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SUBMISSION TO INQUIRY ON *CRIMES LEGISLATION AMENDMENT (PROCEEDS OF CRIME AND OTHER MEASURES) BILL 2015*

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The Justice and International Mission Unit, Uniting Church in Australia, Synod of Victoria and Tasmania welcomes this opportunity to make a submission in support of a number of measures of the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015*. The Unit has taken an active interest in issues of the recovery of proceeds of crime, bribery of foreign officials by Australians and combating money laundering, so this submission will only address Schedules 1, 2 and 4.

We strongly support the passage of Schedules 1 and 4. The Unit also supports the passage of Schedule 2, but with amendments to make it more effective in combating the bribery of foreign officials similar to the regime that exists under the US *Foreign Corrupt Practices Act* of 1977.

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Schedule 1 – Proceeds of Crime

The Uniting Church in Australia is committed to working for an end to poverty globally and corruption and financially motivated crimes are often barriers to poverty reduction. For example, we have conducted research into politically exposed persons (PEPs in the language used in anti-money laundering legislation) from PNG who have been charged with corruption related offences in PNG and appear to have been able to transfer assets freely into Australia.

In October 2012 Sam Koim, the head of the Papua New Guinea anti-corruption body Taskforce Sweep, publicly stated that Australia had, at that time, never repatriated any funds stolen through corruption to PNG. He went on to allege that corrupt people from PNG:

> *have bought property and other assets, put money in bank accounts and gambled heavily in your casinos and have never been troubled by having their ill-gotten gains taken off them. Unless the money can be prevented from leaving our country or prevented from entering Australia, the bad guys win and the rest of Papua New Guinea suffers.*

He stressed what was at stake:

> *When money that is supposed to build hospitals, to buy medical equipment is used to buy real estate in Cairns or Brisbane, people die. And, quite frankly, those who turn a blind eye to this are as guilty as the offenders.*

He also said:

> *Be under no illusion, these people have chosen Australia as their preferred place to launder and house the proceeds of their crimes because it is easy. Cairns is only a short flight and property can be bought off the plan without permission. The financial system is stable and, it has been, up until now, extremely easy to get money into your system….*
>
> *As Chairman of Taskforce Sweep, I am privy to the thinking of our Prime Minister on this topic. I can share with you the fact he has become increasingly unhappy as our Taskforce has progressed, with the fact that the Australian financial system is being used to systematically launder tens of millions and possibly hundreds of millions of kina that should be used to provide healthcare, education and infrastructure for our people – the priority areas of the Government I represent.*

As outlined below, based on the work by the World Bank and the UN Office on Drugs and Crime (UNODC), a non-conviction based forfeiture scheme is an essential tool in dealing with the problem of money stolen from developing country governments and shifted into Australia, as well as other criminal activity.

The Unit welcomes that new subsections 319(2) – (5) clarify where a court must not grant a stay of civil proceedings under the *Proceeds of Crime Act 2002.* The Unit believes that it is vital that concurrent civil and criminal proceedings be possible.

The World Bank Stolen Asset Recovery initiative has recommended that non-conviction based (NCB) "asset forfeiture should be complementary to criminal prosecutions and convictions. It may precede a criminal indictment or parallel criminal proceedings."[1] The

[1] Theodore Greenberg, Linda Samual, Wingate Grant, and Larissa Gray, 'Stolen Asset Recovery. A good practices guide for non-conviction based asset forfeiture', The World Bank, 2009, p. 29.

World Bank recommends that it is preferable that NCB asset forfeiture action and criminal prosecution be pursued simultaneously.[2] They state there are circumstances where both might not proceed at the same time, such as when the use of "discovery in the NCB asset forfeiture case to obtain information that would then be used to prejudice the criminal prosecution."[3]

The World Bank makes the point that:[4]

> *Both a criminal prosecution and an NCB asset forfeiture action can proceed without violating protections against double jeopardy because NCB asset forfeiture is neither a "punishment" nor a criminal proceeding. In the United States v. Ursery, the United States Supreme Court stated, "Our cases reviewing civil forfeitures under the Double Jeopardy Clause adhere to a remarkably consistent theme…. In rem NCB asset forfeiture is a remedial civil sanction, distinct from potentially punitive in personam civil penalties such as fines, and does not constitute a punishment under the Double Jeopardy Clause." Courts in other jurisdictions have reached the same conclusion, or have confirmed that NCB asset forfeiture is not a punishment or a criminal proceeding. In Walsh v. Director of the Asset Recovery Agency, the Northern Ireland Court of Appeal stated, "The primary purpose is to recover proceeds of crime; it is not to punish the appellant in the sense normally entailed in a criminal sanction.*

Theft from Developing Countries

The Unit notes that the World Bank and UN Office on Drugs and Crime (UNODC) believe that $20 to $40 billion a year is lost from developing countries due to corruption (and this excludes money lost by tax evasion by multinational companies), only $5 billion in total has been repatriated to developing countries in the last 15 years.[5] They noted most of the legal barriers are onerous requirements to the provision of mutual legal assistance, a lack of non-conviction based asset confiscation procedures and an overly burdensome procedural and evidentiary laws.[6]

In cases of the theft of assets from governments and cases of corruption, often the only tangible evidence that a crime has taken place is the money that changes hands between the corrupt official and his or her partner in crime. Thus the enrichment of the corrupt official becomes the most visible manifestation of corruption. An offense such as bribery, which requires the demonstration of an offer by the corruptor or acceptance by the official, is difficult to prosecute in these circumstances. Similarly, once an offense has been established in a court of law, linking the proceeds to an offense for the purposes of recovering assets can often be a complex endeavour. Efforts to combat corruption are further challenged by the anonymity and fluidity with which assets can be moved, concealed, and transferred before effective means can be taken to seize, freeze, and return them to their rightful owners.[7] These challenges around dealing with funds stolen from developing country governments point to the value of laws to seize, restrain and return unexplained wealth.

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[2] Theodore Greenberg, Linda Samual, Wingate Grant, and Larissa Gray, 'Stolen Asset Recovery. A good practices guide for non-conviction based asset forfeiture', The World Bank, 2009, p. 30.
[3] Theodore Greenberg, Linda Samual, Wingate Grant, and Larissa Gray, 'Stolen Asset Recovery. A good practices guide for non-conviction based asset forfeiture', The World Bank, 2009, p. 30.
[4] Theodore Greenberg, Linda Samual, Wingate Grant, and Larissa Gray, 'Stolen Asset Recovery. A good practices guide for non-conviction based asset forfeiture', The World Bank, 2009, p. 31.
[5] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 1.
[6] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 3.
[7] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 5.

International Standards and Laws in Other Jurisdictions

By 2010, over 40 jurisdictions has introduced legislation criminalising illicit enrichment.[8] Illicit enrichment was introduced as a mandatory offence in the 1996 Inter-American Convention against Corruption. The *UN Convention Against Corruption*, to which Australia is a state party, adopted a position in Article 20 that states should consider criminalising illicit enrichment by public officials "subject to the requirements of their constitutions and the fundamental principles" of their legal systems.[9] Article 12(7) of the UN *Convention on Transnational Organised Crime*, to which Australia is a states party, states that jurisdictions "may consider the possibility of requiring an offender demonstrate the lawful origin of alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the principles of their domestic law and with the nature of the judicial and other proceedings."

The World Bank and the UNODC point out that properly constructed legislation for the restraint and confiscation of unexplained wealth is consistent with human rights standards. The jurisprudence of the European Court of Human Rights clearly delineates that the presumption of innocence does not prevent legislatures from creating criminal offenses containing a presumption by law as long as the principles of rationality and proportionality are duly respected. Of particular relevance is whether institutions involved in the investigation, prosecution, and adjudication of illicit enrichment are properly monitored, accountable, resourced, and trained so that they are in a position to implement the obligations taken under the International Covenant on Civil and Political Rights and to pursue corrupt money effectively and fairly.[10] In the precedent set by *Salabiaku v. France* the European Court of Human Rights outlined its approach to the permissibility of burden-shifting provisions, as approach that has been referred to as the *Salabiaku* test.[11] The UN Human Rights Council has stated "effective anticorruption measures and the protection of human rights are mutually reinforcing and that the promotion and protection of human rights is essential to the fulfilment of all aspects of an anticorruption strategy."[12]

The World Bank and UNODC point out that freezing or seizure of assets infringes on the property rights of the asset holder, but such action is warranted when balanced against the rights of victims to recover stolen funds and the need to secure funds before the asset holder is tipped off. In addition, safeguards can be introduced to ensure that the asset holder has the opportunity to contest the freezing order.[13] Such legislation already exists in Ireland, the US, the UK and Italy.[14]

In addition in Germany, Criminal Code, Section 73d, is enabling legislation that shifts the burden of proof to the accused if the prosecution establishes a significant increase in the assets of a public official that have not been accounted for. The legislation requires forfeiture

[8] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 8.
[9] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 9.
[10] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. xiv.
[11] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 31.
[12] UN Human Rights Council Resolution 7/11 of 27 March 2008, on the role of good governance in promoting and protecting human rights.
[13] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 55.
[14] Parliamentary Joint Committee on Law Enforcement, 'Inquiry into Commonwealth unexplained wealth legislation and arrangements', March 2012, p. v.

of assets "where there are grounds to believe that the objects were used for or obtained through unlawful acts." The Federal Supreme Court has argued that this does not reduce the burden of proof but absolves the prosecution from establishing "the specific details" of the offence.[15]

Similarly, Article 36 of the Dutch Criminal Code allows for the confiscation of the proceeds of the crime for which the offender has been convicted as well as the confiscation of assets "which are probably derived from other criminal activities". The Supreme Court has argued that this is consistent with the presumption of innocence because:[16]

> *Once a presumption of criminal origin of proceeds has been established by the prosecution, the defense can always reverse the presumption. Once the criminal origin of the proceeds has been made probable, the burden to rebut – not simply to deny – this presumption lies with the defense.*

In Switzerland if it is established that an individual supports or is part of a criminal organisation, the court is obligated to order the confiscation of all the assets owned by that individual. Criminal Code, Article 59(3), creates a presumption that a criminal organisation controls the assets of all of its members. It is then up to the individual to rebut the presumption by demonstrating the legal origin of the assets. The Supreme Court upheld the position that this respects the presumption of innocence because the accused can rebut it by demonstrating that they are not under the organisation's control or the assets have legal origin.[17]

In 2010 the Swiss Parliament also introduced the *Return of Illicit Assets Act*, which seeks to facilitate the recovery of the proceeds of corruption in situations where the state of origin of the assets is unable to conduct a criminal procedure that meets the requirements of Swiss law on international mutual assistance. This provides for the freezing, forfeiture and restitution of assets held by foreign politically exposed persons (PEPs, a term defined within international anti-money laundering standards) and their associates in Switzerland on the basis of decisions by the Federal Administrative Court. The court may presume the unlawful origin of these assets where:

> *The wealth of the person who holds powers of disposal over the assets has been subject to an extraordinary increase that is connected with the exercise of a public office by the politically exposed person and the level of corruption in the country of origin or surrounding the politically exposed person in question during their time in office is or was acknowledged as high.*

The court may reject the presumption "if it can be demonstrated that in all probability the assets were acquired by lawful means." Decisions of the Federal Administrative Court are subject to appeal to the Federal Supreme Court.[18]

The Need for Speed, Trust, Transparency and Flexibility

The World Bank and UNODC have pointed out that because assets can be moved within minutes and at the click of a button, investigations need to act in a time-sensitive manner. Any delay in executing a freezing request after the suspect has been arrested or tipped off can be fatal to the recovery of assets. They expressed concerns that the current mutual legal assistance processes are not sufficiently agile to address this reality, particularly for tracing,

[15] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 35.
[16] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 35.
[17] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 36.
[18] Lindy Muzila, Michelle Morales, Marianne Mathias and Tammar Berger, 'On the Take. Criminalizing Illicit Enrichment to Fight Corruption', The World Bank and UNODC, Washington, 2012, p. 37.

freezing or seizing of assets. Although many jurisdictions permit mutual legal assistance applications during the investigation stages or once there is reason to believe that a proceeding is about to be instituted against the alleged offender, a few jurisdictions require that criminal charges be initiated before the restraint or seizing assistance can be provided. Practitioners stated to the World Bank and UNODC that this approach impairs efforts to preserve assets by providing notice to the asset holder before the necessary provisional measures have taken place. By the time a response is received to a request to restrain assets, they will have been moved.[19]

They also point out a lack of trust of foreign jurisdictions often has resulted in delays that have allowed criminal assets to move before they can be seized.[20] The Unit notes with concern that there often are groups within Australia who will oppose effective legislation to co-operate with foreign law enforcement agencies on the basis that foreign law enforcement agencies cannot be trusted. The Unit believes instead that effective and timely co-operation should be provided, but with adequate safeguards for human rights and against misuse of the assistance provided.

Importance of Non-Conviction Based Restraint and Confiscation

The World Bank and UNODC also point out the importance of having a non-conviction based confiscation and restraint mechanism, arguing that in many instances it is the only way to recover the proceeds of corruption and to exact some measure of justice.[21] In their research they found practitioners highlighted the usefulness of non-conviction based confiscation because it can be quicker and more efficient and may be the only recourse when the offender if dead, has fled the jurisdiction, or is immune from prosecution.[22] The World Bank and the UNODC further argue that it is best not to limit the scope of non-conviction based confiscation and restraint, but at a minimum it should apply to circumstances where the perpetrator is dead, a fugitive, absent or unknown as well as in "other appropriate cases".[23] In addition to having domestic legislation allowing for non-conviction based restraint and confiscation of assets, they recommend that jurisdictions should allow for enforcement of foreign non-conviction based restraint orders.[24]

Schedule 2 – False Accounting

As identified in section 7.1 of the joint submission of the Uniting Church and Publish What You Pay (PWYP) Australia dated 24 August 2015 made in relation to the Senate inquiry into foreign bribery, the Uniting Church is supportive of moves by the Commonwealth Government to introduce a false accounting offence into Australia law similar to that which exists in the US *Foreign Corrupt Practices Act* of 1977 (FCPA) and the UK *Theft Act 1968*.[25]

[19] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 54.
[20] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, pp. 19-20.
[21] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 66.
[22] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 67.
[23] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 67.
[24] Kevin Stephenson, Larissa Gray, Ric Power, Jean-Pierre Brun, Gabriele Dunker and Melissa Panjer, 'Barriers to Asset Recovery', The World Bank and UNODC, Washington, 2011, p. 69.
[25] Section 17.

The OECD Convention on Combating Bribery of Foreign Public Officials

Article 8 of the Organisation for Economic Co-operation and Development (OECD) *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Convention) requires signatories to regulate both financial statement disclosures and the proper maintenance of accounting books and records to prohibit off-the-books accounts that may disguise acts of foreign bribery.

The OECD Convention further requires that signatories provide effective, proportionate and dissuasive civil, administrative or criminal penalties for such omissions and falsifications in respect of the books, records, accounts and financial statements of companies.

The OECD *Revised Recommendation of the Council on Combating Bribery in International Business Transactions*[26] (Revised Recommendations) provides some additional guidance on the topic. In Part VA of the *Revised Recommendations*, the Council suggests that:

(a) Member countries should require companies to maintain adequate records of the sums of money received and expended by the company, identifying the matters in respect of which the receipt and expenditure takes place. Companies should be prohibited from making off-the-books transactions or keeping off-the-books accounts.

(b) Member countries should require companies to disclose in their financial statements the full range of material contingent liabilities.

(c) Member countries should adequately sanction accounting omissions, falsifications and fraud.

The Revised Recommendations also provide guidance in relation to (among other things) independent external audit and internal company controls, which are related issues but outside the scope of the Proposed Law.

International comparative benchmarking of the Proposed Law against key jurisdictions

The Unit has considered the Schedule 2 of the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015* against the requirements of the OECD Convention and the Revised Recommendations. In essence, the OECD Convention and the Revised Recommendations impose two axiological requirements on convention signatories, namely:

(a) they oblige corporations to properly maintain books and records disclosing their operations and affairs; and

(b) they prohibit off-the-book accounts, non-disclosure and falsification of accounts.

Appendix 1 of this submission contains a high-level comparative analysis of the Bill against the equivalent laws of the United States, the United Kingdom and Canada focusing specifically upon the two principal criteria identified. Based on that analysis, we make the following observations:

[26] Adopted by the OECD Council at its 901st session on 23 May 1997 C(97)123/Final.

(a) In comparison to the Schedule 2 of the Bill, the US FCPA false accounting provisions are couched in relatively more straight-forward language and are in substance less complicated.

(b) The US FCPA false accounting provisions are intimately connected to the related internal-controls and audit provisions, which are absent from the Bill. Accordingly, we would be supportive of these issues also being put on the legislative reform agenda at the earliest opportunity.

(c) The FCPA false accounting provisions impose a relatively low enforcement burden on regulators in terms of the requirements necessary to establish a contravention of the law, although importantly the US provisions apply only to issuers rather than to all US corporations and other business structures.

(d) In terms of the potential consequences of contravention, Schedule 2 of the Bill is more congruous with the approach adopted by the UK and Canada, which are widely considered to be more demanding than the FCPA and the current high water-mark, but have been enacted more recently and have limited (if any) enforcement history.

(e) The penalties contained in Schedule 2 of the Bill are aligned with those already imposed by the *Criminal Code Act* 1995 (Cth) in respect of foreign bribery which we consider to be an appropriate approach, although the penalties are halved for offences relating to “reckless false dealing with accounting documents”.

(f) The jurisdictional reach of Schedule 2 of the Bill is broadly consistent with that which exists under the US, UK and Canadian regimes.

Specific comments and potential refinement of the Proposed Law

In our view, there are three matters of substance which need to be addressed in order to ensure that Schedule 2 of the Bill is effective at deterring bribery and corruption and implementing Australia's obligations under the OECD Convention in respect of false accounting.

<u>Obligation to maintain proper books and records</u>

First, Schedule 2 of the Bill seeks to piggyback upon the patchwork of existing laws in Australia which require corporations (and other business structures) to create and maintain proper accounting records. Appendix 1 contains a summary of some of the key aspects of those laws, but additional obligations may also arise under, for example, the common law, Commonwealth taxation laws and State and Territory revenue laws.

In particular, section 490.1(1)(a)(ii) and Section 490.2(1)(a)(ii) of the Bill refers to "an accounting document that the person is under a duty, under a law of the Commonwealth, a State or Territory or at common law, to make or alter." We are concerned that this approach:

(a) assumes that a legally enforceable duty to make or alter an accounting document already exists under Australian law. This may not be the case for reasons including the following:

(i) in respect of corporations, sections 286 and 1307 of the *Corporations Act* 2001 (Cth) may fall short in terms of founding a duty upon which the Bill could be prosecuted given the extent to which they have been

historically enforced and the uncertainty which exists as to their requirements; and

(ii) in respect of other business structures, the existence, source and extent of a duty to make or alter an accounting document is uncertain and inconsistent;

(b) is unnecessarily equivocal with the consequence that public dissemination of the Bill and its enforcement will be unduly difficult and problematic.

The success of the FCPA lies, at least in part, in the way in which the US false accounting provisions seamlessly and harmoniously integrate with related US laws such as *The Sarbanes-Oxley Act*, *The Dodd-Frank Wall Street Reform and Consumer Protect Act* and *The Money Laundering Control Act*. We submit that it time for Australia to take an analogous approach in formulating the Bill.

Adopting the approach taken by the FCPA, the Bill could be amended to include an express obligation on persons to maintain proper accounting records for the purposes of demonstrating compliance with the foreign bribery provisions of the *Criminal Code Act* 1995 (Cth). We are also supportive of the Bill being more fundamentally harmonised with existing Australian laws to ensure efficient utilisation of enforcement resources and appropriate allocation of enforcement responsibility.

Section 490.1(1)(b) and Section 490.2(b) should be expanded by inserting a new paragraph (vi) the contravention of a law of the Commonwealth.

Effective enforcement of the Bill

Second, the Unit submits that the Bill could be further refined to improve its effectiveness and reduce the evidential and enforcement burden its introduction will bring about. For example, the false accounting offence contained in Section 490.1 of the Bill requires the regulator to establish that (among other things):

(a) a person made, altered, destroyed or concealed an accounting document;

(b) the person *intended* the making, alteration, destruction or concealment of the document, or the failure to make or alter the document, to facilitate, conceal or disguise the occurrence of the person receiving a benefit not legimately due to them.

The Unit is concerned that the Australian Federal Police and Department of Public Prosecutions will experience difficulty establishing the "intention" aspects of the offence except in rare cases, such as where a witness co-operates with the Australian Federal Police or otherwise documents those aspects of the offence.[27] The lessor offence of 'recklessness' under Section 490.2 is more likely to be pursued in most cases.

Schedule 4 – Secrecy and access to AUSTRAC information

The Unit is supportive of the proposed amendments to the AML/CTF Act contained in Schedule 4 of the Bill. Effective information sharing is essential to curbing money laundering and financing of terrorism.

[27] For example, if email correspondence lawfully obtained by the Australian Federal Police were to record a person's knowledge, belief or intention and could be admitted into evidence.

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Appendix 1: International comparative benchmarking of Schedule 2 of the Bill against key jurisdictions

Comparative element	Australia[28]	US[29]	UK[30]	Canada[31]
Jurisdiction	Under the Bill, Australian regulators will have jurisdiction in 3 separate circumstances: 1. The person:[32] – is a constitutional corporation; – is an officer or employee of a constitutional corporation acting in the performance of his/her duties or the carrying out of his/her functions; – a person engaged to provide services to a constitutional corporation and acting in the course of providing those services; or – is a Commonwealth public official acting in the performance of his/her duties or carrying out his/her functions. 2. The act or omission:[33] – occurs within Australia; – occurs outside Australia; – concerns matters or things outside Australia; – facilities or conceals the commission of an offence against a law of the Commonwealth. 3. The accounting document:[34]	US regulators[35] principally have jurisdiction in respect of:[36] 1. Domestic concerns - US companies and individuals, irrespective of whether they act within, or wholly outside of, the United States; 2. Issuers - any company (domestic or foreign) which has securities listed on a US exchange and any company that is required to file periodic reports with the Securities and Exchange Commission; 3. Officers, directors, employees, agents and stockholders of domestic concerns and issuers; 4. Foreign persons/entities that engage in any act in furtherance of a corrupt payment while in the US; 5. Any foreign national or company that conspires with, aids or abets, or acts as an agent of an issuer or domestic concern.	UK authorities[37] principally have jurisdiction in respect of: 1. Any act or omission forming part of the offence takes place in the UK; 2. An act committed outside of the UK that would form part of an offence if that act were committed in the UK and the act is committed by a party that has a "close connection" with the UK; 3. Commercial organizations who can be liable for actions taken by an "associate person" (someone who performs services for or on behalf of one of these actors), regardless of the associate person's nationality, in certain prescribed circumstances;[38] 4. Corporations and individuals who are liable for aiding, abetting, counselling or procuring unlawful activity in accordance with the UK's ordinary rules of criminal law.[39]	Canadian authorities principally have jurisdiction in respect of circumstances where: 1. There is a "real and substantial" connection between the alleged offence and Canada;[40] 2. The alleged offence is committed by a Canadian citizen, permanent resident or organization incorporated, formed or otherwise organized under the laws of Canada or a province; 3. A party conspires or attempts to commit an impugned activity, is an accessory after the fact, or counsels the commission of an impugned activity.[41]

[28] All references are to the provisions of the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015* unless otherwise indicated.
[29] All references are to the provisions of the FCPA unless otherwise indicated.
[30] All references are to the provisions of the UK *Bribery Act 2010* unless otherwise indicated.
[31] All references are to the provisions of the *Corruption of Foreign Public Officials Act, S.C. 1998* unless otherwise indicated.
[32] Section 490.1(2)(a).
[33] Section 490.1(2)(b).
[34] Section 490.1(2)(c).
[35] Department of Justice and Securities and Exchange Commission.
[36] § 78dd-1(g), 78dd-2(i), 78dd-3(a) and 78ff(c).
[37] Serious Fraud Office accountable to the Attorney General.
[38] Sections 8 and 12.
[39] UK Ministry of Justice "Bribery Act 2010: Explanatory Notes", note 2 page 8.
[40] For example, see *R v. Libman* [1985] 2 SCR 178, 21 DLR (4th) 174 (Supreme Court of Canada).
[41] Sections 5 and 6.

Comparative element	Australia[28]	US[29]	UK[30]	Canada[31]
	– is inside or outside Australia; – is kept under or for the purposes of a law of the Commonwealth; or – is kept to record the receipt or use of Australian currency.			

Comparative element	Australia[28]	US[29]	UK[30]	Canada[31]
Obligation to maintain books and records	Section 286 of the *Corporations Act* 2001 (Cth) requires (among other things) a company to keep written financial records that: 1. correctly record and explain its transactions and financial position and performance; and 2. would enable true and fair financial statements to be prepared and audited. A breach of section 286 is a strict liability offence[42]. Section 9 of the *Corporations Act* defines "financial records" to include: 1. invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and 2. documents of prime entry; and 3. working papers and other documents needed to explain: – the methods by which financial statements are made up; and – adjustments to be made in preparing financial statements. Further, section 1307 of the *Corporations Act* makes it an offence for an officer, former officer, employee, former employee, member or former member of a company who engages in conduct that results in the concealment, destruction, mutilation or falsification of any securities of or belonging to the company or any books affecting or relating to affairs of the company. False accounting offences also exist in State and Territory legislation, such as section 83 of the *Crimes Act* 1958 (Vic). For individuals, this offence has a maximum penalty of 10 years imprisonment or a fine of approximately $169,000. For corporations, this offence bears a maximum fine of approximately $845,000.	Issuers are required to:[43] 1. make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and 2. devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: – transactions are executed in accordance with management's general or specific authorization; – transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and to maintain accountability for assets; – access to assets is permitted only in accordance with management's general or specific authorization; and – the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any difference.	In general terms, section 386 of the UK *Companies Act 2006* requires companies to keep proper accounts requiring that: 1. Every company keep adequate accounting records; 2. Accounting records must, in particular, contain: – entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; and – a record of the assets and liabilities of the company. Section 387 makes it clear that failure to comply with this regulation is a criminal offence which is punishable with imprisonment for a term not exceeding two years or a fine (or both). The offence is committed by every officer of the company.	In general terms, pursuant to section 20(2.1) of the *Canada Business Corporations Act RSC 1985*, a corporation shall prepare and maintain, adequate accounting records. Every person who, without reasonable cause, contravenes the requirement to prepare and maintain adequate accounting records, is guilty of an offence and liable on summary conviction to a fine not exceeding CAD 5,000 or imprisonment up to six months, or both (section 22 *Canada Business Corporations Act*).

[42] Section 286(3). Strict liability is defined in section 6.1 of the Criminal Code.
[43] §78m(b).

Comparative element	Australia[28]	US[29]	UK[30]	Canada[31]
Prohibition on off-the-books accounts, non-disclosure and falsification	There are two independent limbs to the absolute liability[44] false accounting prohibition contained in the Bill. Limb 1: Intentional false dealing with accounting documents[45] A person commits an offence if the person: – makes, alters, destroys or conceals an accounting document or fails to alter an accounting document that the person is under a duty to make or alter; – the person intents that, as a result of the making, alteration, destruction or concealment of the document (or failure to alter the document), it facilitates, conceals, disguises the occurrence of one or more of the following; o the person, or another person, receiving a benefit that is not legitimately due to the person; o the person, or another person, giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit; o loss to another person that is not legitimately incurred by the other person. Limb 2: Reckless false dealing with accounting documents[46] A person commits an offence if the person: – makes or alters, destroys or conceals an accounting document or fails to alter an accounting document that the person is under a duty to make or alter; – the person is reckless that, as a result of the making, alteration, destruction or concealment of the document (or failure to alter the document), it facilitates, conceals, disguises the occurrence of one or more of the following; o the person, or another person, receiving a benefit that is not legitimately due to the person; o the person, or another person, giving a benefit that is not legitimately due to the recipient, or intended recipient, of the benefit; o loss to another person that is not legitimately incurred by the other person.	No person shall directly or indirectly, falsify or cause to be falsified, any book, record or account subject to the obligation to maintain books and records set out above.[47] Directors and officers of issuers are also subject to obligations not to (among other things) make or cause to be made a materially false or misleading statement to an accountant in connection with any audit, review or examination of financial statements or the preparation or filing of any document or report required to be filed with the SEC.	The Bribery Act does not contain a stand alone provision for record keeping requirements. However, the British government has provided some guidance on the adequate procedures that commercial organizations are required to follow. These procedures require commercial organizations to maintain "accurate and appropriate documentation" of risk assessments, engage in appropriate levels of due diligence and to have adequate internal mechanisms set up to deter, detect and investigate bribery and monitor the ethical quality of transactions.[48] In addition, section 17 of the UK *Theft Act 1968*, provides that a person commits an indictable offence if the person dishonestly, with a view to gain for himself or another or with intent to cause loss to another: 1. destroys, defaces, conceals or falsifies any account or any record or document made or required for any accounting purpose; or 2. in furnishing information for any purpose produces or makes use of any account, or any such record or document as aforesaid, which to his knowledge is or may be misleading, false or deceptive in a material particular. Pursuant to section 18(1) of the Theft Act, where an offence committed by a body corporate under section 17 is proved to have been committed with the consent or connivance of any director, manager, secretary or other similar officer of the body corporate, he (as well as the body corporate) shall also be guilty of that offence, and shall be liable to be proceeded against and punished accordingly.	It is an indictable criminal offence for anyone to:[49] 1. establish or maintain accounts which do not appear in any of the books and records that they are required to keep in accordance with applicable accounting and auditing standards; 2. make transactions that are not recorded in those books and records; 3. record non-existent expenditures; 4. enter liabilities with incorrect identification; 5. knowingly use false documents; or 6. intentionally destroy accounting books and records (earlier than permitted by law).

[44] Section 490.1(3) and Section 490.2(2).

Comparative element	Australia[28]	US[29]	UK[30]	Canada[31]
Penalties	Individuals[50] For intentional false dealing with accounting documents – Imprisonment for not more than 10 years; and/or – Fine not more than 10,000 penalty units. Half these penalties for reckless false dealing with accounting documents Corporations[51] For intentional false dealing with accounting documents a fine not more than the greatest of the following: – 100,000 penalty units;[52] – if the court can determine the value, 3 times the value of the benefit obtained by the body corporate and related bodies corporate; – if the court cannot determine the value, 10% of the annual turnover of the body corporate during the 12 months ending at the end of the month in which the conduct constituting the offence occurred. Half these amounts for reckless false dealing with accounting documents.	Individuals Individuals face imprisonment for periods of up to 5 years and fines of up to US$5 million. Corporations Corporations can be fined up to US$25 million.[53]	The *Bribery Act* provides for a maximum jail term for individuals of up to 10 years. There are no limits on fines.[54] The maximum penalty under the *Theft Act* is imprisonment for a term not exceeding 7 years. The recovery of any illegitimate gain obtained may be pursued under separate legislation.	Contraventions are prosecuted by the commencement of criminal proceedings with a maximum jail term of 14 years. There are no limits on the fines that may be imposed.[55]

[45] Section 490.1(1).
[46] Section 490.2(1).
[47] §78m(b)(2), 78m(a), 78m(b)(1), 78o(d), 78j(b), 78n(a), 78t(b), 78t(c).
[48] UK Ministry of Justice, *Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing,* 11 February 2012, pages 20-31.
[49] Section 4(1).
[50] Section 490.1(4) and Section 490.2(3).
[51] Section 490.1(5) and Section 490.2(4).
[52] A penalty unit is currently A$180 in accordance with section 4AA of the *Crimes Act* 1914 (Cth).
[53] §78ff.
[54] Section 11.
[55] Sections 3(2) and 4(2).