

The Committee Secretary
Senate Standing Committees on Economics
P O Box 6100
Parliament House
Canberra ACT 2600
Via email: economics.sen@aph.gov.au

24 August 2015

Dear Sir or Madam,

Inquiry into Foreign Bribery

I have pleasure in enclosing a submission which has been prepared by the Working Group on Foreign Corrupt Practices of the Business Law Section of the Law Council of Australia.

If you have any questions in relation to the submission, in the first instance please contact Mr Greg Golding, Chair of the Working Group either by email: [REDACTED] or by phone: [REDACTED]

Yours faithfully,

John Keeves, Chairman
Business Law Section

Enc.

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LAW COUNCIL OF AUSTRALIA
BUSINESS LAW SECTION
WORKING GROUP ON FOREIGN CORRUPT PRACTICES

SUBMISSION TO SENATE ECONOMICS REFERENCES COMMITTEE:
INQUIRY INTO FOREIGN BRIBERY

General Comments

The Law Council Business Law Section Working Group on Foreign Corrupt Practices (**Working Group**)¹ strongly supports the Senate Economics References Committee undertaking an inquiry into foreign bribery. We consider that there is much that could be done to improve the effectiveness of Australian sanctions against the bribery of foreign public officials. The failure of Australian regulatory bodies to successfully achieve a prosecution in the 15 years that Division 70 of the Australian Criminal Code has been in place suggests to us that there are serious problems with the Australian regime (both with the legislation and with enforcement) that need to be confronted.

It should not be assumed that bribery of foreign public officials involving Australian corporations or persons who are Australian citizens or residents does not take place. Australia's enforcement record lags that of comparable Western countries. Australia is not adequately meeting its international obligations in this area.

We believe that the key areas where improvements could be made are as follows:

- better resourcing and empowering the regulatory bodies who are responsible for investigating allegations of foreign bribery;
- improving the skill levels of investigators;
- improving the legislative framework; and
- an enhanced regulatory enforcement pyramid of sanctions.

We have attempted to respond to all of the questions raised by the Terms of Reference in this Submission. In view of the broad scope of those questions we have attempted to respond as succinctly as possible. We have assumed a high level of familiarity with the relevant materials to which we refer. We would be very happy to elaborate on any of the matters that we note.

We comment on the specific matters set out in the Terms of Reference as follows:

a. The effectiveness of and any possible improvements to Australia's implementation of its obligations under the OECD Convention and the UNCAC

The Working Group supports Australia's adoption of Division 70 of the Australian Criminal Code to satisfy its requirements pursuant to the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the United Nations Convention Against Corruption.

¹ The members of the Working Group responsible for this submission are listed in the schedule

As dealt with more specifically below, we believe that there are drafting difficulties with Division 70 that warrant attention. In addition, and a more significant issue than the drafting of the legislation, are difficulties with the enforcement regime that surrounds Division 70.

We are of the opinion that Australia's approach to the enforcement of the foreign bribery offence has improved significantly in recent years following the negative comments made by the OECD Working Party in the Phase 3 Report on Implementing the OECD Anti-bribery Convention in Australia released in 2012.

Details of the improvements made are set out in the April 2015 OECD Australia Follow-up to the Phase 3 Report and Recommendations, including the establishment of the panel of experts and the Fraud and Corruption Centre (FAC Centre) within the AFP and the signing of the various co-operation arrangements between the AFP, ASIC, APRA and the Department of Foreign Affairs and Trade.

However, we believe there is still significant work that needs to be done to establish a credible and effective enforcement regime. The track record of enforcement remains poor. We believe that it continues to be the case that there are insufficient specialist skills within the AFP to properly investigate this type of financial crime. As we discuss below we also believe that an effective solution is likely to require a range of structural changes.

The 2014 OECD Report on Analysis of the Crime of Bribery of Foreign Public Officials discloses that the most common ways in which foreign bribery comes to the attention of authorities are self-reporting (31%), law enforcement (13%), mutual legal assistance (13%), media (5%) and whistleblowing (2%). Australia should build more effective enforcement strategies around each of these areas.

Moving to the terms of Division 70 itself, we believe the key drafting deficiencies of the Division are as follows:

- The application of the fault and default fault requirements of the Criminal Code to Division 70 is likely to involve practical difficulties with prosecutions through the complexity of those requirements when applied to the three limbs of conduct that constitute the offence. The legislation would benefit from more simply expressed fault requirements.
- The requirements that a benefit not be legitimately due to the bribe taker and bribe giver creates unnecessary complexity to the offence. The UK Bribery Act deliberately removed these requirements from that legislation.
- Corporate culpability is too complex (see below).
- Liability for acts of agents involves ambiguity (see below).

Australia's obligations under the OECD and UN conventions can be characterised as "supply side" regulation of bribery in that an Australian offence is created against persons who supply bribes to foreign public officials. While we believe there is a sound policy basis to act against foreign bribery through this mechanism we also believe there is a greater leadership role Australia could play in also addressing the "demand side" of foreign bribery to sanction persons who receive bribes. Obviously demand side encouragement involves enforcement activities by foreign countries which Australia cannot directly influence. Ways in which Australia could influence the demand side is through its public advocacy around the issue and the terms on which aid and other support is provided to foreign jurisdictions. Demand side considerations should be part of the policy matrix through which Australia constructively engages with its neighbours.

b. Effectiveness of and any possible improvements to existing Commonwealth legislation governing foreign bribery

(i) Commonwealth treaties, agreements, jurisdictional reach, and other measures for gathering information and evidence

Foreign corruption of public officials by its nature is opaque and largely takes place outside Australia's borders. This clearly makes investigations within Australia difficult.

International mutual assistance surrounding foreign bribery investigations continues to develop and Australia should seek to be in the vanguard of these developments. Active involvement in the OECD Convention and the recent G20 initiatives should continue to be encouraged, as we believe it is. Measures for gathering information and evidence through co-operation with offshore regulators should continue to be encouraged, as we believe it is.

We believe that there are problems with the Foreign Evidence Act 1994 (Cwth). This legislation requires a high level of compliance with technical rules in order to render evidence admissible. This legislation should be reviewed.

We do not consider that there are issues with the jurisdictional reach of the statute (subject to the point below concerning parent corporation responsibility for the acts of subsidiaries).

(ii) Resourcing effectiveness and structure of accountability of agencies and statutory bodies to investigate, and where appropriate, prosecute under the legislation, including co-operation between bodies

The Working Group believes that there continues to be a fundamental structural problem with the existing arrangements in Australia for the investigation and enforcement of foreign bribery. We believe that there is substantial scope for improvement.

At present the AFP has exclusive jurisdiction in relation to Division 70 and prosecutions are undertaken at the discretion of the CDPP. While the Working Group welcomes the establishment of the FAC Centre within the AFP and its efforts in seeking a more coordinated approach to foreign bribery between various Commonwealth agencies, these initiatives are insufficient to address the present shortcomings in the system.

One of the fundamental difficulties which remains is that the investigation and decision whether to prosecute corporations and/or individuals for foreign bribery offences is fractured. The AFP has traditionally not had the expertise or resources to investigate effectively this type of commercial financial crime, which invariably occurs within a corporate environment. The AFP has traditionally lacked a good understanding of corporate governance structures deployed within a commercial enterprise (operating within and outside Australia) and how corporations delegate functions to lower levels of management for execution through foreign agents or other intermediaries. While we believe the role of the FAC Centre has improved these skills within the AFP, our understanding is that investigations are still taking many years to complete for reasons that are rarely made public. This can easily create the public impression that the AFP is doing "too little too late", unfair though that perception may be in reality.

By contrast, ASIC has in general, a more sophisticated understanding of corporate governance and how corporate conduct should be investigated. It is the view of the Working Group that ASIC should be empowered to

investigate and civilly prosecute foreign bribery by Australian corporations. As matters presently stand, ASIC eschews any responsibility for foreign bribery investigations and only has a role to the extent that a contravention of officers' duties arises or where there is a possible violation of existing books and record offences under the Corporations Act. There have been no such civil penalty prosecutions in the past referable to foreign bribery offences and indeed, the current penalties for inaccurate records under the *Corporations Act 2001* are nominal in monetary value, notwithstanding the existence of a possible 6 month term of imprisonment.

A better form of regulation is seen in the United States where on the one hand, the Department of Justice (**DOJ**) is responsible for the criminal enforcement of the bribery provisions of the FCPA and civil enforcement of the bribery provisions against non-issuers (entities not registered under the Securities and Exchange Act). On the other hand, the Securities and Exchange Commission (**SEC**) is responsible for civil enforcement of the accounting provisions of the FCPA and for civil enforcement of the bribery provisions against issuers of securities registered under the Securities and Exchange Act. By and large the DOJ and SEC work well together, they invariably commence parallel prosecutions and achieve effective enforcement outcomes.

We believe an explicit separation of roles in Australia in a similar way would create a much more active enforcement regime as it would combine complimentary investigative skills. We appreciate that issues concerning the AFP are matters for the Attorney General's department while matters concerning ASIC are a Treasury responsibility. We believe that focus on making the Australian foreign bribery offence effective should be seen as a whole-of-government responsibility. However, this separation of criminal and civil enforcement responsibilities should, in the ideal environment, only occur where the overall responsibility in tackling foreign bribery rests with one coordinating agency.

We believe there is merit in creating a specialist enforcement body, similar to the Serious Fraud Office of the United Kingdom and New Zealand, to better focus resources on the pursuit of serious and complex financial crime. The creation of specialist bodies in both of these jurisdictions appears to have improved the skills of the investigating agents and enforcement outcomes.

Additionally, or in the alternative, we believe consideration ought be given to empowering ASIC to enforce a civil penalty regime akin to Part 9.4B of the Corporations Act (see below) which could be modelled on the elements of the foreign bribery offence in Division 70 of the Criminal Code. This new civil penalty regime would exist in parallel to (and not in substitution of) the existing Division 70 criminal offence. We believe a civil penalty regime has resulted in much stronger enforcement outcomes under the Corporations Act since its introduction in the 1990's.

If this new civil penalty prohibition is introduced, it would effectively harness ASIC's expertise and experience in investigating corporate misconduct. ASIC would need to be empowered to investigate and prosecute foreign bribery by an Australian corporation, in the same manner as ASIC is empowered to investigate and civilly prosecute insider trading conduct (see, for example, the civil penalty prohibition for insider trading in section 1317E of the Corporations Act).

In the context of relevant agencies, something must be said about the Office of the Commonwealth Director of Public Prosecutions (**CDPP**). The CDPP is the statutory officer responsible for conducting prosecutions for breaches of Commonwealth law. It appears to the Working Group that the CDPP is very

risk averse and is unlikely to commence any complex financial crime prosecution arising out of foreign bribery unless it is almost certain of a successful result. At one level that is commendable as the powers of the State should only be invoked against a defendant where it is clear a reasonable case exists to secure a conviction². But for those involved in foreign bribery (whether corporations or individuals) in light of the numerous official investigations, the question arises: why have more matters not been prosecuted³?

The foreign bribery laws do not seem to have been amended because of procedural or technical difficulties, which is the first thing regulators typically seek from governments when problems arise. In addition, regulators and enforcement agencies have extremely wide powers to gather information of potential offences yet still there is almost no enforcement action in Australia. The attitude of the Australian Taxation Office (**ATO**) in aggressively pursuing taxpayers for revenue fraud and money laundering stands in stark contrast to the pursuit of foreign bribery offences.

What needs to be considered is what is causing this apparent lack of enforcement and prosecution:

- is it deficiencies in the criminal law?
- or are there complexities in obtaining foreign evidence that makes any prosecution untenable and bound to fail (as the AFP held on legal advice in relation to the AWB criminal investigation)?
- or is there a lack of training and expertise within investigators used to investigate traditional crime and now being introduced to complex financial economic crime operating across boundaries with no respect for local laws or customs?

The role and views of the CDDP in terms of this apparent lack of foreign bribery enforcement should be part of this review.

(iii) **Standards of admissible evidence**

The Working Group does not support the proposition that standards of admissible evidence for offences relating to foreign bribery should be different to other Commonwealth offences.

In particular the Working Group does not support:

- strict liability being considered in any part of this offence as fault should be a necessary element of the offence;
- any reversal of the onus of proof in relation to the establishment of the primary offence in view of the seriousness of the offence (note our comments below on corporate culpability); and
- the use of fines as an enforcement mechanism in view of the seriousness of the offence (compare the currently proposed fine regime for foreign investment concerning residential housing which

² The Prosecution Policy of the Commonwealth Guidelines for the Making of Decisions in the Prosecution Process (**CDDP Prosecution Policy**) specifically states that a “prosecution should not proceed if there is no reasonable prospect of a conviction being secured”: paragraph 2.5.

³ OECD, *Phase 3 Report on Implementing the OCED Anti-Bribery Convention in Australia*, Oct 2012, pages 5 and 19. Out of 28 referrals to the AFP as at 2012, 21 had been closed with no action.

the Law Council similarly opposes). Refer also to the discussion on the appropriate use of fines in ALRC Report 95.

(iv) **The range of penalties available to the Courts, including debarment from Government contracts and programs**

We support a broad range of penalties being available to the Courts in aid of their jurisdiction concerning the foreign bribery offence. Some of the additional sanctions that we consider that might be considered are:

- a civil penalty regime akin to Part 9.4B of the Corporations Act, with the power of a Court to make a declaration of contravention and impose pecuniary penalties based on a civil burden of proof (administered by ASIC as suggested above);
- a power for a Court to require the adoption of compliance and training programs (with court appointed monitors and periodic audit); and
- other orders the Court considers appropriate.

We believe that Australian courts have in the past been overly lenient in the penalties imposed for serious financial crimes. This is starting to change in more recent judgment at the trial and appellate level both in the UK and in Australia⁴. We believe it would be helpful for judicial workshops to be held that contrast Australian enforcement outcomes to those in other jurisdictions. We believe that a further review of existing financial penalty units for the existing foreign bribery offences as compared to maximum financial penalties in other jurisdictions should also be considered.

We also support broader settlement mechanisms being available to investigating agencies (see below).

While it is not a matter for the Courts, we support sanctions based on debarment from Government contracts and programs being a relevant penalty. The means by which this can be imposed as a sanction can be seen in the policies adopted by the multi-lateral development banks (World Bank, etc) to debar corporations from being involved in bank funded projects if found to have been involved in questionable practices – see Uniform Framework for Preventing and Combatting Fraud and Corruption of September 2006 and Agreement for Mutual Enforcement of Debarment Decisions of April 2010. The Commonwealth 2014 Procurement Guidelines should be reviewed by reference to these policies to set out a clear, transparent debarment procedure. For example, in the US, there exists an Interagency Suspension & Debarment Committee (**US ISDC**). The latest annual report from the US ISDC to the US Congress reveals that the number of suspension and debarment actions undertaken by U.S. agencies has increased steadily over the last six years. This program sets out clear procedures which apply across US agencies and which are known to corporations seeking to tender for US government contracts.

⁴ See *R v Innospec Limited* [2010] EW Misc 7 at [31] to [32] Lord Justice Thomas observed, “I approach sentencing on the basis in this case that a fine comparable to that imposed in the US would have been the starting point, such a fine being quite separate from and in addition to depriving Innospec Limited of the benefits it had obtained through its criminality”; *ASIC v Paul John Ingleby* [2013] VSCA49 at [95] and *CDPP v Hill & Kamay* [2015] VSC 86 at [31] to [32].

(v) **Statute of limitations**

We believe that the current Statute of Limitations provisions applicable to Division 70 are appropriate. There is no time bar to prosecutions under these provisions save for a CDPP prosecution policy discretion based on time delay and ultimately, a judicial discretion whether to permit a stale prosecution.

(vi) **The range of offences**

(A) **false accounting along the lines of the books and records head in the US Foreign Corrupt Practices Act**

As identified in the OECD Phase 3 Report, the Working Group believes the key deficiency with the Australian books and records offence is not the existence of relevant provisions in the Corporations Act, but the small, almost nominal penalties that are applicable and a low to non-existent level of enforcement by ASIC concerning any foreign bribery investigation for over 15 years.

We understand that the Attorney-General's Department is considering a new books and records offence for the Criminal Code, possibly based on Bill S-14 of 2003 of Canada. This provides an offence for a person who for the purpose of bribing a foreign public official maintains incorrect or misdescribed accounts or records. We believe that there are difficulties with the practicality of an offence couched in these terms, particularly if a finding of bribery is a pre-condition to liability.

We would instead endorse a more generally expressed books and records offence such as that contained in the FCPA, noting such offences are already contained in the Corporations Act. The maximum penalty under these provisions should be increased to align with Division 70 of the Criminal Code.

Fundamentally, we believe that an offence of this nature is properly a matter that should be referred to ASIC as ASIC has the necessary resources and expertise to undertake investigations in this area. Investigations into such an offence would not be within the core competency of the AFP and ought not to become delayed due to the higher evidentiary threshold applicable for criminal prosecutions.

We therefore believe that the best position for a books and records offence is in the Corporations Act, administered by ASIC. That could be achieved by maintaining existing offences (with any desirable amendments) but with substantially increased potential penalties. We believe the ASIC Act should also be amended to reinforce the importance of ASIC investigation in relation to anti-bribery matters as part of its regulatory remit. Again, we believe that the adoption of effective foreign bribery offences should be seen as a whole-of-Government issue.

(B) **Increase focus on the offence of failure to create a corporate culture of compliance.**

The Working Group believes that there is a problem with section 12.2 of the Criminal Code. We believe that problem is self-evident when the lack of corporate enforcement based on section 12.2 over the last 15 years is considered. Even at the time the corporate culture aspects of section 12.2 were recommended it was

recognised that the ambiguity of the terms used could cause problems for prosecutions (1993 Criminal Law Offices Committee of the Standing Committee of Attorneys General Final Report).

We believe that a better model for regulating corporate culpability for foreign bribery is now found in the UK Bribery Act 2010 in section 7(2) of that Act. This offence provides for presumptive corporate liability if a bribery offence is established subject to an affirmative defence if the organisation proves it had in place “adequate procedures” designed to prevent persons “associated” with the organisation from engaging in the conduct.

We note that in the United States, principles of respondeat superior substantially extend corporate culpability when compared with general principles of directing mind and will under Australian law. We favour the UK Bribery Act approach to the US approach from a policy basis in that it encourages and rewards the establishment of compliance cultures and focuses the mind of all businesses on the fact that it is primarily the responsibilities of Boards of Directors and management to instil ethical and compliant culture in their organisations, supported by clear guidance from Government and regulatory agencies.

(C) **Liability of directors and senior managers who do not implement a corporate culture of compliance**

The Working Group believes that director and officer liability is adequately dealt with through existing provisions that provide for:

- accessory liability for any person who participates in unlawful conduct and knew the essential matters that constituted the offence (we also note the “knowingly concerned” changes proposed by the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015);
- potential officer liability through the duty of care, skill and diligence contained in the Corporations Act.

(D) **Liability of parent companies for subsidiaries and intermediaries, including joint ventures**

The Working Group believes that this is an area that warrants further consideration.

We believe there is a deficiency under Division 70 in that foreign subsidiaries of Australian companies are not within the jurisdictional reach of the offence. This consequence was specifically intended (see Senate Hansard 10 March 1999 at page 2546). As a result, if conduct is engaged in by a non-Australian subsidiary of an Australian entity, no liability can be established against the Australian parent unless the conduct can be directly attributed to the Australian parent through the parent’s conduct (and the conduct of its employees and agents). We believe that this is a clear deficiency in the structure of the offence.

At a more general issue there is a problem with the Australian legislation as it applies to conduct of intermediaries and agents. The OECD 2014 Report on Analysis of the Crime of Bribery of Foreign Public Officials discloses that of the cases reviewed in participating

States since the adoption of the OECD Convention, 3 out of 4 cases involved payments through intermediaries.

The Division 70 offence provides that the physical elements for an offence deems an agent's conduct to be attributed to the corporation where the agent is acting within their actual or apparent authority. It may be extremely difficult to conclude that a foreign agent who has paid bribes on behalf of an Australian corporation is acting within the authority of the corporation where the corporation did not directly condone the conduct. Further, there may be multiple levels of agents where the actual bribe payer is not in a direct contractual relationship with the corporation. Further, in establishing corporate culpability it may be difficult to attribute the conduct of the agent to corporate culture of the corporation where agents acted with a degree of independence from the corporation or where the principal turns a blind eye to activities engaged in by the agent. Finally, it may be difficult to prove that payments made through an agent are not legitimately due to the agent, particularly where the intermediary provides both legitimate and illegitimate services.

Both the UK Bribery Act and the FCPA provide better models in imposing liability on agents. Under the UK legislation, acts of associates of a commercial organisation are directly attributable to the organisation. Under the FCPA, the foreign bribery offence has a separate limb of liability for the making of payments to third parties knowing that any part of the payment will be offered to a foreign public official. For these purposes, "knowledge" is defined to include deliberate ignorance based on awareness of a high probability of the existence of those circumstances, unless the person actually believed the circumstances did not exist.

(vii) **Measures to encourage self-reporting, including but not limited to, civil resolutions, settlements, negotiations, plea bargains, enforceable undertakings and deferred prosecution agreements**

The Working Group believes that measures to encourage self-reporting would significantly assist enforcement activities. In this respect the sentencing guidelines applied in the United States and United Kingdom are helpful models.

Chapter 8 of the US Federal Sentencing Guidelines provides that self-reporting, co-operation or acceptance of responsibility and the existence of effective compliance and ethics programs are specific mitigating factors to be applied by US Courts. The UK Sentencing Guidelines for Fraud, Bribery and Money Laundering of the UK (adopted at October 2014) provide that co-operation with investigation, early admissions and and/or self-reporting justify lower end culpability ranges.

We support a range of settlement options being available to the relevant regulatory bodies. Having regard to the complexity of investigating this kind of serious financial crime, we believe the availability of flexible settlement mechanisms would be in the interests of the administration of justice. We support the adoption of the following kind of settlement that are not currently available in connection with foreign bribery investigations:

- Deferred Prosecution Agreements (**DPAs**), preferably based on the UK model that has been available since February 2014 (see UK Consultation Paper 9/2012) with a clearer and a more transparent set of criteria to allow corporations to be satisfied a DPA will be the outcome of the investigation when approaching the regulatory body

(the broad unilateral discretion given to the SFO to offer a DPA is a frequently identified criticism of the UK regime); and

- enforceable undertakings similar to those available to ASIC under the ASIC Act (perhaps administered by ASIC as suggested above).

(viii) **Official guidance to corporations and others as to what is a culture of compliance and a good anti-bribery compliance program**

The Working Group supports the promulgation of official guidance for purposes of assisting Australian corporations to identify what is an effective compliance program and the steps that should be taken to properly implement such a program.

We believe such a guidance document should be based on Chapter 5 of the FCPA Resource Guide (Hallmarks of Effective Compliance Programs) and the UK Ministry of Justice Guidance about Procedures which Relevant Commercial Organisations can put in place to Prevent Persons Associated with them from Bribing promulgated in March 2011.

We favour the UK approach which explicitly provides the guidance principles do not have the force of law and that adequate procedures is a matter that is for the corporation to implement (subject to its business risk profile) and can only be resolved by the Courts taking into account the particular facts and circumstances of the case. However, the guidance principles are expressed to be a factor that UK prosecutors must take into account in deciding whether to pursue prosecutions.

(ix) **Facilitation payments defence**

The Working Group supports the removal of the facilitation payments defence. In that regard we note that the UK Bribery Act contains no facilitation payments defence and that Canada removed its facilitation payments defence in 2013. We support the reasons for removal that are set out in the Attorney General's department 2012 Discussion Paper.

We believe that the facilitation payments defence is not properly understood in Australia, particularly the requirement that the prescribed record must set out the value of the benefit, the date of conduct, the identity of the foreign public official, particulars of the routine government action and the signature or identity of the payer of the benefit. In our experience and that of forensic accountants with whom members of the Working Group have worked, there is a low level of compliance with these technical requirements of the existing defence.

(x) **Use of suppression orders in prosecutions**

The Working Group does not consider that there is anything special about the foreign bribery offence that suggests different issues surrounding the possible use of suppression orders in prosecutions. Having said that, given the high public interest in ensuring that all cases of foreign bribery are conducted in public and in an open and transparent manner, there ought to be only exceptional grounds existing before suppression orders are granted in foreign bribery cases.

The Working Group has noted the decisions of the Victorian Supreme Court in not only suppressing almost the entirety of the Secrecy foreign bribery prosecution (contrast cases in the US, where suppression has not occurred), but the attempts made by the Australian Government to protect the identity of foreign politicians allegedly involved or named in the Secrecy case (on the

grounds of national security), but not the subject of any public investigation or prosecution. The Working Group considers that it is for individuals to act to seek to suppress their identity (if that is properly warranted as a matter impacting on the proper administration of justice) rather than for Governments to do so. However, there is scope for a system whereby an interim suppression order is made to protect the identity of the individual until such individual is able to seek a suppression order themselves or confirm that a suppression order is not required. To keep such prosecutions suppressed is, in the Working Group's view, unsatisfactory and does little to encourage public support for the legal process.

(xi) **Foreign bribery not involving foreign public officials, for example, company to company or international sporting bodies**

The policy basis for the OECD and the United Nations Conventions is to address the demand side of the bribery of foreign public officials to encourage a culture of compliance by corporations doing business in foreign countries that may have less scrupulous practices.

We believe that the policy basis for criminalising foreign bribery involving company to company and international sporting bodies is equally as compelling as bribery involving foreign public officials, although that should not muddy Australia's commitments under the OECD and United Nations Conventions. We note that the existing state based offences for bribery and corruption are poorly drafted and could usefully be supplanted by Commonwealth legislation.

In relation to sporting bodies, it is clear that sport is business and very big and profitable business. While an Australian Institute of Criminology report on "Corruption in Sport " (February 2015) saw the risk of corruption in Australian sport as reasonably low, given the relatively low levels of money involved, the increasing role that internet gambling plays in sport meant that sporting associations and players needed to be aware of the risks of bribery and corruption. The FIFA scandal and the US prosecutions of senior FIFA officials involving serious allegations of racketeering, conspiracy and money laundering have touched Australia and various World Cup bids. That is more than enough reason to regard this as a matter requiring serious Government attention.

We consider that serious consideration should be given to amending the definition of "foreign public official" under the Criminal Code to specifically include persons, corporations or any other entities from, engaged by, acting on behalf of or employed or directed by any international sporting association, organisation or federation.

(xii) **The economic impact including compliance and reporting costs of foreign bribery**

The Working Group believes that the economic impact of foreign bribery extends far beyond matters that can be measured by cost. As the foreword to the United Nations Convention states:

Corruption is an insidious plague that has a wide range of corrosive effects on societies- it undermines democracy and the rule of law, it leads to violations of human rights, distorts markets, erodes the quality of life and allows organised crime, terrorism and other threats to human security to flourish.

It is for reasons related to these broader goals that we believe a global campaign to eradicate foreign bribery on the demand side should continue to be pursued.

To be sure, there is a competitive concern for Australian business if there is active enforcement of foreign bribery claims against Australian companies but other jurisdictions are not equally as rigorous in their enforcement activities. Clearly in such a situation, companies in jurisdictions with active enforcement are at a competitive disadvantage to companies in jurisdictions with lax enforcement (although in that regard, we do note US activity in recent years in seeking to impose jurisdiction over numerous non-US multinationals and individuals under the FCPA and increasingly targeting business in the Asia Pacific region).

In the 1990's when it appeared that the US was the only country actively pursuing foreign bribery prosecutions, various sources suggested that the competitive cost to American business at that time was a least US\$30 billion per year.

We believe the correct means of addressing concerns of competitive disadvantage against poorly enforced countries is to ensure that the demand side response is global. The actions of the OECD, the United Nations and now the G20, to actively ensure a global response is the best means of addressing this concern.

(xiii) **Any other related matters**

Whistleblowing - Of the topics associated with foreign bribery and its enforcement, a key issue not noted above is whistle blowing protection. The OECD Working Party's Phase 3 Report criticised the lack of foreign bribery whistleblower protection applicable in Australia, describing existing provisions as 'insufficient or irrelevant', and in need of strengthening in both the public and private sectors.

After the GFC in the late 2000s, the US undertook significant reforms to its financial system, one of which included real and substantial reform to whistleblower protection. After nearly 4 years, the verdict on the SEC's Whistleblower Program can best be reflected in the words of the Chair of the SEC, Ms Mary Jo White⁵:

The program, while clearly still developing, has proved to be a game changer.

There have always been mixed feelings about whistleblowers and many companies tolerate, at best, their existence because the law requires it. I would urge that, especially in the post-financial crisis era when regulators and right-minded companies are searching for new, more aggressive ways to improve corporate culture and compliance, it is past time to stop wringing our hands about whistleblowers. They provide an invaluable public service, and they should be supported. And, we at the SEC increasingly see ourselves as the whistleblower's advocate.

The bottom line is that responsible companies with strong compliance cultures and programs should not fear bona fide whistleblowers, but embrace them as a constructive part of the process to expose the wrongdoing that can harm a company and its

⁵ "The SEC as the Whistleblower's Advocate", Mary Jo White, speech to the Corporate & Securities Institute, Northwestern University School of Law Chicago 30 April 2015.

reputation. Gone are the days when corporate wrongdoing can be pushed into the dark corners of an organisation. Fraudsters rarely act alone, unobserved and, these days, the employee who sees or is asked to make the questionable accounting entry or to distribute false offering materials may refuse to do it or just decide that they are better off telling the SEC. Better yet, either there are no questionable accounting entries or false offering materials to be reported in the first place or companies themselves self-report the unlawful conduct to the SEC.

Developments in foreign bribery enforcement practice internationally indicate that provision of corporate whistleblowing systems is an important part of managing foreign bribery risk and for the internal and external detection and reporting of improper commercial conduct.

Notwithstanding this, Division 70 of the Australian Criminal Code contains no whistleblowing provisions, and while public whistleblowing regulation in Australia has been strengthened since the Phase 3 Report (by the *Public Interest Disclosure Act 2013* (Cth) which itself has been criticised as not properly covering the whole public sector, including politicians), private whistleblowing protection remains unchanged, poorly enforced and largely leaving whistleblowers at the mercy of potentially unfriendly even hostile employers (and co-employees).

Australia's primary corporate whistleblowing provisions in the private sector apply to foreign bribery only to the extent that the relevant disclosure relates to a breach of the Corporations Act. Immediate improvement could be achieved by a legislative amendment of the existing Corporations Act whistleblower provisions to insert direct reference to a breach of the criminal law. The promulgation of official guidance encouraging the implementation of foreign bribery whistleblowing systems within Australian corporations would further facilitate whistleblowing in relation to foreign bribery activity. In addition, there ought to be clear authority with ASIC to be properly resourced to protect whistleblowers, to create a division or office within ASIC (modelled on the US SEC Office of the Whistleblower) to effectively look after whistleblowers and to actively sanction companies which target whistleblowers.

We believe an effective whistleblowing regime is necessary to cause a change in community attitudes in Australia surrounding whistleblowing and the exposure of unlawful activity. In that regard we also believe there is a role for the introduction of incentive arrangements to actively encourage whistleblowing, although we do not support a rewards system as extreme as that introduced in the United States. The principle of rewarding whistleblowers is sound and the ethical message it carries forward is vital. It can be justified not as an inducement or bonus to the whistleblower, but rather as a necessary counter-balance to overcome those deterrent factors that might make otherwise honest persons reluctant to come forward. Seen in that light, and because the reporting of potential fraudulent or corrupt commercial conduct is a priority and is in the public interest, those who do that must be encouraged and modestly rewarded.

In general terms we agree with the recommendations concerning whistleblowing contained in the report of the Senate Economics Reference Committee on Performance of ASIC (June 2014), (see Recommendations 12 to 16 covering these topics)

Alternatively, if the Working Party's recommendation that a foreign bribery civil penalty division be inserted in the Corporations Act were adopted (see

paragraph b(ii) above), the necessary nexus with the Corporations Act whistleblowing provisions would automatically be created.

FCPA opinions – A useful resource guide that forms part of United States practice is the role played by the DOJ (through the office of the US Attorney General) in giving “FCPA opinions”. The use of these opinions allows corporations greater predictability and certainty in complying with the FCPA by permitting them to seek a formal opinion as to the legality of a proposed transaction and verification that, on the facts as presented to the authorities, there is not a potential violation of the FCPA. The DOJ also makes issued “FCPA opinions” publicly available, thereby providing broader guidance to the public on these matters.

The translation of an opinion facility to the Australian context would require a significant change in behaviour as to how the authorities in Australia manage such a facility, who manages the process and in whose name (such as the Attorney General or CDPP) an opinion is issued. Careful consideration should be given on the role each of the AFP (and CDPP) and ASIC could play (in relation to criminal and civil opinions, respectively) in setting up a structure similar to the US model.

Schedule – Members of the Working Group

Name	Organisation
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Ms Shabarika Ajitkumar	King & Wood Mallesons
Mr Ben Allen	Norton Rose Fulbright
Professor Bob Baxt AO	Herbert Smith Freehills
Ms Annette Hughes	Corrs Chambers Westgarth
Mr Daniel Blue	Zimatra Advisory
Dr Vivienne Brand	Flinders University
Ms Natalie Caton	King & Wood Mallesons
Mr Murray Deakin	PricewaterhouseCoopers
Mr Jason Gray	Allen & Overy
Ms Elizabeth Macknay	Herbert Smith Freehills
Mr Grant Marjoribanks	Herbert Smith Freehills
Ms Abigail McGregor	Norton Rose Fulbright
Mr Arthur Moses SC	New Chambers
Mr Stephen Newman	Hope Earle
Ms Rachael Nicholson	Allens Linklaters
Ms Jacqueline Wootton	Herbert Smith Freehills
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