry will increase at an annual average rate of 8%, totalling AUD 284 billion in 2018-2019.⁹⁷

168. AUSTRADE'S internal staff training and outreach program specifically references the oil and gas, mining, and mining equipment technical services industries and the particular risks they face regarding foreign bribery in low governance jurisdictions, where contracts for natural resources necessarily involve local government tendering, permits, and approval. AUSTRADE provides that it works closely with its natural resources clients, having met several times with miners on particular market access issues in South East Asia, provided advice on sensitive matters regarding solicitation of corrupt payments in Eastern Europe, and assisted in facilitating oil exploration in South America.

169. In addition, on 6 May 2016, the Australian Government announced it would join the Extractive Industries Transparency Initiative (EITI), which provides an international standard for increased transparency and accountability in the oil, gas, and mining sectors. Australia asserts that joining the EITI, will ensure its domestic policy is consistent with international efforts to increase transparency, including in tax systems and provide significant benefits for Australian companies through improved global investment conditions resulting from consistent and open reporting standards for the world's resources sector.

Commentary

The lead examiners acknowledge Australia's extensive efforts to raise awareness of foreign bribery among the private sector both in Australia and abroad. They encourage Australia's commitment to implement the fiscal transparency principles of EITI, and welcome AUSTRADE'S efforts to specifically target the mining, oil, and gas sectors. However, there still appears to be a general lack of

⁹⁷ <https://industry.gov.au/Office-of-the-Chief-Economist/Publications/Pages/Resources-and-energy-quarterly.aspx>

understanding among SMEs regarding their foreign bribery risks and how they can comply with Australia's foreign bribery laws. During the on-site, representatives noted that they often turn to international and other Parties' guidance to fill this gap. To address this, the lead examiners recommend that Australia find additional ways to encourage companies, particularly SMEs, to develop and adopt adequate internal controls, ethics, and compliance programmes, or measures for the purpose of preventing and detecting foreign bribery. Efforts in this regard could include drawing companies' attention to existing domestic and international guidance, including practical guidance on the high-risk sectors and regions in which Australian businesses commonly operate. Moreover, in the event that Australia establishes a 'failure to prevent' offence for legal persons, the lead examiners recommend that Australia closely engage with the private sector to prepare guidance on the establishment and implementation of adequate compliance measures with regard to the new offence.

CONCLUSION: POSITIVE ACHIEVEMENTS, RECOMMENDATIONS, AND ISSUES FOR FOLLOW-UP

170. The Working Group commends Australia for increasing enforcement of its foreign bribery offence since Phase 3 and securing its first convictions. However, in view of the level of exports and outward investment by Australian companies in jurisdictions and sectors at high risk for corruption, Australia must continue to increase its level of enforcement. The Working Group anticipates that the number of concluded cases will further increase by the time of Australia's two-year written follow-up report, due to the substantial steps taken by Australia since Phase 3 to improve its institutional framework for detecting, investigating and prosecuting foreign bribery cases.

171. Throughout the evaluation process, Australia was highly cooperative and forthcoming, and extremely flexible regarding the organisation of the on-site.

172. Regarding outstanding Phase 3 recommendations, Australia has fully implemented the following recommendations: 2a on facilitation payments, 2b on proof of the intent to bribe, 4a on sanctions for false accounting, 4b on false accounting, 10c on Article 5 of the Anti-Bribery Convention, 8a(v) on investigations of money laundering, 14b on the non-deductibility of bribe payments, and 15b on reporting obligations of Australian civil servants. The following recommendations remain partially implemented: 3 on the liability of legal persons, 9 on plea bargaining and self-reporting, and 13 on money laundering. The following recommendations remain unimplemented: 11 on mutual legal assistance and 16a on debarment by procuring agencies. The following recommendations have been converted to follow-up issues: 14b on the enforcement of false accounting offences related to foreign bribery, 15a on the reporting obligations of external auditors, and 15c on the reporting obligations of public servants.

173. In conclusion, based on the findings in this report, the Working Group identifies positive achievements and good practices in Part I below and makes recommendations in Part II below. The Working Group will follow-up on issues identified in Part III below. The Working Group invites Australia to submit a written report on the implementation of these recommendations and issues for follow-up in two years (December 2019). At the time of its two-year report, the Working Group also invites Australia to provide non-confidential information about its foreign bribery enforcement actions, including sanctions, reasons for any acquittals, and horizontal challenges.

Positive Achievements and Good Practices

174. Throughout this report, several good practices and positive achievements by Australia have been identified, which have proved effective in combating bribery of foreign public officials and enhancing enforcement. In addition to making substantial institutional changes to enhance AFP's foreign bribery investigative and prosecution capacity described above, Australia has taken other important steps to strengthen foreign bribery prevention and enforcement.

175. Whistleblower protections have been strengthened under the Public Interest Disclosure Act 2013 (PIDA), a dedicated Office of the Whistleblower has been established for corporate whistleblowers, and a Parliamentary Inquiry into whistleblower protections in the corporate, public and not-for profit sectors is ongoing. Australia's foreign bribery offence was amended in 2015 to address potential weaknesses identified in Phase 3, and Australia is proactively identifying possible barriers to successful investigation and prosecution of the foreign bribery offence. Australia has conducted extensive awareness-raising initiatives on the use of facilitation payments. Since Phase 3, it has also established false accounting offences in the Criminal Code.

176. Moreover, the Working Group identifies two important initiatives by Australia to combat foreign bribery that it believes constitute good practices. The first initiative concerns the establishment of Fintel Alliance, formerly launched by the Ministry of Justice in March 2017. Fintel is a public-private partnership to enhance the fight against money laundering, terrorist financing and organised crime by focusing on developing 'smarter regulation', including streamlining the AML/CFT regulatory framework for industry. Examining the Panama Papers is one of its first joint projects. The second initiative concerns AFP's International Operations, particularly the engagement of AFP liaison officers around the world in foreign bribery investigations. Liaison officers provide a direct point of contact for suspicious activities, help ensure the smooth exchange of intelligence, and report on open source media. They facilitate outgoing MLA requests from Australia by directly engaging with foreign MLA authorities, and by helping ensure that evidence obtained from foreign countries satisfies Australia's evidentiary requirements. They facilitate incoming MLA requests to Australia by, for instance, obtaining information on whether the person identified in the request might face inhumane treatment, including the death penalty.

Recommendations of the Working Group to Australia

1. Regarding the **detection of foreign bribery**, the Working Group recommends that Australia:
 - a. Increase the potential for detecting foreign bribery through its **Anti-Money Laundering** system by:
 - i. Raising awareness of foreign bribery as a predicate offence for money laundering, including by providing additional guidance with case studies and typologies to reporting entities regarding the detection of foreign bribery predicated on money laundering (in particular, through the real estate sector) [Convention Article 7], and
 - ii. Taking appropriate steps to address the risk that the proceeds of foreign bribery will be laundered through the Australian real estate sector, in line with the FATF standards. These should include specific measures to ensure that the Australian financial system is not the sole gatekeeper for such transactions [Convention Article 7].
 - b. Enhance its **whistleblower protections** by:

- i. Enacting legislation that provides clear, comprehensive, protections for whistleblowers across the private sector that align (where appropriate) with the protections for public sector whistleblowers in the PIDA. When enacting this legislation, Australia should consider seriously the recommendations made by the September 2017 Report of the Joint Parliamentary Committee on Corporations and Financial Services [2009 Recommendation IX (iii)], and
 - ii. Raising awareness of any new legislation to ensure that employees in all sectors are fully apprised of the new regime [2009 Recommendation IX iii)], and
 - c. Clarify existing guidance to tax auditors to minimise the risk of tipping off taxpayers regarding ongoing and future foreign bribery investigations when interviewing taxpayers and third parties to verify whether tax deductions have been taken for bribe payments [2009 Recommendation III (iii)].
2. Regarding the **investigation and prosecution of foreign bribery**, the Working Group recommends that Australia:
 - a. Continue to resource AFP effectively to ensure it can continue its foreign bribery enforcement efforts [Convention Article 5, 2009 Recommendation Annex I B)]; and
 - b. Continue to resource CDPP so it can effectively prosecute foreign bribery cases at the rate they are expected to be generated by AFP [Convention Article 5, 2009 Recommendation Annex I B)].
3. Regarding **international cooperation**, the Working Group recommends that Australia, to the fullest extent possible within its legal system, ensure that a broad range of MLA can be provided to Parties to the Convention that apply civil or administrative (and not criminal) liability to legal persons for foreign bribery [Convention Article 9.1].
4. Regarding **sanctions and confiscation**, the Working Group recommends that:
 - a. Where appropriate, Australian authorities pursue confiscation of bribe payments and their proceeds [Convention Article 3.3]; and
 - b. Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals convicted of foreign bribery [2009 Recommendation XI (i)].
5. Regarding **the liability of legal persons**, the Working Group recommends that Australia:
 - a. Proactively pursue criminal charges against legal persons, where appropriate, for foreign bribery and related offences, such as false accounting, money laundering, fraud and tax evasion, including where an individual perpetrator pleads guilty; [Convention Articles 2 and 8, 2009 Recommendation VIII i)];
 - b. Finalise and publish the draft Best Practice Guideline on Self-Reporting of Foreign Bribery and Related Offending by Corporations, and take concrete steps to raise awareness of the Guideline amongst the private sector [Convention Articles 3 and 5]; and
 - c. Provide clear information in the public domain about where a company should go in order to make a voluntary report of foreign bribery [2009 Recommendation Annex I B)].

6. Regarding **engagement with the private sector**, the Working Group recommends that Australia:
 - a. Find additional ways to encourage companies, particularly SMEs, to develop and adopt adequate internal controls, ethics, and compliance programmes or measures for the purpose of preventing and detecting foreign bribery. Efforts in this regard could include drawing companies' attention to existing domestic and international guidance, including practical guidance regarding the high-risk sectors and regions in which Australian businesses commonly operate. [2009 Recommendation C i) and ii)]; and
 - b. In the event that Australia enacts a 'failure to prevent' offence for companies, closely engage with the private sector to prepare guidance on the establishment and implementation of adequate compliance measures with regard to the new offence [2009 Recommendation i) and ii)].

Follow-up Issues

7. The Working Group will follow-up on:
 - a. Whether ATO proactively detects and reports to AFP suspected bribe payments to foreign public officials;
 - b. Whether AUSTRADE, in the course of its trade facilitation role, effectively detects and reports foreign bribery suspicions that involve client companies to AFP;
 - c. Whether the Department of Defence reports credible suspicions of foreign bribery involving its contractors and potential contractors to AFP;
 - d. Australia's ongoing review and monitoring of the defence for facilitation payments, including any recommendations that come out of the ongoing Senate Inquiry Into Foreign Bribery;
 - e. The steps that Australia has taken to address the recommendations made by the Committee with respect to whistleblowers in both the public and private sectors;
 - f. Investigations into foreign bribery allegations to verify whether the increased foreign bribery capacity is working in practice;
 - g. Whether there are any specific issues impacting on CDPP's ability to prove intent;
 - h. Whether the proposed new corporate offence of failing to prevent foreign bribery is enacted;
 - i. Whether external auditors who discover indications of a possible illegal act of bribery are reporting the discovery to management and, as appropriate, to corporate monitoring bodies;
 - j. Sanctions and confiscation in foreign bribery cases;
 - k. Australia's enforcement of foreign bribery cases that may be politically sensitive; and
 - l. Australia's enforcement of false accounting offences related to foreign bribery.

ANNEX 1: PHASE 3 WGB RECOMMENDATIONS TO AUSTRALIA AND ASSESSMENT OF IMPLEMENTATION BY THE WORKING GROUP ON BRIBERY IN 2014

Recommendations of the Working Group in Phase 3		<i>Progress at time of two year written follow-up in December 2014*</i>
Recommendations for ensuring effective investigation, prosecution and sanctioning of foreign bribery		
1.	The Working Group recommends that Australia review its overall approach to enforcement in order to effectively combat international bribery of foreign public officials (Convention Article 1, 5; 2009 Recommendation V).	<i>Fully Implemented</i>
2.	With respect to the <u>foreign bribery offence</u> , the Working Group recommends that Australia:	
	a) Continue to raise awareness of the distinction between facilitation payments and bribes, and encourage companies to prohibit or discourage the use of small facilitation payments in internal company controls, ethics and compliance programs or measures, recognising that such payments must in all cases be accurately accounted for in such companies' books and financial records (2009 Recommendation VI.ii);	<i>Partially Implemented</i>
	b) Take appropriate steps to clarify that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery offence (Convention Article 1);	<i>Not Implemented</i>
3.	Regarding the <u>liability of legal persons</u> , the Working Group recommends that Australia take steps to enhance the usage of the corporate liability provisions, including those on corporate culture, where appropriate, and provide on-going training to law enforcement authorities relating to the enforcement of corporate liability in foreign bribery cases (Convention Article 2).	<i>Partially Implemented</i>
4.	Regarding the <u>false accounting offence</u> , the Working Group recommends that Australia:	
	a) Increase the maximum sanctions against legal persons for false accounting under Commonwealth legislation to a level that is effective, proportionate and dissuasive within the meaning of Article 8(2) of the Convention, commensurate with Australia's legal framework; or increase the maximum sanctions and broaden the scope of liability of legal persons for false accounting offences at the State level (Convention Article 8(2));	<i>Not Implemented</i>
	b) Vigorously pursue false accounting cases and take all steps to ensure such cases are investigated and prosecuted where appropriate (Convention Article 8(1)).	<i>Partially Implemented</i>
5.	Regarding <u>confiscation</u> , the Working Group recommends that Australia take further concrete steps (such as providing guidance and training) to ensure that its law enforcement authorities routinely	<i>Fully Implemented</i>

* The right-hand column sets out the findings of the Working Group on Bribery on Australia's written follow-up report to Phase 3, considered by the Working Group in June 2012.

	considers confiscation in foreign bribery cases (Convention Article 3(3)).	
6.	Regarding the <u>Australian Securities and Investment Commission (ASIC)</u> , the Working Group recommends that Australia take steps to ensure that ASIC's experience and expertise in investigating corporate economic crimes are used to assist the AFP to prevent, detect and investigate foreign bribery where appropriate (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).	<i>Fully Implemented</i>
7.	With respect to <u>co-ordination and information-sharing</u> , the Working Group recommends that:	
	a) The AFP, ASIC, and APRA set out in writing with greater precision, following consultations with one another, their complementary roles and responsibilities in foreign bribery and related cases, and written rules for case referral and information sharing (Convention Article 5; 2009 Recommendation IX.ii);	<i>Fully Implemented</i>
	b) Australia establish clear guidelines as to when each State and Territorial authority would refer foreign bribery cases to the AFP or commence its own investigations (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).	<i>Fully Implemented</i>
8.	With respect to <u>investigations</u> of foreign bribery, the Working Group recommends that:	
	a) The AFP (i) take sufficient steps to ensure that foreign bribery allegations are not prematurely closed; (ii) be more proactive in gathering information from diverse sources at the pre-investigative stage to increase the sources of allegations and to enhance investigations; (iii) take steps to ensure that it explores all avenues for exercising jurisdiction over related legal persons in foreign bribery cases; (iv) as a matter of policy and practice, continue to systematically consider whether it would be appropriate to conduct concurrent or joint investigations with other Australian and foreign law enforcement agencies, especially when foreign bribery is allegedly committed by a company that has its headquarters or substantial operations in Australia; and (v) routinely consider investigations of foreign bribery-related charges such as false accounting and money laundering, especially in cases where a substantive charge of foreign bribery cannot be proven (Convention Articles 2, 5, 7 and 8; Commentary 27; 2009 Recommendation Annex I.C and I.D);	<i>Partially Implemented</i> [additional follow-up in June 2015]
	b) The AFP Foreign Bribery Panel of Experts consider the Working Group's recommendations to the AFP (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D).	<i>Fully Implemented</i>
9.	Regarding <u>plea bargaining and self-reporting</u> , the Working Group recommends that Australia develop a clear framework that addresses matters such as the nature and degree of co-operation expected of a company; whether and how a company is expected to reform its compliance system and culture; the credit given to the company's co-operation; measures to monitor the company's compliance with a plea agreement; and the prosecution of natural persons related to the company (Convention Articles 3 and 5; Commentary 27; 2009 Recommendation Annex I.D).	<i>Partially Implemented</i>
10.	With respect to <u>resources and priority</u> , the Working Group recommends that:	
	a) The AFP continue to provide its officers with additional training in foreign bribery, and training to law enforcement officials to implement the Cybercrime Legislation Amendment Act 2012 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);	<i>Fully Implemented</i>
	b) Australia take steps to ensure that the CDPP has sufficient resources to prosecute foreign bribery cases (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D);	<i>Fully Implemented</i>
	c) The AFP and other bodies involved in foreign bribery investigations and prosecutions take measures (such by issuing written guidance or policy) to continue to ensure that they are not	<i>Partially Implemented</i>

	impermissibly influenced by factors listed in Article 5 (Convention Article 5; Commentary 27; 2009 Recommendation Annex I.D)	
11.	With respect to <u>mutual legal assistance (MLA)</u> , the Working Group recommends that Australia take reasonable measures to ensure that a broad range of MLA, including search and seizure, and the tracing, seizure, and confiscation of proceeds of crime, can be provided in foreign bribery-related civil or administrative proceedings against a legal person to a foreign state whose legal system does not allow criminal liability of legal persons (Convention Article 9(1); 2009 Recommendation xIII.iv).	<i>Not Implemented</i>
Recommendations for ensuring effective prevention and detection of foreign bribery		
12.	With respect to <u>awareness-raising</u> , the Working Group recommends that Australia:	
	a) Raise awareness of the foreign bribery offence among State-level law enforcement authorities involved in investigating economic crime (2009 Recommendation III.i);	<i>Fully Implemented</i>
	b) Continue to raise awareness among the private sector of the foreign bribery offence and the importance of developing and implementing anti-bribery corporate compliance programs, including by (i) promoting Annex II of the 2009 Recommendation, (ii) targeting companies (particularly SMEs) that conduct business abroad, and (iii) co-ordinating efforts to promote corporate compliance, including those undertaken by the AFP (2009 Recommendation III.i, III.v, X.C and Annex II);	<i>Fully Implemented</i>
	c) Consider summarising publicly available information on when hospitality, promotional expenditure, and charitable donations may amount to bribes (2009 Recommendation III.i and X.C);	<i>Fully Implemented</i>
	d) Adopt a “whole-of-government” approach to raise awareness of foreign bribery (2009 Recommendation III.i).	<i>Fully Implemented</i>
13.	With respect to anti-money laundering measures, the Working Group recommends that Australia further raise awareness of foreign bribery as a predicate offence, and provide additional guidance to reporting entities regarding the detection of foreign bribery, including through case studies and typologies (2009 Recommendation III.i).	<i>Partially Implemented</i>
14.	With respect to <u>tax-related measures</u> , the Working Group recommends that:	
	a) Australia align the record-keeping requirements for deducting a facilitation payment under the ITAA 1997 with those for the facilitation payment defence under the Criminal Code Act (2009 Recommendation VI.ii, VIII.i; 2009 Tax Recommendation I.i);	<i>Not Implemented</i>
	b) The AFP promptly inform the ATO of foreign bribery-related convictions so that the ATO may verify whether bribes were impermissibly deducted (2009 Recommendation VIII.i; 2009 Tax Recommendation I.i);	<i>Partially Implemented</i>
	c) The ATO consider including periodically bribery and facilitation payments in its Compliance Program (2009 Recommendation III.i, VIII.i; 2009 Tax Recommendation I.ii).	<i>Fully Implemented</i>
15.	With respect to <u>prevention, detection and reporting</u> , the Working Group recommends that:	
	a) Australia extend the reporting obligation of external auditors under the Commonwealth Corporations Act to cover the reporting of foreign bribery, including foreign bribery committed by an audited company’s subsidiary or joint venture partner (2009 Recommendation III.iv, X.B.v);	<i>Not Implemented</i>
	b) Australia align the APS Guide with its practice of requiring Australian civil servants who work overseas to report suspicions of foreign bribery to the AFP in all cases (2009 Recommendation	<i>Not Implemented</i>

	IX.ii);	
	c) Australia ensure that Australian public servants, and officials and employees of independent statutory authorities are subject to equivalent reporting requirements (2009 Recommendation IX.ii);	<i>Not Implemented</i>
	d) Australia put in place appropriate additional measures to protect public and private sector employees who report suspected foreign bribery to competent authorities in good faith and on reasonable grounds from discriminatory or disciplinary action (2009 Recommendation IX.iii);	<i>Partially Implemented</i>
	e) AusAID expressly require that all foreign bribery allegations involving Australian nationals, residents and companies are always reported to the AFP; and train its employees on this reporting obligation and procedure (2009 Recommendation IX.ii);	<i>Fully Implemented</i>
	f) Austrade consider taking concrete steps to encourage companies, in the strongest terms, to conduct due diligence on agents, including those referred to them by Austrade (2009 Recommendation x.C.i).	<i>Fully Implemented</i>
16.	With respect to <u>public advantages</u> , the Working Group recommends that:	
	a) Australian procuring agencies put in place transparent policies and guidelines on the exercise of their discretion on whether to debar companies or individuals that have been convicted of foreign bribery (Convention Article 3(4); 2009 Recommendation xl.i);	<i>Not Implemented</i>
	b) EFIC (i) conduct due diligence on agent commission fees below 5% of large absolute value to ensure funds are not being provided as bribes; (ii) report all credible allegations of foreign bribery involving Australian nationals, residents and companies to the AFP, and not consider the CCPM when deciding whether to report these cases; and (iii) reduce to writing its criteria and guidelines for terminating support to entities involved in foreign bribery (2009 Recommendation xlii.ii; 2006 Export Credit Recommendation).	<i>Fully Implemented</i>

ANNEX 2: LIST OF PARTICIPANTS IN THE ON-SITE VISIT

From the Australian government, ministries, and other bodies:

- Attorney-General's Department (including representatives from Australia's central authority)
- Australian Federal Police (representatives from Sydney, Canberra, Singapore, London)
- Australian Public Service Commission
- Australian Securities and Investments Commission
- Australian Taxation Office
- Australian Trade and Investment Commission
- Australian Transaction Reports and Analysis Centre
- Commonwealth Director of Public Prosecutions (representatives from Sydney and Melbourne offices)
- Department of Defence
- Department of Foreign Affairs and Trade
- Department of the Prime Minister and Cabinet
- Export Finance and Insurance Corporation
- Independent Commission against Corruption (New South Wales)
- New South Wales Police Force
- New South Wales Office of the Director for Public Prosecutions
- Office of the Commonwealth Ombudsman
- The Treasury

From the private sector and business associations:

- 9 representatives from Australian business, industry, or sectoral associations
- 6 representatives from the extractives sector
- 5 representatives from the financial sector
- 3 representatives from the transport sector
- 1 representative from the telecommunications sector
- 1 representative from the food markets sector

From civil society, legal practitioners, compliance, tax and auditing professionals:

- 8 representatives from Australian non-governmental organisations
- 8 representatives from the legal profession
- 6 representatives from the accounting and auditing profession
- 2 representatives from academia
- 1 representative from the media

ANNEX 3: LIST OF ABBREVIATIONS, TERMS, AND ACRONYMS

ABF	Australian Border Force
ACC	Australian Chamber of Commerce
AFP	Australian Federal Police
AG	Attorney-General
AGD	Attorney-General's Department
AML	Anti-money laundering
APS	Australian Public Service
PSC	Australian Public Service Commission
APS Code	APS Code of Conduct
APS Guide	APS Values and Code of Conduct in Practice
ASA	Australian Auditing Standard
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
ATO	Australian Taxation Office
AUD	Australian dollar
AUSTRAC	Australian Transaction Reports and Analysis Centre
AUSTRADE	Australian Trade and Investment Commission
AusAID	Australian Agency for International Development
CACT	Criminal Assets Confiscation Taskforce
CCA	Criminal Code Act 1995
CCPM	Case Categorisation and Prioritisation Model
CDPP	Commonwealth Director of Public Prosecutions
CFC	Commercial, Financial & Corruption Group
CMF	Case Management Forum
DFAT	Department of Foreign Affairs and Trade
DFD	Department of Finance and Deregulation
DNFBPs	Designated Non-Financial Business Professionals
DOD	Department of Defence
DPA	Deferred Prosecution Agreement
EFIC	Export Finance and Insurance Corporation
EU	European Union
EUR	Euro
FAC	Fraud and Anti-Corruption
FACC	Australian Federal Police hosted Fraud and Anti-Corruption Centre
FATF	Financial Action Task Force
FBCR	Foreign Bribery Case Review
FIRB	Foreign Investment Review Board

ICCCA	International Crime Cooperation Central Authority (Australia)
JDP	Joint Petroleum Development Area
MABRA	Mutual Assistance in Business Regulation Act 1992
MACMA	Mutual Assistance in Criminal Matters Act 1987
MER	Mutual evaluation report (FATF)
MLA	Mutual legal assistance
MNE	Multi-national enterprises
MOU	Memorandum of understanding
NGO	Non-governmental organisation
NSW	New South Wales
ODA	Official development assistance
POCA	Proceeds of Crime Act 2002
PSA	Public Service Act 1999
SFCT	Serious Financial Crimes Taskforce
SME	Small and medium-sized enterprise
STR	Suspicious transaction report

ANNEX 4: FACC CENTRE REFERRAL FLOWCHART

