



DIRECTORATE FOR FINANCIAL AND ENTERPRISE AFFAIRS

AUSTRALIA: PHASE 2

**REPORT ON THE APPLICATION OF THE CONVENTION ON
COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS IN
INTERNATIONAL BUSINESS TRANSACTIONS
AND THE 1997 RECOMMENDATION ON COMBATING
BRIBERY IN INTERNATIONAL BUSINESS TRANSACTIONS**

This report was approved and adopted by the Working Group on Bribery in International Business Transactions on 4 January 2006.

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EXECUTIVE SUMMARY

1. The Phase 2 Report on Australia by the Working Group on Bribery evaluates and makes recommendations on Australia's implementation of the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and related instruments. The Australian authorities demonstrated a strong commitment to combating foreign bribery. Although no cases have been prosecuted, the Australian Federal Police has opened three investigations (one which has been terminated) and is currently conducting two investigations. Meetings held with the Australian authorities, including police, prosecutors and officials from the Attorney-General's Department, were highly constructive.

2. In 2001, Australia established a progressive framework for corporate criminal liability (i.e. the criminal liability of bodies with legal personality). Despite the broad scope of this liability, which includes in its application offences linked to "corporate culture", it has not yet been applied to corruption-related offences. The Working Group therefore identified this as an area requiring follow-up once there has been sufficient practice. Additionally, it was recommended that Australia increase the maximum corporate fine of AUD 330 000 (about EUR 209 000/USD 252 000) for foreign bribery, in view of the size and importance of many Australian companies as well as MNEs with headquarters in Australia. The defence of facilitation payments was also identified for further monitoring because of concerns such as the practical effectiveness of the record-keeping requirement and the prohibition against facilitation payments under some State criminal codes. The Australian authorities agreed with these recommendations.

3. The Working Group recommended improved measures for the referral of information about foreign bribery cases to the AFP from other Commonwealth agencies and State and Territorial police, and for ensuring that the process for notifying the Minister for Justice and Customs of foreign bribery cases in politically sensitive matters does not potentially result in delays in the referral of cases to the AFP. The Working Group welcomed improvements announced by the Australian Taxation Office (ATO) to more effectively prevent and detect bribe payments to foreign public officials and ensure that the tax deduction for facilitation payments is not misused.

4. The Report also discusses elements of the Australian system that should positively impact on the international fight against foreign bribery, including Australia's commitment to support good governance in its partner countries. In addition, two of the three foreign bribery investigations were referred through the AFP International Liaison Network, which facilitates the investigation of transnational crime involving Australian interests by placing liaison officers in key centres around the world.

5. The Report, which provides the findings of experts from Japan and New Zealand, was adopted by the OECD Working Group. Within one year of the Group's approval of the Report, Australia will make a follow-up report on its implementation of the recommendations, with a further written report within two years. The Report is based on the laws, regulations and other materials supplied by Australia, and information obtained by the evaluation team during its five-day on-site visit to Canberra and Sydney in June 2005, during which the team met with representatives of several Australian Commonwealth agencies, State agencies, the private sector, civil society and the media.

INTRODUCTION

1. On-Site Visit

6. From 6 to 10 June 2005, Australia underwent the Phase 2¹ on-site visit by a team from the OECD Working Group on Bribery in International Business Transactions (Working Group). The purpose of the on-site visit, which was conducted pursuant to the procedure for the Phase 2 self and mutual evaluation of the implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Convention) and the 1997 Revised Recommendation (Revised Recommendation), was to study the structures in place in Australia to enforce the laws and rules implementing the Convention and to assess their application in practice as well as monitor Australia's compliance in practice with the Revised Recommendation.

7. The OECD team was composed of lead examiners from Japan² and New Zealand³, as well as representatives of the OECD Secretariat⁴.

8. During the on-site visit, meetings were held with officials from the following Commonwealth bodies: the Department of Foreign Affairs and Trade, Attorney-General's Department, Commonwealth Director of Public Prosecutions, Australian Federal Police, Australian Crime Commission, Australian Taxation Office, Australian Public Service Commission, Department of the Treasury, Department of Finance and Administration, Australian Agency for International Development (AusAID), Export Finance and Insurance Corporation, Australian National Audit Office, Department of Immigration and Multicultural and Indigenous Affairs, Australian Customs Service, Australian Securities and Investments Commission, Australian Prudential Regulation Authority, Australian Trade Commission (AUSTRADE), Invest Australia, Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian Institute of Criminology, and the Commonwealth Ombudsman's Office. At the State level, the following government bodies were represented: the New South Wales (NSW) Director of Public Prosecutions, NSW Ministry for Police, and NSW Police Fraud Squad.

¹ The Phase 1 examination of Australia took place in December 1999. The purpose of the Phase 1 examination is to assess whether a Party's laws for implementing the Convention and the Revised Recommendation comply with the standards there under.

² In alphabetical order, Japan was represented by: Makoto Izakura, Assistant Director, OECD Division, Ministry of Foreign Affairs; Toshihiro Kawaide, Associate Professor, Faculty of Law, Tokyo University; Takeshi Nishino, Deputy Director, Research Division, Tax Bureau, Ministry of Finance; and Yasuhiro Tanabe, Senior Attorney for International Affairs, Ministry for Justice.

³ In alphabetical order, New Zealand was represented by: Alex Conte, Senior Law Lecturer, New Zealand Law Foundation International Research Fellow, University of Canterbury, Christchurch; James Mullineux, Senior Prosecutor, Serious Fraud Office; and Mike Spelman, National Advisor Transfer Pricing, Inland Revenue Department.

⁴ The OECD Secretariat was represented by: Christine Uriarte, Principal Administrator, Anti-Corruption Division, Directorate for Financial and Enterprise Affairs (DAF); and France Chain, Administrator, Anti-Corruption Division, DAF.

9. At the on-site visit civil society was represented by: Transparency International-Australia, the Corruption Prevention Network, Whistleblowers Australia, two members of the media, and academics from the University of Adelaide Law School, the Australian National University and Monash University. The private sector was represented by: the International Bank and Securities Association of Australia, Australian Bankers Association, Investment and Financial Services Association, Australian Chamber of Commerce and Industry, Certified Practising Accountants Australia, Institute of Chartered Accountants Australia, Ernst and Young, Pricewaterhouse Coopers, KPMG and Deloitte. The following companies participated: ADI, BHP Billiton, Telstra, and Tenix. The Australian legal profession was represented by two practicing lawyers with experience in anti-corruption matters, the New South Wales Law Society, and the Law Council of Australia. The judiciary was represented by the Australian Institute of Judicial Administration and National Judicial College of Australia.

10. In preparation for the on-site visit, the Australian authorities provided the Working Group with responses to the Phase 2 Questionnaire and responses to a supplementary questionnaire, which contained specific questions about the implementation of the Convention and Revised Recommendation in Australia. The Australian authorities also submitted relevant legislation and regulations, case law, statistical information and various government and non-government publications. The OECD team reviewed these materials and also performed extensive independent research to obtain non-government viewpoints.

11. The on-site visit involved meetings for three days in Canberra, where the principal focus was on the implementation of the Convention and Revised Recommendation from a Commonwealth government perspective. Two days were then spent in Sydney, where the focus of the meetings was on the detection of the offence of bribing a foreign public official by State authorities, the possible overlap between State and Territory bribery offences and the Commonwealth foreign bribery offence, as well as the perspective of civil society and the private sector on the fight against foreign bribery in Australia.

12. The Australian authorities made impressive efforts to ensure the smooth running of the on-site visit through the preparation of a comprehensive agenda for the visit, and by making substantial efforts to provide access to all requested participants. Leading up to and following the on-site visit, the Australian authorities responded to all requests for information and documentation. The examination team appreciates the high level of cooperation of the Australian authorities at all stages of the Phase 2 process, and notes that the cooperative spirit was conducive to constructive discussions concerning best practices and potential problem areas identified by the lead examiners regarding Australia's implementation of the Convention and Revised Recommendation.

2. General Observations

a. Governance

13. Australia is a federal state, with a three-tier system of government—Commonwealth, state and territory, and local. It is administratively divided into six states and two mainland territories.⁵ Each state and mainland territory has its own legislature.

14. Pursuant to the Commonwealth of Australia Constitution, the Commonwealth Parliament has the power to legislate on certain matters, including trade and commerce with other countries and among the states; taxation; foreign corporations and financial corporations formed within the Commonwealth. The State Parliaments have the power to legislate in respect of any matter, including education, transport, law

⁵ Australian Capital Territory (Canberra), New South Wales (Sydney), Northern Territory (Darwin), Queensland (Brisbane), South Australia (Adelaide), Tasmania (Hobart), Victoria (Melbourne) and Western Australia (Perth).

enforcement, health services and agriculture. In addition, the States and Territories are primarily responsible for the development of the criminal law and criminal trial procedure.⁶ Under section 109 of the Commonwealth Constitution, “when a law of a State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”. Legislation implementing provisions of an international convention or treaty can be regarded as falling within the Commonwealth external affairs power.⁷ It is thus pursuant to the external affairs power that the Commonwealth Parliament established the offence of bribing a foreign public official under the Commonwealth Criminal Code in order to implement the Convention.

15. As is normal in any federal system of government, tensions sometimes occur between the Commonwealth and State governments. The examination team has not seen evidence of tensions between the Commonwealth and state governments concerning the responsibility for implementing Commonwealth criminal offences, including the offence of a bribing a foreign public official under the Commonwealth Criminal Code.

16. Australia has strong and secure democratic institutions and a tradition of working closely with civil society on law reform—a robust consultation process was employed before introducing the amendments to the Commonwealth Criminal Code for the purpose of implementing the Convention. In addition, Australia has provided important leadership in the region in recent years by cooperating with Pacific Islands and other countries to “help improve law and order, democratic processes and public sector accountability and transparency”.⁸ For instance, Australia leads the Regional Assistance Mission to Solomon Islands to improve law enforcement and governance and assist in economic reform,⁹ Australia administers the Enhanced Cooperation Program in Papua New Guinea to assist PNG with such governance issues as financial reporting, budget management, corruption and law enforcement, and provides development assistance to the Republic of Nauru on matters including economic governance and financial reform. Australia also plays a leading role in the Pacific Regional Policing Initiative, which seeks to improve policing in Forum Island Countries¹⁰ with the overall goal of improving regional security and national economic, social and political stability¹¹.

b. Legal System

17. Under the Australian legal system, the Commonwealth Parliament as well as State Parliaments and the legislative assemblies of the Northern Territory, the Australian Capital Territory and Norfolk Island, may pass legislation. Due to the application of section 109 of the Commonwealth of Australia Constitution Act, State laws that overlap with a Commonwealth law operate concurrently to the extent that the State law is not inconsistent with the Commonwealth law.¹² However, with respect to the offence of

⁶ See section 51 of the Commonwealth of Australia Constitution Act (<http://scaleplus.law.gov.au/html/pasteact/1/641/0/PA000700/htm>); and “World Factbook of Criminal Justice Systems: Australia [Biles, D (1993)].

⁷ “In Defence of the Use of Public International Law by Australian Courts” (Monk, S., Australian Yearbook of International Law, vol.22, August 2002, p.210).

⁸ Statement of the Honourable Mrs. Christine Gallus MP, Parliamentary Secretary to the Minister for Foreign Affairs and Trade, to the Commission on Human Rights, High Level Segment, United Nations, Geneva, 16 March 2004 (<http://www.australia.ch/stmnt10.htm>).

⁹ Ibid.

¹⁰ The Forum Island Countries are: Cook Islands, Federated States of Micronesia, Fiji, Kiribati, Marshall Islands, Nauru, Niue, Palau, Papua New Guinea, Samoa, Solomon Islands, Tonga, Tuvalu and Vanuatu.

¹¹ Program Profile of the Pacific Regional Policing Initiative (http://www.prpi.sagric.com/pri_top.html).

¹² See paragraphs 9 regarding section 109 of the Commonwealth Constitution.

bribing a foreign public official, section 70.6 of the Commonwealth Criminal Code states that the Division of the Commonwealth Criminal Code regarding the offence of bribing a foreign public official “is not intended to exclude or limit the operation of any other law of the Commonwealth, or any law of a State or Territory”.

18. Generally, under Australian law treaties and conventions to which Australia is a party, except for those terminating a state of war, are not directly and automatically incorporated into Australian law, in the absence of implementing legislation. Nevertheless, pursuant to the Acts Interpretation Act 1901 (Commonwealth), treaties and conventions that are implemented by a Commonwealth law may be used by the courts in the interpretation of those laws.¹³ The Australian common law, originally developed from the English common law, is based on *stare decisis* or the doctrine of precedent. Pursuant to this doctrine, lower courts are bound to follow the decisions of higher courts. The High Court of Australia is the final court of appeal in all matters, regardless if the appeal originates from a federal or state/territory court. Australian state and territory courts have original jurisdiction in all matters arising under state/territory laws, as well as Commonwealth laws where federal jurisdiction has been conferred on them by the Commonwealth Parliament. Most criminal offences established under Commonwealth law, including the offence of bribing a foreign public official, are adjudicated by state or territory courts exercising federal jurisdiction.¹⁴

c. *Economy*

19. Australia’s economic indicators have been positive for a number of years, ranking 4th in overall competitiveness in 2004, with 13 years of uninterrupted economic growth. The forecasted economic growth is 3.8 per cent for 2005 and 3.6 per cent for 2006, which represents a more rapid expansion than forecasted for most other OECD economies. In addition, Australia is ranked the 2nd most cost competitive country for business operations in the industrialised world.¹⁵ Australia’s strong economic indicators along with its highly competitive location have attracted significant foreign direct investment (FDI). According to AT Kearney’s FDI Confidence Index 2004, Australian ranks 7th as a preferred investment destination and 2nd in the Asia-Pacific region, following China.¹⁶

20. The Australian Government, through its inward investment agency – Invest Australia – has embarked on a vigorous campaign to further attract foreign investment in Australia, in particular for MNEs seeking headquarters to do business in the Asia-Pacific region. Australia has actively pursued bilateral relationships in the region by, for instance, concluding free trade agreements with Thailand and Singapore, and currently negotiating a free trade agreement with China – the first western country to do so.

21. Australia’s economy has evolved from the traditional agricultural and resource sectors to a predominantly services-based economy, with services now amounting to almost 80 per cent of economic activity.¹⁷ In 2002, Australia’s major exports partners were Japan (18.5 per cent), United States (9.6 per cent), South Korea (8.3 per cent), China (7 per cent), New Zealand (6.6 per cent), United Kingdom (4.7 per cent), Singapore (4.1 per cent), Chinese Taipei (4 per cent), Hong Kong (3 per cent) and Indonesia (2.6 per

¹³ Australia International Treaty Making Information Kit (Executive Director of the Treaties Secretariat International Organisations and Legal Division, Department of Foreign Affairs and Trade: <http://bar.austlii.edu.au/au/other/dfat/infokit.html>).

¹⁴ Australia’s Legal System (Attorney General’s Department: <http://www.ag.gov.au/www/agdHome>).

¹⁵ For instance, property prices are highly competitive, remuneration levels for management staff are lower than in many other industrialised countries, and the overall tax burden as a share of GDP is significantly lower than the OECD average.

¹⁶ Ibid, footnote 14

¹⁷ Ibid.

cent).¹⁸ The major types of exported goods included coal, crude petroleum, gold, iron ore, aluminium and aluminium ores, wheat, meat, wool, motor vehicles, dairy products, refined petroleum, natural gas, wine, aircraft and parts, and pharmaceuticals.¹⁹

22. Recent export trends include an increase in exports in goods and services to ASEAN countries by 5.7 per cent from 1998-2003, with the most significant increase to Thailand, Vietnam and Indonesia.²⁰ From 1991 to 2001, the value of Australia's exports to ASEAN increased by 116 per cent, reaching AUD 15 922 million in 2001-2002.²¹ In 2003, merchandise exports to India increased by 34 per cent (AUD 2.3 billion).²² Emerging markets for Australian exports also include Saudi Arabia, the United Arab Emirates, Kuwait, Bahrain, Oman, Qatar, South Africa and Iraq.²³

23. In 2002, the total goods imported amounted to USD 69.3 billion, 15th amongst 30 OECD countries, representing 16.9 per cent of GDP.²⁴ In 2003, Australia's major import partners were the United States (16 per cent), Japan (12.5 per cent), China (11 per cent), Germany (6.1 per cent) and the United Kingdom (4.2 per cent).²⁵ The major types of imported goods included motor vehicle parts, refined petroleum, motor vehicles for transporting goods, non-monetary gold, telecommunications equipment, pharmaceuticals, aircraft and parts, computers, crude petroleum and passenger motor vehicles.²⁶

24. From 1997 to 2001, the top destination countries for outflows of foreign direct investment (FDI) from Australia were the United States (AUD 3 828 million), New Zealand (AUD 889 million), ASEAN (AUD 723 million, including Singapore at AUD 382 million and Indonesia at AUD 141 million), Asian countries²⁷, excluding Singapore and Japan (AUD 542 million) and Japan (AUD 249 million).²⁸ From 1997 to 2001, the top source countries for inflows of FDI in Australia were the United Kingdom (AUD 1 951 million), United States (AUD 1 859 million) Netherlands (AUD 987 million), Germany (AUD 499 million), France (AUD 433 million) and Japan (AUD 403 million).²⁹

d. On-Going Investigations and Evaluation

25. To date no company or individual has been charged with the bribery of a foreign public official under section 70.2 of the Commonwealth Criminal Code. On the first day of the on-site visit (6 June 2005), the Australian Federal Police (AFP) confirmed two ongoing investigations concerning the bribery of foreign public officials. Due to confidentiality requirements, including the need to protect witnesses, the Australian authorities were only at liberty to disclose certain non-identifying information. They assured the

¹⁸ Trade date on DFAT STARS data base [Australian Bureau of Statistics—Cited in Australia's Foreign and Trade Policy White Paper, DFAT (2003), p. 143].

¹⁹ Ibid at p. 147.

²⁰ Annual Report 2003-2004 (DFAT, 2004, p. 44).

²¹ Australia's Export Markets: 1991-92 to 2000-01 (Australian Bureau of Statistics, June 2001).

²² Australia—Trading with the World (DFAT, 2003).

²³ Ibid, footnote 23.

²⁴ Ibid, footnote 18, at pp. 252-253.

²⁵ The World Fact Book (U.S. CIA, 27 January 2005).

²⁶ Composition of Trade—Australia 2003 (DFAT, Market Information and Analysis Section, May 2004).

²⁷ China, Hong Kong, Chinese Taipei, India, Indonesia, Malaysia, Philippines, and Thailand.

²⁸ International Direct Investment Yearbook 1991-2002—2003 Edition [OECD (2004)]

²⁹ Ibid.

lead examiners that if prior to the finalisation of the Phase 2 Report the investigations were to lead to charges and publicly available documents, such information would be provided forthwith to the examination team. The Australian authorities have kept the examination team up-to-date on changes in the status of these investigations as well as the commencement and status of a new investigation.

26. The AFP indicated that the two original investigations were not linked. The first allegation was received by the AFP on 8 November 2004 and the second on 17 February 2005. Both allegations were referred directly through the AFP international liaison network³⁰ in which overseas inquiries were made by an AFP liaison officer located in the foreign country and evaluated in Australia by an investigative team. In the Phase 2 responses, the Australian authorities state that one of these investigations was triggered by a complaint from an employee.

27. On 6 June 2005, a representative of the AFP told the examination team that it looked unlikely that one of the investigations would disclose any foreign bribery offences. He also confirmed that the AFP had consulted the Commonwealth Director of Public Prosecution (CDPP) for limited advice about one of the investigations and that the Attorney-General's Department (AGD) had not been consulted in either of the investigations. On 24 June 2005, following the on-site visit, the Australian authorities informed the examination team that one investigation had been finalised without the identification of an offence of bribing a foreign public official. They further advised that information about this allegation had been forwarded to the foreign authority. The AFP determined, following the interview of a number of witnesses, that the complaint related to "unethical business activities" and not the offence of bribing a foreign public official. On 24 June 2005 and 14 September 2005, the Australian authorities confirmed that the other original investigation was still on-going.

28. On the last day of the on-site visit (10 June 2005), the AGD announced to the examination team that a third investigation had been opened since the first day of the on-site visit, but that the AGD had not yet had an opportunity to obtain specifics from the AFP. On 24 June 2005, following the on-site visit, the Australian authorities confirmed that a referral had been received by the AFP concerning certain allegations. The allegations were being evaluated in accordance with the AFP assessment process, and had not yet been accepted for investigation by the AFP. Then on 14 September 2005, the Australian authorities confirmed that this allegation had been accepted for investigation.

29. Following the on-site visit, the AFP advised that in the original continuing investigation, the need for search warrants has not been identified. With respect to the two investigations that were ongoing as of 14 September 2005, mutual legal assistance has not been deemed necessary.

³⁰ The AFP international liaison network is discussed under A.3.a.(v) ("Special measures of the AFP for facilitating foreign bribery investigations").

A. EFFECTIVENESS OF AUSTRALIA’S MEASURES FOR PREVENTING, DETECTING AND INVESTIGATING THE BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Awareness and Prevention

a. Government awareness and training

30. Australia has undertaken a number of important awareness raising activities on the foreign bribery offence targeted at Australian government agencies in charge of enforcing the foreign bribery legislation, and those dealing with Australian enterprises operating abroad. As a result, officials of the Australian government and agencies interviewed at the on-site visit had good general awareness that bribery of foreign public officials constitutes an offence under Australian law.

31. The Australian authorities have conducted training and information sessions for Commonwealth law enforcement authorities, notably for liaison and non-liaison officers of the Australian Federal Police (AFP) posted abroad,³¹ on the operation of the foreign bribery offence, and how it should be reported. Where prosecutors are concerned, members of the Commonwealth Director of Public Prosecutions Office (CDPP) undergo continual criminal education sessions on newly implemented Criminal Code provisions and legislation. They also maintain an extensive intranet database of material, including on the foreign bribery offence. However, given that no foreign bribery cases have reached the prosecutorial stage to date, prosecutors interviewed at the on-site visit based their knowledge on their extensive experience prosecuting similar offences, including fraud and Commonwealth domestic bribery cases. State law enforcement authorities interviewed at the on-site visit appeared to have good knowledge of the entry into force of the foreign bribery offence, and, consequently, to be sufficiently trained to detect any such offence, even where it occurred in conjunction with related State offences (see also part A.3.a.(iv) “Reports of foreign bribery from State and Territorial law enforcement authorities” on the treatment of overlapping criminal offences.).

32. In the Australian Government, the Attorney-General’s Department (AGD) has been one of the main bodies to disseminate information on the Convention and its implementation in Australian law in the public administration. This has notably taken the form of a webpage on the AGD’s website with detailed information on the Convention, the foreign bribery offence and relevant links.³² Several Commonwealth agencies, such as the AFP, the Australian Transaction Reports and Analysis Centre (AUSTRAC), the Australian Customs Service, the Department of Foreign Affairs and Trade (DFAT), the Australian Export Finance and Insurance Corporation (EFIC), the Australia Agency for International Development (AusAID), and the Australian Public Service Commission have included a link to this page on their own websites.

33. The AGD has also published a pamphlet—“Bribery of Foreign Public Officials is a Crime”³³--on the bribery of foreign public officials and its legal consequences in Australia for both individuals and companies. This pamphlet has been distributed to a wide number of officers in law enforcement agencies (such as the CDPP and the AFP) and other Commonwealth agencies in regular contact with the business community (EFIC, the Australian Trade Commission, the Taxation Office, DFAT, etc.), as well as to

³¹ See discussion on the AFP International Liaison Network under A.3.a.(v) (“Special measures of the AFP for facilitating foreign bribery investigations”).

³² See www.ag.gov.au/foreignbribery.

³³ See: <http://www.ag.gov.au/foreign> bribery.

Australia's top 100 companies, and private companies and industry bodies involved in international business. A guidance document on the bribery of foreign public officials is also available on the AGD foreign bribery website. At the time of the on-site visit, the lead examiners identified four areas where the pamphlet and guidance document could be clarified³⁴. However, since then the AGD amended the pamphlet to clarify these areas, and considers the re-launching of the pamphlet under a new design as an important awareness-raising activity. The AGD is also reviewing the guidance document to address these issues.

34. DFAT issued in December 1999 an Administrative Circular³⁵ advising all its staff of the effect of the extraterritorial reach of the new foreign bribery offence. The Circular focuses essentially on the risks for DFAT officers to become involved in a possible violation of the foreign bribery offence, through ancillary offences of complicity, incitement and conspiracy. A large part of the Circular is devoted to the acceptability and definition of facilitation payments, and the necessity to record these where they are made by overseas posts. The Circular does not address the issue of advice and support which could usefully be provided by DFAT staff to Australian companies likely to be in contact with overseas posts, nor does it encourage DFAT officials to report instances of foreign bribery that they may come across in the course of their functions (see also part A.3.d.(i) below on reporting by DFAT officials). However, the Australian authorities report that a recent cable and DFAT news article encourage DFAT staff to report instances of foreign bribery to the AFP.

35. Staff of other agencies closely involved with Australian companies have also been informed of the entry into force of the foreign bribery offence. Australia's Export Credit Agency, EFIC, has carried out awareness raising activities among its staff to alert employees to the criminalisation of foreign bribery under Australian law. This has notably resulted in a new corporate responsibility policy within EFIC, and a modification of its internal code of conduct, which now includes an undertaking to "not participate in corrupt practices, including bribing foreign officials..." Failure to follow the code's provisions may result in disciplinary action and, in the most extreme cases, dismissal (see also part b(i) below on actions by EFIC to raise awareness of Australian companies, and part 3.d.(ii) on detection and reporting by EFIC officials). Similarly, the "Guidance on Ethics and Probity in Government Procurement", which provides general guidance and practical advice to officials of Australian public procurement agencies, has been modified to specify that the bribery of a foreign public official is an offence under the Criminal Code and carries a maximum penalty of ten years imprisonment.

36. Finally, the Australian authorities established a working group to develop an anti-corruption campaign. The working group has focussed on raising awareness of the Commonwealth's anti-fraud and anti-corruption policies among staff of all member agencies, and ensuring that staff are aware of the mechanisms for reporting suspicious activities or behaviours to their internal affairs units. With respect to anti-corruption training, the working group has also prompted considerable information sharing among its members and is developing a best practices guide. The working group is considering the development of a mechanism to further promote awareness of the foreign bribery offence.

³⁴ These areas were the following: (a) the definition of foreign public officials does not include employees of foreign state-owned or state-controlled companies; (b) the description of the offence does not include the case where the bribe is made through an intermediary, or for the benefit of a third party; (c) the description of the offence is limited to acts of Australian nationals and companies, and does not cover foreign bribery committed by non-Australian individuals and companies in Australia; and (d) the defence for "facilitation payments" is described as "rarely (if ever) available" (The problem raised by this statement is discussed further under part B.1.c.(ii)).

³⁵ Since the issuance of this Circular, regular reminders have been posted to DFAT staff through diplomatic cables sent out on a regular basis, as well as in "DFAT News", DFAT's internal newsletter.

Commentary

The lead examiners welcome initiatives by Australia to raise awareness of staff in Australian institutions and agencies, notably those involved in law enforcement or with Australian companies operating abroad. The lead examiners encourage Australia to proceed diligently with its plans to develop, through a working group, a mechanism to further promote awareness of the foreign bribery offence.

b. Raising awareness in the private sector and civil society

37. Awareness raising activities regarding the foreign bribery offence targeted at Australian companies have been undertaken by both the public and private sectors, as well as within a number of large Australian corporations. Discussions at the on-site visit with representatives of government agencies, the Australian Chamber of Commerce and Industry, and Australian companies indicated an overall high level of awareness of the foreign bribery offence on the part of large companies, but very little knowledge within small and medium size enterprises (SMEs).

(i) Government initiatives

38. A number of government agencies, such as the AGD, the Australian Customs Service³⁶ and the Department of the Treasury have participated in briefings to industry groups on the foreign bribery offence. The above-mentioned AGD document on foreign bribery (“Bribery of Foreign Public Officials is a Crime”) has also been distributed to several industry organisations in Australia, notably by such agencies as the AFP, ATO, Austrade, and AGD. As a follow-up to this distribution, the AGD conducted an “OECD Foreign Bribery Public Awareness Campaign Follow-Up Survey” among the top 100 Australian companies to enquire on actions taken within these corporations to raise awareness. As of 5 August 2005, responses had been received from 35 out of 100 organisations surveyed, and were still being returned to the AGD. Preliminary figures indicated that 77 per cent of companies had distributed the AGD pamphlet, 32 per cent had published an article in their internal newsletter on foreign bribery, 13 per cent had published an article on foreign bribery in an external newsletter, 45 per cent had provided training on foreign bribery to staff and/or members, and 13 per cent had participated in foreign bribery related seminars. Furthermore, 71 per cent of the respondents confirmed that they have a code of conduct in place, 26 per cent were aware of the existence of a mechanism to examine whether a particular transaction would constitute a foreign bribery offence, 48 per cent confirmed that their company or industry has a process in place for reporting allegations of foreign bribery internally or externally, and 52 per cent had protections for whistleblowers in place.

39. The Department of the Treasury, through its National Contact Point, maintains relations with the business community and NGOs to discuss issues included in the OECD Guidelines for Multinational Enterprises. In this respect, the issue of foreign bribery was addressed in May 2003 in consultations with the business community, in the lead-up to the June 2003 OECD Corporate Responsibility Roundtable on “Enhancing the Role of Business in the Fight against Corruption”. A roundtable, with participation of a number of Australia’s largest corporations and NGOs, was further organised in November 2004 on the OECD Guidelines and the Convention, with presentations by AGD officers on the foreign bribery offence.

40. AUSTRAC has also drawn the AGD pamphlet “Bribery of Foreign Public Officials is a Crime” and webpage on the foreign bribery offence to the attention of cash dealers. An Information Circular on the

³⁶ In addition, the Winter 2005 issue of the Australian Customs Service’s “Manifest” magazine provided the definition of the foreign bribery offence in the Criminal Code, and referred readers to the AGD foreign bribery website.

Bribery of Foreign Public Officials has been issued to cash dealers detailing the definition of bribery, the criminalisation of foreign bribery under Australian law, and the legal consequences in terms of imprisonment and monetary sanctions for natural and legal persons. It stresses the need for cash dealers to take the foreign bribery issue into account when considering whether to make suspicious transaction reports. It also encourages all members of the public who suspect the commission of a foreign bribery offence to report it to the AFP. Moreover, further guidance on the offence will be provided in the next AUSTRAC newsletter, and AUSTRAC will be providing a link to the revised AGD pamphlet on foreign bribery on its website.

41. EFIC, Australia's export credit agency, participates in the OECD's Working Party on Export Credits and Credit Guarantees and is party to the Action Statement on Bribery of December 2000.³⁷ In this respect, Australian companies applying for official export credit support receive information from EFIC on the legal consequences of paying bribes to foreign public officials in international business transactions. Applicants are further required to certify that they have not engaged and will not engage in bribery of foreign public officials in relation to the contract for which support is sought.³⁸ (See also part 3.d.(ii) below on detection and reporting by EFIC.)

(ii) *Private sector initiatives*

42. The Australian Chamber of Commerce and Industry (ACCI) is the largest and most representative business association in Australia, with a member network of over 350 000 businesses represented through Chambers of Commerce in each State and Territory, and a nationwide network of industry associations. The ACCI represents the interests of business at the national level as well as internationally, notably through its membership in the OECD's Business and Industry Advisory Committee (BIAC). The ACCI representatives present at the on-site visit indicated that ACCI constituents are largely SMEs, and that there was very little awareness among them of the foreign bribery offence. In their view, Australian SMEs would rarely propose bribes in the context of doing business internationally; however, they would respond to solicitations for facilitation payments. The ACCI did not believe that SMEs were aware of the need to record facilitation payments (Such records are necessary to avail oneself of the defence of facilitation payments under section 70.4—see discussion under part B.1.c.(ii)). Efforts to remedy this lack of awareness and stress the risks of involvement in foreign bribery have been taken by the ACCI, which has distributed information on the foreign bribery offence and its consequences, notably targeting Australian SMEs present in geographically corruption-prone markets such as Africa, Indonesia, or China.

³⁷ See answers to "Export Credits and Bribery: Review of Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits - Situation as of 21 January 2005" [TD/ECG(2005)4].

³⁸ General text appearing in the application form will be along the following lines:
"The Applicant declares that to the best of his or her knowledge nobody acting on the Applicant's behalf or acting with the Applicant's consent or authority (including any of the Applicant's employees, agents or sub-contractors) has engaged or will engage in corrupt activity in relation to a Relevant Matter. The Applicant understands that for the purposes of this declaration: "Relevant Matter" means this Application or a transaction, contract, arrangement, event or thing contemplated by or referred to in this Application; By making this Application, the Applicant acknowledges that it understands that the occurrence of corrupt activity in relation to a Relevant Matter may have serious consequences, including (without limitation):
(a) evidence of corrupt activity being referred to the appropriate national authorities, such as the Australian Federal Police; or
(b) the imposition of fines, penalties or sentences for imprisonment; or
(c) the termination of a Relevant Matter, the acceleration of payments or the cancellation of insurance, as the case may be."

43. With respect to corporate responsibility, several Australian bodies have taken steps to encourage the establishment by Australian companies of internal control mechanisms covering the issue of corruption, particularly through corporate codes of conduct or other such ethical guidelines. The Australian Stock Exchange (ASX) has developed guidelines to help listed entities develop internal corporate governance regimes in the form of “Principles of Good Corporate Governance and Best Practice Recommendations”. The document includes 28 best practice recommendations, under 10 main principles, as well as an explanatory commentary and guidance. Under ASX Rules, listed entities are required to include in their annual report a statement disclosing the extent to which they have followed the 28 recommendations. Companies may choose not to follow certain recommendations, but must give reasons for not following them.

44. Recommendation 10.1, for instance, recommends that a code of conduct be established to “guide compliance with legal and other obligations to legitimate stakeholders; corresponding commentary and guidance does not suggest any specific reference to the prohibition of foreign bribery, but refers to a more general statement on “prohibitions on the offering and acceptance of bribes, inducements and commissions”. The Australian Prudential Regulation Authority (APRA), the prudential regulator of the Australian financial services industry, has also developed Operational Risk Practice Notes for supervisory staff. While these do not specifically cover bribery of foreign public officials, the APRA expects that regulated entities would identify and assess their sources of fraud risk, including bribery, in their fraud control systems (such as codes of conduct or other fraud and corruption control plans), although this does not imply any authority on the part of APRA to sanction entities that choose not to follow this guidance.

45. As in most OECD countries, an increasing number of Australian companies have adopted corporate codes of conduct or other ethical principles. Partial responses received to date by the AGD to its OECD Foreign Bribery Public Awareness Campaign Follow-Up Survey indicate that approximately 71 per cent of Australia’s top 100 companies have a code of conduct in place. These codes cover a range of ethical issues, from social to environmental accountability, as well as business conduct. A review of several codes showed that coverage of bribery in general and foreign bribery more specifically varies between corporations. There will normally be at least a general statement prohibiting the acceptance or offer of bribes. Certain codes refer specifically to the foreign bribery offence and/or the Criminal Code provisions. One code of a major Australian company from the extractive industry devotes an entire chapter to “Financial Inducements”, insisting on their prohibition in the conduct of international business. This same code stresses the importance that this company policy be clearly communicated to and accepted by agents and other third parties. Several codes, on the other hand, do not specify the scope of application of the code, either geographically or as regards agents and contractors. Moreover, certain code provisions demonstrate a misunderstanding of what constitutes an illicit payment. One code examined, for example, states that bribe payments are monetary payments or payments in kind made in order to induce foreign public officials to improperly grant permits or services. The Australian authorities and business organisations should thus continue to make clear, in their awareness raising activities, that the foreign bribery offence also covers payments made to a foreign public official in order for that official to carry out his/her regular functions, even where the company making the payment is in fact entitled to the permit or is the best qualified bidder. (This issue is further explored under B.1.c.(ii) on facilitation payments.)

Commentary

The lead examiners encourage the Australian authorities, in the context of private-sector awareness-raising activities, to continue to make efforts to provide complete information about the offence of bribing a foreign public official, in particular concerning: (a) what constitutes a bribe; (b) which categories of persons should be considered foreign public officials; and (c) the defences, including the distinction between bribery and facilitation payments, as well as the record-keeping requirement for the purpose of the defence of facilitation payments.

The lead examiners also recommend that special attention be given to targeting SMEs in awareness-raising activities, which diplomatic and trade missions in foreign countries could play a role in providing.

2. Systems for Detecting, Investigating and Reporting Bribery of Foreign Public Officials

a. Detection and investigation by the Australian Federal Police (AFP)

(i) Generally

46. The AFP is the primary law enforcement body responsible for investigating offences against Commonwealth law, including the offence of bribing a foreign public official under section 70.2 of the Commonwealth Criminal Code.³⁹ The AFP has several special areas of focus, including anti-terrorism, the investigation of transnational and multi-jurisdictional crime, drug trafficking, organised people smuggling, money laundering, the enforcement of child sex tourism legislation and witness protection. The AFP provides police services for the Australian Capital Territory (ACT) and the Jervis Bay Territory, and external territories such as Norfolk Island and Christmas Island. In addition, the AFP is Australia's international law enforcement and policing representative.

47. In the Phase 2 responses, the Australian authorities explain that investigations into referrals of allegations of bribery or corruption are undertaken within the Economic and Special Operations function.⁴⁰ The Australian authorities further explain that the Economic and Special Operations function is responsible for coordination, reporting and strategic direction with respect to the crime types under its mandate. Investigations of corruption and bribery offences are performed by AFP investigators located in AFP offices across Australia with the assistance, where necessary, of the International Liaison Officer Network (discussed under A.3.a.(v) "Special measures of the AFP for facilitating foreign bribery investigations").

48. Australia does not have a specialised office for the investigation (or prosecution) of the offence of bribing a foreign public official. The AGD explained that this is consistent with the Commonwealth Government's "whole of government" approach to Commonwealth law enforcement and the prosecution of Commonwealth criminal offences. While the AFP and CDPP have primary responsibility for the investigation and prosecution of foreign bribery, they are assisted by other Commonwealth bodies under the "whole of government" approach. While the lead examiners feel that there may be some disadvantages to this approach, the Australian authorities point out that one of the advantages is that the "whole system is looking at foreign bribery". In addition, due to the expansive geographical area of Australia, it would be very costly to establish an office specialised in corruption in the regional areas of each of the States and Territories. As well, it would be inconsistent with Australia's approach to combating most other forms of crime (Although note that Australia has established the Australian Crime Commission (ACC), a specialised law enforcement agency for the purpose of investigating serious and organised criminal activity—See further discussion on the ACC below under "Memoranda of Understanding between the AFP and certain Commonwealth Agencies").

49. The AFP operates independently of the CDPP and the courts. However, the AGD confirms that the AFP regularly requests legal advice from the CDPP in particular in respect of complex investigations,

³⁹ The AFP is established under the Australian Federal Police Act 1979 (Cth). The Act provides for the appointment of a Commissioner of Police, who is responsible for the general administration and control of the AFP. For further information on the AFP see: www.afp.gov.au.

⁴⁰ In July 2004, the AFP established a new organisational structure, focussing on six key national functions. The other five national functions are 1. border and international network; 2. intelligence; 3. international deployment; 4. counter terrorism; and 5. protection.

including whether it is appropriate to proceed with a particular investigation. The AGD confirms that in one of the original two investigations concerning the bribery of foreign public officials (i.e. the two ongoing investigations at the commencement of the on-site visit), the AFP consulted the CDPP for advice.

(ii) *AFP Case Categorisation and Prioritisation Model (CCPM)*

50. According to the Phase 2 responses, implementation of the OECD Convention is considered a matter of “high priority” by the Commonwealth Government. This statement was echoed at the on-site visit by the Attorney-General’s Department (AGD) and the Australian Federal Police (AFP). The Australian authorities explain that because the bribery of foreign public officials is considered “high priority” and is categorised as an “essential” priority and of “high” impact under the Case Categorisations Prioritisation Model (CCPM) of the AFP (the categorisation of foreign bribery in the CCPM is discussed below), cost will not be an impediment to investigating such a case.⁴¹

51. The AFP’s Case Categorisation and Prioritisation Model (CCPM)⁴² assesses the impact of a matter as either “very high”, “high”, “medium” or “low” for the purpose of determining the priority of incidents for investigation services. On its face, the CCPM does not seem to place the bribery of foreign public officials in the “very high impact” or “high impact” categories.

52. The Australian authorities explain that the offence of bribing a foreign public official is not considered an economic crime, but rather is characterised as a sub-category of “corruption”, which means that like all offences that fall within this sub-category, it is considered an “essential priority” or “high impact”. They also explain that due to this characterisation, every allegation of foreign bribery referred to the AFP is evaluated independent of the value of an alleged bribe or attempted bribe. However, since the publicly available CCPM does not contain this specific information about foreign bribery, it appears that it must be contained in an internal working document version of the CCPM. Since the lead examiners have not been able to view this document, they cannot comment on the clarity of the information concerning the priority of foreign bribery cases. In addition, the lead examiners consider that information regarding the priority of foreign bribery cases should be in the public domain, in order to ensure an adequate level of awareness of its importance among other government agencies as well as the public at large. The Australian authorities have undertaken to amend as soon as possible the publicly available document for the purpose of clarifying that the offences of domestic and foreign bribery are to be considered “high impact”.

Commentary

The lead examiners recommend that, consistent with the Australian Government’s intention that implementation of the Convention is given “high priority”, the Australian authorities carry through as soon as possible with the amendment of the publicly available explanatory document on the Case Categorisation Prioritisation Model (CCPM) to state that the offence of bribing a foreign public official is a “high impact” offence.

(iii) *Triggering event for investigations*

53. At the on-site visit, the AFP advised the examination team that investigations were generally opened on the basis of formal referrals, but that in respect of limited, high priority matters, not including

⁴¹ Commonwealth agencies are funded by appropriations in accordance with requirements under the Commonwealth of Australia Constitution.

⁴² The AFP CCPM is available on the AFP external website: www.afp.gov.au. The AFP CCPM are intended to provide the public and government departments with information about how the AFP evaluates referrals.

the bribery of foreign public officials, it took a more proactive intelligence-gathering role. The AFP further stated that it did not initiate investigations of foreign bribery on the basis of media reports, regardless of their level of credibility, nor on the basis of other information that came to its attention other than through formal channels (e.g. the making of a complaint directly to the AFP). The AFP stated that it felt that media reports were not consistently reliable, and therefore would not respond to them. The lead examiners questioned whether it would not be prudent to at least undertake an evaluation where the report was made by a credible source, but the representative of the AFP stated that this is not the policy. During the on-site visit, a media report (by what was acknowledged by the AGD to be a credible investigative journalism program) was aired on Australian television in which several allegations were made about an Australian company's operations in a foreign country, including allegations of the bribery of officials in the foreign country. The AFP stated that it would not open a preliminary investigation based on this media report unless a formal referral of the allegations was made to it.

54. Following the on-site visit, the Australian authorities advised that investigations into the offence of bribing a foreign public official may be triggered by any of the following circumstances: (a) a formal referral of allegations to the AFP; (b) pro-active intelligence gathering by the AFP; (c) identification of the foreign bribery offence during the investigation of another criminal offence; or (d) proactive investigation of persons or organisations where foreign bribery is suspected. Following the on-site visit, the Australian authorities also stated that there are circumstances where the AFP will review media reports of allegations of serious criminal activity, including the bribery of foreign public officials, where such reports are combined with independent supporting information. The Australian authorities explained that this position also reflects the opinion of the AFP. The lead examiners welcome the new information, and believe that it would be prudent to follow-up whether in practice the AFP depends on formal referrals of foreign bribery allegations.

55. The lead examiners were also concerned about the position of the AFP at the on-site visit that it would only open foreign bribery investigations on the basis of formal allegations, because this would have meant that other important sources of information could have been overlooked. For instance, a complaint filed in a foreign court (dated March 2004) alleged that in 2002 an Australian public official acted as an intermediary in the transfer of bribe payments from a company of country "A" to public officials in country "B". The official was named in the publicly available document.⁴³ The proceedings were subsequently dismissed by the court earlier this year. The AFP did not undertake a preliminary investigation regarding the alleged conduct of the Australian official before or after the dismissal of the complaint. The Australian authorities point out that it would be inefficient to expect the AFP to undertake investigations in these circumstances, but the lead examiners believe that it would have been prudent for the AFP to have commenced at least an evaluation prior to the withdrawal of the complaint regarding the Australian official. The lead examiners also question reliance on another country's dismissal of the case, considering that Australia might have access to further substantiating evidence within its own jurisdiction.

56. Requests for mutual legal assistance (MLA) from foreign countries investigating the bribery of foreign public officials can also be sources of important information for the AFP where the requests relate to alleged foreign bribery involving Australian nationals and companies. The AGD explained that such requests would only trigger investigations in Australia if they provided "clear evidence" of "substantial allegations" of foreign bribery involving Australian nationals or companies.

Commentary

The lead examiners recommend that the AFP undertakes evaluations where appropriate of the veracity of allegations of the bribery of foreign public officials involving Australian

⁴³ A second complaint did not contain allegations of bribery against an Australian official.

nationals and companies contained in (i) media reports from credible sources, (ii) publicly available court documents filed in foreign countries, and (iii) requests to Australia from foreign countries for mutual legal assistance.

(iv) *Reports of foreign bribery to the AFP from other Commonwealth agencies*

57. Certain Commonwealth agencies, including those that have a law enforcement and or regulatory function and those transacting with exporting companies, might become aware of the bribery of foreign public officials due to the nature of their responsibilities. These agencies include: the Australian Crime Commission (ACC), Australian Agency for International Development (AusAID), Australian Prudential Regulatory Authority (APRA), Australian Securities and Investments Commission (ASIC), Australian Customs Service (Customs), Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian Taxation Office (ATO), Commonwealth Director of Public Prosecutions (CDPP), Export Finance and Insurance Corporation (EFIC), and Department of Foreign Affairs and Trade (DFAT). In light of the reliance of the AFP on formal referrals of allegations, the role of other Commonwealth agencies in detecting and reporting foreign bribery to the AFP is extremely important.

Serious or Complex Matters

58. The AFP has issued a document for agencies considering referring matters to the AFP⁴⁴. It advises them to read the Commonwealth Fraud Control Guidelines⁴⁵ and to refer matters to the AFP Operations Monitoring Centres, Local Operations Monitoring Centres or the Client Service Team. The document explains that in order to ensure that resources are directed to the highest priority activities, all referrals are assessed using the AFP's Case Categorisation and Prioritisation Model (discussed under A.1. "Overall Priority given to Bribery of Foreign Public Officials"), and provides a link to the Model.

59. The Commonwealth Fraud Control Guidelines aim to minimise "fraud against the Commonwealth" and ensure that, "where it does occur, it is rapidly detected, effectively investigated, appropriately prosecuted and that losses are minimised". The Guidelines broadly define "fraud against the Commonwealth" as "dishonestly obtaining a benefit by deception or other means", and list several unlawful activities covered by the definition, including: (a) theft of Commonwealth property; (b) providing false or misleading information to the Commonwealth; (c) unlawful use of Commonwealth computers, vehicles, telephones and other property or services; and (d) bribery, corruption or abuse of office. Paragraph 4.19 of the Guidelines states that "agencies must refer all instances of potential serious or complex fraud offences to the AFP" except in the following circumstances: (a) the agency satisfies the AFP and the CDPP that it has the capacity, appropriate skills and resources to investigate criminal matters, including the gathering of evidence; or (b) the matter involves multi-jurisdictional organised crime being considered by the National Crime Authority (now the Australian Crime Commission).

60. Paragraph 4.20 of the Commonwealth Fraud Guidelines lists factors that indicate when a matter "is serious or complex and should be referred to the AFP". These factors essentially apply where Commonwealth interests are harmed, including where there is "significant or potentially significant monetary or property loss to the Commonwealth"; "harm to the economy, resources, assets, environment

⁴⁴ Referring Matters to the AFP (Last modified: 17 June 2005. See: www.afp.gov.au/afp/page/GovCorporate/referring.htm)

⁴⁵ The Commonwealth Fraud Control Guidelines: 2002 were issued by the Minister for Justice and Customs as Fraud Control Guidelines under Regulation 19 of the Financial Management and Accountability Regulations 1997. The Minister for Justice and Customs is responsible for coordinating Commonwealth fraud control policy. The AGD advises the Minister for Justice and Customs on fraud control, including the implementation of the Guidelines.

or well-being of Australia”; or “a serious breach of trust by a Commonwealth employee or contractor of a Commonwealth agency”. The list also includes “bribery, corruption or attempted bribery or corruption of a Commonwealth employee or a contractor to a Commonwealth agency”. The list does not contain a factor that specifically applies to the bribery of a foreign public official. Thus foreign bribery does not constitute a serious or complex matter to be referred to the AFP, unless it is committed by a Commonwealth official and constitutes a serious breach of trust by him or her, results in significant monetary damage to the Commonwealth, or harms Commonwealth interests. Following the on-site visit, the Australian authorities stated that because the Commonwealth Fraud Guidelines focus on offences that cause harm to Commonwealth interests, they are unsuitable for the inclusion of the foreign bribery offence. However, they will amend the document to refer to the foreign bribery offence as an awareness raising measure, and include a cross-reference to another document that requires the reporting of foreign bribery cases to the AFP.

61. One incident may illustrate the need for guidelines directing that all information about the bribery of foreign public officials be forwarded to the AFP. In 2001 the Australian Securities and Investments Commission (ASIC)⁴⁶ received several complaints about an Australian company, including one that alleged it had been winning overseas contracts through the bribery of foreign public officials. ASIC reviewed the books and records of the company, and concluded that there was no evidence supporting the complaints. The ASIC member who attended the on-site visit had no knowledge of any informal communication with the AFP concerning the complaint of foreign bribery.

62. Pursuant to section 13 of the ASIC Act, “ASIC may make such investigation as it thinks expedient for the due administration of the corporations legislation” where it has reason to suspect that there may have been committed (a) a contravention of the corporations legislation; or (b) a contravention of a law of the Commonwealth, or of a State or Territory in this jurisdiction, being a contravention that (i) concerns the management or affairs of a body corporate or managed investment scheme, or (ii) involves fraud or dishonesty and relates to a body corporate or managed investment scheme or to financial products. The Australian authorities indicate that the complaints received by ASIC discussed in the previous paragraph met ASIC’s criteria and thus assessment of the complaint was within ASIC’s functional responsibilities and area of expertise. Nevertheless, the lead examiners believe that given that the AFP is the primary law enforcement body responsible for the investigation of foreign bribery, it may have had further information about the case in question that could have corroborated the information of ASIC. Moreover, pursuant to section 13 of the ASIC Act, the ASIC’s powers of investigation⁴⁷ appear narrower in scope than those of the AFP, which is charged with enforcing Commonwealth criminal law and protecting Commonwealth and national interests from crime in Australia and abroad.⁴⁸ Thus it appears that the AFP is procedurally a more appropriate body for assessing whether particular information concerning foreign bribery should be pursued. In addition, as practice in the foreign bribery field develops, it will have more expertise in assessing allegations. The Australian authorities believe that in practice the ASIC would refer cases of foreign bribery to the AFP.

⁴⁶ The ASIC is an independent Commonwealth government body. It regulates financial markets, securities, futures and corporations, and is responsible for consumer protection in superannuation, insurance, deposit taking and credit. It reports to the Commonwealth Parliament, the Treasurer and the Parliamentary Secretary to the Treasurer. The ASIC receives approximately 10 000 complaints each year. In 2004 it received 13 complaints of bribery, including one concerning foreign bribery.

⁴⁷ ASIC enforces and regulates company and financial services laws to protect consumers, investors and creditors (<http://www.asic.gov.au/asic/asic.nsf/byheadline/ASIC=at=a=glance?opendocument>).

⁴⁸ See: <http://www.afp.gov.au/afp/page/AboutAFP/RoleFunctions.htm>.

Notification of Politically Sensitive Matters to Minister for Justice and Customs

63. The AFP has issued National Guidelines for Referring Politically Sensitive Matters to the AFP.⁴⁹ These Guidelines, as well as the Commonwealth Fraud Control Guidelines, state that criminal matters of a politically sensitive nature requiring the assistance of the AFP are to be raised with the Minister for Justice and Customs in the first instance, rather than being referred directly to the AFP.⁵⁰ The Minister for Justice and Customs refers the matter to the AFP. This is to enable the Government to be informed as early as possible of “politically contentious matters that may require AFP investigation”, and to “ensure that a coherent, consistent approach is taken from both a law enforcement and a Government perspective”. The Fraud Control Guidelines state that the power to decide on whether to investigate a particular allegation remains with the AFP.

64. During the on-site visit, the Commonwealth agencies with which the examination team met were aware of the obligation to “raise” politically sensitive criminal matters directly with the Minister for Justice and Customs in the first instance. They also confirmed that they would report directly to the Minister for Justice and Customs information about the bribery of foreign public officials that raises politically sensitive issues, such as the national economic interest or any potential effects upon relations with another State. The AGD and AFP stated that the Minister for Justice and Customs simply passes the information to the AFP and does not filter cases. The representative of the AFP has never seen advice from the Minister for Justice attached to a referral. The Australian authorities explain that measures for ensuring that the Minister acts upon notifications include Senate reviews to enable a notification to be addressed outside of this process, and the expectation on the part of the referring authority to receive a response from the AFP. The AGD further indicates that the delay between the notification to the Minister for Justice and Customs and the referral from the Minister to the AFP is normally not longer than 28 days, and sometimes it takes only a matter of hours. Ministerial involvement in these matters increases their priority level. Pursuant to the Guidelines for Referring Politically Sensitive Matters to the AFP, the Minister for Justice and Customs is to be briefed on the outcome of any investigation referred to the AFP through this process.

65. The lead examiners appreciate the reasons for informing the Minister for Justice and Customs without delay of criminal matters that are politically sensitive. However, they question why the notification of the Minister for Justice and Customs should not be made simultaneously with a referral to the AFP, at least to minimise the appearance of a potential for political interference. The Australian authorities point out that in essence simultaneous notification of the Minister and referral to the AFP may lead to a dual reporting process. They also emphasised that this system has worked well in practice, and it has never created a perception of political interference.

Commentary

The lead examiners welcome Australia’s undertaking to clarify that all cases of the bribery of foreign public officials are to be referred to the AFP by Commonwealth agencies, not just those where the bribery is committed by a Commonwealth official and causes harm to the

⁴⁹ See: www.afp.gov.au/afp/page/GovCorporate/sensitive.htm.

⁵⁰ The National Guidelines for referring Politically Sensitive Matters to the AFP state that “where assistance from the AFP is to be sought in relation to criminal activity likely to have politically sensitive implications, the Department, Agency or Minister should raise this request with the Minister for Justice in the first instance”. The Commonwealth Fraud Control Guidelines (2002) state that “all matters of a politically sensitive nature, not limited to fraud, requiring the assistance of the AFP are raised with the Minister responsible for the AFP by the relevant Minister or Department in the first instance, rather than being referred directly by them to the AFP”.

interests of the Commonwealth or a serious breach of trust by the Commonwealth official, and encourage Australia to do this as soon as possible.

The lead examiners also recommend that the process under the National Guidelines for Referring Politically Sensitive Matters to the AFP for notifying the Minister for Justice and Customs in the first instance of all criminal activity with a politically sensitive nature, rather than directly to the AFP, be revised in respect of the bribery of foreign public officials, in order that referrals to the AFP are not potentially delayed by notifications to the Minister.

Memoranda of Understanding between the AFP and certain Commonwealth Agencies

66. To ensure effective cooperation and coordination between the AFP and other Commonwealth departments and agencies with a law enforcement or regulatory function, the AFP has entered into Memoranda of Understanding with certain agencies, including the Australian Customs Service (ACS), the Australian Taxation Office (ATO), Australian Transaction Reports and Analysis Centre (AUSTRAC), Australian Securities and Investments Commission (ASIC), Commonwealth Director of Public Prosecutions (CDPP), and Department of Immigration and Multiculturalism and Indigenous Affairs. Although the MOUs with these agencies are classified “Security-in-Confidence”, the examination team was provided with the MOU between the AFP and the Australian Customs Service (ACS) on a confidential basis. The MOU between the AFP and ACS is consistent with MOUs between the AFP and other Commonwealth law enforcement and regulatory agencies. Meetings with representatives of these agencies at the on-site visit indicated that the MOUs have generally facilitated a high level of collaboration with the AFP in areas of mutual responsibility. Given that these Commonwealth agencies may discover allegations of the bribery of foreign public officials due to their respective areas of responsibility, the lead examiners consider that the relevant MOUs are critical for ensuring that such information is effectively shared with the AFP.

67. Two agencies with the potential to detect the bribery of foreign public officials, with which the AFP has not entered into a Memorandum of Understanding, are the Australian Prudential Regulatory Authority (APRA) and the Australian Crime Commission (ACC). The APRA⁵¹ oversees banks, credit unions, building societies, general insurance and reinsurance companies, life insurance, friendly societies and most members of the superannuation industry. In the responses to the Phase 2 Questionnaire, Australia indicates that the APRA “may be able to take action against officials of a regulated entity accused of bribing foreign public officials” by, for example, disqualifying a person from acting as an officer on the ground that he or she is “not fit and proper” for carrying out the duties of his or her office. If suspicions arise that a regulatory entity or an officer or employee thereof has been involved in the bribery of a foreign public official, the APRA is not required by law or directives to communicate this information to the AFP. However, the APRA indicates that, although it has never detected foreign bribery, it would refer such information to the AFP⁵² and, where possible, apply the disqualification process to any officer or employee of a regulated entity who has been involved in foreign bribery.

⁵¹ The APRA is a Commonwealth agency funded by levies imposed on its members. The levies are not paid directly to the APRA.

⁵² Pursuant to the “fitness and propriety test”, information about criminal conduct is to be reported to the most appropriate agency, which is the AFP in respect of the bribery of foreign public officials.

68. The ACC⁵³, which was established in January 2003, undertakes investigations approved by the ACC Board into serious and organised criminal activity, including money laundering and tax fraud in specific circumstances. Although the ACC does not have direct responsibility for the investigation of foreign bribery cases, its investigations, which employ extensive coercive powers⁵⁴, sometimes reveal issues of corruption. The ACC indicates that it works in cooperation with law enforcement agencies at the State and Commonwealth levels, and has the authority to disseminate evidence that it uncovers to other agencies. The Australian authorities indicate that at this stage the AFP does not consider it necessary to establish a formal MOU with the ACC because the AFP and ACC share premises in most locations, are jointly involved in a number of permanent task forces, have a number of agreements concerning investigations, and the AFP Commissioner is Chairman of the ACC Board. To date the ACC has not uncovered indications of the bribery of foreign public officials, but it indicates that in such a case the information would be disseminated.

Commentary

The lead examiners recommend that, given the potential for the APRA to uncover suspicions of foreign bribery committed by officers of member entities that it regulates, the AFP enter into a formalised agreement, such as the MOUs already in place between the AFP and other Commonwealth agencies with regulatory or law enforcement functions, concerning areas of overlapping jurisdiction.

(v) *Reports of foreign bribery to the AFP from State and Territorial law enforcement authorities*

69. Pursuant to section 51 of the Commonwealth Constitution, the Commonwealth Government has the power to legislate on “external affairs”. Pursuant to this power, the Commonwealth implemented the Convention into Australian law by enacting the offence of bribing a foreign public official in Division 70 of the Commonwealth Criminal Code Act. Under the Commonwealth Constitution, the States have the power to make laws on any matter, including matters for which the Commonwealth is conferred legislative power under section 51 of the Commonwealth Constitution. The States and Territories have the power to establish laws on criminal offences and procedure. They have implemented their powers in this respect by promulgating legislation that establishes criminal offences, and establishing State and Territory police forces⁵⁵ for the purpose of enforcing these offences. With respect to the offence of bribing a foreign public official under the Commonwealth Criminal Code, section 70.6 states that “this Division (i.e. regarding the offence of bribing a foreign public official) is not intended to exclude or limit the operation of another law of the Commonwealth or any law of a State or Territory”. The Australian authorities underline that section 70.6 supports and is consistent with section 109 of the Commonwealth Constitution, which states that “when a law of a State is inconsistent with the law of the Commonwealth, the latter shall prevail, and the former shall, to the extent of the inconsistency, be invalid”.

70. Australia acknowledges the potential for overlapping criminal offences, and points out that there is nothing unusual or problematic about this in a federal system. Indeed, several State criminal codes

⁵³ The ACC was established to meet the threats posed by nationally significant crime. It aims to reduce the incidence and impact of serious and organised criminal activity. It brings together the following three agencies: the Australian Bureau of Criminal Intelligence, National Crime Authority and Office of Strategic Crime Assessments. The ACC has its headquarters in Canberra and offices in Sydney, Melbourne, Brisbane, Adelaide and Perth. (See: www.crimecommission.gov.au)

⁵⁴ Pursuant to the ACC Act, the ACC has special coercive powers for its intelligence operations and investigations. Police agencies do not hold these powers, which are necessary in circumstances where traditional law enforcement methods are not adequate for combating sophisticated criminal activity.

⁵⁵ The states and territories are served by eight police forces: one in each state and in the Northern Territory.

establish general bribery offences that are sufficiently broad to encompass the bribery of a foreign public official in addition to the bribery of a State public official and, in some cases, bribery in the private sector. For instance, section 249B(2) of the New South Wales Crimes Act 1900 establishes the offence of corruptly giving or offering to give to any “agent” any benefit as an inducement or reward for doing or not doing something, or showing favour or disfavour to any person, in relation to the affairs or business of the agent’s principal. Section 530 of the Western Australia Criminal Code also establishes an offence of corruptly giving or offering any valuable consideration to “any agent”. Paragraph 87(1)(b) of the Queensland Criminal Code establishes the offence of corruptly giving, conferring, procuring, promising or offering any property or benefit to “any person” on account of any act or omission on the part of the person so employed or holding such office. Section 83 of the Tasmanian Criminal Code Act also establishes an offence in these terms.

71. Australia explains that despite the potential for overlap between the federal foreign bribery offence and general bribery offences at the State and Territorial levels, the State and Territorial law enforcement authorities “will be happy to turn over foreign bribery cases to the AFP”. At the on-site visit, the AFP and AGD emphasised that there is a very high degree of cooperation between the State law enforcement authorities and the AFP. State authorities engage in joint investigations with the AFP where appropriate, and State police services have access to the AFP data-base. In addition, the AFP does not envisage the investigation of the bribery of foreign public officials at the State level, especially given the complexity of these matters and the frequent need to make overseas inquiries.

72. The New South Wales (NSW) Fraud Squad advised the examination team that the referral to the AFP of minor Commonwealth offences is made through written correspondence and serious offences through written correspondence and/or in face-to-face meetings. However, it is not automatic that Commonwealth offences are investigated by the AFP because they may be combined with State-based offences--in such cases the AFP and NSW Fraud Squad confer on which is the appropriate police department. A formal process, such as a MOU, for the referral of foreign bribery cases to the AFP has not been established between the AFP and the NSW Fraud Squad, and the AFP has not indicated that a formal process in this respect has been entered into between the AFP and any other State or police department or Northern Territory Police. The Australian authorities indicate that, although there is no requirement for a MOU between state law enforcement bodies and the AFP for the referral of Commonwealth offences by the state agencies to the AFP, inclusion of such guidance may be considered in the development of MOUs between these authorities in the future.

73. The lead examiners are concerned for two reasons about the impact of the overlap between State-level bribery offences and the Commonwealth foreign bribery offence on the enforcement of the Commonwealth offence. First, the bribery of foreign public officials may not be treated as a priority matter at the State level. For instance, the NSW Fraud Squad does not designate corruption as a priority matter for investigation in its case prioritisation model--unless it involves corruption in the Australian public sector—due to the low impact that it has on the victim. It is therefore not clear whether the treatment of corruption by the NSW prioritisation model might result in the non-referral of foreign bribery cases by the NSW Fraud Squad to the AFP. It is also not known whether other States treat corruption similarly in their prioritisation models. Second, the general bribery offences under the State criminal codes do not carry as heavy a sanction as the offence of bribing a foreign public official under the Commonwealth Criminal Code: generally 7 years of imprisonment under the State laws as opposed to 10 years under the Commonwealth law.

74. In addition, there is further potential for overlapping enforcement between the AFP and anti-corruption bodies with investigative powers that have been established in certain States. In particular, several State agencies have the authority to investigate corruption-related offences involving State public officials or specifically the police, including the New South Wales Independent Commission against

Corruption (NSWICAC), New South Wales Police Integrity Commission, Office of Police Integrity (Victoria), Crime and Misconduct Commission (Queensland), and Corruption and Crime Commission (Western Australia). Thus there is a potential for these State-level agencies to detect the bribery of foreign public officials committed by State public officials.

75. The NSWICAC declined to participate in the on-site visit on the ground that “its functions and roles do not cover investigations of the Commonwealth offence of foreign bribery”. Upon receiving this response from the NSWICAC, the examination team informed the Australian authorities that this might reflect an absence of awareness on the part of the NSWICAC that it has the mandate to investigate allegations of foreign bribery perpetrated by NSW public officials. During the on-site visit, the NSW Police indicated that following investigation the NSWICAC will report indications of the bribery of foreign public officials committed by NSW public officials to the NSW Director of Public Prosecution (DPP). The NSW DPP will then look at the matter afresh and if the offence predominantly involves the bribery of a foreign public official, it will refer the case to the CDPP. It is assumed that similar anti-corruption agencies in the other States will treat the bribery of foreign public officials committed by their State public officials in the same manner. The lead examiners are satisfied that cases of foreign bribery involving NSW public officials reported to the NSW DPP by the NSWICAC will in turn normally be reported to the CDPP, but believe that there is a chance that due to differences in investigation and prosecution priorities at the State level, some cases might be filtered out that should be prosecuted. For instance, fraud control guidelines at the State level might put an emphasis on enforcement actions against bribery offences that affect State interests (e.g. the bribery of State officials, or bribery that results in a financial cost to the State). In addition, it is more appropriate that foreign bribery cases be investigated by the AFP.

Commentary

The lead examiners recommend that Australia consider establishing measures, such as MOUs, to ensure the continued referral of cases involving the bribery of foreign public officials by State and Territorial police and anti-corruption bodies to the AFP even where the State or Territorial law establishes a bribery offence that is sufficiently broad to cover the specific act of bribing a foreign public official.

(vi) *Special measures of the AFP for facilitating foreign bribery investigations*

AFP International Liaison Network

76. The AFP International Liaison Network is an effective system for facilitating the investigation of transnational crime affecting Australia and the activities of Australian criminals overseas. The Network is composed of 63 liaison members in 30 federal liaison offices deployed in 25 key centres around the world.⁵⁶ The liaison officers play an important role in gathering criminal intelligence in these key centres to combat transnational organised crime and provide assistance where needed to the ACC, ASIC, State police services, ASD and AUSTRAC. Liaison officers work closely with the host country’s law enforcement agencies to develop and facilitate the exchange of criminal intelligence for all crimes by carrying out functions, including the following: (a) establishing a relationship of confidence with the law enforcement authorities in the host country and other countries in the region; (b) initiating inquiries with local law enforcement authorities on behalf of the AFP, State police and other Australian law enforcement agencies; (c) coordinating and providing advice to host countries on joint investigations; (d) assisting with

⁵⁶ The key centres include: Bangkok, Beijing, Buenos Aires, Hanoi, Hong Kong, Islamabad, Jakarta, Kuala Lumpur, London, Los Angeles, Lyon, Manila, Nicosia, Port Moresby, Rome, Singapore and Washington.

the extradition of persons wanted in Australia or the host country; and (e) facilitating visits by law enforcement officials to and from the host country.⁵⁷

77. The AFP International Liaison Network has proved to be an invaluable tool for the investigation of the bribery of foreign public officials. Out of three cases that have been referred to the AFP to date, two were referred directly through this mechanism.

National Witness Protection Program

78. The AFP Case Categorisation and Prioritisation Model states that in performing its functions, the AFP is expected to give “special emphasis” to “providing protective security services to high office holders and physical establishments and entities of specific interest to the Commonwealth, witnesses and special events”. For the purpose of ensuring the security of witnesses, the National Witness Protection Program (NWPP), which is administered by the AFP, was established under the Witness Protection Act 1994. Pursuant thereto, the AFP may place in the NWPP persons who have, for example, (a) given or agreed to give evidence in criminal proceedings in the Commonwealth or a State or Territory, or (b) made a statement to the AFP or an approved authority in relation to an offence against a law of the Commonwealth or of a State or Territory. Entry into the NWPP is also available for persons in need of protection because of their relationship to a witness. In addition, foreign nationals or residents may be placed in the NWPP at the request of foreign law enforcement authorities where certain conditions are satisfied.⁵⁸ The Witness Protection Act 1994 provides procedures governing the placement in and removal of witnesses from the NWPP, including the signing of a memorandum of understanding (MOU) by the witness, creating new identities and restoring former identities. It also provides the Commonwealth Ombudsman with the authority to review decisions of the AFP to not accept applicants for entry into the NWPP. The Commonwealth Ombudsman and the AFP work together to ensure that applicants not accepted in the NWPP are aware of their rights to complain to the Ombudsman.⁵⁹

79. The lead examiners consider the National Witness Protection Program as an essential mechanism for the effective investigation by the AFP of the bribery of foreign public officials. Due to the tight security concerning the use of the NWPP, the AFP is not able to provide details concerning the use of the NWPP in bribery investigations. However, the Australian Government indicates that the NWPP has been used effectively in a number of cases to protect whistleblowers.

b. Proposed Australian Commission for Law Enforcement Integrity

80. In May 2005, the Minister for Justice and Customs announced that the 2005-2006 budget includes AUD 9.5 million over four years to establish the Australian Commission for Law Enforcement Integrity (ACLEI). A draft Bill for the establishment of the new Commission was due to be introduced into the federal Parliament in May or June 2005, although the AGD advised the examination team at the on-site visit that the Bill was still in its conceptual state and had not yet been drafted. The introduction of the Bill was delayed due to unrelated issues, and is now expected to be introduced in 2006. The Australian authorities indicate that the proposal is for an independent federal body responsible for the investigation of corruption in the AFP and the Australian Crime Commission (ACC). The ACLEI should therefore have

⁵⁷ See discussion about the AFP International Liaison Network in: International Links the Backbone in the Fight against Crime at: www.afp.gov.au/afp/raw/Publications/Platypus/June99/internat.htm.

⁵⁸ Foreign witnesses are only approved for inclusion in the NWPP where they have an entry visa, the foreign law enforcement authority enters into an arrangement for the costs of the protection, and final approval for acceptance into the program is given by the Minister for Justice.

⁵⁹ Complaint Handling: Australian Federal Police (Commonwealth Ombudsman—see: www.comb.gov.au/publications_information/Annual_Reports/AR2000-01/AFP.html).

jurisdiction to investigate the bribery of foreign public officials committed by members of the AFP and ACC, as well as cases where they corruptly fail to investigate a foreign bribery case.

c. Treatment of Bribe Payments by the Australian Taxation Office (ATO)

81. At the time of the Phase 1 examination in 1999, bribes paid to foreign and domestic public officials by Australian resident persons or businesses in producing assessable income or in carrying on a business for the purpose of producing assessable income were tax deductible. Similarly, bribes paid to foreign and domestic public officials by non-resident persons or businesses in producing Australian source assessable income or in carrying on a business for the purpose of producing Australian source assessable income were tax deductible. According to the Australian Tax Office (ATO), before the 2000 amendment to the Income Tax Assessment Act (ITA), bribes to foreign public officials in certain cases (as well as bribes to domestic public officials) were tax deductible pursuant to the general principle under section 8-1 of the ITA that permits the deduction from assessable income of any loss or outgoing that is incurred in gaining or producing assessable income or is necessarily incurred in gaining or producing assessable income.

82. The Explanatory Memorandum to the Bill amending the ITA contains the following statement concerning the rationale for the amendment:

“It is a longstanding principle that Australia’s tax law allows deductions for expenditures incurred in deriving assessable income, irrespective of whether the expenditure relates to legal or illegal activities. Although disallowing bribes paid to foreign public officials would be an exception to this principle, it can be justified on the grounds that it will enable Australia to implement the OECD recommendation and align itself with the majority of OECD countries.”

83. The Department of the Treasury indicates that the introduction of the amendment in 1999 does not appear to have been met with any strong objection from the business community. Submissions were not made by any members of the business community to the Senate Economics Legislation Committee concerning the part of the Bill dealing with the non-tax deductibility of bribe payments.

84. In the Phase 2 responses the Australian authorities state that “the ATO’s current view is that the payment of foreign bribes is not a significant occurrence in Australia. Accordingly the claiming of tax deductions for such payments has not been identified as a risk worthy of specific targeting in the ATO’s Compliance Program 2004-2005⁶⁰.” This position was repeated at the on-site visit, and the ATO explained that its conclusion was not reached through risk analysis, but because the ATO considers that industries and businesses in Australia are already highly regulated by other regulatory regimes. However, the lead examiners are not entirely reassured by this statement, in part because there is no formal requirement for auditors to specifically look for instances of foreign bribery or report indications of foreign bribery to the law enforcement authorities. In addition, they are only obligated to report suspicions of foreign bribery to the ASIC if the contravention of the Corporations Act is “significant” or inadequately redressed (see discussion under A.3.f (iii) “Responsibility of the accounting and auditing profession”). However, the ATO indicates that in practice such information would be disseminated to the AFP.

(i) Non-deductibility of bribe payments

85. Section 26-52 of the ITA prohibits the deduction of a “loss or outgoing” incurred that is a “bribe to a foreign public official”. (Similarly section 26-53 prohibits the deduction of bribes to domestic public

⁶⁰ The Compliance Program has been published annually for three years (see: www.ato.gov.au). The publication describes the risks under the system of self-assessment and how the ATO manages these risks by balancing its resources and structuring itself accordingly to ensure that people meet their obligations.

officials.) To a large extent the description of what constitutes a bribe to a foreign public official under the ITA follows the same formulation as the offence of bribing a foreign public official in the Commonwealth Criminal Code. Under the ITA, in the following two situations payments to foreign public officials are not considered bribes and thus a deduction is available: (a) where the conduct in question is lawful in the foreign public official's country, and (b) for facilitation payments. The first exception is consistent with the defence under section 70.3 of the Criminal Code. However, there are some differences between the exception under the ITA for facilitation payments and the defence for facilitation payments under section 70.4 of the Criminal Code.

86. Pursuant to subsection 70.4(1) of the Commonwealth Criminal Code, the following three factors, for which the defendant bears the evidential burden, must be present in order to satisfy the defence of facilitation payments: (a) the value of the benefit must be of a minor nature, (b) the conduct in question must be for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature, and (c) as soon as practicable after the conduct occurs, the person must make a record of the conduct that complies with section 70.4(3) of the Criminal Code regarding the content of the record. However, under the ITA, the exception for facilitation payments applies where only the second factor applies. The ATO believes that the definition of "routine government action" under subsection 26-52(4) of the Income Tax Act, which is identical to the definition under subsection 70.4(2) of the Criminal Code, is sufficient support to restrict facilitation payments to those of a minor nature. It is the position of the ATO that due to the definition of "routine government actions" of a minor nature, as specified under the Income Tax Act, it is not possible that a payment in order to obtain such an action could be anything but "minor".

87. The ITA does not expressly require the keeping of a record in compliance with section 70.4(3) of the Criminal Code to be eligible for a tax deduction for a facilitation payment. However, the ATO is of the view that the normal record-keeping requirement under section 262A of the Income Tax Assessment Act 1936 (ITA) is satisfactory for this purpose. Pursuant to the ITA, a person carrying on a business is required to keep records that explain all transactions and other acts engaged in by the person that are relevant for any purpose of the Act. The records to be kept include any documents relevant for ascertaining income and expenditure as well as documents that contain particulars of any elections, estimates, etc., made by the person under the Act. The ATO believes that the minimum information required by ATO staff to understand the essential features of transactions relating to income and expenditure is the date, amount and character of the transactions. In some circumstances a tax officer will need further information, such as the purpose of the transactions and the relationships between the parties to the transactions. In addition, the ATO submits that pursuant to a Taxation Ruling and a Practice Statement of the ATO, the general record-keeping requirements for obtaining a tax deduction cover in essence all the requirements under section 70.4(3) of the Criminal Code, except the necessity of obtaining the signature of the foreign public official. The lead examiners believe that in order to obtain a tax deduction for facilitation payments, all the requirements for the defence under the Criminal Code should be satisfied, including the record-keeping requirement, which is specific to the circumstances of such a payment, including the identity of the foreign public official concerned (including his/her signature or some other means of verifying his/her identity) and the particulars of the routine government action. In addition, pursuant to the Criminal Code, a person availing himself/herself of the facilitation payment defence must have made the record as soon as practicable after the conduct occurred.

88. The lead examiners consider that the potential to claim payments other than those of a minor nature as facilitation payments for the purpose of claiming an expense for tax purposes as well as the absence under the ITA of a record-keeping requirement in accordance with the Criminal Code may provide scope for abuse. The lead examiners are also concerned that the inconsistency between the Criminal Code and the ITA will further contribute to confusion on the part of the private sector as to the operation of the

defence of facilitation payments (see also the discussion on the defence of facilitation payments under part B.1.c.(ii)).

89. The lead examiners also consider that both exceptions are highly technical, and believe that it would be very difficult for a tax auditor to effectively apply them without interpretive guidelines or advice from a legal expert. The ATO confirms that interpretive guidelines have not been issued on the application of either exception but that, at least with respect to the exception regarding the law of the foreign public official's country, tax auditors would need to obtain an internal technical interpretation.

(ii) *Detection and reporting of bribe payments to foreign public officials*

Detection

90. The lead examiners consider that, especially given the longstanding principle (which was only recently departed from in respect of bribe payments) in Australia to allow deductions for expenditures incurred in deriving assessable income, irrespective of whether they relate to legal or illegal activities, tax auditors need specific instructions to ensure that they are aware of and know how to identify payments to foreign public officials. However, specific direction has not been provided to tax auditors on the identification of bribe payments, including identification of the categories of allowable expenses under which bribe payments might be concealed (e.g. deductions for gifts or contributions, entertainment industry expenses, and promoting and advertising expenses). The ATO indicated that projects in this respect have not been undertaken because of its determination that in Australia there is a low risk of claiming tax deductions for bribe payments to foreign public officials. However, following the on-site visit, the ATO informed the lead examiners that it is in the process of drafting audit guidelines on the identification of bribe payments to foreign public officials. The ATO advises that the guidelines will be based on the OECD Bribery Awareness Handbook.

91. It is anticipated that the focus in the ATO's Bribery Awareness Handbook will be on developing countries as a risk factor for bribe payments to foreign public officials, but the ATO representatives realise that other indicators may also be important. In addition, the ATO recognises that there is scope for improving the section of the tax return for Australian businesses regarding "overseas transaction information" (Schedule "A") in order to more effectively identify payments that might be bribes to foreign public officials.

Reporting

92. Pursuant to section 3E of the Taxation Administration Act 1953, the Commissioner of Taxation has a discretionary power to disclose information acquired by the Commissioner under the provisions of the tax legislation to an authorised law enforcement agency officer, or to an authorised Royal Commission officer, if the Commissioner is satisfied that the information is relevant to: (a) establishing whether a "serious offence" has been, or is being, committed⁶¹ (Note that in the Act "serious offence" means an "indictable offence" as defined in section 4F of the Commonwealth Crimes Act, and therefore includes the foreign bribery offence.⁶²); or (b) the making, or proposed or possible making, of a proceeds of crime order. For the purpose of giving effect to this power of disclosure, the ATO has issued Internal

⁶¹ The Australian authorities underline that information provided pursuant to section 3E of the Taxation Administration Act 1953 can be used for investigative purposes but not as evidence in a court for non-tax prosecutions (except in respect of proceedings for the purpose of making proceeds of crime orders).

⁶² This is the case regardless if the offence could be tried summarily in certain circumstances, including where both the prosecution and defendant agree.

Guidelines.⁶³ These Guidelines clarify that the information to be disclosed to a law enforcement agency does not have to provide conclusive evidence of a serious offence—it only has to be “relevant”. They also clarify that the Commissioner has the authority to disclose such information in response to a request by an authorised law enforcement agency or upon his or her own initiative. The Guidelines place the responsibility for disclosures with the Serious Non Compliance Business Line (SNC), of which there are offices in seven major centres, including the National Office of the ATO. The ATO indicates that the size of a bribe payment to a foreign public official would not be relevant to determining whether to make a referral to the AFP.

93. With respect to self initiated disclosures, the Internal Guidelines state that tax auditors “should” contact a SNC Audit Team Leader, who will make an assessment of the value of the information and whether a self initiated disclosure should be made to a Law Enforcement Agency or Royal Commission. In the absence of a clear direction to make disclosures concerning serious offences, the lead examiners are of the view that foreign bribery cases worthy of investigation might be filtered out by tax auditors without further consultation.

94. During the 2004-05 financial year, the ATO received 680 requests for information from law enforcement agencies and had begun the year with 130 requests already on hand. Of these 820 requests, 693 were processed and information was disclosed for all 693 requests. These requests pertained to the affairs of 4 113 individuals and corporate entities. The vast majority of the requests concerned offences under the Crimes Act (235), Criminal Code (156) and Drugs Misuse and Trafficking Act (224). The ATO has also advised that during the same period, it made three self-initiated disclosures to law enforcement agencies. The lead examiners note that the ATO has an excellent record concerning disclosures upon requests from law enforcement agencies.

95. The lead examiners believe that disclosure of the bribery of foreign public officials would be promoted by a specific requirement in the Internal Guidelines for tax auditors to report such information to the SNC. In the absence of such a requirement, discretion is applied at two levels—first by the tax auditors and then by the SNC. Combined with other factors, including (a) the absence of specific targeting of foreign bribery in the ATO’s Compliance Program, (b) the absence of specific guidance and training on how to detect the foreign bribery payments, and (c) the potential for abuse created by the availability of tax deductions where the conduct in question is lawful in the foreign public official’s country, and for facilitation payments, the lead examiners believe that it may be difficult for the ATO to effectively detect and report the bribery of foreign public officials. Following the on-site visit, the ATO undertook to clarify in the Guidelines that indications of foreign bribery are required to be reported to the SNC.

Commentary

The lead examiners recommend that the ATO:

- (a) consider revising its Compliance Program to specifically include bribe payments to foreign public officials in their risk profile;***
- (b) issue the bribery awareness audit guidelines that it is currently drafting as soon as possible on: (i) the identification of bribe payments to foreign public officials, including identification of the categories of allowable expenses under which bribe payments might be concealed, and (ii) how to determine whether a particular payment to a foreign public official comes under one of the defences (i.e. defence for conduct that is lawful in the foreign public official’s country, and defence for facilitation payments);***

⁶³

The full title of the Internal Guidelines is: Internal Guidelines for the Processing of Disclosures in Terms of Section 3E of the Taxation Administration Act 1953.

(c) within the bribery awareness audit guidelines currently being drafted, include a requirement that tax auditors report all information regarding the bribery of foreign public officials to the Serious Non Compliance Business Line (SNC).

In addition, the lead examiners recommend follow-up of the application of the deduction for a facilitation payment.

d. Detection and reporting by other public bodies

96. Although Commonwealth public officials are bound by a code of conduct that requires them to not engage in criminal conduct and encourages them to report breaches of the code of conduct perpetrated by members of the public service, there are no specific provisions in Australian law obliging Commonwealth public officials to report offences involving members of the general public of which they become aware in the course of performing their duties. The Australian authorities point out, however, the Public Service Act⁶⁴ and related instruments provide obligations that are consistent with reporting such offences. For instance, The Australian Public Service (APS) Code of Conduct requires an APS employee to “behave honestly and with integrity in the course of APS employment” as well as behave at all times “in a way that upholds the APS Values and the integrity and good reputation of the APS”. The Australian authorities feel that these obligations are broad enough to obligate a member of the Australian Public Service to report to the AFP indications of foreign bribery committed by a company involved in a contractual relationship (or applying to enter into such a relationship) with the Australian government.

97. Other than awareness-raising measures undertaken by DFAT to encourage officials to report suspected breaches of the foreign bribery offence, in the form of a DFAT cable and DFAT news article, there does not appear to have been any awareness raising measures to encourage public officials outside of DFAT to report foreign bribery instances encountered in the course of their work. This could constitute a weakness of the Australian detection system, given that a number of public officials serving in Commonwealth public bodies or agencies are in contact with Australian companies operating abroad and are well-situated to discover instances of bribery of foreign public officials in the course of their work.

98. This apparent weakness of the Australian public service detection system raises further concern given the low level of whistleblower protection in the public sector. Section 16 of the Public Services Act 1999 protects Commonwealth public servants from victimisation and discrimination where they report breaches of the Code by an employee or employees to an authorised person within an Australian Public Service agency. The Australian authorities specify, in their Phase 2 responses, that such breaches would include failure to comply with Australian law when acting in the course of Australian public service employment. However, section 16 only provides protection where reporting is made to the Australian Public Service (APS) Commissioner, the Merit Protection Commissioner, or the Agency Head of the person making the disclosure (or to persons authorised by the fore-mentioned authorities). There are no specific provisions protecting whistleblowers where disclosures are made to law enforcement authorities.

99. The Australian authorities explain that victimisation of, or discrimination against, an APS employee by another APS employee for having reported suspected illegal activity to a law enforcement authority would be a breach of the APS Code of Conduct, and could result in disciplinary action under the APS Act. They also point out that although a recent evaluation conducted by the APS Commission into agency management of suspected breaches of the Code of Conduct found some confusion among employees about how the APS whistleblower scheme operates, a recent survey disclosed general

⁶⁴ Paragraph 10(1)(d) of the Public Service Act states that the APS “has the highest ethical standards”.

satisfaction with the protections.⁶⁵ Between 69 and 77 per cent of APS employees had a high or moderate level of confidence that they would not be victimised or harassed as a consequence of making a report that they suspected that another employee had seriously breached the Code of Conduct. In any case, there has been some criticism of the Commonwealth public sector whistle-blowing protections. For instance, they were considered weak in a Transparency International Report of 2004. In addition, the Parliamentary Committee on Finance and Public Administration observed that the whistleblower scheme was deficient, notably in that⁶⁶: (a) it applies only to half of the federal public sector; (b) it does not cover disclosures by members of the public; and (c) reports can only be received by a limited number of authorities, the APS Commissioner having no power to take remedial action.⁶⁷ Although the Australian authorities have indicated that whistleblower protection provisions applicable to private sector employees would also protect Australian officials, it appears that this legislation is rather weak as well (see discussions on whistle-blowing in the private sector under part g. below). Following the on-site visit, the Australian authorities indicated that the issue of whistle-blower protection is the subject of on-going review by the Australian government.

(i) *The Department of Foreign Affairs and Trade*

100. To the knowledge of the lead examiners, the only Commonwealth agency to have expressly imposed a reporting obligation on its employees is DFAT. Its Overseas Code of Conduct for Australian officials serving overseas includes an obligation and guidance to report breaches of the Code, and misconducts of a criminal nature. This obligation is however quite limited in that it applies only to overseas officials.⁶⁸ Furthermore, reports of alleged breaches of the Code are to be made to the Head of Mission, and, possibly, to the First Assistant Secretary, Corporate Management Division, or the Conduct and Ethics Unit. There is no provision for reporting directly to law enforcement authorities, and reference is made to section 16 of the Public Services Act 1999 as regards protection from disciplinary action, which would not apply for disclosure to law enforcement authorities. Finally, the reporting obligation covers only apparent or alleged breaches of the Code. The Australian authorities contend that breaches of Australian law, including legislation on foreign bribery, would constitute a breach of the Code and would thus have to be reported. However, according to the Overseas Code of Conduct, an APS employee who becomes aware of “serious criminal misconduct by another Australian who is not an APS employee” is only encouraged to report the matter to the Head of Mission. Thus, staff of diplomatic missions who discover instances of bribery of foreign public officials would only be obliged to report alleged breaches of Australian law committed by APS colleagues; reporting of similar misconduct by Australian individuals or corporations is only encouraged but not required.

101. The Australian authorities indicate that DFAT employees not covered by the Overseas Code of Conduct are covered by the Public Service Act and the APS Code of Conduct, which, while not specifically requiring breaches of the criminal law to be reported to the law enforcement authorities, leaves

⁶⁵ The survey was conducted for the purposes of the Public Services Commissioner’s State of the Service Report 2003-04.

⁶⁶ National Integrity Systems, Transparency International Country Study Report (Australia 2004, at p. 25) (http://www.transparency.org/activities/nat_integ_systems/dnld/australia.pdf).

⁶⁷ The Australian authorities explain that although the APS Commissioner can not take remedial action, if he/she inquires into a report and finds that an investigation is warranted under the agency’s procedures for determining if a breach has occurred, a recommendations is made to that effect to the Head of the agency concerned so that the Agency Head can take remedial action.

⁶⁸ See sections 1.1 and 1.4 of the DFAT Code of Conduct for Overseas Service (http://www.dfat.gov.au/dept/code_of_conduct200598.html).

it open for officials to report such allegations to the AFP. In addition, the Australian authorities state that DFAT employees have been encouraged in a DFAT news article to report such breaches in this manner.

102. While DFAT has regularly kept its overseas staff aware of the criminalisation of foreign bribery under Australian law, to the knowledge of the lead examiners, overseas officials have not been encouraged to liaise with Australian companies present in foreign markets, provide advice where they face corruption situations, and encourage them to report to diplomatic missions any instances of foreign bribery they are faced with (whether bribes are being paid by less scrupulous competitors or where they are being solicited). Further efforts in this regard could usefully be undertaken in order to facilitate the detection and reporting of foreign bribery offences.

(ii) *Detection and reporting by EFIC*

103. Australia's Export Finance and Insurance Corporation (EFIC) provides a range of financing options to assist Australian companies exporting and investing overseas, through export finance and insurance products. EFIC also provides specific help to Australian SMEs and can help secure working capital from financial institutions through the Export Working Capital Guarantee facility or provide the bonding often required for export contracts. As such, EFIC is very much in contact with Australian companies operating on foreign markets, and could potentially play a useful role in detecting and reporting foreign bribery offences.

104. Agents' commissions are included in the export contract eligible for EFIC support, and EFIC exercises a control in order to support only commissions that are at a level deemed reasonable. EFIC representatives present at the on-site visit indicated that all agents' commissions are evaluated in terms of commercial reasonableness. Generally, commissions of up to five per cent are acceptable, whereas amounts between five and ten per cent would trigger various checks to ensure that the level of work provided by the agent is proportionate to the fees paid. Commissions exceeding ten per cent receive even greater scrutiny, and could only be supported after a due diligence process involving EFIC's Managing Director. Thus, verification of agents' commissions could potentially uncover attempts to pay bribes to foreign public officials through intermediaries. The Working Group noted that the relationship between the level of agents' commissions and the triggering of increased scrutiny by export credit agencies is a horizontal issue.

105. As EFIC staff are not considered public servants, they are not subject to the APS rules, including the APS Code of Conduct. On the other hand, EFIC has in place a Fraud Control Program, which places an explicit obligation on EFIC employees to report cases of fraud to management as soon as they are detected.⁶⁹ Under the Program, fraud is broadly defined as "any intentionally dishonest or deceitful act that occasions actual or potential loss to EFIC, its clients or key stakeholders, of property, money, information or reputation. Fraudulent behaviour also includes breaches of public trust, bias and misuse of information." Examples of fraud risks are given in the Program, with a reference to bribery that concerns only instances where EFIC employees may be offered a bribe. Thus, it does not appear from the Fraud Control Program that suspicions of foreign bribery would similarly amount to fraud and be subject to a reporting obligation. However, an obligation to report foreign bribery to management may arise indirectly. EFIC indicates that the provision of a false or misleading statement or document in a material particular to EFIC in an application to enter into a contract of insurance or indemnity, etc., amounts to an offence under section 88 of the EFIC Act 1991, triggering the reporting obligation under the Fraud Control Program. Since applicants are invited to provide an undertaking/declaration in an application form that neither they nor anyone acting on their behalf have been engaged or will engage in bribery in the transaction, it would appear that a false statement in this regard would be subject to a reporting obligation. EFIC representatives

⁶⁹ Section 8.1.1 of the EFIC Fraud Control Program.

further explained that it would be within their internal policy to inform investigative authorities of suspicions of bribery, both before and after decisions are made to provide export credit support. While, at the time of the on-site visit, EFIC had not had any experience of suspicions or evidence of foreign bribery in EFIC supported contracts, EFIC representatives indicated they have had previous experience of uncovering fraud by clients, and that such instances had been referred to the AFP. Additionally, EFIC may withhold or withdraw support for a contract where it suspects or has evidence of foreign bribery (see also part B.3.c.on administrative sanctions).

(iii) *Detection and Reporting by ASIC*

106. Following the on-site visit, the Australian authorities indicated that the Australian Securities and Investments Commission (ASIC) intends to provide an internal direction to ensure that staff responsible for receiving, assessing and referring complaints (i.e. ASIC's National Assessment and Action) refer all complaints received relating to foreign bribery to the AFP. The lead examiners consider this a positive development, but consider that it is also important to issue an internal direction to all ASIC staff directing them to report all suspicions of foreign bribery to the Director of National Assessment and Action.

Commentary

The lead examiners recommend that Australia consider taking appropriate measures to ensure that members of the Australian Public Service who come into contact with companies involved in international business understand that the Australian Public Service (APS) Code of Conduct requires Commonwealth officials, bodies and agencies to report to the AFP credible evidence of foreign bribery offences that they uncover in the course of performing their duties, and take steps to encourage and facilitate their reporting. They also recommend that the Australian authorities consider strengthening reporting provisions, such as those already included in the DFAT Overseas Code or EFIC internal rules.

Furthermore, the lead examiners recommend that Australia consider reviewing Commonwealth whistle-blower provisions in the context of the ongoing review on this subject to ensure effective whistleblower protection measures for Commonwealth officials and staff employed by Commonwealth agencies who report suspicions of foreign bribery, in order to encourage them to report such instances without fear of retaliatory action.

(iv) *Detection and reporting by AusAID*

107. Australia is a significant provider of Official Development Assistance (ODA), a significant share (approximately 70 per cent) of which is allocated to the Asia-Pacific Region. In 2003 the total net ODA was USD 1 200 million⁷⁰ and in 2004-5 Australia will provide approximately AUD 2.1 billion in ODA (approximately .28 per cent of GDP). The majority of ODA—approximately 80 per cent—is provided in the form of bilateral aid. In 2002-3 the top recipients of ODA were Papua New Guinea (USD 195 million)⁷¹, Indonesia (USD 79 million), Solomon Islands (USD 44 million)⁷², Vietnam (USD 38 million), Timor-

⁷⁰ OECD (2005), Development Co-operation Report 2004, Volume 6, No. 1, p. 77.

⁷¹ In Papua New Guinea (PNG) AusAID administers the Enhanced Cooperation Program, which aims to strengthen the ability of PNG to tackle corruption, manage its finances, maintain law and order and improve border security through the placement of Australian officials and police in operational and advisory positions in key PNG agencies.

⁷² In the Solomon Islands, Australia administers the Regional Assistance Mission to Solomon Islands (RAMSI) with its regional neighbours. RAMSI focuses on enforcing the law and stabilising the budget,

Leste (USD 33 million) and the Philippines (USD 32 million). Substantial aid was also provided to China (USD 29 million), Cambodia (USD 8 million), Iraq (USD 21 million) and Bangladesh (USD 17 million). The majority of Australia's ODA is administered through the Australian Agency for International Development (AusAID), with 20 per cent administered through government agencies other than AusAID in 2004-5.⁷³ In 2004-5 AusAID managed more than 1 500 contracts with a total contract value of about AUD 2.3 billion. The contracts ranged from short term consultancies to multi-million dollar construction and institutional strengthening projects, and involved relationships with a number of stakeholders.⁷⁴

108. More recently, Australia's commitment to improving the conditions in the Asia-Pacific Region was further demonstrated with its promise in January 2005 of USD 1 billion over five years to the Australia-Indonesia Partnership for Reconstruction and Development (AIPRD), an agency to be administered by the governments of Australia and Indonesia, in response to the Tsunami disaster in the Indian Ocean. The package, which is the largest single aid package in Australia's history, will consist of AUD 500 million in grants and AUD 500 million in concessional loans over 40 years with no interest and no repayments of principal over the first 10 years.⁷⁵ The AIPRD announced in March 2005 that companies from Australia, Indonesia, and New Zealand will be eligible to compete for projects under the AIPRD grant and loan programs.

109. Australian ODA is traditionally "tied", which means that normally only businesses from Australia (and New Zealand) are eligible to tender for AusAID overseas implementation services contracts.⁷⁶ In 2004, in response to growing criticisms about the negative effect of tied aid on competitiveness, Australia introduced a policy of untying part of its ODA.⁷⁷ Moreover, in order to enhance competition in AusAID funded contracts, a Procurement Related Complaints Handling Process was recently established in order to enable AusAID to receive complaints regarding its procurement exercise.⁷⁸

110. The largest budgetary component of Australia's ODA is used to support good governance in Australia's partner countries, with 33 per cent of ODA funds earmarked for this purpose in 2004-5. The Australian authorities indicate that much of this expenditure will be used to assist Australia's partner countries directly and indirectly in effectively combating corruption.

Measures for Preventing and Detecting Foreign Bribery in Bilateral Aid-Funded Procurement Contracts

111. AusAID has established a number of measures for detecting and preventing inappropriate conduct in relation to its activities, such as the bribery of foreign public officials. For instance, Australian Managing Contractors⁷⁹ and NGOs are required to provide regular activity reports advising of risk

with particular attention to tackling corruption through activities to improve local accountability institutions, strengthen government expenditure and revenue management processes, and build the capacity of the criminal justice system to effectively handle corruption cases.

⁷³ OECD (2005), DAC Peer Review: Australia.

⁷⁴ Ibid, p. 73.

⁷⁵ Note that Australia's pre-Tsunami assistance in Indonesia was AUD 160 million, in the form of 100 per cent grant financing and primarily provided through projects managed by Australian contractors selected using the Commonwealth Procurement Guidelines.

⁷⁶ See: www.aisaid.gov.au/business/contracting/eligibility.cfm.

⁷⁷ Ibid, footnote 84.

⁷⁸ See: www.aisaid.gov.au/latestnews/pdfs/procurement.pdf.

⁷⁹ An Australian Managing Contractor (AMC) is typically a large Australian company, partnership or consortium contracted to deliver an aid project.

assessments and risk ratings and measures to manage such issues. AusAID also employs a program of compliance audits, which includes a component for identifying risk areas where fraudulent use of Commonwealth funds could or has occurred. Moreover, pursuant to the Procurement related Complaints Handling Process, suppliers are entitled to lodge a complaint about the procurement process. Suppliers may seek external review through the Commonwealth Ombudsman where they are not satisfied with the outcome of the complaints process.

112. The standard bilateral aid-funded procurement contract with AusAID is the main tool of AusAID for preventing and detecting the bribery of foreign public officials. It includes the following provisions, which are relevant in this respect:

1. an anti-corruption clause warranting that the Contractor shall not engage in an illegal or corrupt practice as an inducement or reward in relation to the execution of the contract,⁸⁰ (violation of this warranty is grounds for immediate termination of the contract by notice from AusAID); and
2. a clause warranting that the Contractor must use best endeavours to ensure that all sub-contractors comply with relevant laws and policies in Australia and the partner country, including Division 70 of the Commonwealth Criminal Code on the bribery of foreign public officials.

113. The lead examiners believe that there is some scope for fine-tuning the relevant clauses in the AusAID standard procurement contract to increase their effectiveness in preventing and detecting the bribery of foreign public officials. A specific prohibition from bribing foreign public officials in the anti-corruption clause would increase awareness of the offence among contracting parties, and in light of the express reference to foreign bribery in the clause regarding the activities of sub-contractors, would remove any ambiguity. Moreover, in the absence of a requirement that contracts with subcontractors include a prohibition against foreign bribery, “best endeavours” to ensure that subcontractors ensure that any second-level subcontractors comply with the foreign bribery offence are not likely to be perceived as forceful by subcontractors.

Reporting the Bribery of Foreign Public Officials

114. At the on-site visit, representatives of AusAID stated that if AusAID receives information that a contractor bribed a foreign public official in relation to an ODA contract, they do not know whether an audit would be performed and are not sure if a report would be made to the AFP. Nevertheless the situation would be considered serious if it were suspected that a managing contractor was involved. They also stated that AusAID’s Fraud Control Policy establishes an obligation to report fraudulent activities, which includes the bribery of Commonwealth officials but not foreign public officials.

115. Following the on-site visit, AusAID representatives stated that AusAID does indeed have in place a policy for responding to indications of the bribery of foreign public officials in ODA contracts, which are set out in AusAID’s Fraud Control Policy, Fraud Control Circular and Fraud Control Brochure. A review of AusAID’s Fraud Control Policy indicates that “fraud” includes “bribery, corruption or abuse of office”, and “requires that all cases of suspected or detected fraud must be reported immediately to the Director of

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The full text of the anti-corruption clause in this respect is: “The Contractor warrants that the Contractor shall not make or cause to be made, nor shall the Contractor receive or seek to receive, any offer, gift or payment, consideration or benefit of any kind, which would or could be construed as an illegal or corrupt practice, either directly or indirectly to any party, as an inducement or reward in relation to the execution of this Contract”.

Performance Review and Audit”. It further states that “AusAID considers the prosecution of offenders for fraud cases including minor instances of fraud where appropriate”. AusAID also drew attention to AusAID’s Contracts Charter and Standard Contract Conditions. The former states that “cases of fraud, corruption or criminal actions are automatically transferred to the appropriate authorities where court action may then follow”, and the latter that “the Contractor and its subcontractors must not engage in any fraudulent activity”. Nevertheless, in light of the statements of the representatives of AusAID at the on-site visit, the lead examiners are concerned that it may not be clear to AusAID personnel that fraud includes the bribery of foreign public officials. They are also concerned that there is no clear direction regarding the reporting of fraud to the law enforcement authorities, and that two AusAID documents contain different reporting directions.

Commentary

The lead examiners recommend that the standard contract with AusAID be amended to clarify that the Contractor shall not engage in the bribery of foreign public officials in relation to the execution of the contract, and that contracts with subcontractors contain a similar prohibition.

The lead examiners further recommend that AusAID take steps to ensure that its staff is aware of the policy for responding to indications of the bribery of foreign public officials in relation to ODA contracts, including the reporting of such indications to the Australian Federal Police.

e. Detection through money laundering reporting systems

(i) The money laundering offences

116. Division 400 of the Criminal Code 1995 establishes the offence of laundering the proceeds of crime, as well as the offence of possession of criminal property that constitutes the proceeds of crime. (These offences are hereafter referred to the offences of money laundering.) Under section 400.1, “proceeds of crime” are defined as “any money or other property that is derived or realised, directly or indirectly, by any person from the commission of an offence that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).” It is quite clear that the advantage obtained by bribing a foreign public official—having been “derived” from the commission of the foreign bribery offence—constitutes the “proceeds of crime”. On the other hand, the advantage provided to the foreign public official (i.e. the bribe payment) does not appear to fit the notion of “proceeds of crime” in respect of the offence of bribing a foreign public official. Under Australian law, the prosecution does not need to prove the predicate offence (sections 400.11 and 400.13), but only that the money or property is the proceeds of crime.

117. Sections 400.3 to 400.8 cover the offences of money laundering, with distinctions depending on the value of the money or property concerned [ranging from over AUD 1 million (approximately EUR 630 000 or USD 760 000) or more to “any value”]⁸¹. Under these sections, a person is guilty of an offence if he/she deals with money or other property, either with the knowledge or belief that such money or property is the proceeds of crime; or reckless or negligent about the fact that the money or property is the proceeds of crime. Thus, the offence covers not only persons who had knowledge of the criminal nature of the money or property, but also persons who may or should have known. The CDPP indicated that it prosecuted one offence of money laundering where the defendant was negligent as to whether the proceeds were derived from the commission of an offence. The defendant was charged with negligently dealing with the proceeds of crime contrary to subsection 400.8(3) of the Criminal Code, and sentenced to eight months

⁸¹ The conversion of Australian Dollars (AUD) into Euros (EUR) and U.S. Dollars (USD) is based on the exchange rate on 26 July 2005, on which AUD 1=EUR 0.63=USD 0.76.

periodic detention. Under Australian law, the prosecution will not need to prove the predicate offence (sections 400.11 and 400.13), but only that the money or property is the proceeds of crime.

118. Pursuant to sections 400.3 to 400.8, it is an offence against the money laundering provisions for a person to possess or deal with money or other property where “the person intends that the money or property will become an instrument of crime”. Thus, a person in Australia who possesses money with the intent to use it to bribe a foreign official in a way that violates Australian law, also commits an offence of money laundering under Australian law. In this respect, the money laundering regime in Australia is far reaching since it sanctions money laundering that takes place before the commission of the predicate offence. Thus, although there have been no cases to date, an individual or company guilty of attempted bribery of a foreign public official could also, depending on the facts, be sanctioned under the money laundering regime for possessing or dealing with an intended bribe payment.

119. Sanctions vary depending on the value of the money or property which constitutes the proceeds of the crime.⁸² They range from 25 years imprisonment and 1500 penalty units [AUD 165 000 (approximately EUR 105 000 or USD 126 000)]⁸³ for a person who knowingly deals with money or property that constitute the proceeds (or instrument) of crime in excess of AUD 1 million, to only 10 penalty units (AUD 1 100) where the person was negligent in dealing with proceeds of crime of “any value” less than AUD 1 000. The Australian authorities confirmed that there have been no prosecutions of money laundering offences involving the proceeds of bribing a foreign public official. Statistical information shows that from 1 July 2000 to 25 May 2005, 51 charges of money laundering were dealt with under the Proceeds of Crime Act (POCA) and the money laundering offences in Division 400 of the Criminal Code (noting that the money laundering offences under the Criminal Code came into effect in January 2003). From 1 January 2000 to 7 March 2005 under the POCA, 28 defendants were convicted, two acquitted and the proceedings were discontinued for ten. Of those convicted, 19 received a sentence involving imprisonment ranging from greater than two years to up to or including five years (Three were released forthwith on recognizance.). The majority (13) of the sentences were imprisonment for up to or including two years. During the same period under the money laundering offences in the Criminal Code there were 5 convictions. Of those convicted, four received a sentence involving imprisonment of up to or including two years (Two were released forthwith on recognizance.).

(ii) Reporting money laundering offences

120. AUSTRAC, the Australian Transaction Reports and Analysis Centre, is Australia’s anti-money laundering regulator and specialist financial intelligence unit. As such, it is responsible for ensuring the collection, analysis and dissemination of financial intelligence to designated Commonwealth, State and Territory law enforcement, revenue, national security and social justice agencies.⁸⁴ As part of this role,

⁸² The offences are categorised based on the value of the money or property involved: Section 400.3 covers dealing in proceeds of crime worth AUD 1 million or more; section 400.4 covers dealing in proceeds of crime worth AUD 100 000 or more, section 400.5 covers dealing in proceeds of crime worth AUD 50 000 or more; section 400.6 covers dealing in proceeds of crime worth AUD 10 000 or more; section 400.7 covers dealing in proceeds of crime worth AUD 1 000 or more; and section 400.8 covers dealing in proceeds of any value.

⁸³ Under section 4AA of the Crimes Act 1914, one penalty unit means AUD 110. As provided under section 4B(3), where a legal person is convicted, the fine may be up to five times the maximum fine that could be imposed by the court on an individual convicted of the same offence.

⁸⁴ AUSTRAC’s current domestic partner agencies are: Australian Crime Commission, Australian Customs Service, AFP, ASIC, ATO, Australian Security Intelligence Organisation, Centrelink, Corruption and Crime Commission of Western Australia, Crime and Misconduct Commission (Qld), Child Support Agency Australia, Independent Commission Against Corruption, New South Wales Crime Commission, New South Wales Police, Northern Territory Police, Police Integrity Commission (NSW), Queensland

AUSTRAC allows partner agencies (such as the ATO, the ACC or the AFP) on-line access to the AUSTRAC database of financial transaction reports information to assist them in their actions against money laundering, terrorist financing and other major crimes, in addition to assisting the administration and enforcement of taxation laws. AUSTRAC provides on-site training and analytical assistance to those agencies to assist their efforts in combating these activities. AUSTRAC also provides training to foreign financial intelligence units, and is currently assisting ten South East Asian nations and seven Pacific Island nations.⁸⁵

121. The Financial Transaction Reports Act 1988 (FTR) requires cash dealers to report to AUSTRAC significant cash transactions of AUD10 000 (EUR 6 300 or USD 7 600) or more or the foreign currency equivalent (Division 1 of the FTR);⁸⁶ suspicious transactions (Division 2); and international funds transfer instructions (Division 3). The FTR also requires cash dealers to verify the identity of persons who are signatories to accounts, and prohibits accounts being opened or operated in a false name. Cash dealers, as defined in section 3 of the FTR, include banks, building societies and credit unions referred to as ‘financial institutions’; financial corporations; insurance companies and insurance intermediaries; securities dealers and futures brokers; cash carriers; managers and trustees of unit trusts; firms that deal in travellers cheques, money orders and the like; persons who collect, hold, exchange or remit currency on behalf of other persons; currency and bullion dealers; and casinos and gambling houses.

122. Section 16 of the FTR details the circumstances under which cash dealers are required to make suspicious transaction reports (STRs), and outlines in particular the need to report suspect transactions that may be linked to evasion of taxation law and financing of terrorism. AUSTRAC produces guidelines to assist cash dealers and their staff in identifying and reporting suspect transactions. Mirroring the FTR, these guidelines focus largely on transactions connected with tax evasion or drug trafficking, and not with foreign bribery offences. AUSTRAC has however issued a Circular on the Bribery of Foreign Public Officials that provides general information on the criminalisation of foreign bribery under Australian law, but does not provide specific guidelines on detecting money laundering offences potentially linked to predicate foreign bribery offences (see part 2.b(i) above on government initiatives to raise awareness in the private sector).

123. AUSTRAC representatives present at the on-site visit indicated that they receive approximately 11 million reports a year, with a large majority concerning international funds transfers, approximately 11 500 of which concern suspicious transactions. To date, AUSTRAC has not received any STRs relating to the bribing of a foreign official. AUSTRAC further indicated that it did not keep track of how many of these STRs result in prosecutions by the law enforcement authorities. However, a reporting procedure is in place whereby law enforcement agencies provide feedback to AUSTRAC on a quarterly basis on enforcement actions taken with respect to STRs. AUSTRAC similarly provides feedback regarding STRs to cash dealers, notably to the Provider Advisory Group, created in 1989 and including the largest representation of cash dealers, but also in regular newsletters and in the AUSTRAC Annual Report.

124. Sanctions are provided under Part V of the FTR for failure by cash dealers to provide information in accordance with the FTR. Under section 30, provision of incomplete information may be sanctioned by

Police Service, South Australia Police, State Revenue Agencies (ACT, NSW, NT, QLD, SA, TAS, VIC, WA), Tasmania Police, Victoria Police Service, and Western Australia Police Service.

⁸⁵ The assistance to South East Asian nations consists of in-country mentoring, attachments to AUSTRAC, IT advice, training programs and assistance with typologies development. In the Pacific, AUSTRAC is assisting with IT systems development

⁸⁶ Solicitors who enter cash transactions for clients are also subject to reporting obligations of significant cash transactions (section 15A). There are also requirements for the public to report cash transfers into and out of Australia of AUD 10 000 or more or the foreign currency equivalent (section 15).

up to ten penalty units for an individual (AUD 1 100) or 50 penalty units for a body corporate (AUD 5 500). Refusal or failure to provide information (section 28) is punished with a maximum of two years imprisonment and/or a fine of maximum 120 penalty units for an individual (AUD 13 200) or 660 penalty units for a body corporate (AUD 66 000). Under section 29, provision of false or misleading information may be sanctioned by imprisonment for up to five years or/and 300 penalty units for an individual (AUD 33 000) or 1 500 penalty units for a body corporate (AUD 165 000). Statistical information shows that from 1 July 2000 to 25 May 2005, 802 charges were brought for violations of the FTR. From 1 January 2000 to 7 March 2005, 672 defendants were convicted, 11 acquitted, and proceedings were discontinued for ten. Of those convicted, 99 received a sentence involving imprisonment, with 77 receiving a sentence including imprisonment for a period of up to or including two years, 21 for more than two years up to or including five years, and one for more than five years (28 were released forthwith on recognisance.) In addition, 234 of those convicted received bonds and 37 received a community service order. Representatives of the AGD interviewed at the on-site visit indicated that most prosecutions and sanctions had been imposed for failure to report transfers of currency into or out of Australia pursuant to section 15 of the FTR. Overall, the penalties imposed appear relatively modest to the examining team. The Australian authorities indicated that they may be complemented by confiscation measures.

125. There are plans to further reform Australia's anti money laundering regime. Australia's implementation of the revised 40 Recommendations of the Financial Action Task Force will be the occasion to review and update Australia's anti money laundering legislation. Preliminary work undertaken by the Australian authorities, in cooperation with cash dealers, indicates that key principles at the core of the new legislation will include new customer due diligence obligations, further reporting and record-keeping obligations, and the setting up of a single money laundering regulator. The process to reform legislation is underway, and a first round of consultations has already taken place with each of the affected industry sectors. Information posted on the AGD's website in November 2004 indicates that "a draft exposure Bill will form the basis of the second round of industry consultation". At the time of the on-site visit, there was no fixed schedule for the issuance and discussion of this draft legislation.

Commentary

The lead examiners encourage Australia to continue to compile statistical information on the application of the offence of money laundering, including the level of sanctions and confiscation of proceeds of crime. They also encourage the Australian authorities to pursue efforts to draw the attention of cash dealers to the foreign bribery offence as a predicate offence to money laundering, and provide them with guidance on identifying suspicious transactions that may be linked to foreign bribery offences.

f. Detection through accounting and auditing requirements

(i) The false accounting offence

126. Bribe payments made to foreign public officials in the context of international business transactions can also be detected through analysis of books and records violations by accountants and auditors. Under Australian law, section 286 of the Corporations Act 2001 requires all companies to keep "written financial records that: (a) correctly record and explain its transactions and financial position and performance; and (b) would enable true and fair financial statements to be prepared and audited (...)" Financial records are defined under section 9 to include invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers, documents of prime entry, and working papers and other documents needed to explain the methods by which financial statements are made up and adjustments to be made in preparing financial statements.

127. According to the Australian authorities in Phase 1, the establishment of off-the-book accounts, the making of off-the-book or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents, prohibited under Article 8 of the Convention, would be contrary to the requirements under section 286 of the Corporations Act, because they would not correctly record and explain transactions and would not enable true and fair financial statements to be prepared and audited. The maximum penalty for a violation of section 286 is six months of imprisonment. CDPP representatives at the on-site visit indicated that there had not been any prosecutions conducted by the DPP under section 286 since the DPP took over the responsibility for the prosecution of Corporations Act offences in 1991. Rather, false accounting offences have been prosecuted under section 1307 of the Corporations Act 2001, which focuses on the falsification of books by officers, employees or members (or former officers, employees or members) of a company. The maximum penalty for a violation of section 1307 is two years of imprisonment.

128. Between 1991 and 2005, 18 prosecutions have been conducted by the DPP under section 1307(1) of the Corporations Act. Of these, six were dealt with summarily and nine on indictment, and where sentences were handed down, these ranged from fines of AUD 500 to AUD 3 000, and imprisonment sentences of six to 12 months. At the time of the on-site visit, three cases were still pending before the courts. In their Phase 2 responses, the Australian authorities indicate that there had been no cases concerning false accounting offences related to foreign bribery. The CDPP further indicates that it has not identified any false accounting case relating to a domestic bribery offence. Given that financial and economic crime, including the payment of bribes, is often likely to result in related accounting offences, the lead examiners are concerned about the level of enforcement in this regard.

(ii) *Accounting and auditing requirements*

129. Under section 292 of the Corporations Act, disclosing entities (i.e. mainly listed companies and registered managed investment schemes), public companies and large proprietary companies must prepare financial reports for each financial year. A small proprietary company is only required to produce annual financial reports if: (a) shareholders with at least 5 per cent of the votes or the Australian Securities and Investment Commission (ASIC) require it; or (b) it is controlled by a foreign company.⁸⁷ Section 45A defines “small proprietary companies” as those satisfying at least two of the following criteria: (a) consolidated gross operating revenue under AUD 10 million; (b) value of the consolidated gross assets under AUD 5 million; and (c) less than 50 employees.⁸⁸ Financial reports must comply with accounting standards set by the Australian Accounting Standards Board (AASB),⁸⁹ although compliance with these accounting standards is not always necessary for “small proprietary companies”. It should be noted that, as of 15 July 2004, the AASB has made Australian accounting standards fully equivalent to the International Accounting Standards Board (IASB) Standards.

130. As concerns auditing obligations, under section 301, companies subject to financial reporting obligations must have their annual financial report audited.⁹⁰ Division 3, Part 2M.3 of the Corporations Act 2001 specifies the modalities that audits and auditors’ reports must follow, in accordance with auditing standards set by the Australian Auditing and Assurance Standards Board (AUASB). At its 8 April 2005 meeting, Australia’s Financial Reporting Council set a Strategic Direction for the AUASB, including reliance, as appropriate, on International Standards on Auditing (ISAs) developed by the International

⁸⁷ Sections 292(2), 293 and 294 of the Corporations Act 2001.

⁸⁸ All these figures concern the company, as well as the entities it controls (if any).

⁸⁹ Sections 296, 304 and 334 of the Corporations Act 2001.

⁹⁰ With the exception of small proprietary companies which only need to have the financial report audited if the report has been requested by the ASIC, or if the shareholders have specifically requested it.

Auditing and Assurance Standards Board. Representatives from accounting firms interviewed at the on-site visit stated that most ISAs do not go beyond provisions in the Corporations Act 2001, which is already 90 per cent compliant with ISAs. The objective of the Strategic Direction will be to make Australian auditing standards 100 per cent compliant, but the Australian legislation will retain additional requirements beyond those required by the ISAs.

(iii) *Responsibility of the accounting and auditing profession*

131. Division 3, Part 2M.4 of the Corporations Act 2001 provides for auditor independence measures, including mandatory rotation of auditors, “cooling-off” periods before renewed engagement, etc. Under section 311 of the Corporations Act 2001, individual auditors as well as auditing companies are obliged to report to ASIC contraventions to the Corporations Act that they become aware of in the course of conducting an audit. An auditor contravenes section 311 of the Corporations Act if he/she fails to report to the ASIC contraventions of the Corporations Act that are significant or have not been adequately redressed. In the view of ASIC representatives interviewed at the on-site visit, this would not place a requirement on auditors to report potential foreign bribery offences, and auditors would only be obliged to report suspicions of foreign bribery if the bribe payments made the accounts “materially” inexact. According to representatives of the Institute of Chartered Accountants in Australia (ICAA), any amount below five per cent of the total of the specific expense account audited would not “generally” be considered “material”, while any amount over ten per cent would definitely be considered material. Amounts between five and ten per cent constitute a “grey area”, where the materiality would have to be determined by the auditor based on other relevant information. ASIC indicated that, since 2001, it had received 267 reports under section 311, most of these concerning failures to lodge reports in due time.

132. Auditors interviewed at the on-site visit indicated that Australian auditing standards only place an onus on auditors to question fraud incidences detected in the course of an audit. Thus there is no responsibility on the auditor to look specifically for instances of foreign bribery. Auditors further pointed out that they are strongly opposed to such an obligation as well as an obligation to report indications of foreign bribery to law enforcement authorities. Furthermore, because their first and foremost responsibility is to the shareholders of the company being audited, they consider that any suspicion of fraud should be reported to the company itself. Auditors of certain auditing firms are also encouraged to refer such suspicions to their legal office.

Commentary

The lead examiners welcome the important efforts by the Australian authorities to establish rigorous accounting and auditing standards and to adhere generally to the relevant international standards relating to accounting and auditing. However, the lead examiners are concerned about the low number of prosecutions for false accounting under either section 286 or section 1307 of the Corporations Act as well as the low sanctions for those prosecutions under section 1307 that ended in convictions, and thus recommend follow-up by the Working Group with regard to the application in practice of Article 8 of the Convention.

The lead examiners recommend that Australia should require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies. In addition, the lead examiners recommend that Australia should consider requiring the auditor to report indications of a possible illegal act to the competent authorities.

g. Detection within companies

133. The Australian authorities indicate in the Phase 2 responses that one of the two investigations that were ongoing at the outset of the Phase 2 on-site visit was triggered by a complaint received from an employee. Australia further indicates that ASIC has received 13 complaints concerning alleged breaches of the Corporations Act. Part 9.4AAA of the Corporations Act provides protections for officers and employees, etc., of a company who disclose information indicating that the company has or may have contravened a provision of the Corporations Act. Disclosures qualifying for protection are those made to the ASIC, the company's auditor, director, senior manager or a person authorised by the company to receive such disclosures. In addition, the discloser must provide his/her name and have reasonable grounds to suspect the breach of the Corporation Act. Where an individual makes a disclosure in accordance with the Act, he/she is protected from civil or criminal liability for the disclosure, enforcement of a contractual or other remedy. In addition, the court may order reinstatement of his/her contract of employment where it was terminated due to the disclosure. The lead examiners recognise the importance of these protections in general, but feel that they provide limited protection to employees who disclose indications of foreign bribery, in particular to individuals and bodies not listed as qualifying for protection under the Act.

134. Moreover, two NGOs (the Australian Chapter of Transparency International and Whistleblowers Australia), consider that whistle-blowing arrangements do not provide adequate protections. According to Whistleblowers Australia, at the State level, five statutes are in place, with little conformity between them, and with an emphasis on compensation for victimisation rather than also preventing victimisation in the first place. Commonwealth legislation such as the Corporations Act or the Workplace Relations Act provides protection to certain categories of employees, but only in respect of contraventions of the Act in question. Additionally, anonymity of the person making the disclosure is generally not assured (in fact, under the Corporations Act, disclosure is only protected if the whistleblower gives his/her name), and whistle-blowing directly to law enforcement authorities is not protected. Consequently, NGO representatives feel there is little incentive to blow the whistle, and that, on the contrary, employees would fear retaliation in the workplace, as well as being seen as troublemakers on the job market.

135. Large Australian companies have recognised the need to provide for whistleblower protection, and sometimes even encourage the reporting of misconduct to appropriate bodies. As of 5 August 2005, the partial responses received by the AGD to its OECD Foreign Bribery Public Awareness Campaign Follow-Up Survey appear to indicate that approximately 52 per cent of Australia's top 100 companies have whistleblower protection in place. Indeed, a majority of the corporate codes of conduct reviewed by the examining team provide encouragement to report or discuss suspected misconduct with nominated entities, and about half of the codes specifically provide whistleblower protection measures such as the possibility to raise issues anonymously, the use of specifically dedicated hotlines (some of these external to the company), and an undertaking that employees raising concerns in good faith will not be subject to retribution or disciplinary action. Most corporations with whistleblowing procedures in place have a specific ethical body in charge of investigating reports made; in fewer cases, a senior officer within the company is in charge of handling the follow-up of reports. Representatives of companies present at the on-site visit stressed that at least half of all reports resulted in some sort of action on the part of the company, including reporting to law enforcement authorities, although most of the reports concerned the handling of human resources and not the conduct of business.

Commentary

Given the key role that whistleblowers could play in detecting foreign bribery offences, the lead examiners recommend that Australia consider introducing stronger whistleblower protection measures for private sector employees who report suspicions of foreign bribery, in order to encourage them to report such instances without fear of retaliatory action.

B. EFFECTIVENESS OF AUSTRALIA'S MEASURES FOR PROSECUTING AND SANCTIONING THE BRIBERY OF FOREIGN PUBLIC OFFICIALS

1. Elements of the Offence of Bribing a Foreign Public Official

136. Australia's provisions on the offence of bribing a foreign public official, contained in sections 70.2-70.6 of the Commonwealth Criminal Code, are detailed and comprehensive. The Australian legislature has made a commendable effort in drafting the offence in terms that are accessible to the general public, by using plain language. The offence provides a glossary of definitions, including "foreign public enterprise" and "benefit". In addition, section 70.5 provides rules on the establishment of territorial and nationality jurisdiction over conduct constituting the offence. Nevertheless, the lead examiners have identified certain elements of the offence, as well as the defences to the offence, as areas requiring attention.

a. Results and necessity of payment

137. Pursuant to section 70.2(1)(b) of the Commonwealth Criminal Code, one of the elements of the offence of bribing a foreign public official is that the benefit provided "is not legitimately due to the other person". Section 70.2(2) clarifies that in determining whether a benefit "is not legitimately due" the following shall be disregarded: (a) whether the benefit is customary or perceived as customary; (b) the value of the business advantage; and (c) any official tolerance of the advantage. Section 70.2(2) largely codifies Commentary 7 on the Convention, except that it does not prohibit consideration of: (a) the "results" of the conduct; and (b) the "alleged necessity of the payment". The lead examiners also note that the offence of bribing a domestic public official under section 141.1 of the Commonwealth Criminal Code does not import the requirement that the benefit must not be legitimately due to the other person. The AGD doubts that the factors in Commentary 7 that are not reproduced in section 70.2(2) would be taken into account in prosecuting the foreign bribery offence.

b. Omissions of the foreign public official

138. Neither the offence of bribing a foreign public official under section 70.2 nor the definition of "duty" in section 70.1 expressly refers to omissions in the performance of a foreign public official's duties. However, the Australian authorities explain that indeed bribes for the purpose of obtaining omissions by a foreign public official are covered, and provided the decision in *R. v. Stuart Harold Tange* (1993, Supreme Court of Queensland Court of Appeal) as supporting authority. In *Tange* the defendant allegedly bribed a detective sergeant with AUD 5 000 to take no action against him or deal with drug charges summarily rather than on indictment. The judgement of the Full Court of the Queensland Supreme Court of Appeal in *Tange* holds that provision of a benefit to obtain an omission can amount to a bribe. In light of this decision, the lead examiners are satisfied that section 70.2 covers bribes for the purpose of obtaining omissions.

c. Defences

(i) Conduct Lawful in the Foreign Public Official's Country

139. Section 70.3 provides a defence where the conduct of the foreign public official that is sought by the briber is lawful in the foreign public official's country. A detailed table is contained in section 70.3 for the purpose of clarifying how it is determined in specific situations which country's law is determinative. In general terms, the person is not guilty of the foreign bribery offence, which is established under section 70.2, where "the person would not have been guilty of an offence against a law in force" (emphasis added)

in the place where the central administration is located for which the official performs his/her duties. This defence exceeds the limits in Commentary 8 on the Convention for the following reasons, and thus might, in the opinion of the lead examiners, be an obstacle to the effective implementation of the Convention.

140. Commentary 8 on the Convention states that it is not an offence “if the advantage was permitted or required by the written law or regulation of the foreign public official’s country, including case law” (emphasis added). It has been widely accepted in the Working Group on Bribery in International Business Transactions that Commentary 8 only provides an exception to the offence where the law of the foreign public official’s country states that the advantage in question is permitted or required. However, the Australian exception applies even where pursuant to the law of the foreign public official’s country the person would not be guilty of an offence. Thus in effect section 70.3 provides a rule of dual criminality, which applies even where the act of bribing a foreign public official takes place in Australia.

141. The Australian authorities do not believe that a matter such as an expired statute of limitations in the foreign public official’s country could be a consideration because the table in section 70.3 expressly provides that the defendant “would not” have been guilty of an offence against a law in force in the foreign public official’s country. The Australian authorities believe that because this is a past tense expression that requires consideration of the law at the time the offence was committed, prosecution of the foreign bribery offence would not be restricted by foreign statutes of limitation. The AGD views section 70.3 as a valid interpretation by Australia of Commentary 8. The CDPP views section 70.3 as virtually synonymous with Commentary 8, and believes that a literal interpretation of Commentary 8 is unworkable. Nevertheless, the Australian authorities agree that the test set out under this defence may, in some circumstances, operate more broadly than is contemplated by Commentary 8 (e.g. where the conduct in questions is prohibited in the foreign country by a mechanism that falls short of creating an offence), and has undertaken to amend this defence.

(ii) *Facilitation Payments*

142. Section 70.4 provides a defence for “facilitation payments” that is largely modelled after a defence under the United States Foreign Corrupt Practices Act.⁹¹ So far the Australian courts have not had an opportunity to interpret this defence. In addition, interpretive guidelines on the application of this defence have not been issued by the Commonwealth government. Unlike the United-States, the Commonwealth government does not provide a service whereby individuals and companies may request an opinion concerning prospective payments to foreign public officials.

143. Nevertheless, in certain respects the defence for facilitations payments under the Commonwealth law sets more precise limitations than the one under the Foreign Corrupt Practices Act,⁹² as follows: (a) the value of the benefit must be of a “minor nature”; (b) the routine government action of the foreign public official must be of a “minor nature”; and (c) a record of the payment must have been kept in accordance with section 70.4(3)⁹³. In addition, pursuant to section 70.4(1)(d)(ii) and (iii), the defence for facilitation

⁹¹ For instance, an inclusive list of what constitutes a “routine government action” of a foreign public official is provided, and covers actions such as “granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in a part of a foreign country”; “processing government papers such as a visa or work permit”, and “providing police protection or mail collection or delivery”.

⁹² In one respect the defence under the Australian law is broader than the one under the U.S. law—the U.S. law is restricted in application to “payments” whereas the Australian law covers “benefits”.

⁹³ According to section 70.4(3), for the record to be considered valid, it must set out: (a) the value of the benefit concerned; (b) the date on which the conduct occurred, (c) the identity of the foreign public official or, if the foreign public official is not the other person mentioned in section 70.2(1)(a), the identity of the

payments also applies where a record of the conduct was made in accordance with 70.4(3) but was lost or destroyed because of actions beyond the person's control, or no record has been kept and the prosecution of the offence is instituted more than 7 years after the conduct occurred. Australia explains that these limitations on the application of the defence were included by the legislature as a compromise. Two bills were submitted to the Senate—one including the defence for facilitation payments and one without the defence. Due to pressure from Australian industry to have the same defence as is contained in the United States law, the defence was included in the final law, but with the record-keeping requirement and other limitations to minimise the potential for a loophole caused by the defence.

144. A publication (pamphlet) of the AGD entitled “Bribery of Foreign Public Officials is a Crime”⁹⁴ states that the “the [facilitation payments] defence is rarely (if ever) available in circumstances where the payment was made to facilitate making a decision to award business to a company”. This language implies that, contrary to the Convention and section 70.4 of the Commonwealth Criminal Code, there may be cases where a “routine government action” consists of a decision in relation to the awarding of business. Following the on-site visit, this document was amended, and the AGD will also amend a similar guidance document available on its website.

145. In addition, one major Australian resource company includes a description of what constitutes a facilitation payment in its code of conduct that demonstrates how difficult it is for companies to differentiate between facilitation payments and bribes under the Commonwealth Criminal Code. The code of conduct in question states that it is not always a simple matter to make this differentiation, and emphasises the need to address facilitation payments on a case-by-case basis in consultation with a manager. Although the code of conduct of this company has painstakingly attempted to describe for its employees what constitutes a facilitation payment, it still contains one key piece of misleading information—it states that bribes, unlike facilitation payments, are intended to induce people to act illegally or dishonestly and thus corrupt decision-making. However, the Convention also covers cases where the act or omission of the foreign public official which is sought is legal or honest—for instance pursuant to Commentary 4 on the Convention “it is an offence to bribe to obtain or retain business or other improper advantage whether or not the company concerned was the best qualified bidder or was otherwise a company for which could properly have been awarded the business”.

146. Further difficulties arise regarding the necessity to keep a record of the facilitation payment in accordance with section 70.4(3). For instance, neither the Australian Bankers Association nor the Australian Defence Industries was aware of the record-keeping requirement. The representative of the Australian Chamber of Commerce and Industry believes that it is unlikely that a company will keep a record of a facilitation payment given that the existence of such a record is likely to be perceived as “an admission of guilt”. In addition, for the purpose of obtaining a tax deduction for a facilitation payment, the Australian Taxation Office (ATO) requires the keeping of a record of a more general nature as opposed to one in accordance with section 70.4(3) (See also discussion under A.3.c.(i) on “Non-deductibility of bribe payments”). The Australian authorities point out that where the records are not sufficient to satisfy a judge that the facilitation payments defence is established, and in the absence of any other defence, the offence will be proved.

147. Moreover, the examination team was informed by representatives of the Australian legal profession that nearly all acts amounting to facilitation payments under the Commonwealth Criminal Code are prohibited under most State criminal codes, and, thus, what amounts to a defence under the Commonwealth Criminal Code is prohibited under State law. Since the State laws have an extraterritorial

other person; (d) particulars of the routine government action; and (e) the person's signature or some other means of verifying the person's identity.

⁹⁴ See www.ag.gov.au/foreignbribery.

reach, the conflict does not just exist in respect of offences that take place in Australia. The conflict in this regard between the Commonwealth and State law was not apparently considered when the Bill implementing the Convention was drafted, and the prosecutors who participated in the on-site visit did not appear to be aware of the conflict. Although the AGD does not believe that the conflict represents a problem in practice, the lead examiners remain concerned that at the very least Australian companies will have a disincentive to maintain records of facilitation payments in accordance with section 70.4(3), with the result that the defence might be misused in order to avoid liability at the State level.

Commentary

The lead examiners recommend that the Australian authorities take appropriate measures to clarify and ensure that the offence of bribing a foreign public official covers cases regardless of the results of the conduct or the alleged necessity of the payment.

The lead examiners are of the view that the defence for conduct that is “lawful” in the foreign public official’s country under section 70.3 of the Commonwealth Criminal Code, appears to exceed the limits in Commentary 8 on the Convention. They therefore recommend that Australia carry out its undertaking to amend this defence to ensure consistency with the scope contemplated under Commentary 8 as soon as possible.

In addition, the lead examiners recommend that the Australian authorities carry out the undertaking as soon as possible to revise the existing guidance document on the foreign bribery offence, which is publicly available on the AGD website, to clarify the details of the defence of facilitation payments, as well as follow-up the application of the defence, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements.

2. Liability of Legal Persons for the Offence

a. Effectiveness in Practice

(i) Legal Provisions

148. Section 12 of the Commonwealth Criminal Code on corporate criminal liability came into full operation in late 2001. It establishes an organisational model for the liability of legal persons, representing a major shift in the Australian legal system. Section 12 is ambitious and progressive, with many elements that are not contained in the criminal legal systems of most other countries, in particular liability based on a corporate culture conducive to the criminal conduct in question. The lead examiners regard section 12 as a commendable development, and well-suited to prosecutions for foreign bribery.

149. In summary, “bodies corporate” are liable for offences committed by “an employee, agent or officer of a body corporate acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority” where the body corporate “expressly, tacitly, or impliedly authorised or permitted the commission of the offence”. Authorisation or permission by the body corporate may be established in ways including the following:

1. The board of directors intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorised or permitted it to occur;
2. A high managerial agent intentionally, knowingly or recklessly carried out the conduct, or expressly, tacitly or impliedly authorised or permitted it to occur;

3. A corporate culture existed that directed, encouraged, tolerated or led to the offence; or
4. The body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

150. Section 12 is generally detailed enough to enable companies to know with adequate precision what conduct is prohibited. Section 12.3(3) clarifies that, if a high managerial agent is directly or indirectly involved in the conduct, no offence is committed where the body corporate proves that it “exercised due diligence to prevent the conduct, or the authorisation or permission”. Section 12.3(4) provides factors relevant to determining whether the corporate culture was responsible for the offence. The only area in which section 12 is not sufficiently detailed concerns the term “bodies corporate”, which is not defined in the Code. Nonetheless, according to the Australian authorities the term is commonly used in Australian statutes and is broadly interpreted.⁹⁵ The Australian authorities have not provided supporting case law for its opinion as, to date, there has been no judicial consideration of the meaning of this term under the Commonwealth Criminal Code.

(ii) *Enforcement*

151. To date, the application of section 12 of the Commonwealth Criminal Code has been essentially limited to regulatory offences such as offences resulting in environmental damage, and no legal person has been prosecuted for domestic bribery. The CDPP states that in 2004 it prosecuted 52 cases involving regulatory offences, such as environment and health and safety offences, committed by corporate bodies. The Australian authorities do not consider there to be any obstacles to prosecuting legal persons for the bribery of foreign public officials.

152. The Australian authorities note that since 2001 there has not been adequate time for the development of a body of case law on the liability of legal persons for bribery offences, and adds that the Australian legal system does not generate a large number of bribery cases. The CDPP explains that it has not had any domestic or foreign bribery charges against legal persons referred to it. In addition, the CDPP has not so far prosecuted a legal person where nationality jurisdiction was established. At the State level, the New South Wales Director of Public Prosecution (NSW DPP) has not prosecuted a legal person for bribery, but points out that there has been an increased tendency since 1990 to seek corporate criminal liability. The representative of the NSW DPP who participated in the on-site visit has personally been involved in the prosecution of a company for customs fraud⁹⁶ as well as several other cases.

153. From the perspective of the legal profession, there has not been much enforcement activity regarding the criminal liability of legal persons, except for environmental, health and safety offences. Two representatives of the legal profession who participated in the on-site visit explained that it has been difficult to interest corporations in compliance programs. In addition, they have not seen a demand for developing specialised legal expertise in the field of foreign bribery. Both the legal profession and Attorney-General’s Department acknowledge that the level of interest is unlikely to increase until prosecutions of the foreign bribery offence occur. On the other hand, a representative of the banking and securities sector reports that the Australia Securities and Investments Commission (ASIC) has been very active in prosecuting directors under the Commonwealth Corporations Act. This may partly explain why representatives of a major telecommunications company and the defence industry have observed that, in the last 10 to 15 years, Australian corporations have been increasingly focusing on corporate governance.

⁹⁵ In Phase 1 the Australian authorities stated that they were certain that “bodies corporate” covers all companies including those that are state-owned or state-controlled.

⁹⁶ In the customs fraud case the two principals of the company were also prosecuted.

Commentary

The lead examiners recommend following-up the application of the criminal liability of legal persons to the bribery of domestic and foreign public officials once there has been adequate time for the development of case law and practice in this regard.

b. Sanctions for Legal Persons

154. Pursuant to the formula for calculating fines in sections 4B(2) and 4B(3) of the Commonwealth Crimes Act, a “body corporate” is liable to a fine of AUD 330 000 (EUR 209 000 or USD 251 900) for the offence of bribing a foreign public official under section 70.2 of the Commonwealth Criminal Code.⁹⁷ In Phase 1 the Working Group on Bribery in International Business Transactions recommended that the level of sanctions for legal person be followed-up in Phase 2. However, given that neither the offence of bribing a foreign public official nor of bribing a domestic official has to date been enforced against a legal person, it is not possible to assess the effectiveness of the fine available for legal persons. In any case, the lead examiners consider that it is highly questionable whether the available maximum fine can be sufficiently “effective, proportionate and dissuasive” given the size and importance of many Australian companies as well as MNEs with headquarters in Australia. Moreover, the Australian authorities have not pointed to any examples where confiscation of the proceeds of bribery has been imposed on a legal person pursuant to the Commonwealth Proceeds of Crime Act (POCA).

155. The AGD indicates that the level of monetary sanctions for legal persons committing the offence of bribing a foreign public official may be an issue that needs to be examined. The Australian authorities inform that significant reforms have been recently enacted in respect of competition and trade practices legislation⁹⁸. The Australian Government has also announced that it will shortly enact legislation providing that the maximum pecuniary penalty for corporations convicted of cartel conduct will be the greater of AUD 10 million (EUR 6.3 million, USD 7.6 million) or three times the gain from the contravention or, where the gain cannot be readily ascertained, ten per cent of the turnover of the body corporate and all of its interconnected bodies corporate (if any). Following the on-site visit, the Australian authorities agreed that the current maximum fine for the foreign bribery offence is inadequate, and announced that the Australian government has commenced a review of all criminal penalties, including the fines for legal persons. The review is expected to take approximately 12 months.

Commentary

The lead examiners recommend that Australia increase the fine for legal persons for the offence of bribing a foreign public official to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia.

⁹⁷ Pursuant to section 4B(3) of the Crimes Act, “the court may, if the contrary intention does not appear and the court thinks fit, impose a pecuniary penalty not exceeding an amount equal to five times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence”. (Natural persons are liable to a maximum pecuniary penalty of AUD 66 000 for the offence of bribing a foreign public official under the Commonwealth Criminal Code.)

⁹⁸ See: (i) Review of the Competition Provisions and the Trade Practices Act (Dawson Report) (January 2003, Commonwealth of Australia; www.dcita.gov.au/cca); and (ii) Criminal Penalties for Serious Cartel Behaviour (Announcement No. 004, Treasurer of the Commonwealth of Australia, www.treasurer.gov.au/tsr/content/pressreleases/2005/004.asp?pf=1).

3. Sanctions in General

a. *Treatment of Foreign Bribery as Summary versus Indictable Offence*

156. Pursuant to the Commonwealth Crimes Act 1914, the offence of bribing a foreign public official under section 70.2 of the Commonwealth Criminal Code may be prosecuted summarily or on indictment.⁹⁹ With respect to natural persons, if proceeded with summarily, the offence is punishable by a maximum penalty of two years imprisonment and/or a fine of AUD 13 200 (approximately EUR 6 500 or USD 7 800) (i.e. 120 penalty units multiplied by AUD 110), as opposed to ten years of imprisonment and/or a maximum fine penalty of AUD 66 000 (approximately EUR 41 700 or USD 50 400) where proceeded with as an indictable offence. With respect to a corporation, the maximum penalty for a foreign bribery offence that is tried summarily would be a fine of 600 penalty units or AUD 66 000. According to the CDPP, it is “highly unlikely” that a foreign bribery offence involving a corporation would be dealt with summarily. One reason would be the low penalty level applicable. According to the CDPP, decisions on whether to prosecute summarily or on indictment would be made in accordance with the Prosecution Policy of the Commonwealth, which provides the criteria governing the mode of prosecution.¹⁰⁰ The decision to try the offence of bribing a foreign public official on a summary basis must be concurred in by the defendant and the CDPP.

b. *Monetary Sanctions and Imprisonment for Natural Persons*

157. In light of the absence at this stage of convictions for bribing a foreign public official under the Commonwealth Criminal Code, it is necessary to review the sentences for similar offences to assist in predicting the level of sanctions for foreign bribery. In this respect, Australia has provided statistical information on the sanctions imposed for fraud, which carries the same maximum term of imprisonment and fine sanction as for foreign bribery under the Commonwealth Criminal Code. The Australian authorities indicate that from 1 July 2003 to 30 June 2004 the courts imposed terms of imprisonment for fraud 1713 times. The vast majority of the terms were for less than 12 months (1266) and the longest term imposed was for less than six years. Periodic detention was imposed 83 times, home detention 73 times and suspended sentences 1067 times. Information about the fine sanctions imposed has not been provided.

158. The sanctions for the bribery of a Commonwealth public official under section 141.1(1) are the same as for foreign bribery, and providing a corrupting benefit to a Commonwealth public official under subsection 142.1(1) is punishable by a maximum of five years of imprisonment.¹⁰¹ Prior to the introduction of sections 141.1 and 142.1 of the Criminal Code, domestic bribery was prosecuted under section 73 of the Crimes Act 1914. Section 73 was repealed upon the coming into force of the Criminal Code Amendment (Theft, Fraud, Bribery and Related Offences) Act 2000 (which inserted Divisions 141 and 142 into the Criminal Code). For the period of 1984 to 2005, there were 60 cases where convictions for Commonwealth domestic bribery offences were obtained. In 46 of these cases, the prosecutions were under section 73 of the Crimes Act and in some of these 46 cases more than one conviction was recorded. The remaining 14 cases were prosecuted under Divisions 141 and 142 of the Criminal Code. During this period there were four acquittals for Commonwealth domestic bribery charges. Out of the 60 convictions, 32 were dealt with

⁹⁹ Depending on a number of factors, an indictable offence could be tried by a judge and jury.

¹⁰⁰ The criteria governing the selection of the mode of trial is set out in the Prosecution Policy of the Commonwealth (paragraphs 5.9-5.11)

¹⁰¹ The offence of bribing a Commonwealth public official under section 141.1(1) of the Commonwealth Criminal Code requires the intention of influencing the public official; whereas the offence of giving a corrupting benefit to a Commonwealth public official under section 142.1(1) requires the expectation that the benefit “would tend to influence” the public official.

on indictment and 27 by summary conviction. The prosecutions resulted in 33 terms of imprisonment,¹⁰² eight sentences of community service under section 20AB of the Crimes Act, 14 good behaviour bonds under sub-section 20(1)(a) of the Crimes Act, three good behaviour bonds under section 19B of the Crimes Act and nine fines¹⁰³. Neither a fine nor a confiscation order under the Proceeds of Crime Act (POCA) was ordered in any of the active corruption cases prosecuted under Divisions 141 or 142.¹⁰⁴ Statistics regarding offences prosecuted under the previous article 73 do not differentiate between active and passive bribery.

159. The examining team notes that the terms of imprisonment imposed in the domestic bribery cases are much lower than the available maximum penalty of imprisonment for those offences. However, they recognise that in most of these cases the bribes involved relatively low amounts (In one case the bribe was AUD 82 300, and in three cases the judge was satisfied that the bribe amount was between AUD 2 500 and 10 000 paid in AUD 50 and 100 amounts), or the amount of the bribe could not be ascertained. The Australian authorities point out that the penalties imposed by the courts do not necessarily reflect the penalties that CDDP officers have submitted to the courts as appropriate.

160. The lead examiners question whether the CDDP routinely requests monetary sanctions upon conviction for domestic bribery offences where it is appropriate, and are concerned that, since the sanctions for the bribery of foreign public officials are likely to be influenced by those for domestic bribery, this might also occur for foreign bribery. The AGD believes that POCA is wide enough to enable the confiscation of the proceeds of bribing a foreign public official if it can be shown that the contract would not have been obtained without bribing, but adds that this has not yet been tested.¹⁰⁵

Commentary

The lead examiners recommend that the Working Group follow-up the practice regarding the choice of proceeding with foreign bribery offences as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive.

With respect to the sanctions for natural persons convicted of foreign bribery, the lead examiners recommend follow-up to determine whether monetary sanctions, including fine penalties and confiscation, are imposed where appropriate.

¹⁰² The longest term of imprisonment was 39 months (two times), the shortest seven days, and the average was approximately 18.5 months. In 14 cases an early release was ordered, in seven cases release forthwith was ordered, and in eight cases periodic or weekend detention was ordered.

¹⁰³ The fines ranged from AUD 500 to AUD 5 000, with an average of approximately AUD 2 066.

¹⁰⁴ A pecuniary penalty order under POCA was made in respect of one passive bribery case prosecuted under Division 141 (i.e. AUD 115 000).

¹⁰⁵ Pursuant to POCA, which provides a comprehensive scheme for the restraining and forfeiture of property derived from the commission of offences as well as property used to commit offences, five processes are available: (a) restraining orders prohibiting the disposal of property, (b) civil based forfeiture orders, (c) forfeiture on conviction of an indictable or serious offence, (d) pecuniary penalty orders requiring the payment of amounts based on benefits derived from committing offences upon conviction of an indictable or serious offence or in certain circumstances upon the commission of a serious offence, and (e) literary proceeds orders requiring payment of amounts based on literary proceeds relating to offences. "Literary proceeds" are any benefit that a person derives from the commercial exploitation of, for example, the person's notoriety resulting, directly or indirectly, from the person committing an indictable offence or a foreign indictable offence.

c. Administrative Sanctions

(i) Disqualification from Managing Corporations, etc.

161. Under section 206B of the Corporations Act 2001, a natural person is disqualified from managing corporations if convicted on indictment of an offence that “concerns the making, or participation in making, of decisions that affect the whole or a substantial part of the business of the corporation” or “concerns an act that has the capacity to affect significantly the corporation’s financial standing”. Thus, in the special circumstances outlined in section 206B, a conviction for bribing a foreign public official could result in such a disqualification for a period of five years from the conviction or release from prison, whichever is the later. Moreover, pursuant to section 915B the ASIC may suspend or cancel an Australian financial services licence held by a natural person if the person is “convicted of serious fraud”, and pursuant to section 920A the ASIC may make a banning order against a person (i.e. from participating in the industry) if “the person is convicted of fraud”.

(ii) Disqualification from Contracting with the Government

162. There are no formal rules for disqualifying companies or individuals from contracting with the government where they have been convicted of the bribery of foreign public officials. Given that the monetary sanction for legal persons is quite low, such alternative or complementary administrative penalties may be useful and may act as a deterrent.

163. Since the courts do not have the authority to impose additional administrative sanctions such as disqualification from contracting with the Commonwealth government, it is important to review whether key government contracting agencies, such as the Department of Finance and Administration, Export Credit and Insurance Corporation (EFIC) and Australian Agency for International Development (AusAID), have special rules in their contracting processes for companies and individuals convicted of foreign bribery.

164. Officials responsible for public procurement in the Department of Finance and Administration, EFIC and AusAID confirmed that they do not maintain blacklists of firms convicted of criminal offences, including foreign bribery or any other corruption or fraud-related offences.

Department of Finance and Administration —Public Procurement

165. With regard to public procurement, conviction of a company for a foreign bribery offence would not automatically disqualify it from applying for a publicly funded contract. However, the Department of Finance and Administration indicates that if a company were convicted of an offence relating to the foreign bribery provisions, this would be sufficient ground for an agency to consider refusing to award a public procurement contract to that company. Section 44 of the Financial Management and Accountability Act (FMA Act) places a primary obligation on Chief Executive Officers of agencies to ensure proper (efficient, effective and ethical) use of Commonwealth resources. Issues such as the misuse of public money are addressed in the Fraud Control Guidelines, which are issued under the FMA Act. The Australian authorities also point to the general guidance in the Commonwealth Procurement Guidelines, which recommend the ethical use of resources when awarding contracts.¹⁰⁶ These provisions focus on the ethical behaviour to be adopted on the part of officials involved in handling and awarding public tenders. They do not refer to any necessity to take into account the ethical behaviour of companies applying in these tendering processes. In any case, public procurement agencies would retain the flexibility to not deal with a

¹⁰⁶ See part 6 of the Commonwealth Procurement Guidelines – January 2005 on Efficient, Effective and Ethical Use of Resources.

company based on ethical issues. In their view, where there is a conviction or clear factual evidence of a foreign bribery case concerning a company applying for a public tender, this could potentially constitute a reason to refuse a public procurement contract. There have not however been any practical cases to date.

Export Finance and Insurance Corporation (EFIC)

166. As indicated in its responses to the OECD's Working Party on Export Credits and Credit Guarantees' Survey,¹⁰⁷ EFIC may also withhold or withdraw support for a contract where there is evidence, or even a suspicion, of bribery. Although they do not maintain a blacklist, EFIC representatives indicated that they do check the World Bank List of Debarred Firms, and that any application for official export credit support from one of the organisations listed therein would trigger particular scrutiny on the part of EFIC. There is however no formal requirement that support must automatically be refused or withdrawn where there has been a conviction for foreign bribery, whether in an Australian or a foreign jurisdiction. EFIC retains discretion to accept or refuse support, and each request is examined on a case-by-case basis. To date, the EFIC has not had any practical experience dealing with applicants or contractors convicted of foreign bribery.

Australian Agency for International Development (AusAID)

167. The Australian Agency for International Development (AusAID) has the discretion to not enter into a bilateral aid-funded procurement contract with any applicant. The decision on who to contract with is made on a case-by-case basis, and AusAID does not have a policy regarding the treatment of applicants who have been convicted of the bribery of foreign public officials. Although AusAID does not maintain its own blacklist to assist in making its contracting decisions, it has access to the World Bank and Asian Development Bank blacklists. AusAID routinely consults these blacklists when considering applicants.

168. A similar discretion exists in relation to the authority of AusAID to terminate a bilateral aid-funded procurement contract where the contractor has engaged in a "corrupt practice". Clause 35.4 of the Standard Contract Conditions states that "any such practice shall be grounds for immediate termination" of the contract upon notice from AusAID. AusAID has not established a policy for terminating its contracts where the contractors have been convicted of the bribery of a foreign public official. In addition, AusAID has not established a procedure for obtaining information about such convictions concerning its contracting partners.

Commentary

The lead examiners recommend that Australia consider introducing formal rules on the imposition of additional civil or administrative sanctions upon legal persons and individuals convicted of the bribery of foreign public officials, so that public subsidies, licences, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied as a sanction for foreign bribery in appropriate cases.

In addition, the lead examiners recommend that public agencies that provide contracting opportunities, such as the public procurement agencies, EFIC and AusAID, consider establishing a policy for denying access to such opportunities to individuals and companies convicted of the offence of bribing a foreign public official in appropriate cases, as well as

¹⁰⁷ See answers to: Export Credits and Bribery: Review of Responses to the 2004 Revised Survey on Measures Taken to Combat Bribery in Officially Supported Export Credits - Situation as of 21 January 2005 [TD/ECG(2005)4].

including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after the contract has been entered.

4. Prosecutorial Discretion

169. The Commonwealth Director of Public Prosecutions (CDPP) is responsible for prosecuting offences against the Commonwealth law, including the offence of bribing a foreign public official under the Commonwealth Criminal Code, and for recovering the proceeds of crime under the Proceeds of Crime Act (POCA). All decisions regarding the prosecution process are made in accordance with the Guidelines on the Prosecution Policy of the Commonwealth, which is a publicly available document that has been tabled in Parliament.

170. Item 2.13 of the Guidelines on the Prosecution Policy of the Commonwealth lists the considerations that must “clearly” not influence a decision whether or not to prosecute. These prohibited considerations include “the possible political advantage or disadvantage to the Government or any political group or party”¹⁰⁸ While none of the prohibited considerations under Article 5 of the Convention (i.e. “considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural and legal persons involved”) are expressly included, Australia believes that item 2.13 is broad enough to encompass them.

171. Moreover, the CDPP does not believe that factors such as the national economic interest would be taken into account in making a decision whether or not to prosecute a foreign bribery case, and no opinion was provided during the on-site visit to contradict this position. However, under the Australian legal system there is very little scope to address a decision of a prosecutor to not prosecute a foreign bribery case for any reason except internally within the CDPP. Australia does not provide a formal review process for decisions to not prosecute offences, although the CDPP indicates that it would possible to go to the Deputy DPP, and advises that decisions not to prosecute are reviewed by senior officers of the CDPP as a matter of practice. The CDPP advises that prosecutorial decision-making is exempt from the Judicial Review Act, which establishes a procedure for the review of the legality of federal administrative decisions in Australia.

Commentary

The lead examiners recommend that Australia take appropriate steps to clarify that item 2.13 of the Guidelines on the Prosecution Policy of the Commonwealth prohibits consideration of the factors listed in Article 5 of the Convention in deciding whether or not to prosecute offences of bribing a foreign public official.

5. International Co-operation

a. Mutual legal assistance

172. Pursuant to sections 9 and 11 of the Mutual Assistance in Criminal Matters Act 1987, requests for international assistance in a criminal matter must be sent to the Attorney-General, who determines whether the conditions for providing such assistance have been met. Section 8 of the Act prescribes the grounds for automatic or discretionary refusal of assistance. Mutual legal assistance (MLA) requests must

¹⁰⁸ Other prohibited grounds include: (a) “the race, religion, sex, national origin or political associations, activities or beliefs of the alleged offender”, (b) “personal feelings concerning the alleged offender or victim”, and (c) “the possible effect of the decision upon the personal or professional circumstances of those responsible for the prosecution decision”.

be refused, for instance, in situations where the alleged crime is a political offence, where the death penalty may be imposed and there are no special circumstances, or where the granting of the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory. The Attorney-General retains discretionary power to refuse MLA “if it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted”.¹⁰⁹ Statistics indicate that only three MLA requests were refused between 1999 and 2004. One of the requests refused concerned a case where, under Australian rules, a testimony could not be required from the witness on a compulsory basis, since the matter was only under preliminary investigation in the requesting country; the other two concerned non criminal matters and discussions with the requesting countries resulted in withdrawal of the request in both cases.

173. With respect to requests for mutual legal assistance concerning legal persons, Australia is only able to provide MLA for criminal matters. AGD representatives indicated that the concept could be interpreted broadly to a certain extent, where the conduct in question constitutes a criminal offence. However, where the country making the request only provides for purely non-criminal penalties in respect of legal persons, Australia may not be able to provide MLA. There may be a possibility to grant assistance to some extent in such cases under the Mutual Assistance in Business Regulation Act 1992. Pursuant to this Act the Attorney-General may authorise Commonwealth business regulatory agencies to gather information for purposes of answering MLA requests from a foreign business regulatory agency and to forward it to that agency for purposes relating to the administration or enforcement of a foreign business law. However, this would not enable Australia to provide MLA in relation to non-criminal proceedings where the request is made by law enforcement authorities. Furthermore, MLA can only be provided in response to requests made in respect of laws that regulate or relate to the regulation of businesses or persons engaged in business.¹¹⁰

174. The Australian authorities indicate that they have not received any requests for MLA concerning foreign bribery offences. At the time of the on-site visit they also stated that no request for MLA had been made by Australia to foreign countries in either of the two ongoing investigations (of which one has subsequently been terminated) or the evaluation (which has since become an investigation) concerning allegations of the bribery of foreign public officials made to the AFP.

b. Extradition

175. Pursuant to the Extradition Act 1988, Australia may provide extradition to any “extradition country”¹¹¹ for extraditable offences, in respect of any person, including Australian nationals. The Extradition (Bribery of Foreign Public Officials) Regulations 1999 declare all parties to the Convention to be “extradition countries”. Extraditable offences are those that meet the dual criminality condition, which would be satisfied where the conduct comprises a criminal offence in both the requesting and requested country, the offence is within the scope of Article 1 of the Anti-Bribery Convention and carries a minimum term of imprisonment of at least 12 months in the requesting country. Australian magistrates decide whether there are legal grounds for providing extradition following an extradition hearing (i.e. whether a person is extraditable). As in most countries, the Attorney-General retains overall discretionary power to

¹⁰⁹ Section 8(2)(g) of the Mutual Assistance in Criminal Matters Act 1987.

¹¹⁰ Sections 3 and 6 of the Mutual Assistance in Business Regulation Act 1992.

¹¹¹ The Extradition Act regulates extradition from Australia to “extradition countries”, which are defined therein. It also regulates extradition from Australia to New Zealand, and extradition to Australia from “other countries”.

provide or deny surrender for any reason.¹¹² At the time of the on-site visit, no extradition requests had been received or sent out in respect of foreign bribery offences.

Commentary

The lead examiners recommend follow-up of whether in practice Australia's capacity to provide mutual legal assistance in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence. The lead examiners note that this is a horizontal issue affecting many Parties.

¹¹² Section 12(3) of the Extradition Act 1988.

C. RECOMMENDATIONS OF THE WORKING GROUP AND FOLLOW-UP

Based on the findings of the Working Group regarding the application of the Convention and the Revised Recommendation by Australia, the Working Group (i) makes the following recommendations to Australia, and (ii) will follow-up certain issues when there has been sufficient practice.

1. Recommendations

Recommendations for Ensuring Effective Prevention, Detection and Investigation of Foreign Bribery

176. Concerning awareness and knowledge of the Convention and the offence of bribing a foreign public official in the Commonwealth Criminal Code, the Working Group recommends that Australia strengthen awareness by: (i) further promoting awareness within the Commonwealth public service, (ii) continuing efforts to raise the awareness of the private sector, including the distinction between bribery and facilitation payments and the record-keeping requirement for the defence of facilitation payments, (iii) paying special attention to raising the awareness of SMEs through, for instance, Australian diplomatic and trade missions in foreign countries, and (iv) raising the awareness of cash dealers of the foreign bribery offence as a predicate offence for the offence of money laundering, and providing them with guidance on identifying suspicious transactions.

177. Concerning the detection and investigation of the offence of bribing a foreign public official by the Australian Federal Police (AFP), the Working Group recommends that:

(a) it is clarified in the publicly available explanatory document on the Case Categorisations Prioritisation Model (CCPM), that implementation of the Convention is to be given “high priority”;

(b) the AFP undertakes evaluations where appropriate of the veracity of allegations of foreign bribery involving Australian nationals and companies contained in (i) media reports from credible sources, (ii) publicly available court documents filed in foreign countries, and (iii) requests to Australia from foreign countries for mutual legal assistance;

(c) Australia clarify that all cases of foreign bribery be referred to the AFP by Commonwealth agencies;

(d) the process be revised under the National Guidelines for Referring Politically Sensitive Matters to the AFP so that referrals of politically sensitive cases of foreign bribery to the AFP are not potentially delayed by notification to the Minister of Justice and Customs, and

(e) the AFP take the following steps to ensure the effective transmission of information to it about foreign bribery cases: (i) enter into a formalized agreement with the Australian Prudential Regulation Authority (APRA) concerning areas of overlapping jurisdiction respecting foreign bribery, and (ii) consider establishing measures such as MOUs to ensure the direct referral of foreign bribery cases by State and Territorial police and anti-corruption bodies to the AFP even where a State or Territorial law establishes a bribery offence broad enough to cover foreign bribery. (Convention, Art. 5; Commentary 27; Revised Recommendation I, II)

178. Concerning the prevention and detection of foreign bribery through measures for disallowing the tax deductibility of bribe payments to foreign public officials, the Working Group recommends that the Australian Taxation Office (ATO):

(a) consider revising its Compliance Program to specifically include bribe payments to foreign public officials in their risk profile; and

(b) issue as soon as possible the bribery awareness audit guidelines that it is currently drafting on identifying bribe payments to foreign public officials and determining whether a particular payment meets one of the defences, and include within the bribery awareness audit guidelines a requirement that tax auditors report all information regarding foreign bribery to the Serious Non Compliance Business Line (SNC). (1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

179. Concerning other measures for preventing and detecting foreign bribery, the Working Group recommends that Australia:

(a) should require an external auditor who discovers indications of a possible illegal act of bribery to report the discovery to management and, as appropriate, to corporate monitoring bodies, and consider requiring external auditors to report indications of a possible illegal act to the competent authorities; (Revised Recommendation V.B.iii, iv)

(b) consider taking appropriate measures to ensure that members of the Australian Public Service who come into contact with companies involved in international business understand that the Australian Public Service Code of Conduct requires Commonwealth officials to report to the AFP credible evidence of foreign bribery offences that they uncover in the course of performing their duties, encourage and facilitate such reporting, and consider strengthening reporting provisions, such as those included in the Department of Foreign Affairs and Trade (DFAT) Overseas Code and Export Finance and Insurance Corporation (EFIC) internal rules; (Revised Recommendation I)

(c) ensure that AusAID staff are aware of the policy for responding to indications of foreign bribery in relation to ODA contacts, including the reporting of such indications to the AFP, amend the standard contract with AusAID to clarify that the Contractor shall not engage in foreign bribery in relation to the execution of the contract, and ensure that contracts with subcontractors contain a similar prohibition; (Revised Recommendation I, VI. iii) and

(d) consider reviewing the Commonwealth whistleblower provisions in the context of the on-going review on this subject to ensure effective whistleblower protections for Commonwealth officials and staff of Commonwealth agencies who report suspicions of foreign bribery, and consider introducing stronger whistleblower protections for private sector employees who report suspicions of foreign bribery. (Revised Recommendation I)

Recommendations for Ensuring Effective Prosecution and Sanction of Foreign Bribery and related Offences

180. Concerning the implementation of the offence of bribing a foreign public official under the Commonwealth Criminal Code, the Working Group recommends that Australia:

(a) clarify that the foreign bribery offence applies regardless of the results of the conduct or the alleged necessity of the payment; (Convention, Art. 1; Commentary 7)

(b) carry out its undertaking to amend as soon as possible the defence for conduct that is “lawful” in the foreign public official’s country to ensure consistency with Commentary 8 on the Convention; (Convention, Art. 1; Commentary 8) and

(c) carry out the undertaking to revise the existing publicly available guidance document on the foreign bribery offence as soon as possible to clarify the defence of facilitation payments. (Convention, Art. 1; Commentary 9)

181. Concerning the sanctions for the offence of bribing a foreign public official and the related offences of money laundering and false accounting, the Working Group recommends that Australia:

(a) increase the fine for legal persons for the foreign bribery offence to a level that is effective, proportionate and dissuasive, in light of the size and importance of many Australian companies as well as MNEs with headquarters in Australia; (Convention, Art. 3.1)

(b) with respect to companies that have been convicted of foreign bribery (i) consider introducing formal rules on the imposition of civil or administrative sanctions upon legal persons and individuals convicted of foreign bribery, so that public subsidies, licenses, government procurement contracts (including ODA procurement), and export credits and credit guarantees, could be denied or terminated, including through the provisions of the relevant contracts, as a sanction for foreign bribery in appropriate cases, and include provisions for the termination of such contracts in appropriate cases; and (ii) consider establishing a policy for denying access to contracting opportunities with public agencies, such as the public procurement agencies, EFIC and AusAID, as well as including provisions for the termination of such contracts in appropriate cases where contractors are convicted of foreign bribery after entering the contract; (Convention, Art. 3.4; Revised Recommendation II.v, VI ii) and

(c) continue compiling statistics on the offence of money laundering, including the level of sanctions and the confiscation of proceeds of crime. (Convention, Art. 7)

182. Concerning the discretion to prosecute the offence of bribing a foreign public official, the Working Group recommends that Australia clarify that the Guidelines on the Prosecution Policy of the Commonwealth prohibits consideration of the factors listed in Article 5 of the Convention. (Convention, Art. 5)

2. Follow-Up by the Working Group

183. The Working Group will follow-up the following issues once there has been sufficient practice:

(a) application of the defence of facilitation payments, in particular to determine whether Australian companies conscientiously comply with the record-keeping requirements under section 70.4(3) of the Commonwealth Criminal Code; (Convention, Art. 1; Commentary 9)

(b) the application of the tax deduction for facilitation payments; ((1996 Recommendation of the Council on the Tax Deductibility of Bribes to Foreign Public Officials)

(c) application of the criminal liability of legal persons for the bribery of foreign public officials; (Convention, Art. 2)

(d) the choice of proceeding with foreign bribery cases as summary conviction versus indictable offences, and where the choice is made to proceed summarily, whether the resulting sanctions are sufficiently effective, proportionate and dissuasive, as well as the sanctions imposed on natural persons for foreign

bribery, to determine whether monetary sanctions, including fine penalties and confiscation, are imposed where appropriate; (Convention, Art. 3.1, 5)

(e) whether in practice Australia's capacity to provide mutual legal assistance in respect of legal persons is frustrated where the request emanates from a Party that has established the non-criminal liability of legal persons for the foreign bribery offence (The Working Group notes that this is a horizontal issue affecting many Parties.); and (Convention, Art. 9.1)

(f) the use of false accounting offences under the Corporations Act, including the level of sanctions. (Convention, Art. 8.1, 8.2)

APPENDIX – LIST OF ACRONYMS

AASB	Accounting and Auditing Standards Board
ACC	Australian Crime Commission
ACCI	Australian Chamber of Commerce and Industry
ACLEI	Australian Commission for Law Enforcement Integrity
ACT	Australian Capital Territory
AFP	Australian Federal Police
AGD	Attorney-General's Department
AIPRD	Australia-Indonesia Partnership for Reconstruction and Development
APRA	Australian Prudential Regulatory Authority
APSC	Australian Public Service Commission
ASIC	Australian Securities and Investments Commission
ASX	Australian Stock Exchange
ATO	Australian Taxation Office
AUASB	Australian Auditing and Assurance Standards Board
AusAID	Australian Agency for International Development
AUSTRAC	Australian Transaction Reports and Analysis Centre
Austrade	Australian Trade Commission
CCPM	Case Categorisation Prioritisation Model
CDPP	Commonwealth Director of Public Prosecution
DFAT	Department of Foreign Affairs and Trade
EFIC	Export Finance and Insurance Corporation
FTR	Financial Transaction Reports Act 1988
HOCOLEA	Heads of Commonwealth Operational Law Enforcement Agencies
IASB	International Accounting Standards Board
ICAC	Independent Commission against Corruption
ICAA	Institute of Chartered Accountants in Australia
ISAs	International Standards on Auditing
ITA	Income Tax Assessment Act
MLA	Mutual legal assistance
MNE	Multinational enterprise
MOU	Memorandum of Understanding
NAO	Australian National Audit Office
NGO	Non governmental organisation
NSW	New South Wales
NWPP	National Witness Protection Program
ODA	Official Development Assistance
PNG	Papua New Guinea
POCA	Commonwealth Proceeds of Crime Act
SME	Small and medium size enterprise
SNC	Serious Non Compliance Business Line
STR	Suspicious transaction report