Submission 45 - International Bar Association

International Bar Association made submission 6 to the inquiry into foreign bribery in the 44th Parliament.

This document is intended as a supplementary submission to the original submission 6.

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

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International bar Association
Anti-Corruption Committee

Supplementary Submission to
Australian Senate Economics
Reference Committee on Australia's Foreign Bribery Laws

4 August 2017

International bar Association
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1 Introduction

1.1 International Bar Association

(a) The International Bar Association (**IBA**) is the global voice of the legal profession and includes over 80,000 of the world's top lawyers and over 200 Bar Associations and Law Societies worldwide as its members.

(b) The IBA has had a long standing interest in, and advocacy of, issues concerning transparency and probity in the public and private sector and steps that countries around the world can take to combat foreign bribery and corruption.

(c) The IBA sees it as a matter of critical importance to support legal and policy reforms which focus on combating foreign bribery, fraud and corruption in all forms, domestic and foreign, in all countries.

1.2 The IBA Anti-Corruption Committee

(a) The IBA's Anti-Corruption Committee (the **Committee**) draws its members from around the world, made up of anti-corruption lawyers (in private practice and in the public sector), academics, prosecutors, investigators, judges and forensic accountants. This membership gives the Committee a unique opportunity to comment upon important policy initiatives that affect anti-bribery and anti-corruption laws policies and how they are implemented around the world and in particular countries.

(b) The Committee made a submission to the Senate Economics Reference Committee of the Australian Parliament (the **Senate Committee**) on the state of Australia's foreign bribery laws dated 24 August 2015 (the **2015 Submission**).

(c) The Senate Committee is holding public hearings during August 2017. The Committee is pleased to make the Supplementary Submission to the Senate Committee on recent developments since 2015.

1.3 Scope of this Submission

(a) The scope of this submission considers the state of the law as it applies in Australia as at 30 July 2017.

(b) This submission also reviews some policy issues which the Committee believes might be considered by the Senate Committee in its deliberations under review.

2 2015 Recommendations

2.1 IBA Anti-Corruption Committee 2015 Recommendations

(a) In the 2015 Submission, the Committee made a number of recommendations which are set out below:

(i) Recommendation 1 - Section 70 of the Criminal Code

(A) Review the fault elements of the foreign bribery offence in order to simplify the elements of the offence.

(B) Abolish facilitation payments as a defence to a foreign bribery offence.

(C) Enact the proposed changes in the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2015* (Cth).

(D) Increase the penalties for the foreign bribery offence, both as to monetary fine and the maximum term of imprisonment.

(ii) **Recommendation 2** - Corporate Criminal Liability

(A) Review whether the elements of sections 12.1 to 12.6 of the Criminal Code are adequate or whether another formulation is required in order to allow prosecutions to take place against corporations.

(B) Review the existing basis for corporate criminal liability and for foreign bribery and private bribery to create an offence similar to section 7 in the UK Bribery Act, deeming liability unless the corporation can justify it has taken adequate procedures to avoid the offending conduct.

(C) The liability of a corporation should be determined by the combined knowledge of its properly regarded relevant officers.

(iii) **Recommendation 3** - Structured Settlement Agreements

(A) Introduce statutory amendments to the Criminal Code to provide for structured settlement agreements as between prosecutors and corporations that:

(1) set clear criteria for corporations to satisfy in order to be eligible to negotiate an agreement (that is, do not follow the UK model which grants a discretion only to the prosecutor to "invite a person" to negotiate an agreement);

(2) maintain clear and transparent terms as to how the negotiations will be conducted;

(3) allow for active supervision by the Courts;

(4) permit prosecutors and a corporation to make agreed submissions on any penalties, with the ultimate discretion on whether or not to approve the proposed agreement lying with the Court; and

(5) Publish Code of Practice or Guidelines similar to the UK model.

(iv) **Recommendation 4** - Mutual Legal Assistance

(A) Review existing mutual legal assistance legislation.

(B) Amend legislation and supporting legislation to streamline the admissibility of information and documents.

(C) Review and focus on inter-agency memoranda of understandings to facilitate and streamline the exchange of information.

(v) **Recommendation 5** - AFP and ASIC

(A) Ensure the AFP is adequately resourced in terms of funds and experienced personnel to proactively investigate and prosecute foreign bribery offences.

(B) Give serious consideration to the creation a single, focused agency to deal with complex financial crimes (including foreign bribery) or, as a second-best outcome, ensure ASIC, the AFP and the CDPP work together and where appropriate, bring parallel proceedings like the US DOJ and the US SEC in respect of clear criminal and civil offences in circumstances where clear, public memoranda exists concerning responsibilities and accountabilities to secure better more focused enforcement of foreign bribery offences in Australia.

(vi) **Recommendation 6** - Books and records and internal controls offence

(A) Introduce a substantial books and records and internal controls offence as a stand-alone offence, in the Criminal Code or in the Corporations Act (on the basis that the nominated enforcement agency (the AFP or ASIC) proactively enforces the laws).

(B) Impose monetary penalties at least equal to the primary foreign bribery offence.

(C) Make the offence one of strict liability (on the US model) with an appropriate “adequate procedures” defence.

(D) Ensure the nominated enforcement agency is properly resourced to both investigate and prosecute such cases.

(vii) **Recommendation 7** - Australian Government Foreign Bribery Guidance

(A) Prepare and publish an Australian Foreign Bribery Resources Guide for Australian business, ensuring that the Guide covers not only business but Australian embassies, trade missions, trade and aid organisations, commercial attachés and all Australian public and private organisations.

(B) In order to promote the importance of compliance, create a position of Anti-Corruption Compliance Officer or Counsel (within ASIC, the AFP or the CDPP), drawing upon experienced compliance experts, to evaluate a corporation’s compliance program, as part of any decision to prosecute or to reach a structured settlement.

(viii) **Recommendation 8** - Whistleblower Protections

(A) Enact broad statutory protections for all private sector whistleblowers.

(B) Create an Office of the Whistleblower with ASIC based on the US model (with reporting complaints either to the corporation or directly to the authorities).

(C) Ensure ASIC is properly resourced to both investigate and prosecute cases where whistleblowers are mistreated or corporations act in such a way as to limit employees’ rights.

(D) Allow for a fund to be established to pay modest rewards to whistleblowers where information has resulted in a conviction against the corporation, again based on the US model.

(ix) **Recommendation 9** - Corruption in business and sporting bodies

(A) Enact laws to criminalise private, business to business bribery to cover conduct not presently caught by the State-based criminal law.

(B) Ensure all Australian sporting bodies and associations have clear, understood and enforced codes of code dealing with corruption (particularly any sporting body that receives Commonwealth funding).

(C) Consider 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.

(x) **Recommendation 10** - National Anti-Corruption Plan

(A) Publish a Consultation Paper for the establishment and creation of a national anti-corruption plan.

(B) Subject to the consultation process, publish a whole of government anti-corruption plan.

(xi) **Recommendation 11** - Commonwealth Anti-Corruption Commission

(A) Enact laws to establish an independent, properly resourced and staffed Commonwealth anti-corruption commission that covers all aspects of Commonwealth government activity and the conduct of all public servants employed by any Commonwealth entity and all politicians.

(xii) **Recommendation 12** - Attorney General Opinion Procedure

(A) Consider establishing a form of foreign bribery opinion procedure based on the US model.

3 Committee Submissions on Developments and Outstanding Issues

3.1 Introduction

Since 2015, there have been a range of legislative initiatives seeking to address some but not all of the shortcomings in Australia's foreign bribery framework. These initiatives are discussed below in light of the recommendations made in the 2015 Submission.

3.2 ***Recommendation 1*** *– Section 70 of the Criminal Code*

(a) In March 2017, the Attorney General's Department (**AGD**) published a Consultation Paper, setting out a range of proposed amendments to Australia's foreign bribery laws (section 70 of the Criminal Code Act 1995 (Cth) (**Criminal Code**)) contained in an Exposure Draft, *Crimes Legislation Amendment Bill 2017* (the **Foreign Bribery Amendment Consultation Paper)**.

(b) The AGD received a large number of submissions and held an open forum in Sydney to discuss the proposed amendments.

(c) The Committee made a submission to the AGD dated 26 April 2017. Subject to certain matters raised in the Committee's submission, the Committee broadly supported all of the proposed amendments. The Committee considers that the reforms will, if enacted, substantially enhance Australia's legislative framework in tackling foreign bribery, particularly the proposed new corporate offence of failing to prevent bribery (of which see Recommendation 2 below).

3.3 ***Recommendation 2*** *– Corporate Criminal Liability*

(a) The Foreign Bribery Amendment Consultation Paper proposed one important legislative change – the introduction of a strict liability offence, of a company failing to prevent foreign bribery by an associate. This was recommended in the Committee's 2015 Submission and supported in the Committee's submission to the AGD dated 26 April 2017.

(b) The proposed corporate offence of failing to prevent bribery is modelled on the section 7 offence in the United Kingdom *Bribery Act 2010* (**Bribery Act**). It is an offence of strict liability, reversing the onus of proof and seeking to impose strict liability on a company for the conduct of an associate (as defined) where the underlying conduct constitutes foreign bribery (by the associate engaged in the conduct). The only defence is if the company can prove that it had in place "adequate procedures" to prevent the offending conduct from occurring. The Committee recommended some drafting changes to the definition of an "associate" to make the offence closer to and more consistent with the UK offence under the Bribery Act.

(c) The Bribery Act section 7 offence, together with the UK deferred prosecution agreement scheme (see Recommendation 3 below), has in the opinion of the Committee and its members, resulted in a significant cultural and behavioural shift in attitude by companies, small, medium and large in the UK. No longer can companies subject to UK jurisdiction simply factor in the risk of being caught as a "low" risk and do nothing. Rather, the Bribery Act promotes a culture of proactive compliance and education to change behaviour. The company is now at risk of a criminal conviction and unlimited fines if, for example, a subsidiary, an agent, a distributor or a joint venture partner acted improperly (or illegally) and the company cannot demonstrated it had adequate procedures in place to prevent such conduct. This can and is, in the Committee's opinion, a powerful agent to change corporate conduct.

(d) The Committee supports the introduction of the proposed offence as outlined in the Foreign Bribery Amendment Consultation Paper together with the other proposed amendments subject to the matters set out in the Committee's submission dated 26 April 2017.

3.4 ***Recommendation 3*** *– Structured Settlement Agreements*

(a) In March 2016, the AGD published a Consultation Paper, *Consideration of a Deferred Prosecution Agreements Scheme in Australia*. The Committee made a submission to the AGD dated 2 May 2016, in support of the introduction of a deferred prosecution agreement (**DPA**) scheme in Australia, for certain Commonwealth offences.

(b) In March 2017, the AGD published a further Consultation Paper, *A proposed model for a Deferred Prosecution Agreement scheme in Australia*. The Committee made a submission to the AGD dated 26 April 2017 in support of the proposed model, noting some changes that might be considered.

(c) Again, as with the issue of corporate criminal liability (see above), the AGD received a range of submissions, and again, they were broadly in support of the proposed model. Indeed, one need only look at the cultural change of corporate voluntary reporting in the UK under the UK DPA scheme and the judgments of the UK High Court in the Standard Bank[1] and the Rolls-Royce[2] cases to see the importance of these schemes and the value they have both for regulators and for companies proactively addressing illegal conduct when it is discovered or otherwise comes to light.

(d) The Committee remains of the opinion it expressed to the AGD in its April 2017 submission:

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[1] *Serious Fraud Office v Standard Bank*, Case U20150854 dated 4 November 2015, approved in *Serious Fraud Office v XYZ Limited*, Case U20150856

[2] *Serious Fraud Office v Rolls-Royce Plc*, Case U20170036 dated 17 January 2017

> The introduction of a DPA scheme will not only enhance the accountability of Australian business in responding to serious corporate crime but will act as an incentive to support an improved level of compliance and corporate culture both for companies that participate in the DPA scheme and more generally. However, this incentive must be supported by enhanced funding and resourcing for the investigators (it is the Committee's opinion that the Australian Federal Police (**AFP**) should be the investigator in conjunction with the Commonwealth Director of Public Prosecutions, (**CDPP**), as the prosecuting authority) and a structure where one dedicated agency undertakes the investigation of serious corporate crime. For too long, there has remained the perception that the policing resources in Australia are too disparate, diffuse and have lacked real in-depth specialisation in corporate finances, structures and international business transactions. This problem of diffused agencies only adds to unnecessary duplication on costs and resources. What is needed is one dedicated agency, perhaps using the Serious Fraud Office model in the United Kingdom and New Zealand as a starting point. While much has been done to improve this over the last few years, the Committee believes this is a critical area to improve upon to ensure that in turn, the business community responds accordingly. It hardly needs to be said that the lower the perceived risk of detection, investigation and prosecution, the less incentive exists to voluntarily disclose conduct.

3.5 ***Recommendation 4*** *– Mutual Legal Assistance*

(a) In its 2015 Submission, the Committee made a number of recommendations to enhance the ability of agencies to exchange information and to streamline the admissibility of information and documents.

(b) While the Committee is aware of the AFP continuing to engage in relationships with other international agencies, particularly through the International Foreign Bribery Taskforce, little other legislative activity has occurred in this area.

3.6 ***Recommendation 5*** *– AFP and ASIC: wherein lies a dedicated agency?*

(a) In its 2015 Submission, the Committee said this:

> Who should enforce Australia's foreign bribery laws? – While the Australian Securities and Investments Commission (ASIC) appears better skilled in knowledge about corporate governance and how corporations operate in domestic and international financial markets, ASIC eschews anything to do with enforcing foreign bribery offences (although it is part of the AFP-hosted National Fraud and Anti-Corruption Centre). While the AFP has coordinated its activities in a more streamlined manner, experience on the ground leads the Committee to question the AFP's knowledge and skills, at a personal investigator level, on international finance, corporate governance and the way international corporations do business. In the Committee's opinion, Australia needs one dedicated agency to have primary responsibility for all complex financial crime cases (including foreign bribery) in all its aspects, criminal and civil.

(b) No progress has been achieved on this front; indeed, it does not appear to be a topic to be addressed.

(c) In April 2016, the Australia Institute published a discussion paper on corporate malfeasance in Australia. One of its findings was that staffing levels for regulators and other agencies that monitor corporate malfeasance had been cut by 3,926 (or 124.9%) between the numbers budgeted for in 2013-2014 and for the year 2015-2016[3]. The Institute found it difficult to understand the rationale for such cuts, given that the monitoring agencies showed that corporate wrongdoing was widespread in Australia. The Institute noted that ASIC, like many other regulators, has limited resources and has a reluctance to take formal proceedings absent a very high prospect of success and the exhaustion of cheaper, more informal procedures. While this is a commonly held view expressed in the media, ASIC has achieved some recent notable wins, securing orders against the former Chairman of the Australian Wheat Board, Trevor Flugge[4] and is in the process of litigating against the major Australian trading banks over allegations about improper conduct relating to the BBSW interest rates.

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[3] Australian Institute, *Corporate Malfeasance in Australia*, April 29016, page ii.

[4] *ASIC v Flugge & Geary* [2016] VSC 779 on liability and *ASIC v Flugge (No 2)* [2017] VSC 117 on sentencing.

(d) The Committee has noted the proposed establishment of a new "Home Office" department, (apparently modelled on the UK system rather than a Department of Homeland Security as operating in the US) gathering together under one Minister a range of department activities, primarily focused on intelligence gathering and sharing related to terrorism and terror-related activities. The Committee is unclear what impact, if any, the creation of a new Home Office department will have in the foreign bribery space. The Committee is concerned that by subsuming all the agency activities into one large department, any focus on foreign bribery will be lost. Notwithstanding the UK Prime Minister proposing to abolish the UK Serious Fraud Office and subsume it into the UK National Crime Agency, the Serious Fraud Office has survived and indeed, might well continue for the foreseeable future.

(e) The Committee believes that serious consideration should be given, as it said in the 2015 Submission, to the creation of a properly funded and resourced, dedicated agency to tackle serious financial crime, of which foreign bribery is one. The Committee believes such a body should not be ASIC or the AFP, but a stand-alone independent entity that can both investigate and prosecute, resourced by dedicated experienced staff (in the model of the UK Serious Fraud Office). Media coverage of the role of ASIC in investigating corporate misconduct has been less than complimentary[5]. In some areas, such as whistleblower protections, ASIC publicly suggested it was not the body to act to look after and protect whistleblowers[6].

3.7 ***Recommendation 6*** *– Books and Records and Internal Controls offences*

(a) As of 1 March 2016, the Commonwealth amended the Criminal Code, introducing substantial offences for the false or reckless dealing with accounting documents (defined broadly) in section 490 of the Criminal Code. These provisions complimented the various false accounting offences under State criminal laws, but with substantially higher penalties. Importantly, these offences are not limited to foreign bribery – they apply to any facts or circumstances where a person engages in conduct (intentional or reckless) which has the effect of facilitating, concealing or disguising any alteration, destruction or concealment of an accounting document with the result that a person gives or receives a benefit to which the person (or another person) is not legitimately entitled to or otherwise causes loss to a person.

(b) There have as yet been no prosecutions or convictions under these offences. They are drafted using the same language as the foreign bribery offence in section 70.2 of the Criminal Code, which has been the subject of commentary as to its complexity.

(c) Assuming the proposed amendments to the Criminal Code as set out in the Foreign Bribery Amendment Consultation Paper (see above) are enacted, the Committee believes thought should be given to ensuring the language in section 490 of the Criminal Code has similar changes enacted. If that does not occur, the Committee is concerned that the section 490 offences will suffer the very difficulties in securing prosecutions that the foreign bribery offence in section 70 currently experiences.

3.8 ***Recommendation 7*** *– Australian Government Foreign Bribery Guidance*

(a) In its 2015 Submission, the Committee recommended the Commonwealth publish a broad guidance for business on foreign bribery, similar to the US FCPA Resources Guide published by the US Department of Justice and Securities & Exchange Commission.

(b) No action has occurred on this front. Indeed, in statements by the AGD, the view is expressed that as there is no law on the topic, there is nothing the Commonwealth can or need say and besides, it is for companies to take their own legal advice.

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[5] "*ASIC needs more power, and attitude*" Adele Ferguson, The Australian Financial Review, 27 March 2017 where Ms Ferguson expressed a commonly reported view in this way – "*ASIC has been trying to lift its game in the past few years but it has a long way to go to become the regulator we badly need, the "tough cop on the beat". Some of its problems relate to shortcomings in the legislation, but others relate it itself*".

[6] ASIC Commissioner John Price, JP Committee Hansard Thursday 27 April 2017 at page 60.

(c) However, if the proposed corporate offence of failing to prevent foreign bribery is enacted as outlined in the Foreign Bribery Amendment Consultation Paper, the relevant Minister must publish guidance on what is expected of a company in seeking to have in place adequate procedures to avoid offending conduct occurring. In addition, during the consultation process for a DPA, there was strong submissions made calling for clear guidance to be issued by the Commonwealth (perhaps by the CDPP in the Commonwealth Prosecution Policy) as to how a discretion would be exercised to invite a company to negotiate a DPA and the factors that would be taken into account in order to give companies a degree of certainty in a process that otherwise appears to lack any transparency (or certainty for companies).

(d) Irrespective of the proposed corporate offence referred to above, the Committee believes there are good grounds to encourage the Commonwealth (through the AGD, the AFP and the CDPP) to publish a general guidance in the manner published by the US authorities. It need not be binding yet it would act as a great help and educative tool, particularly for small to medium size businesses, which often lack the resources of public companies to tackle these issues.

3.9 ***Recommendation 8*** *– Whistleblower Protections*

(a) In its 2015 Submission, the Committee proposed a number of recommendations to effect substantial reforms to whistleblower protection laws in the private sector, to create an independent office to protect and enforce whistleblower rights and to create a reward scheme to incentivise whistleblowers reporting illegal conduct.

(b) In December 2016, the Joint Parliamentary Committee on Corporations & Financial Services (the **JP Committee**) commenced a consultation process into whistleblower protections in the private and not-for-profit sectors in light of the proposed reforms contained in the *Fair Work (Registered Organisations) Amendment Act 2016*. At the same time, the Commonwealth Treasury issued a separate consultation paper looking at tax and corporate whistleblower protections in Australia,

(c) The Committee made three submissions to the JP Committee (together with appearing before the Committee) as follows:

(i) Submission dated 10 February 2017;

(ii) Supplementary Submission on Questions on Notice dated 24 April 2017; and

(iii) Supplementary Submission on Question on Notice concerning the Fair Work (Registered Organisations) Amendment Bill 2014 dated 18 May 2017.

(d) Over 70 submissions were received by the JP Committee. Almost all of them called for and supported substantial reforms to whistleblower protection laws in the private and not-for-profit sectors. The reforms covered substantially better legal protections, enhanced confidentiality, a more streamlined Commonwealth process (including the creation of a separate statutory office) to protect and act for whistleblowers, improved rights to seek compensation for losses suffered and in many cases, the ability to seek a reward for voluntarily disclosing illegal conduct. The concept of a reward divided the submissions. Some submissions, such as those from The St James Ethics Centre were against rewards, believing that citizens had a duty to report illegal conduct. Other submissions were more prosaic, noting that reality is often harsher and less than perfect compared to the perfect world. The Committee, on balance, supported a reward scheme.

(e) The Committee supports the opinions expressed in the submission lodged with the JP Committee by the Australian Institute of Company Directors, namely:

> Existing protections afforded to corporate whistleblowers in Australia are in need of substantive reform to broaden and strengthen their coverage…strong systems for whistleblowing promote strong standards of governance…directors' play a critical role in establishing and promoting a culture that supports disclosure of wrongdoing with Australian businesses. This is essential to detecting, addressing and, ideally, preventing corporate wrongdoing. The regulation of whistleblowing has a significant

> impact on establishing a culture of disclosure, and by extension, affects the ability of directors to play their part in ensuring the compliance of their organisations with the law. For their part, directors welcome information about misconduct and would prefer for misconduct to be brought to light and addressed at the earliest opportunity….the ultimate aim of a whistleblowing framework should be to encourage disclosures of wrongdoing, protect whistleblowers and incentivise companies to establish internal disclosure regimes.

(f) The Committee supports the JP Committee and its work to ensure that the broadly supported whistleblower protection reforms are implemented. Across the private and not-for-profit sectors in a consistent manner.

3.10 ***Recommendation 9*** *– Corruption in Business and Sporting Bodies*

(a) In its 2015 Submission, the Committee proposed recommendations on the extent to which corruption and bribery laws should apply to business (noting the broad commercial bribery offences under the UK Bribery Act) and sporting bodies

(b) No action has occurred on this front.

(c) Sport is big business, whether in Australia or involving international sport. The amount of money that is associated with large sporting events is vast. One only has to follow the FIFA saga on corruption within the constitutent sporting bodies and the convictions that are now occurring in the US to realise that sport is very big and is a natural attraction to those engaged in bribery and corruption. In Australia, sporting codes are not immune from allegations of impropriety, players betting against their own team and teams or clubs seeking to avoid salary caps to become more successful.

(d) The Committee believes there is no good reason to exempt sporting bodies from the reach of bribery and corruption laws, particularly given the significant levels of Commonwealth (public) money poured into sport. Laws should be enacted which complement existing State laws. In addition, the definition of a “foreign public official” should be broadened to cover individuals and entities engaged by, acting on behalf of or employed or directed by and international sporting association, organisation or federation.

3.11 ***Recommendation 10*** *– National Anti-Corruption Plan*

(a) In its 2015 Submission, the Committee noted its support for the implementation of a Commonwealth whole-of-government anti-corruption plan. Such a national plan was announced by the Commonwealth Government in September 2011, subjected to an AGD Discussion Paper in March 2012 and then nothing further occurred.

(b) The Commonwealth Open Government National Action Plan 2016-2018 is a good start in tackling issues of transparency, accountability and the integrity of the Commonwealth Government activities. The aims of the Plan cover a broad range of important areas:

(i) Transparency and accountability in business;

(ii) Open data and digital transformation;

(iii) Access to government information;

(iv) Integrity in the public sector; and

(v) Public participation and engagement.

(c) The Committee supports these initiatives and ongoing activities across the whole of government.

3.12 ***Recommendation 11*** *– Commonwealth Anti-Corruption Commission*

(a) In its 2015 Submission, the Committee strongly recommended the creation of a broad, robust and independent anti-corruption commission to cover all aspects of Commonwealth activity, including the conduct of public servants and politicians.

(b) No action has occurred on this front.

(c) Corruption and the public perception of corruption remains. Australia is part of a global economy and in particular, its business operates in many parts of the world that are considered high risk in terms of the perception of corruption occurring. While Transparency International (**TI**) recently reviewed the perceptions of corruption in the Asia Pacific region and focused on traditional high risk countries such as China, Indonesia and India (significant trading partners for Australian business), Australia did not escape attention. At least 34% of people surveyed in Australia by TI believed corruption had increased[7] and there was a poor perception in Australia towards government efforts to fight corruption[8].

(d) While media coverage has regularly raised this topic, neither of the major political parties appear to show any real interest in the creation of such a body. They seem to prefer the diffuse, deregulated landscape where certain agencies are reviewed in secret by an independent agency, the Australian Commission for Law Enforcement Integrity. However, there also appears in the media to be a strong sense of disbelief that while anti-corruption commissions are good for the States, they are simply not needed in Canberra. In addition, after certain public hearings conducted by the New South Wales Anti-Corruption Commission involving a prominent public prosecutor[9], there was a strong campaign to reign in such commissions, limit or abolish public hearings, protect peoples' reputations from adverse findings (where they are later exonerated) and otherwise to hold all inquiries in secret, away from the public eye.

(e) In recent media coverage, investigative journalists Nick McKenzie and Richard Baker said this[10]:

> Senior officials who back the existing system of secret federal police and integrity commission investigations say it safeguards the reputations of those suspected of corruption but later cleared.
>
> The Coalition opposes an ICAC, with politicians wary of the risk of a corruption commission chasing political scalps.
>
> Veteran corruption fighter Tony Fitzgerald QC, who is working with the left-leaning Australia Institute as it campaigns for a national ICAC says those opposed to public hearings "demonstrate a fundamental ignorance of democracy". "In a truly open society, citizens are entitled to full knowledge of government affairs. Information about official conduct does not become any less important because it diminishes official reputations," says Mr Fitzgerald.

(f) Until there is political will to ensure real open and transparent government across the Commonwealth sector and for all public officials, including politicians to have their conduct, if alleged to be improper, judged independently and not behind closed doors in a less than transparent manner, which the Committee supports, the fractured, disparate and secret processes currently used will continue. As a consequence, the public and society will continue to feel disengaged with government as they see or perceive one rule for those in or exercising official power and another rule for

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[7] TI, *People and Corruption: Asia Pacific, Global Corruption Barometer*, February 2017, page 9.

[8] Ibid, at page 27.

[9] The particular case involving the NSW Independent Commission Against Corruption involved an inquiry into the conduct of a senior public prosecutor, Margaret Cunneen, a subsequent High Court challenge that ruled the ICAC inquiry into Ms Cunneen was invalid (see *Independent Commission Against Corruption v Cunneen* [2015] HCA 14), an independent review into ICAC's charter and amending legislation to ensure ICAC focused on serious, systemic corruption.

[10] "*Anti-corruption body goes missing*", The Sydney Morning Herald 22-23 July 2017.

everyone else. The Committee does not consider that is a healthy attribute to open government.

3.13 ***Recommendation 12*** *- Attorney General Opinion Procedure*

(a) In its 2015 Submission, the Committee proposed consideration of an Opinion Procedure similar to that available in the United States. Such an Opinion is directed towards whether certain specified and identified conduct does or does not conform to the law and the US authorities' present enforcement policy. If an Opinion is issued, then the company seeking the Opinion is protected from regulatory investigation and prosecution assuming the conduct disclosed in seeking the Opinion is put into effect. The Opinion also acts as useful guidance for business generally, setting out the regulatory response to a fact scenario that can benefit business where business acts consistently with the Opinion.

(b) No action has occurred on this front.

(c) The Committee accepts that in Australia's traditional criminal justice system, the proffering of such an opinion is unusual to say the least. Indeed, one suspects the AGD, the AFP and the CDPP would be aghast at the idea that they or one of them expresses such an opinion and which is made public. In the Committee's opinion, the fact that it has never been done in Australia is no good reason not to consider the idea to explore its advantages and disadvantages.

4 Summary Conclusions

4.1 Perceptions of Foreign Bribery and Corruption

(a) The public perception of bribery and corruption has not lessened; if anything, the perception has increased. In the Asia Pacific Region, TI recently concluded that bribery affects and continues to affect, a huge number of citizens, expressing its view as follows[11]:

> We estimate that over 900 million people across the 16 surveyed places (in the Asia Pacific region, including Australia) had paid a bribe in the past year when trying to access basic services liked education or health-care. Bribery rates for countries vary considerably across the region – fro 0.2 per cent in Japan to 69 per cent in India. What is clear is that public sector graft is a crime that affects men and women, young and old, rich and poor, and must be urgently addressed in order to further social progress in the region.

(b) Australia, while having relatively low rates of bribes affecting the public sector, is not immune to the impact that regional corruption has on it, the business undertaken by Australian companies and aid administered through Australian aid programs. The perception of corruption, while seemingly low as it affects Australia, can often tell a different story domestically when allegations of financial and corporate misconduct go unaddressed and those in power and influence judge themselves rather than be subjected to independent scrutiny.

(c) The impact of corruption in the business sector remains constant. The recent Ernst & Young Asia-Pacific Fraud Survey 2017 had some salutory findings:

(i) Ethical standards are not improving;

(ii) Standards are not being applied consistently;

(iii) 35% of respondents said it is common practice to use bribery to win contracts, up from 14% in 2013; while

[11] TI, *People and Corruption: Asia Pacific, Global Corruption Barometer*, February 2017, page 3.

(iv) 93% of respondents considered compliance culture to be an important factor when choosing where to work.

(d) The Ernst & Young survey reflects a number of other recent surveys in Australia and overseas that suggest fraud, bribery and corruption, and unethical corporate conduct remain an issue of key concern[12]. It is however, unclear whether such conduct has itself increased or there is now a greater awareness of it, due to extensive media coverage and the impact of social media.

4.2 Response to Foreign Bribery by the Australian Government

(a) Between 1999 and 2012, the commonly held view in Australia is that the approach of the Australian Government was reactive rather than proactive to any foreign bribery issues.

(b) Since 2012 and the targeted criticisms of Australia by the OECD in the peer review process under the OECD Anti-Bribery Convention, a more focused and proactive approach has been adopted by the Australian Government. Initiatives have included:

(i) The establishment within the AFP of an Expert Panel to review all foreign bribery matters;

(ii) The creation of the National Fraud & Anti-Corruption Centre hosted by the AFP with other agencies closely involved;

(iii) Further resources for foreign bribery teams in Melbourne, Sydney and Perth;

(iv) The AFP joining the International Foreign Bribery Taskforce; and

(v) During 2016 and 2017:

(A) The Senate Committee's review of foreign bribery laws;

(B) The AGD proposed amendments to the foreign bribery laws including the creation of the corporate offence of failing to prevent bribery;

(C) The AGD proposed model DPA scheme; and

(D) The work of the JP Committee looking into whistleblower protections

(c) There are however, some areas where the initiative appears to have been less forthcoming. These areas include:

(i) A failure to address the issue of whether the "facilitation payment" defence should remain in the Criminal Code;

(ii) The creation of a dedicated agency to investigate and prosecute serious financial crime, using the model of the UK Serious Fraud Office (so combining the skills within the AFP and the CDPP);

(iii) Maintaining adequate resourcing for ASIC and the AFP to focus on foreign bribery, rather than constant budgetary cuts with occasional increases in resources; and

(iv) From a domestic standpoint, demonstrating that those in public power and exercising public duties are held to a transparent account, the creation of a federal anti-corruption commission.

[12] As examples, see Ernst & Young *Corporate misconduct – individual consequences*, 14th Global Fraud Survey 2016 and Eversheds *Beneath the surface: The business response to bribery and corruption 2016*.

(d) The one remaining "elephant in the room" still is the lack of prosecutions. While investigations and prosecutions can be time-consuming and expensive (as the AFP constantly reminds us (by quoting the OECD *Foreign Bribery Review* statistics of 7 years to bring a case), it remains puzzling why we have only 2 cases (or 3 if you include the false accounting prosecutions against Messrs Gregg and Waugh arising out of events concerning Leighton Holdings) over nearly a 20 year period. Maybe given the proposed amendments to the foreign bribery offences (noted above), the law is deficient and it is too hard to bring a prosecution. Combined with the complexity of the existing laws and the ever-changing personnel investigating foreign bribery, there is, of course, no legal incentive for companies to voluntarily report potential corruption and no legal obligation on companies where they fail to prevent foreign bribery. While the recently proposed reforms in these areas, noted in section 4.2(b) above, should go a considerable way to address these issues, the reality is that until prosecution is seen as a probable event, companies are still likely to treat foreign bribery as a small risk to be internally managed rather than a serious reputational risk which must not only be proactively prevented but which should be reported when it is discovered. While the Committee commends the Australian Government for its recent initiatives, until the real reality of a prosecution faces companies, directors and executives, Australia's response to foreign bribery is likely to be regarded as more muted and reactionary than proactive and encouraging sustainable and ethical business practices. The Committee supports the endeavours of the Senate Committee in a wholesale review of Australia's foreign bribery laws which, together with the current initiatives by the Government and through the JP Committee, can only enhance Australia's commitment to tackling foreign bribery and, to the extent corruption exists in Australia, domestic bribery and corruption.