Submission 140 - Attorney-General's Department

Attorney-General's Department made submission 52 to the inquiry into criminal, civil and administrative penalties in the 44th Parliament.

This document is intended as a supplementary submission to the original submission 52.

All submissions received in the 44th Parliament can be accessed via the following link:
http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/White_collar_crime/Submissions

Australian Government
Attorney-General's Department

5 December 2016

Dr Kathleen Dermody
Committee Secretary
Senate Economics References Committee
Parliament House
Canberra ACT 2600

Submission No: 52

By email: economics.sen@aph.gov.au

Dear Dr Dermody

The Attorney-General's Department has identified errors in the penalties listed on page 9 of its submission to the Senate Economics References Committee's *inquiry into criminal, civil and administrative penalties for white collar crime*.

These errors occurred due to a miscalculation in applying subsection 4B(2) of the *Crimes Act 1914*, which allows the courts to impose a maximum fine for Commonwealth offences punishable only by imprisonment.

These errors have been corrected in the attached submission.

Apologies for any inconvenience caused.

Yours sincerely

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Assistant Secretary
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Australian Government
Attorney-General's Department

April 2016

Attorney-General's Department

Senate Economics References Committee

Inquiry into penalties for white collar crime

1. Scope of submission

The Attorney-General's Department (the department) thanks the Senate Economics References Committee for the opportunity to make a submission to its inquiry into 'penalties for white collar crime'.

On 25 November 2015, the Senate referred an inquiry into the inconsistencies and inadequacies of current criminal, civil and administrative penalties for corporate and financial misconduct or white-collar crime to the Senate Economics References Committee for inquiry and report.

This inquiry is to have particular reference to:

a. evidentiary standards across various acts and instruments;
b. the use and duration of custodial sentences;
c. the use and duration of banning orders;
d. the value of fine and other monetary penalties, particularly in proportion to the amount of wrongful gains;
e. the availability and use of mechanisms to recover wrongful gains;
f. penalties used in other countries, particularly members of the Organisation for Economic Co-operation and Development [OECD]; and
g. any other relevant matters.

Our submission focuses on the particular matters outlined in the inquiry's Terms of Reference above.

2. Introduction

The department understands the terms 'corporate and financial misconduct' and 'white collar crime' encompass illegal or unethical acts that violate fiduciary responsibility or public trust. These acts may be committed by an individual or organisation and are usually committed during the course of legitimate occupational activity for personal or organisational gain.

2.1 The prevalence of white collar crime in Australia

The department notes estimates of the prevalence of white collar crime in Australia. According to PwC's 2014 Global Economic Crime Survey, 57 per cent of surveyed Australian organisations had experienced white collar crime in the past two years, with more than a third of organisations losing more than $1 million.[1] There has also been over $1.2 billion in reported fraud against the Commonwealth from 2010-14 stemming from 391,831 incidents. The actual cost of fraud, however, is likely to be much greater as this figure does not include undetected, unquantified or unreported incidents.[2]

Due to the complexity of obtaining evidence associated with corporate crime, many government agencies face significant challenges in investigating corporate crime. Large frauds can take large investigative teams many years to investigate. As at 30 June 2015, the AFP had 114 fraud-related matters on hand with an estimated total value of $1.6 billion.

[1] Available online at http://www.pwc.com.au/consulting/assets/risk-controls/global-economic-crime/global-economic-crime-au-may14.pdf.
[2] Figures taken from Australian Institute of Criminology, *Fraud against the Commonwealth: Report to Government 2010-2014* (not yet published).

2.2 The National Organised Crime Response Plan

The *National Organised Crime Response Plan 2015-2018* (the Response Plan) articulates Australia's national response to the current threat posed by serious and organised crime. The Response Plan is informed by the Australian Crime Commission's assessment of the organised crime threat environment which it provides through a range of products such as the biennial *Organised Crime in Australia* report.

In relation to white collar/financial crime, the Response Plan notes that the ACC has identified the following as key emerging threats:

- the upward trend in sophisticated transnational serious and organised crime groups targeting the Australian financial sector
- the emergence of globalised professional money laundering syndicates and the complexity of the global electronic banking and finance system that is used to launder the proceeds of financial crime, and
- the increased prominence of entrepreneurial individuals as key players in illicit markets, especially as a result of globalisation and technological advances.

In response to these threats, the Response Plan outlines a number of initiatives that the Commonwealth, states and territories will purpose over the term of the plan. A key initiative is the development of a strengthened national approach to financial crime, which includes the establishment of the Serious Financial Crime Taskforce to lead a Commonwealth operational response to high priority serious financial crimes, including professional facilitators and phoenix taxation fraud.

The Commonwealth government is working closely with its state and territory counterparts to progress these initiatives.

2.3 The Attorney-General Department's role in combating white collar crime

The department is responsible for a number of policy areas related to white collar crime, including national anti-money laundering and counter-terrorism financing (AML/CTF), Commonwealth fraud, proceeds of crime, anti-corruption and foreign bribery. The department administers a range of Acts used to combat white collar crime, including the *Proceeds of Crime Act 2002* and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). The department also fulfils a legislative scrutiny role, assessing Commonwealth legislation against the principles outlined in the *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*.

The department works closely with law enforcement agencies such as the Australian Federal Police (AFP), the Australian Crime Commission (ACC), CrimTrac, AUSTRAC, and the Commonwealth Director of Public Prosecutions (CDPP) and provides legal and policy advice to government on criminal justice issues, including issues surrounding white collar crime.

2.4 Recent Government efforts to combat white collar crime

Recent Government initiatives to combat white collar crime include establishing the Serious Financial Crime Taskforce, developing the National Organised Crime Response Plan, reviewing the approach to foreign bribery and introducing new offences for false accounting.

Serious Financial Crime Taskforce

In 2015, the Government established a multi-agency Serious Financial Crime Taskforce (SFCT) designed to deter and disrupt serious and complex financial crime. In the 2015-16 Budget, the Government committed $127.6 million over four years to fund the SFCT. The SFCT brings together the knowledge, resources and experience of law enforcement and regulatory agencies, including the AFP, Australian Tax Office (ATO), ACC, the Attorney General's Department (AGD), AUSTRAC, Australian Securities and Investments Commission (ASIC), CDPP and Australian Border Force (ABF). The department's role within the SFCT is to manage extradition and mutual assistance matters and to provide guidance on legislative reform issues.

The SFCT builds on the successful partnerships that were established by Project Wickenby, a cross-agency taskforce established in 2006 to strengthen national law enforcement and ATO compliance activities against tax fraud. Project Wickenby resulted in the conviction and sentencing of 46 individuals and the recovery of over $985 million in outstanding revenue as at 30 June 2015. The SFCT has a broader remit than Project Wickenby, allowing the SFCT to target a wide variety of serious financial crimes including tax fraud, phoenix fraud (which involves a company deliberately liquidating assets to avoid paying creditors) and fraud related to trusts and superannuation.

The resources of the SFCT are focused on operational activities, collecting and sharing intelligence and identifying and initiating reform measures to deprive criminal organisations of their assets and prosecute facilitators and promoters of financial crime. The SFCT also deploys deterrent and preventative strategies. Operational activities of the SFCT include targeting phoenix fraud, trust fraud and international tax evasion fraud. The SFCT targets activities that occur both in Australia and overseas. SFCT agencies work closely with international partner agencies, governments and organisations around the world, including those countries subject to Australia's bilateral tax treaties and Tax Information Exchange Agreements.

The SFCT provides a forum to develop policy, regulatory and legislative reform initiatives associated with serious financial crime. Particular areas of interest are professional facilitators, abuse of secrecy jurisdictions and information sharing.

The SFCT forms part of the AFP-led, multi-agency Fraud and Anti-Corruption (FAC) Centre. The FAC Centre was created in 2014 to improve the delivery of the AFP's existing fraud and anti-corruption efforts and to support the Commonwealth's anti-corruption framework. FAC Centre agencies include the AFP, ATO, ACC, ABF/Department of Immigration and Border Protection, CDPP, ASIC, AUSTRAC, Defence, Department of Foreign Affairs and Trade (DFAT), the Department of Human Services and AGD.

Combating foreign bribery

Australia is a party to the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (the OECD Anti-bribery Convention). Australia's implementation and enforcement of the Convention and related instruments is monitored by the OECD Working Group on Bribery, which completed its Phase 3 evaluation of Australia's compliance in 2012.

Since this evaluation, Australia has renewed its approach to enforcement of the foreign bribery offence, and Commonwealth agencies have taken significant steps to respond to the Working Group's recommendations. This includes the creation of the new AFP-led FAC Centre mentioned above, development of memoranda of

understanding between agencies to clearly delineate roles and responsibilities, and an expansion of outreach and awareness-raising efforts.

Australia reported back to the Working Group in December 2014 and June 2015 on progress in addressing the Phase 3 recommendations. This report-back was well-received. The OECD commended Australia for making good progress, particularly on important recommendations relating to enforcement. Further detail is contained in the department's submission to the Committee's inquiry into foreign bribery.[3]

False Accounting Offences

The Government introduced two new offences of false dealing with accounting documents which came into force on 1 March 2016.

These false accounting offences make it an offence for a person to facilitate, conceal or disguise in accounting documents payments or benefits which are not legitimately due. The first offence criminalises this conduct where a person intends that this conduct would facilitate, conceal or disguise the offender or another person giving or receiving a benefit, or another person incurring a loss, where that benefit or loss is not legitimately due. The second offence is the same as the first offence, except that the lower fault element of recklessness applies as to whether the benefit or loss would result from the offending conduct. The first offence (intention) imposes a maximum penalty for an individual of 10 years imprisonment, a fine of 10 000 penalty units ($1.8 million), or both, and a maximum penalty of at least $18 million for a body corporate. For the second offence, to which the lower fault element of recklessness attaches, the maximum penalties are half of the penalties applying to the first offence.

The offences target not only bribes to foreign public officials, but any duplicitous payments. The broad application of the offences will assist to combat false accounting in a range of criminal contexts as a significant and serious form of corporate crime. The introduction of these offences also strengthens Australia's compliance with Article 8 of the OECD Anti-Bribery Convention, which requires parties to criminalise false accounting to conceal foreign bribery.

Work with regional partners

The department also engages in aid-funded work in the Asia-Pacific that helps build capacity to counter money laundering and corruption and promote the recovery proceeds of crime. The department's work contributes to building more effective governance, which helps to create an efficient public sector and functioning institutions that maintain law and order and provide the foundations for economic growth, private sector investment and trade.

The department works directly with our foreign counterpart agencies to:

- develop effective laws to implement the Financial Action Task Force (FATF) Recommendations on anti-money laundering, and proceeds of crime
- 'follow the money trail' and strengthen anti-money laundering and proceeds of crime laws and practices to attack the financial incentive for crime
- improve inter-agency cooperation to ensure the effective operation of a country's laws, and

[3] See http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Foreign_Bribery/Submissions.

- build policy and legislation capabilities by training and mentoring policy officers and peer reviewing legislation.

The department also works closely with the AFP, DFAT, AUSTRAC, other donors, multilateral and regional bodies to maximise the effectiveness of our work. This work advances Australia's national interest by promoting stability and prosperity in our region.

3 Evidentiary Standards

Criminal proceedings generally have stricter evidentiary requirements than civil proceedings, which reflects the relative seriousness of criminal penalties.

3.1 Standard of Proof

In civil proceedings, the standard of proof imposed is generally the balance of probabilities standard, while in criminal proceedings; the standard is beyond reasonable doubt.

The balance of probabilities standard will be met if a decision-maker is reasonably satisfied that a matter is more likely than not to have occurred. The court must have regard to three considerations in applying the balance of probability standard, (1) the seriousness of the allegation, (2) the inherent unlikelihood of its occurrence and (3) the gravity of its consequences.[4] The beyond reasonable doubt standard, on the other hand, is the highest standard of proof at law, and cannot be a fantastic or unreal possibility.

While the balance of probability and reasonable doubt standards are generally the standards of proof for civil and criminal proceedings respectively, there are exceptions. In criminal matters, for example, the defendant may be required to prove that a matter exists on the balance of probabilities, including when a defendant is required to prove the matters giving rise to a criminal defence.[5] In civil matters such as unexplained wealth restraining order proceedings, the state may only require 'reasonable grounds' that a matter exists before an order can be made.[6]

3.2 Burden of Proof

In criminal trials the prosecution has the burden of proving the guilt of the accused beyond reasonable doubt. This principle accords with the presumption of innocence as expressed in the *International Covenant on Civil and Political Rights* (ICCPR) and at common law.[7] The burden of proof is sometimes reversed in cases where the offence carries a relatively low penalty or the burden of proof does not relate to an essential element of an offence.[8] The defendant will generally bear the burden of proving a legal defence, for example, but the prosecution will be required to disprove any matter to which the defendant has discharged a burden of proof.[9]

In civil cases, it is a basic principle that the person seeking the benefit of the law bears the burden of persuading the court that it should exercise its authority. A person seeking civil compensation for fraud, for example, will bear the burden of proving that fraud occurred on the balance of probabilities. There are

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[4] *Evidence Act 1995* (Cth) s 140(2).
[5] *Criminal Code Act 1995* ss 13.3 and 13.4; *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* p. 51.
[6] *Proceeds of Crime Act 2002* s 20A.
[7] ICCPR Art 14(2).
[8] *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* p. 16.
[9] *Criminal Code Act 1995* s 13.1.

exceptions to this rule, however, where reasons of justice or public policy require that the respondent carry the onus of proof, or at least bear the burden of bringing evidence on a particular issue. Under the *Proceeds of Crime Act 2002* (Cth), for example, an unexplained wealth order may be made if a person cannot satisfy the court that wealth is not derived from certain offences and a preliminary unexplained wealth order has been made.[10] This reversal of the burden of proof is appropriate as '[d]etails of the source of a person's wealth will be peculiarly within his or her knowledge'.

3.3 Strict/absolute liability offences

Offences are generally comprised of both physical elements (the actions attracting criminality) and fault elements (ie requisite mental states such as intention, recklessness or negligence). Strict and absolute liability offences remove a fault element that would otherwise attach to a physical element of an offence, meaning that the prosecution does not need to establish that the defendant had a particular state of mind. Strict liability allows a defence of honest and reasonable mistake of fact to be raised, while absolute liability does not.

Strict and absolute liability offences should only be introduced in limited circumstances, as the requirement of proof of fault is a fundamental protection in criminal law. This requirement reflects the premise that "it is generally neither fair, nor useful, to subject people to criminal punishment for unintended actions or unforeseen consequences unless these consequences resulted from unjustified risk."[11]

The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* provides that applying strict liability or absolute liability to an offence or particular physical element may be justified where there are legitimate grounds for penalising a person who lacks 'fault' in relation to that offence or physical element. Appropriate uses of absolute liability and strict liability include cases where the physical element does not relate to the substance of the offence or is an objective fact established by reference to an objective standard that does not relate to culpability.[12]

4 Custodial Sentences

4.1 Criminal Code Offences

The Attorney-General's Department administers offences within the *Criminal Code Act 1995* ('Criminal Code'), including fraud affecting the Commonwealth government, domestic bribery, foreign bribery, money laundering, forgery and false accounting offences.

Domestic Bribery and Related Offences

Division 141 of the Criminal Code contains offence provisions relating to bribery of domestic officials. Section 141.1 provides that an individual who bribes a Commonwealth official or receives a bribe in his capacity as a Commonwealth official commits an offence punishable by a maximum of 10 years imprisonment, a fine of 10,000 penalty units ($1.8 million) or both. If this offence is committed by a body corporate it is punishable upon conviction by a fine not exceeding the greatest of the following:

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[10] *Proceeds of Crime Act 2002* s 179E(1).
[11] *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* p. 22.
[12] See Senate Standing Committee for the Scrutiny of Bills, Alert Digest 2/2010, available at < http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Scrutiny_of_Bills/Alerts_Digests/2010/index>.

- 100,000 penalty units ($18 million)
- if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence — 3 times the value of that benefit,
- if the court cannot determine the value of that benefit — 10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

Division 142 of the Criminal Code contains a number of offences related to bribery. Section 142.1 provides that giving a corrupting benefit to a Commonwealth public official or receiving a corrupting benefit as a Commonwealth public official is an offence punishable by a maximum of 5 years imprisonment. Section 142.2 provides that an abuse of public office by a current or former Commonwealth public official is also an offence punishable by a maximum of 5 years imprisonment.

Chapter 7 of the Criminal Code also contains a number of offences related to white collar crime regarding Commonwealth public officials or entities. These offences include theft, dishonestly receiving stolen property, dishonestly causing a loss to a Commonwealth entity and obtaining property or a financial advantage by deception. These offences are punishable by a maximum sentence of 10 years imprisonment. Other relevant offence provisions include knowingly making false or misleading statements in applications (maximum penalty: 12 months imprisonment) and general dishonesty offences (maximum penalty: 5 years imprisonment).

Foreign Bribery

Section 70.2 of the Criminal Code provides that an individual who bribes a foreign public official will face a maximum penalty of imprisonment for 10 years, a fine not more than 10,000 penalty units ($1.8 million), or both. If this offence is committed by a body corporate it is punishable upon conviction by a fine not exceeding the greatest of the following:

- 100,000 penalty units ($18 million)
- if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence — 3 times the value of that benefit,
- if the court cannot determine the value of that benefit — 10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

A person or body corporate does not commit this offence if their conduct was lawful in the foreign public official's country (section 70.4) or if the benefit received by the foreign public official qualifies as a facilitation payment (section 70.5).

Money Laundering

Australia's criminal offences for money laundering are contained in Division 400 of the Criminal Code. The sections are drafted broadly to capture the widest range of criminal behaviour and assist in Australia's efforts

to disrupt and deter criminal behaviour in Australia. Further, sanctions are tiered to ensure they match the seriousness of the offending.

Division 400 of the Criminal Code criminalises dealing with both the proceeds (funds generated by an illegal activity) and instruments of crime (funds used to conduct an illegal activity). 'Dealing with' is broadly defined and includes receiving, possessing, concealing, importing into Australia, exporting from Australia or disposing of money or other property. Engaging in banking transactions using money or other property is also captured.

The money laundering offences and corresponding sanctions are tiered according to the value of the money or property dealt with and the state of mind (fault element) of the defendant. Sanctions for natural persons currently range from 25 years imprisonment and/or a fine of $270,000 (intentionally laundering $1 million or more), to a fine of $1,800 (negligence, laundering less than $1,000). Sanctions for legal persons range from a fine of $9,000 to $1,350,000.

The table below sets out the relevant penalties in sections 400.3 to 400.8 of the Criminal Code:

		400.3	**400.4**	**400.5**	**400.6**	**400.7**	**400.8**
Value of money/property		$1 million or more	$100,000 or more	$50,000 or more	$10,000 or more	$1000 or more	Any value
Penalty	Ss (1) Intention	25 years and/or 1500 p/units	20 years and/or 1200 p/units	15 years and/or 900 p/units	10 years and/or 600 p/units	5 years and/or 300 p/units	12 months and/or 60 p/units
	Ss (2) Reckless	12 years and/or 720 p/units	10 years and/or 600 p/units	7 years and/or 420 p/units	5 years and/or 300 p/units	2 years and/or 120 p/units	6 months and/or 30 p/units
	Ss(3) Negligent	5 years and/or 300 p/units	4 years and/or 240 p/units	3 years and/or 180 p/units	2 years and/or 120 p/units	12 months and/or 60 p/units	10 p/units
	Note: As at April 2016, the value of a penalty unit is $180.[13]						

Section 400.9 also creates an offence of dealing with property reasonably suspected of being the proceeds of crime. The penalty is two years and/or a fine of $21,600 if it is valued at less than $100,000 or three years imprisonment and/or a fine of $32,400 if the property is valued at $100,000 or more. Sanctions for legal persons range from a fine of $108,000 to $162,000.

Additional money laundering-related offences can also be found in the *Financial Transactions Reports Act 1988* (Cth) and the AML/CTF Act.

[13] *Crimes Act 1914* (Cth) s 4AA(1).

Forgery and Related Offences

Division 144 of the Criminal Code provides a number of forgery offences which relate to Commonwealth public officials, Commonwealth entities and the creation of false Commonwealth documents. These offences are punishable by a maximum sentence of 10 years imprisonment and/or a fine of up to $108,000 for natural persons or $540,000 for legal persons.

Division 145 contains a number of offences related to the forgery of Commonwealth documents or forgery committed by a Commonwealth public official. These offences include:

- using a forged document and possessing a forged document, which are both punishable by a maximum of 10 years imprisonment and/or a fine of up to $108,000 for natural persons or $540,000 for legal persons
- possessing, making or adapting devices for making forgeries when a person intends to use the device to forge a document and knows that it can be used for this purpose, which is punishable by a maximum of 10 years imprisonment and/or a fine of up to $108,000 for natural persons or $540,000 for legal persons
- possessing a device for making forgeries when a person knows the device can be used to make a false Commonwealth document and does not have a reasonable excuse for owning the device, which is punishable by 2 years imprisonment and/or a fine of up to $21,600 for natural persons or $108,000 for legal persons
- making or adapting devices for making forgeries when a person knows that it can be used to make a false Commonwealth document, which is punishable by 2 years imprisonment and/or a fine of up to $21,600 for natural persons or $108,000 for legal persons
- falsification of documents, which is punishable by imprisonment for 7 years and/or a fine of up to $75,600 for natural persons or $378,000 for legal persons, and
- giving information derived from false or misleading documents, which is punishable by 7 years imprisonment and/or a fine of up to $75,600 for natural persons or $378,000 for legal persons.

False Accounting

As noted above, the Government has recently introduced new provisions which apply to false dealing with accounting documents. These provisions came into effect on 1 March 2016. Section 490.1 of the Criminal Code provides that a person who intentionally engages in false dealing with accounting documents will commit an offence punishable by imprisonment for not more than 10 years, a fine not more than 10,000 penalty units ($1.8 million), or both. If this offence is committed by a body corporate it is punishable by a fine not exceeding the greatest of the following:

- 100,000 penalty units ($18 million)
- if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—3 times the value of that benefit,
- if the court cannot determine the value of that benefit — 10% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

Section 490.2 provides a separate offence for persons who recklessly engage in false dealing with accounting documents, which is punishable by imprisonment for not more than 5 years, a fine not more than 5,000

penalty units ($900,000), or both. If this offence is committed by a body corporate it is punishable by a fine not exceeding the greatest of the following:

- 50,000 penalty units ($9 million)
- if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence — 1.5 times the value of that benefit,
- if the court cannot determine the value of that benefit — 5% of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

4.2 Enforcement and Prosecution of Criminal Code Offences

The AFP is responsible for investigating Commonwealth offences and the CDPP has primary responsibility for prosecuting these crimes. There are also a number of bodies that have enforcement and prosecutorial functions to address white collar crime, including the ASIC, the ATO, the ACC and the ACCC.

5 Banning orders

The department notes that banning orders under the Corporations Act are administered by ASIC.

6 Fines and other penalties

The department comments on this issue relate to the relevant criminal offences it administers within the Criminal Code. These offences were previously outlined in Section 4.

The Criminal Code imposes different penalties for individuals and corporations convicted of offences relating to corporate and financial misconduct. For individuals, the Criminal Code generally imposes a term of imprisonment and/or a fine calculated in penalty units (as at April 2016, the value of a penalty unit is $180).[14] Where an individual retains a wrongful gain after the imposition of a fine under these offence provisions, it is open to the CDPP and AFP to recoup this wrongful gain by bringing a forfeiture order under the *Proceeds of Crime Act 2002.* Further information on forfeiture orders can be found in Section 7 below.

As noted above, some offences in the Criminal Code frame the maximum penalty for corporate bodies as the greatest of the following:

- a value determined in penalty units
- if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence—a multiple of that benefit, or
- if the court cannot determine the value of that benefit—a certain percentage of the annual turnover of the body corporate during the period (the turnover period) of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

Such penalty provisions attach to the domestic bribery offences, foreign bribery offence and false accounting offences.[15] This formulation allows for flexibility in determining penalties for white collar crime, ensuring that

[14] *Crimes Act 1914* (Cth) s 4AA(1).
[15] Criminal Code ss 70.2, 141.1 and 490.1.

the penalty imposed on corporations is proportional to the wrongful gain obtained by this corporate body. This means of calculating the maximum penalty for a corporation helps to ensure that the penalty imposed is sufficiently high to deter and punish financial crime and promote good governance, the rule of law and confidence in corporate practices.

7 Mechanisms for recovering wrongful gains

Wrongful gains obtained from white collar crime may be recovered through criminal prosecution, civil remedies and administrative remedies. These methods have been used by the Commonwealth to recoup funds that were fraudulently obtained from the Australian Government. In the Australian Institute of Criminology's *Fraud against the Commonwealth Report 2010-2013*, it was estimated that the Commonwealth recovered $3m in total in respect of internal fraud using these methods, and $53m in respect of external fraud, totalling $56m for the three years of the study.[16]

In addition to the methods outlined above, the Commonwealth may also recover wrongful gains obtained by white collar criminals by utilising the confiscation scheme under the *Proceeds of Crime Act 2002* (POC Act). The POC Act provides a comprehensive scheme to trace, investigate, restrain and confiscate proceeds generated from Commonwealth indictable offences, foreign indictable offences and certain offences against State and Territory law. This includes offences related to white collar crime. POC Act proceedings are civil proceedings, and do not impose a criminal conviction.

One of the key characteristics of the POC Act is that proceedings can be taken where a conviction has been secured (conviction based forfeiture) or independently from the prosecution process entirely, and where there is no criminal conviction (non-conviction based forfeiture or civil forfeiture). Generally, before assets can be seized under the non-conviction scheme in the POC Act, it must be established that the asset is the proceeds or an instrument of crime and that the asset was under the effective control of a person. The POC Act also contains a range of restraining orders and freezing orders which are designed to prevent an individual from disposing of an asset before a forfeiture application is resolved.

Conviction based forfeiture was included in the *Proceeds of Crime Act 1987* and is included in the 2002 Act (which replaced the 1987 Act). The ALRC found that, under the earlier conviction based forfeiture system, Australian authorities faced challenges in seizing assets from individuals who were suspected of committing white collar crime, as they often struggled to prove that these individuals had committed a specific offence.[17] The conviction based system failed to impact on those at the pinnacle of criminal organisations, who, with advancements in technology and globalisation, could distance themselves from the individual criminal acts, thereby evading conviction and placing their profits beyond the reach of conviction-based laws. The introduction of a civil forfeiture system in 2002 provided an additional tool for Commonwealth authorities to seize the assets of these individuals without requiring a conviction for an offence.

Australia's criminal asset confiscation scheme is further strengthened by 'unexplained wealth' provisions. Under these provisions, where there are reasonable grounds to suspect that a person's total wealth exceeds the value of their wealth that was lawfully acquired, the court can compel the person to

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[16] Australian Institute of Criminology, *AIC Fraud against the Commonwealth: Report to Government 2010-2011 to 2012-2013*, Monitoring Report no. 24 (2015) 30.
[17] See Australian Law Reform Commission, *Confiscation that Counts: A Review of the Proceeds of Crime Act,* Report no. 87 (1987).

attend court and prove, on the balance of probabilities, that his or her wealth was legitimately obtained. These laws can be used to target white collar criminals that make large profits from their crimes, but distance themselves from the commission of offences. Recent amendments to the POC Act have strengthened this regime by, for example, clarifying aspects of the civil procedures and increasing the existing penalties for failing to comply with production orders or notices to financial institutions. The Australian Government is working with participating jurisdictions to develop a national cooperative scheme on unexplained wealth, which will improve cooperative arrangements between Commonwealth, state and territory agencies responsible for dealing with unexplained wealth.

The criminal confiscation scheme is supported by the AFP-led Criminal Assets Confiscation Taskforce ('The CAC Taskforce'). The CAC Taskforce combines the resources and expertise of the AFP, ACC and ATO. The Taskforce aims to reduce duplication and enable the development of a confiscation strategy most suited to maximising disruption in each individual case, whether through proceeds action, tax remedies, civil debt recovery or recovery through international cooperation with foreign law enforcement agencies.

Applications for non-conviction based forfeiture under the POC Act are made by proceeds of crime authorities: the AFP (through the Criminal Assets Litigation area) or the Commonwealth Director of Public Prosecutions (CDPP).

8 Penalties used in other countries

There is extensive material available on penalties used by foreign jurisdictions to address white collar crime. For further information, the department refers the Committee to:

- The Financial Action Task Force's (FATF) mutual evaluations of foreign countries.[18] FATF monitors foreign countries based on their compliance with the FATF Recommendations, which set out a ccomprehensive and consistent framework of measures which countries should implement in order to combat money laundering and terrorist financing, as well as the financing of proliferation of weapons of mass destruction.
- The OECD Working Group on Foreign Bribery's implementation reports, which assesses each country's compliance with the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*.[19]
- The Implementation Review Group for the *United Nations Convention against Corruption*, which releases reports on each country's compliance with the Convention.[20]

9 Other matters: Proposed new tool to fight serious crime – Deferred Prosecution Agreements

On 16 March the Government released a consultation paper on the possible adoption of an Australian Deferred Prosecution Agreement Scheme (DPA Scheme). This paper is available on the AGD website at <www.ag.gov.au/Consultations>. Submissions are sought by Monday 2 May 2016.

Under a DPA scheme, where a company has engaged in serious corporate crime, prosecutors would have the option to invite the company to negotiate an agreement to comply with certain specified conditions, in return

[18] See www.fatf-gafi.org/publications/mutualevaluations.
[19] See www.oecd.org/daf/anti-bribery.
[20] See www.unodc.org/unodc/en/treaties/CAC.

for which prosecution would be deferred. The terms of the DPA may require the company to cooperate with any investigation, make admissions, pay financial penalties, and implement programs to improve compliance into the future. Upon fulfilment of the terms, any prosecution would be discontinued, and no criminal conviction would be recorded. Breach of the terms may result in the prosecution resuming and further penalties being imposed.

Both the US and UK have DPA schemes which apply to corporate crime. The UK introduced its DPA scheme in February 2014. The first DPA was announced by the UK Serious Fraud Office in November 2015 in relation to alleged failure to prevent bribery under the *Bribery Act 2010 (UK)*. The UK model provides a high level of judicial involvement, with DPAs only an option for certain listed offences (serious economic crimes).

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