



13 November 2023

## **Update on measures taken by Australia to implement recommendations pursuant to Chapter III (Criminalisation and law enforcement) and Chapter IV (International cooperation) of the UNCAC**

Since the completion of Australia's first cycle review in 2012 under the *United Nations Convention against Corruption* (UNCAC) Implementation Review Mechanism, Australia has made progress to address a number of the recommendations pertaining to Chapters III (Criminalisation and law enforcement) and IV (International cooperation) made in the review. These recommendations are identified at pages 9 and 12 of the Executive Summary to Australia's first cycle country report.

### **Chapter III recommendations**

1. Continue to periodically review policies and approach on facilitation payments in order to effectively combat the phenomenon and continue to encourage companies to prohibit or discourage the use of such payments, including in internal company controls, ethics and compliance programmes or measures

In line with OECD Anti-Bribery Convention recommendations, the Australian Government strongly discourages individuals and businesses from making facilitation payments and is committed to global efforts to reduce corruption and to supporting Australian businesses seeking to eliminate facilitation payments to officials.

Although the Commonwealth Criminal Code offence for foreign bribery contains a facilitation payment defence, operational experience has demonstrated this defence has not been an impediment to the effective enforcement of Australia's foreign bribery offence. Such defences are not prohibited by the OECD. The facilitation payment defence is very narrow in its operation and is only available in respect of a payment of minor value provided in return for securing a routine government action of a minor nature, and must be appropriately documented. The defence would not apply if the payment was made to secure any decision to award or continue business, or any decision related to the terms of new or existing business.

The Australian Government Attorney-General's Department has produced publications to educate individuals and businesses about the risks of foreign bribery and to discourage individuals and businesses from making facilitation payments. These include:

- a webpage on facilitation payments (<https://www.ag.gov.au/crime/foreign-bribery/facilitation-payments>)
- a training module on foreign bribery (<https://foreignbriberymodule.ag.gov.au/>)

Australian Government agencies are also active participants in Australia's Bribery Prevention Network (BPN). The BPN, which was officially launched in October 2020, is a public-private partnership that brings together business, civil society, academia and government with the shared goal of supporting Australian business to prevent, detect and address bribery and corruption and promote a culture of compliance. The BPN curates



the Bribery Prevention Hub ([www.briberyprevention.com](http://www.briberyprevention.com)), a free online portal that provides accessible, relevant, and reliable resources to help organisations develop and implement effective anti-bribery and anti-corruption policies and compliance procedures.

The resources include information about the risks of making facilitation payments and how to 'say no' to such payments. This includes a case study for business owners on how to identify and respond to a request for a facilitation payment. The case study provides practical advice on what the company could do to prevent the situation, detect suspicious payments, including facilitation payments, and address the situation, including:

- implementing a policy which prohibits facilitation payments
- undertaking a risk assessment before engaging local agents and traveling offshore
- educating staff to recognise all suspicious payments, no matter their size
- educating employees on what they should do if they receive a suspicious payment request
- empowering whistleblowing and speaking up
- maintaining effective audit processes
- taking active steps to understand why a suspicious payment was paid and consider seeking legal advice.

The full case study can be found at <https://briberyprevention.com/case-studies/facilitation-payments/>.

## 2. Consider adopting a written policy on parole that sets forth the factors for consideration

Article 30(5) of the UNCAC sets out certain matters to be taken into account when considering the parole of persons convicted of offences established in accordance with the UNCAC.

Under Australia's federal system of government, criminal law enforcement is primarily a matter for the states and territories, with each managing their own criminal justice system. State and territory parole authorities make available a range of guidance material online and within prisons regarding their individual processes and practices.

Matters relating to the consideration of parole for federal offenders are set out in Part 1B of the *Crimes Act 1914* (Cth). This includes section 19ALA, which was inserted by the *Crimes Legislation Amendment (Powers, Offences and Other Measures) Act 2015* (Cth). Section 19ALA sets out a comprehensive list of matters that may be considered by the decision-maker when making a parole decision. This includes matters such as the person's conduct in prison, whether rehabilitative programs have been completed, criminal history and previous behaviour on conditional release and information provided by corrective services agencies.



3. The adoption and implementation of legislation currently under review for the establishment of a comprehensive scheme for public sector whistleblower protection and to expedite access to existing protections for private sector whistleblowers

### **Public sector whistleblower protections**

In July 2013, the Australian Parliament enacted the *Public Interest Disclosure Act 2013* (Cth) (PID Act). The PID Act, which commenced in January 2014, provides a legislative framework for the management of public interest disclosures, including through the provision of robust protections for public sector whistleblowers.

The PID Act protections require that a discloser believes on reasonable grounds that there is disclosable conduct. Disclosable conduct is defined broadly, and includes illegal conduct, corrupt conduct, and conduct that constitutes maladministration or is an abuse of public trust. The PID Act protections do not require that disclosures are made in good faith. The PID Act provides protections to disclosers regardless of their motivation for disclosing wrongdoing, and has ways to manage disclosures that are made not in good faith. For example, protections do not apply to disclosers and witnesses who knowingly provide false and misleading statements or to disclosers who disclose their own wrongdoing in an attempt to avoid liability for that conduct.

On 1 July 2023, the *Public Interest Disclosure Amendment (Review) Act 2023* came into effect, delivering priority reforms to the PID Act and improved protections for public sector whistleblowers. This Act implemented 21 of the 33 recommendations made by a 2016 comprehensive review of the PID Act by Mr Philip Moss AM and was also informed by other parliamentary committee reports. This includes expanding protections to individuals who 'could' make a public interest disclosure and to witnesses providing assistance in relation to a disclosure. The reforms also focused the scheme on serious integrity wrongdoing such as fraud and corruption, made the scheme easier for Commonwealth agencies to administer, and enhanced the oversight of the scheme by the Commonwealth Ombudsman and the Inspector-General of Intelligence and Security.

The Australian Government has committed to a second stage of reforms, including further reforms to address the underlying complexity of the PID Act and public consultations on the need for additional supports for public sector whistleblowers, such as a Whistleblower Protection Authority or Commissioner. The second stage of reforms will be an opportunity to review the PID Act in light of the establishment of the National Anti-Corruption Commission (NACC), which commenced operations on 1 July 2023, and other integrity initiatives across the Australian government.

The *National Anti-Corruption Commission Act 2023* (Cth) (NACC Act) also provides a range of protections to any person who provides information or evidence about a corruption issue to the NACC. The protections from liability and reprisal action in the NACC Act are similar to those available to public officials who make a public interest disclosure under the PID Act. A public official may be able to access protections under both the



PID Act and the NACC Act if their disclosure to the NACC also constitutes disclosable conduct under the PID Act.

### **Private sector whistleblower protections**

Australia's private sector whistleblower protection regime is contained in Part 9.4AAA of Australia's *Corporations Act 2001* (Corporations Act) and the *Taxation Administration Act 1953* (Taxation Administration Act).

In 2019, the Australian Parliament strengthened the private sector whistleblowing scheme and introduced protections for tax whistleblowers through amendments to the Corporations Act and the Taxation Administration Act. The amendments, introduced by the *Treasury Laws Amendment (Enhancing Whistleblower Protections) Act 2019*, have expanded the regime to provide greater protections for whistleblowers who report misconduct about companies, company officers and company employees. These reforms allowed for anonymous disclosures, imposed civil penalties in addition to criminal sanctions, made it easier to obtain civil redress and required all large companies to have a whistleblower policy.

The Corporations Act private sector whistleblower protection regime:

- Includes in the definition of whistleblower both current and former employees, officers, and contractors, as well as their spouses, dependants, and other relatives.
- Extends the protections to whistleblowers who report anonymously.
- Extends the protections to whistleblower reports that allege misconduct, an improper state of affairs or circumstances, breach of the law, or danger to the public or financial system (though a report solely about a personal work-related grievance is not covered by the protections). This includes reports of any alleged breach of a Commonwealth offence punishable by imprisonment of 12 months or more by any company, company officer, or company employee, and therefore includes alleged breaches of the foreign bribery offence in section 70.2 of the Criminal Code.
- Requires whistleblowers to have reasonable grounds to suspect reportable matters and removes the requirement for whistleblowers to report in good faith to qualify for protections.
- Expands the range of persons whistleblowers may disclose reportable matters to and qualify for protections.
- Contains civil penalty provisions, in addition to the pre-existing criminal offences, for causing or threatening detriment to (or victimising) a whistleblower and for breaching a whistleblower's confidentiality.
- Gives protections for whistleblowers in limited circumstances if they disclose to a journalist or parliamentarian after they have reported certain concerns to relevant regulatory authorities, namely



the Australian Securities and Investments Commission (ASIC) or the Australian Prudential Regulation Authority (APRA). The concerns that are covered are concerns about:

- substantial and imminent danger to the health or safety of one or more people or to the natural environment, or
  - matters in the public interest (whistleblowers must wait 90 days after first reporting their concerns for public interest disclosures).
- Provides whistleblowers with easier access to compensation and remedies if they suffer detriment, including reversal of onus of proof and protections from costs orders unless a court finds the claim to be vexatious or the whistleblower acted unreasonably.
  - Requires all public companies, large proprietary companies, and corporate trustees of registrable superannuation entities to have a whistleblower policy that reflects the requirements in the strengthened Corporations Act whistleblower protection regime. This requirement commenced on 1 January 2020.

The Taxation Administration Act provides broadly similar whistleblower protections in relation to disclosures about tax misconduct.

On 6 August 2023, as part of a broader package of measures aimed at strengthening the power of regulators, the Government announced it would extend whistleblower protections to eligible whistleblowers who provide the Tax Practitioners Board with evidence of tax agent misconduct.

ASIC is responsible for administering the amended corporate sector whistleblower protection regime in the Corporations Act. Since the commencement of the legislative amendments on 1 July 2019, ASIC has issued:

- Media Release 19-164MR<sup>1</sup> to raise awareness of the reforms and media release 19-205MR to remind regulated entities of the whistleblower policy requirement.<sup>2</sup>

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<sup>1</sup> <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-164mr-new-regime-for-corporate-whistleblower-protections-commences-today/>

<sup>2</sup> <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-205mr-asic-consults-on-new-guidance-for-companies-on-whistleblower-policies/> and <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-372mr-whistleblower-policies-required-from-1-january-2020-for-certain-large-and-public-companies/>



- Revised ASIC information sheets and website information to explain the new legislative rights and protections to whistleblowers and potential whistleblowers in companies and not-for-profit organisations, and to remind regulated entities of their obligations. These include:
  - ASIC Information Sheet 238 'Whistleblower rights and protections'<sup>3</sup>
  - ASIC Information Sheet 239 'How ASIC handles whistleblower reports'<sup>4</sup>
  - updates to ASIC's Whistleblowing website<sup>5</sup>
  - a summary of the protections for corporate sector whistleblowers including a brief comparison with the previous regime<sup>6</sup>
  - information for not-for-profit organisations that are now subject to the corporate sector whistleblower protection regime.<sup>7</sup>
- Articles on the reforms in the Australian Institute of Company Directors' *Company Director* magazine<sup>8</sup> and the Association of Superannuation Funds of Australia's *Superfunds* publication.<sup>9</sup>
- Regulatory Guide 270 'Whistleblower Policies'<sup>10</sup>, which contains guidance and good practice tips for companies on establishing and implementing a whistleblower policy and program.

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<sup>3</sup> <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/whistleblower-rights-and-protections/>

<sup>4</sup> <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/how-asic-handles-whistleblower-reports/>

<sup>5</sup> <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/>

<sup>6</sup> <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/protections-for-corporate-sector-whistleblowers/>

<sup>7</sup> <https://asic.gov.au/about-asic/asic-investigations-and-enforcement/whistleblowing/whistleblower-protections-for-not-for-profit-organisations/>

<sup>8</sup> <https://aicd.companydirectors.com.au/membership/company-director-magazine/2019-back-issues/july/regulator>

<sup>9</sup> <https://asic.gov.au/about-asic/news-centre/articles/support-and-protections-for-whistleblowers/>

<sup>10</sup> <https://asic.gov.au/regulatory-resources/find-a-document/regulatory-guides/rg-270-whistleblower-policies/>.

This was accompanied by a media release <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2019-releases/19-308mr-asic-gives-guidance-on-companies-whistleblower-policies-and-relief-to-small-not-for-profits/>



- Report 758 on good practices for handling whistleblower disclosures, to help entities improve their arrangements for handling whistleblower disclosures and ensure they are effective and encourage people to speak up.<sup>11</sup>
- New ASIC information sheets to explain company auditor and officer obligations under the new whistleblower regime:
  - ASIC Information Sheet 246 'Company auditor obligations under the whistleblower protection provisions'<sup>12</sup>
  - ASIC Information Sheet 247 'Company officer obligations under the whistleblower protection provisions'<sup>13</sup>
  - an open letter to CEOs of public companies, large proprietary companies and trustees of registrable superannuation entities (RSEs) urging them to review their whistleblower policies to ensure they comply with the law.<sup>14</sup>

ASIC has also spoken about the legislative amendments at academic conferences and industry events, delivered presentations to financial services firms, and engaged with stakeholders across the corporate, legal, academic, public, and regulatory sectors on the regime.

As mentioned in the Australian Government's response to the UNODC in 2015, ASIC has also established an Office of the Whistleblower to monitor ASIC's handling of whistleblower reports, manage staff development and training and handle the relationship with whistleblowers on more complex matters. ASIC is now receiving and responding to more whistleblower reports than before the amendments commenced.<sup>15</sup>

The Corporations Act scheme will be reviewed after 1 July 2024, with a copy of the report to be tabled before both Houses of Parliament as required by section 1317AK of the Corporations Act.

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<sup>11</sup> <https://asic.gov.au/regulatory-resources/find-a-document/reports/rep-758-good-practices-for-handling-whistleblower-disclosures/>

<sup>12</sup> <https://asic.gov.au/for-finance-professionals/company-auditors/your-ongoing-obligations-as-a-registered-company-auditor/company-auditor-obligations-under-the-whistleblower-protection-provisions/>

<sup>13</sup> <https://asic.gov.au/for-business/running-a-company/company-officeholder-duties/company-officer-obligations-under-the-whistleblower-protection-provisions/>

<sup>14</sup> <https://asic.gov.au/about-asic/news-centre/find-a-media-release/2021-releases/21-267mr-asic-calls-on-australian-ceos-to-review-whistleblower-policies/>

<sup>15</sup> <https://download.asic.gov.au/media/yjggnu5/asic-annual-report-2019-20-full-1.pdf>





4. Continue the consultative process for the development of a comprehensive national anti-corruption action plan, which will include an examination of how to make anti-corruption systems more effective

The Australian Government is committed to combatting corruption and making its anti-corruption systems more effective. Since the UNODC made this recommendation in 2012, the Australian Government has developed initiatives to enhance Australia's anti-corruption systems, most notably through the establishment of the NACC.

The NACC commenced operations on 1 July 2023 and is a central pillar of the Government's broader federal integrity framework. It is an independent Australian Government agency that detects, investigates and reports on serious or systemic corrupt conduct in the Australian Government public sector.

The NACC also has a role to educate the public service and the public about corruption risks and prevention, and will work with Commonwealth agencies to help prevent corruption. It will do this by:

- raising awareness and providing training to people who work in the Australian Government public sector about preventing, detecting and reporting corruption
- providing corruption prevention and education products based on research and analysis of corruption risks and trends, and
- making recommendations to prevent corruption (including identifying risks and vulnerabilities) based on issues it finds during its investigations.

The NACC will also be able to conduct public inquiries into corruption risks, vulnerabilities and prevention activities in government agencies.

The legislation that established the NACC was subject to a parliamentary inquiry which invited non-government stakeholders to make submissions on the legislation. Amendments were made to the Bill following careful consideration of recommendations made by the reports of the parliamentary committee.

Australia is also a member of the Open Government Partnership. The Australian Government is working with civil society to develop a Third National Action Plan, which will capture an ambitious plan for open government, transparency and accountability. As part of this process, Australia's Open Government Forum is seeking public feedback on the proposal to include the development of a Commonwealth Government Integrity Strategy as one of the key commitments in the Third National Action Plan.<sup>16</sup> The Strategy would improve information-sharing across government agencies, enhance public visibility of public sector work to

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<sup>16</sup> <https://consultations.ag.gov.au/integrity/ogp/>





enhance integrity – including by countering corruption – and harness use of data to improve reporting and integrity measurement.

## Chapter IV recommendations

5. Continue to periodically review policies and legal mechanisms to provide the widest measure of mutual legal assistance, including taking statements of suspects or accused persons, in investigations, prosecutions and judicial proceedings

Australia's *Mutual Assistance in Criminal Matters Act 1987* (Cth) enables Australia to provide other countries with the widest measure of legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by the UNCAC. Australia's international assistance includes taking evidence, production of documents, providing material from Australian investigations, providing electronic evidence (including stored communications and prospective telecommunications data), locating witnesses and locating, restraining and forfeiting proceeds of crime.

Australia continually assesses the appropriateness of its mutual assistance frameworks to ensure we are able to provide the most effective and efficient assistance possible. Following a comprehensive review of Australia's international crime cooperation law, the Australian Parliament passed a significant package of reforms in 2012 (*Extradition and Mutual Assistance Legislation Amendment Act 2012*). Among other things, these reforms:

- increased the range of law enforcement tools available to assist other countries with their investigations and prosecutions
- streamlined processes for providing certain forms of assistance
- streamlined proceeds of crime action authorisation processes, and
- allowed registration and enforcement of foreign non-conviction based proceeds of crime orders from any country.

In 2017, the Attorney-General's Department concluded a review of the 2012 amendments which found that the changes were beneficial and streamlined the mutual assistance and extradition processes. Australia continues to monitor the effectiveness of laws and policies, and pursues reform where appropriate.

Further enhancements to Australia's mutual assistance regime, introduced by the *Telecommunications and Other Legislation Amendment (Assistance and Access) Act 2018* (Cth) and the *Telecommunications Legislation Amendment (International Production Orders) Act 2021* (Cth) have streamlined some of the processes for providing assistance to foreign countries and increased the range of law enforcement tools Australian authorities can use to assist in a foreign investigation or prosecution. Significant amendments include:



- enabling Australian authorities to access information held on and communicated between electronic devices to better assist international law enforcement partners in response to a mutual assistance request, and
- providing for Australia to enter international agreements to allow Australian agencies' to obtain electronic information from service providers in other jurisdictions (and vice versa) without the need for a mutual assistance request. The first of these agreements, between Australia and the United States, is expected to be operational by the end of 2023.

On 4 September 2023, the Australian Parliament passed the *Crimes and Other Legislation Amendment (Omnibus) Act 2023* which reforms the *Foreign Evidence Act 1994* to improve the operation of provisions regarding the use of foreign material in Australian proceedings. Key amendments include:

- Expanding the category of persons who can sign or certify testimony in the relevant foreign country to 'a person authorised to administer an oath or affirmation or put a person under an obligation to tell the truth'. This is consistent with categories of persons who may administer oaths or affirmations in Australia, such as legal practitioners.
- Replacing references to 'exhibit' with 'documents or things' to ensure consistent use of terminology throughout the Act. The term 'exhibit' is associated with terminology used in court rules governing affidavits. As Australia receives material from both common and civil law countries, the use of the term 'documents or things' is more appropriate as the latter typically do not recognise nor use affidavits.
- Addressing current issues regarding the requirement for foreign countries to formally annex documents or things to testimony in order to be admissible in Australian courts. By replacing the term 'annexed to' with 'produced by or with', the amendment ensures an appropriate connection between testimony and the documents is retained and supports the movement towards the electronic production of evidence in Australia and other countries.

The reforms aim to respond to challenges faced in obtaining and using foreign material in Australian proceedings, and will reduce the burden on partner countries in providing mutual legal assistance to Australia.