Mechanism for the Review of the Implementation
United Nations Convention against Corruption

Review Report on Australia

Reviewing countries: United States of America and Turkey

Year II - Phase I
I. Introduction

The Conference of the States Parties to the United Nations Convention against Corruption was established pursuant to article 63 of the Convention to, inter alia, promote and review the implementation of the Convention.

In accordance with article 63, paragraph 7, of the Convention, the Conference established at its third session, held in Doha from 9 to 13 November 2009, the Mechanism for the Review of Implementation of the Convention. The Mechanism was established also pursuant to article 4, paragraph 1, of the Convention, which states that States parties shall carry out their obligations under the Convention in a manner consistent with the principles of sovereign equality and territorial integrity of States and of non-intervention in the domestic affairs of other States.

The Review Mechanism is an intergovernmental process whose overall goal is to assist States parties in implementing the Convention.

The review process is based on the terms of reference of the Review Mechanism.

II. Process

The following review of the implementation by the Commonwealth of Australia (hereinafter Australia) of the Convention is based on the completed response to the comprehensive self-assessment checklist received from Australia, and any supplementary information provided in accordance with paragraph 27 of the terms of reference of the Review Mechanism and the outcome of the constructive dialogue between the governmental experts from the United States of America and Turkey, by means of telephone conferences, e-mail exchanges and in-person dialogue, and involving the following experts:

Australia:
- Mr. Peter Ritchie, Senior Policy Officer, International Crime-Policy and Engagement Branch, Commonwealth Attorney-General’s Department,
- Ms. Claire Cocker, Policy Officer, Anti-Corruption Section, International Crime Cooperation Division, Commonwealth Attorney-General’s Department.

The United States of America:
- Mr. John Brandolino, Senior Advisor, Office of Anticrime Programs, Bureau for International Narcotics and Law Enforcement Affairs (INL), United States Department of State,
- Ms. Alexis Blane, Attorney Adviser, United States Department of State,
- Mr. Joseph Gangloff, Deputy Director, United States Office of Government Ethics.

Turkey:
- Mr. Engin Kücet, Chief Inspector, Inspection Board, Office of the Prime Minister
- Mr. Ahmet Bıcakcı, Chief Inspector, Inspection Board, Office of the Prime Minister
- Ms. Seda Türkan Manav Dursun, Judge, Ministry of Justice, General Directorate of International Law and Foreign Relations.

The Secretariat:
- Mr Jason Reichelt, Crime Prevention and Criminal Justice Officer, Corruption and Economic Crime Branch, UNODC
- Ms Thi Thuy Van Dinh, Associate Crime Prevention and Criminal Justice Officer, Corruption and Economic Crime Branch, UNODC

A country visit, agreed to by Australia, was conducted from 5 to 9 March 2012 in Canberra. Meetings were held with the following institutions: Attorney General Department (Financial
Crime Section and Criminal Law and Policy Section, International Crime Cooperation Division), Department of Foreign Affairs and Trade, Commonwealth Director of Public Prosecutions, The Treasury, Department of Prime Minister and Cabinet, Australian Commission for Law Enforcement Integrity, and Australian Federal Police. Meetings with representatives of the society - Transparency International Australia and the Accountability Roundtable- and of the private sector were also held.

III. Executive summary

Australia

Legal system

The United Nations Convention against Corruption was signed by Australia on 9 December 2003 and ratified by Parliament on 7 December 2005. The power to enter into treaties is an Executive power under section 61 of the Constitution.

Australia has a federal system with three layers of government: federal, state and local. Australia is a constitutional democracy based on the Westminster system, a system which provides checks and balances to guard against corruption. The review of Australia was limited to the federal level.

Under the Constitution, power is divided between three separate branches of government: the legislature, executive and judiciary.

Overview of the anti-corruption legal and institutional framework of Australia

Australia has several agencies, including the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Crime Commission (ACC), the Commonwealth Ombudsman and the Australian Federal Police (AFP), which prevent and detect corruption. The Government’s approach to corruption is based on the idea that no single body should be solely responsible for anti-corruption. All Government agencies must maintain plans for preventing and reporting corruption.

IMPLEMENTATION OF CHAPTERS III AND IV

Criminalization and Law Enforcement (Chapter III)

2.1.1. Main findings and observations

Bribery offences; trading in influence (articles 15, 16, 18, 21)

Bribery of a Commonwealth public official is a criminal offence, and covers a wide array of public officials at the federal level and a range of conduct involving the giving of benefits, obtaining gains or causing losses. It is also a criminal offence for a public official to receive an undue advantage in exchange for influence, either actual or perceived, on the exercise of that official’s duties.

Australia continues to improve its measures to combat foreign bribery. In 2010, penalties were increased to a maximum of 10 years imprisonment and/or a fine of 10,000 penalty units (S$1.1 million). The maximum penalty for a body corporate was also increased. Broad jurisdiction applies both to conduct within Australia, and to conduct by Australian citizens, residents and companies overseas. In addition, the definition of “foreign public official” extends to officials designated by law or custom. Detection of foreign bribery crimes is facilitated under the Anti-Money Laundering and Counter Terrorism Financing Act (2006).
Although passive bribery by foreign public officials has not been made a criminal offence in Australia, its laws provide for evidence sharing with the respective government so that the official may be prosecuted domestically.

The number of cases of foreign bribery having reached the criminal justice system remains small. Australia emphasized that foreign bribery is an enforcement priority, and consultations with the private sector confirmed that attention to foreign bribery has recently increased. This encouraging development was noted, and progress in the area of foreign bribery will be analysed in more depth in a future multilateral review.

While the foreign bribery statute criminalizes many forms of payment made to foreign government officials, there is an exception for facilitation payments made to expedite or to secure the performance of a routine governmental action by a foreign official, political party or party official. In contrast, the principal domestic bribery statute contains no such exception. Notwithstanding the fact that the obligation of appropriate culpability to establish a criminal offence is fundamental to the legal system of Australia, as well as a constituent element of the offence established in accordance with article 16(1) of the Convention (“committed intentionally”), it was noted that the Convention contains no enumerated exception for facilitation payments. Accordingly, Australia should consider continuing to review its policies and approach on facilitation payments in order to effectively combat the phenomenon. Australia reported that the issue of facilitation payments is currently under review.

The Criminal Code Act (1995) conforms to the requirements of UNCAC with regard to trading in influence, which encompasses both acting and refraining from acting.

There is no specific offence under the Australian Corporations Act (2001) which deals directly with private sector bribery, although there are provisions in that Act which may have some application. Australia reported that companies must maintain guidelines for preventing and reporting crimes or risk facing corporate liability for corrupt acts by employees. The Corporations Act contains principles-based offence provisions that are intended to prevent corporate misconduct generally rather than specific offences such as bribery or money-laundering.

*Laundering of proceeds of crime; concealment (articles 23, 24)*

The main provisions criminalizing the laundering of proceeds of crime are contained in Division 400 of the Criminal Code. Australia has a robust regime to detect and deter money-laundering and terrorism financing. The legal framework comprises the Anti-Money Laundering and Counter-Terrorism Financing Act (2006), which establishes obligations that are supervised and regulated by the Australian Transaction Reports and Analysis Centre (Austrac).

In 2010, Australia introduced legislative amendments to the money-laundering offences to further increase their effectiveness and to expand geographical jurisdiction. These offences incorporate elements of intent, recklessness and negligence, which go beyond the minimum requirements of article 23 of the Convention. Penalties range up to a maximum of 25 years imprisonment, and the court can also impose a fine of up to $1.65 million for individuals and $8.25 million for companies.

In addition, the money-laundering offences apply to both proceeds (i.e., money or property that is derived or realized, directly or indirectly, from the commission of an indictable offence — an offence with a prison term of more than 12 months) and instruments of a crime (i.e., money or property used in or to facilitate the commission of an indictable offence). Importantly, the money-laundering offences apply to the proceeds of crime derived from both Commonwealth indictable offences and foreign indictable offences. To proceed with the money-laundering charge, there is no need for there to be a conviction for the predicate or underlying offence.
All “indictable offences”, which means offences with a penalty of at least 12 months imprisonment, count as predicate offences. It was noted that the range of indictable offences at the Commonwealth level is comprehensive of Convention offences.

*Embezzlement; abuse of functions; illicit enrichment (articles 17, 19, 20, 22)*

Criminal penalties apply to the misuse of public property by public officials through the Financial Management and Accountability Act (1997) and the Commonwealth Authorities and Companies Act (1997) (CAC Act). For Commonwealth Authorities, the CAC Act also contains criminal penalties when officials do not act in good faith, misuse their position or information to the detriment of the Authority. The Criminal Code details offences that relate to the administration of government more broadly, including theft, obtaining property or financial advantage by deception, making of false statements on official documents and general dishonesty by public officials.

Regarding abuse of functions, the Criminal Code prohibits a wide array of activity, including when the official unlawfully acts with the intention of dishonestly obtaining a benefit for themselves or another person or dishonestly causing a detriment to another person. In some cases, this can include conduct committed intentionally or recklessly, which goes beyond the minimum standards in the Convention.

An illicit enrichment offence was considered during development of unexplained wealth powers in the Crimes Legislation Amendment (Serious and Organised Crime) Act (2010). Australia concluded that it would not be appropriate to implement such a criminal offence due to concerns that it may trespass on the presumption of innocence. Nevertheless, under the Proceeds of Crime Act (2002) (POCA), unexplained wealth can be restrained and confiscated in civil proceedings.

Where there are reasonable grounds to suspect that a person’s total wealth exceeds the value of that wealth that was lawfully acquired, the court can compel the person to prove that his or her wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence, or a State offence with a federal aspect. If the person cannot demonstrate this, the court may order them to pay the proportion of wealth that they cannot demonstrate was legitimately obtained. This innovative approach to addressing concerns of unexplained wealth and illicit enrichment outside the scope of the criminal justice system was particularly noted.

As these provisions are implemented in the context of the considerable protections afforded to the defendant under the Australian legal system, the effectiveness of these measures will be of interest to future reviews.

With respect to embezzlement in the private sector, section 596 of the Corporations Act (2001) makes fraud by officers of a company a criminal offence.

*Obstruction of justice (article 25)*

The Criminal Code prohibits the obstruction of justice, including intimidating or corrupting witnesses, inducing false testimony, deceiving a witness, preventing the attendance of a witness in court, tampering with or destroying evidence and attempting to pervert justice. These measures go beyond the minimum standards in the Convention.

*Liability of legal persons (article 26)*

The Crimes Act provides that a law of the Commonwealth relating to indictable offences shall, unless the contrary intention appears, refer to bodies corporate as well as to natural persons. This provision makes bodies corporate subject to many offences, and affects the sentence that can be imposed on a corporation, including criminal, civil and/or administrative sanctions.

*Participation and attempt (article 27)*
Part 2.4 of the Criminal Code extends criminal responsibility to aiding, abetting, counselling or procuring the commission of an offence, joint commission, commission by proxy, incitement and conspiring to commit an offence. A person who attempts to commit an offence can be punished as if the offence attempted had been committed. Section 11.5 of the Criminal Code Act (1995) prohibits a person from conspiring with another person to commit an offence so long as at least one overt act (which can be an act in preparation to commit the offence) has occurred.

Prosecution, adjudication and sanctions; cooperation with law enforcement authorities (articles 30, 37)

Australia has strong criminal, civil and administrative sanctions in place to address acts of corruption, and courts are obligated to take into account the circumstances of the offence in determining an appropriate sentence. Crown immunity from criminal responsibility does not extend to public servants. The Commonwealth Department of Public Prosecutions (CDPP) is responsible for prosecution of offences of laws against the Commonwealth.

Australia’s approach that no individual is immune from prosecution for corruption cases, including parliamentarians, deserves favourable mention, although certain evidentiary restrictions protect statements made on the floor of the parliament from being presented in a subsequent criminal prosecution.

With regard to parole, although there was no written policy that requires the Attorney-General to take certain factors into account when determining parole, Australia reported that the nature and circumstances of the offence are taken into account in making such a decision.

An Agency Head may suspend an Australian Public Service employee from duties on grounds of a suspected breach of the Code of Conduct and if it is in the public interest or the agency’s interest. If the employee has breached the Code of Conduct, employment may be terminated. In addition, the Commonwealth Electoral Act (1918) disqualifies persons who have been convicted of bribery from sitting in Parliament for two years from the conviction. The Constitution also disqualifies from such office a person who is under sentence for any indictable offence; however, they may nominate once they have completed their sentence.

Persons who have a criminal record or who are convicted of a criminal offence are not automatically excluded from employment in the Australian Public Service, but this can be taken into account in making an employment decision.

With regard to cooperation with law enforcement, the CDPP may give a person written assurances that they will not be prosecuted, subject to conditions determined by the Policy of the Commonwealth. In determining the appropriate sentence upon conviction, courts must take into account the degree of cooperation with law enforcement.

Protection of witnesses and reporting persons (articles 32, 33)

Australia’s mechanisms to protect persons giving evidence in judicial proceedings make no distinction between victims and witnesses. The Witness Protection Act (1994) and the National Witness Protection Program provide protection and assistance to witnesses identified as being at risk because of assistance they have given to law enforcement.

In addition, the Witness Protection Act allows for the court to hold proceedings in private and suppress the publication of evidence given. The Criminal Code empowers the court to issue orders to protect witnesses, their identities and their families.
With regard to the protection of reporting persons, the Public Service Act 1999 and the Parliamentary Service Act 1999 provide that a person must not victimize, or discriminate against, an Australian Public Service (APS) or Parliamentary Service employee because that employee has reported breaches (or alleged breaches) of the applicable Codes of Conduct. Regulation 2.4 of the Public Service Regulations 1999 requires an APS Agency Head to establish procedures for dealing with a report made by an APS employee under the Public Service Act.

Australia reported that draft legislation is currently being developed to provide a comprehensive scheme for public sector whistle-blower protection at the Commonwealth level, and further noted that means to expedite access to the existing whistle-blower protections in Part 9.4AAA of the Corporations Act for the private sector were also under consideration. These positive developments were acknowledged.

_Freezing, seizing and confiscation; bank secrecy (articles 31, 40)_

The POCA establishes a civil scheme for restraining and confiscating the proceeds and instruments of Commonwealth indictable offences, foreign indictable offences and indictable offences of Commonwealth concern. Measures include:

- Confiscation of the proceeds and instruments of crime following a person’s conviction for a Commonwealth indictable offence;
- A non-conviction-based process where the Court is satisfied that (a) a person has committed a serious offence, or (b) the property is proceeds of an indictable offence or the instrument of a serious offence;
- Pecuniary penalty orders, which require a person to pay an amount equal to the profit derived from a crime;
- Literary proceeds orders, derived from commercial exploitation of notoriety; and
- Unexplained wealth orders.

The POCA allows for the confiscation of instruments of offences, including where no conviction has been obtained, and provides tools to identify and trace property, including examinations, production and monitoring orders, and mechanisms to freeze, restrain and seize property. Parties can apply for their legitimately acquired property to be excluded from restraint or forfeiture where the property was lawfully acquired. Under the Banking Act 1959 and the POCA, bank secrecy is not an impediment to AFP investigations.

_Statute of limitations; criminal record (articles 29, 41)_

Under Section 15B of the Crimes Act, a prosecution may be commenced at any time if the maximum penalty is a term of imprisonment of more than six months. A prosecution of a body corporate may be commenced at any time if the maximum penalty is a fine of more than 150 penalty units. In any other case, prosecution must begin within one year after the commission of the offence.

Australian courts take into account similar convictions that have been recorded elsewhere when sentencing a person for an offence.

_Jurisdiction (article 42)_

With regard to most corruption offences, jurisdiction is established over acts committed wholly or partly within the territory of Australia as well as acts committed by nationals, residents and corporate bodies overseas. Specifically, the money-laundering offence applies to conduct occurring in Australia, proceeds or instruments of crime relating to indictable offences, conduct by citizens, residents and bodies corporate, and ancillary offences relating to primary offences occurring in Australia.

_Consequences of acts of corruption; compensation of damage (articles 34, 35)_
Australia has remedies in place to address corruption, including criminal, civil and administrative sanctions. Further, Australia’s legal system provides for natural or legal persons to seek compensation for wrongs through civil proceedings, including tort, contract or another common law principle. In addition, Australia makes efforts to ensure severe consequences for public officials who engage in corruption, including the possible forfeiture of the public sector contribution to the convicted official’s pension fund.

Specialized authorities and inter-agency coordination (articles 36, 38, 39)

Australia employs a multi-agency approach to corruption involving many Commonwealth Agencies. The ongoing process by Australia to develop a comprehensive national anti-corruption action plan was noted.

Australia has in place an effective system for coordination and sharing of intelligence among anti-corruption institutions. The recently established Commission for Law Enforcement Integrity, which is a leading anti-corruption institution, demonstrated a significant proactive approach to anti-corruption. This and other relevant institutions are detailed below.

Australian Commission for Law Enforcement Integrity (ACLEI): In 2006, the Law Enforcement Integrity Commissioner Act 2006 (LEIC Act) established a new independent office of Integrity Commissioner, supported by the ACLEI. The Integrity Commissioner has jurisdiction to investigate activities of the AFP, ACC and since 1 January 2011, the Australian Customs and Border Protection Service.

The LEIC Act contains measures to maintain ACLEI’s integrity and to ensure that it remains free from political interference.

Australian Federal Police (AFP): Commonwealth agencies are required to refer all matters of serious and complex fraud, bribery and corruption matters against the Commonwealth to the AFP.

Australian Crime Commission (ACC): The ACC is Australia’s national criminal intelligence agency with unique investigative capabilities. The ACC conducts special operations and investigations against Australia’s highest threats and organized crime.

Australian Public Service Commission (APS): The Public Service Commissioner’s functions include promoting the APS Values and Code of Conduct. The Commissioner can inquire into allegations of breaches of the APS Code of Conduct by agency heads and report findings to the appropriate Minister or, for certain agency heads, officers of Parliament. The Commissioner is also required to evaluate the adequacy of systems for ensuring compliance with the APS Code of Conduct. The Commissioner and the Merit Protection Commissioner may inquire into whistle-blowing reports in certain circumstances.

The Commonwealth Ombudsman: The Ombudsman is independent and impartial, and plays an important role, along with courts and administrative tribunals, in examining government administrative action.

A strong regulatory framework governing Australia’s private sector encourages cooperation between the private sector and relevant law enforcement authorities, including reporting suspicious activities to AUSTRAC.

Successes and good practices

Overall, the following successes and good practices in implementing Chapter III of the Convention are highlighted:
• The broad jurisdiction of the foreign bribery offence, applying both to conduct within Australia, and to conduct by citizens, residents and companies overseas.

• The definition of “foreign public official,” which extended to officials designated by law or custom.

• The money-laundering offences, which incorporate elements of intent, recklessness and negligence, and which go beyond the minimum standards in article 23.

• Australia’s position that no individual is immune from prosecution for corruption cases, including parliamentarians.

• The development and expansion of the federal non-conviction-based forfeiture regime in Australia.

• Australia’s positive efforts to ensure severe consequences for public officials who engage in corruption, including the possible forfeiture of the public sector contribution to the convicted official’s pension fund.

Challenges and recommendations

The following steps could further strengthen existing anti-corruption measures:

• 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.

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

• The adoption and implementation of legislation currently under review for the establishment of a comprehensive scheme for public sector whistle-blower protection and to expedite access to existing protections for private sector whistle-blowers.

• 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.

International cooperation (Chapter IV)

2.2.1. Main findings and observations

Extradition, transfer of sentenced persons; transfer of criminal proceedings (articles 44, 45, 47)

Extradition is principally covered by the Extradition Act 1988. The Extradition (Convention against Corruption) Regulations (2005) facilitate Australia’s ability to make and receive requests to and from States parties to the Convention with respect to Convention offences. Although there are no major issues in handling extradition from and to Australia, the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill which was passed on 29 February 2012, will make a number of changes to the current system to streamline and modernize the extradition process.

Australia does not make extradition conditional on the existence of a bilateral treaty, and considers the Convention as the basis for extradition cooperation with other States parties. Australia is a party to several multilateral conventions that deal with extradition and has 38 bilateral extradition treaties in force. In the absence of a bilateral extradition treaty, Australia is able to receive extradition requests, provided that the requesting country is declared to be an extradition country in regulations made under the Extradition Act. To date, 31 countries have been declared extradition countries in the absence of a bilateral extradition treaty.
Dual criminality, a prerequisite to extradition from Australia, is determined based on the conduct underlying the extradition request. The offence for which extradition is sought must be punishable by at least 12 months imprisonment or as otherwise agreed by treaty. If extradition is sought for offences that are not “extradition offences”, an accessory extradition can occur if the person has consented to extradition.

Most of Australia’s extradition relationships are conducted on a “no evidence” basis. The requesting country shall provide relevant authenticated documentation, such as a statement of the offence and the applicable penalty, warrant for arrest or evidence of conviction or sentence, and statement setting out the alleged conduct constituting the offence. A full brief of evidence is not necessary.

Extradition must be refused, among other reasons, for political offences as well as for military offences that are not also offences under the ordinary criminal law of Australia. Requests cannot be refused on the ground that the offence involves fiscal matters.

A sentenced person may apply to serve their sentence in their home country under the International Transfer of Prisoners Scheme. The Scheme is consent-based and allows Australians imprisoned overseas, and foreign nationals imprisoned in Australia, to serve the balance of their sentence in their home country provided certain conditions are met. Australia is currently able to undertake transfers with over 60 countries through the Council of Europe Convention on the Transfer of Sentenced Persons and several bilateral treaties.

Due process is observed at all stages of the consideration of an extradition request.

Moreover, the Extradition Act applies a range of human rights safeguards to the extradition process.

Australia does not transfer criminal proceedings. In cases of concurrent jurisdiction, Australia is able to both extradite a person and provide mutual legal assistance.

Mutual legal assistance (article 46)

Australia is a party to numerous mutual legal assistance bilateral and multilateral arrangements. The Mutual Assistance in Criminal Matters Act 1987 (MACMA) enables Australia to provide other countries the widest measure of legal assistance in investigations, prosecutions and judicial proceedings in relation to Convention offences. The Mutual Assistance in Criminal Matters (Convention against Corruption) Regulations 2005 facilitate Australia’s ability to make and receive mutual assistance requests to and from States parties to the Convention.

The Attorney-General’s Department (AGD) is the Central Authority for mutual legal assistance in criminal matters. Foreign requests are referred to the AFP for execution.

Dual criminality is a discretionary ground for refusing a request for mutual legal assistance. The Attorney-General can take into consideration the circumstances of the case, including the Convention, in making a decision whether or not to grant a request for assistance. Bank secrecy is not a ground for refusing a request. A request must be refused if granting the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory. Similarly, a request must be refused if it was made to prosecute, punish or otherwise prejudice a person on account of his or her race, gender, religion, nationality or political opinions.

Australia’s international assistance includes taking evidence, locating witnesses, production of documents, executing search warrants, providing material from Australian investigations, and locating, restraining and forfeiting proceeds of crime. Information relating to criminal matters can be transmitted, without the involvement of formal requests, on an informal basis. Any exercise of coercive powers, such as a search warrant, must be sought through a formal request. Australia will
comply with a foreign country’s request to keep information confidential except insofar as disclosure of the request is required in the performance of one’s duties or approval of disclosure is provided by the Attorney-General.

Under Australian law, a mere suspect cannot be compelled to give evidence; however, in such cases, Australia liaises with the requesting country to provide necessary information.

Australian law meets standards set forth in article 46(27) of the Convention regarding safe conduct.

Any material received by Australia from a foreign country for the purposes of a proceeding or investigation is not to be used for any other purpose without the approval of the Attorney-General. As a matter of practice, Australia will seek the consent of the foreign country before asking the Attorney-General to approve the use of material for another purpose.

The AGD liaises with domestic law enforcement agencies when processing mutual assistance requests. All active requests are tracked via an electronic casework database of exceptional quality.

Generally, Australia will bear the ordinary and reasonable costs of executing a request, subject to any relevant bilateral or multilateral agreements.

*Law enforcement cooperation; joint investigations; special investigative techniques (articles 48, 49, 50)*

To enhance international cooperation, Australia has an extensive law enforcement liaison network. The AFP plays a key role in law enforcement cooperation through operational planning and information sharing. The AFP’s International Liaison Officer Network has offices in 29 countries. The Network supports bilateral or multilateral cooperation, and cooperates closely with other counterparts in the framework of ASEAN Chiefs of Police Conference (ASEANAPOL), Pacific Islands Chiefs of Police (PICP), INTERPOL, the National Central Bureau Conference, the Australia and New Zealand Police Commissioners Forum, Europol, and the Asia/Pacific Group on Money-Laundering. The AFP has information-sharing agreements in place with each state and territory police force in Australia, as well as federal and state law enforcement departments and agencies.

The AFP is invested with wide powers to combat serious offences, including corruption, and has extensive powers to conduct undercover and controlled operations.

### 2.2.2. Successes and good practices

Overall, the following successes and good practices in implementing Chapter IV of the Convention are highlighted:

* The AFP’s impressive cooperation measures at both the domestic and international levels, and their experience and expertise in detecting and investigating corruption, which could further assist foreign law enforcement counterparts.

* The existence of a comprehensive range of investigative tools for fighting corruption in Australia.

* The high quality of databases to track extradition and mutual legal assistance matters.

### 2.2.3. Challenges and recommendations

The following steps could further strengthen existing anti-corruption measures:
• 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.

IV. TECHNICAL ASSISTANCE NEEDS

Australia has identified no technical assistance needs at this time.
Implementation of the Convention

A. Ratification of the Convention

Australia signed the Convention on 9 December 2003 and ratified it by Parliament on 7 December 2005. Australia deposited its instrument of ratification with the Secretary-General on 7 December 2005.

The Convention is implemented by a number of key pieces of Commonwealth legislation, including the Criminal Code 1995 and the Crimes Act 1914 and a range of subsidiary instruments, such as the Extradition (Convention Against Corruption) Regulations 2005 and the Mutual Assistance in Criminal Matters (Convention Against Corruption) Regulations 2005.

B. Legal system of Australia

The Convention and Australia’s legal system

The power to enter into treaties is an Executive power under section 61 of the Australian Constitution. Under the Constitution, treaty making is the formal responsibility of the Executive Government.

The key legislative power to implement treaties in Australian domestic law is granted in subsection 51(29) of the Australian Constitution and is known as the ‘external affairs power’. States and Territories can have a complementary role in implementing treaties in cases where treaty provisions are affected in whole or in part by State or Territory legislation.

Accordingly, the Convention was ratified by Australia on 7 December 2005 and an instrument of ratification was deposited with the Secretary-General on that same date. The Convention entered into force in Australia on 6 January 2006 (in accordance with Article 68 of the Convention). The Convention is implemented by provisions in a number of key pieces of Commonwealth legislation, including the Criminal Code 1995 and the Crimes Act 1914 and a range of subsidiary instruments, such as the Extradition (Convention Against Corruption) Regulations 2005 and the Mutual Assistance in Criminal Matters (Convention Against Corruption) Regulations 2005.

AUSTRALIA’S SYSTEM OF GOVERNMENT

Australia has a federal system with three layers of government: federal, state and local.

Australia is a constitutional democracy based on the Westminster system, a system which provides checks and balances to guard against corruption. Ministers are constitutionally responsible for government departments and are answerable to Parliament for any abuses of power.

The doctrine of the separation of powers is a key principle underpinning the Constitution. Under the Constitution, the three types of government power, legislative, executive and judicial, are divided between three separate branches of government, the legislature, executive and judiciary, respectively. This separation of power ensures that no one body has a concentration of power. By distributing the power, each branch of government acts as a check and balance on the other.

The rule of law underpins Australia’s legal system and system of government. The rule of law is the principle that every person, regardless of rank, status or office should be subject to the same legal and judicial processes. In Australia, the rule of law is upheld by a strong and professional judiciary, whose independence is constitutionally protected.

Together, these constitutional safeguards form a strong basis for preventing and addressing corruption in Australia.
The Federal Approach to Corruption

The Australian Government’s approach to preventing corruption is based on the idea that no single body should be solely responsible for anti-corruption. Instead, the strong constitutional foundation is enhanced by a range of bodies and government initiatives designed to promote accountability and transparency. This strategy addresses corruption in both the private and public sectors.

Australia sees this distribution of responsibility as a great strength in Australia’s approach to corruption because it creates a strong system of checks and balances. All Government agencies must maintain guidelines for preventing and reporting corruption and all companies must also maintain guidelines for preventing and reporting crimes or risk facing liability for corrupt acts by employees.

Australia has a strong legislative regime criminalising corrupt behaviour. Australia’s corruption offences cover a very broad range of crimes, including bribery, embezzlement, nepotism and extortion. For this reason, Australia’s corruption offences are not contained in any single Act of Parliament.

Usually, different types of corruption are dealt with in different pieces of State, Territory and Commonwealth legislation. For example, at the Commonwealth level:

- Domestic bribery and foreign bribery offences are contained in the Criminal Code Act 1995
- Obstruction of justice is criminalised in the Crimes Act 1914
- Dealing in proceeds of crime is an offence under the Criminal Code Act 1995, and
- Breach of duties as a director of a company is dealt with by the Corporations Act 2001.

Responsibility for investigating corruption-related offences is similarly divided between State and Territory police forces, the Australian Federal Police and specialised bodies such as the Australian Crime Commission, the Australian Commission for Law Enforcement Integrity, the Commonwealth Ombudsman and the Australian Securities and Investments Commission.
STATES AND TERRITORIES

Map of Australia with the External Territories identified:
Map of Australia with the States and internal Territories identified:

Australia is a federation of six States - New South Wales, Victoria, Queensland, Western Australia, South Australia and Tasmania. Each State has its own government, parliament and court system.

The Constitution established a parliamentary system of government with a federal government (the Australian Government or Commonwealth Government), parliament and judiciary. However, the Constitution does not impact on the systems of government in the States.

The founders of the Australian Constitution intended that the Australian Parliament would have the power to legislate on specific areas of common concern to the whole of Australia. The powers of the Australian Parliament are, therefore, limited to specific heads of power set out in the Constitution.

States and Territories have the power to make their own laws over matters not controlled by the Commonwealth (section 51 of the Constitution). State governments also have their own Constitutions, as well as independently functioning legislatures, executives and judiciaries.

Territories are areas within Australia’s borders that are not claimed by one of the six States. Territories can be administered by the Australian Government, or they can be granted a right of self-government. Self-government allows a territory to establish its own government in a similar manner to a State.

Australia has two self-governing internal territories (the Australian Capital Territory and the Northern Territory) and one self-governing external territory (Norfolk Island). All other internal and external territories are administered by the Australian Government.

Each State and Territory has criminalised corrupt activities such as bribing public officials and attempting to pervert the course of justice. Statutory offences are complemented by common law offences. When the Commonwealth legislative regime is taken together with the State and Territory legislative regimes, Australian legislation meets the mandatory requirements for Criminalisation under Chapter III of UNCAC.

The Commonwealth and each State and Territory also have a Code of Conduct or ethical standards that apply to their public service and prohibit corrupt practices. All Australian police forces are similarly governed by a Code of Conduct.
All States and Territories in Australia have some criminal law legislation, however in New South Wales, South Australia and Victoria the bulk of criminal law is based on the common law whereas in the other States and Territories the criminal law has been codified. The States and Territories with common law jurisdictions have Crimes Acts which list the most common offences and fix their penalties, but do not always exhaustively define the elements of the offence e.g. *Crimes Act 1900* (NSW).

The jurisdictions with a criminal code are:

- the Commonwealth
- the Australian Capital Territory
- the Northern Territory
- Queensland
- Tasmania, and
- Western Australia.

In these jurisdictions a statutory code has been introduced to be a comprehensive statement of criminal law, and is interpreted to replace the common law except in cases of ambiguity. Legislation (including the criminal codes) is further refined by the method of judicial precedent and interpretation.

**CRIMINAL LAW**

The Australian Parliament was not given any specific powers with regard to criminal law. Commonwealth criminal legislation is primarily restricted to criminal activity against Commonwealth interests, Australian Government officers or Commonwealth property.

Commonwealth criminal law also addresses crimes with an international element such as international drug trafficking, hijacking of aircraft, child sex tourism, slavery and sexual servitude and the bribery of foreign officials.

Accordingly, most criminal law is State and Territory law and most criminal prosecutions occur in State and Territory courts. Indictable offences are usually heard before a jury in State and Territory Supreme Courts.

The Commonwealth and the States and Territories have their own domestic bribery offences and proceeds of crime legislation. However, the overlap between Federal and State and Territory criminal law does not cause difficulties in practice as the Australian Parliament has vested State and Territory courts with extensive jurisdiction to hear matters arising under federal law.

**LAW ENFORCEMENT**

The federal structure of Australia’s system of government extends to law enforcement authorities as well.

The Australia Federal Police (AFP) enforces Commonwealth criminal law, and protects Commonwealth and national interests from crime in Australia and overseas. The AFP is also Australia’s international law enforcement and policing representative, and the chief source of advice to the Australian Government on policing issues.

Each State and the Northern Territory has its own police force to enforce local laws.

Mechanisms, such as the Australian Crime Commission, exist for coordination on criminal matters of national concern.

**National Anti-Corruption Plan**

In September 2011, the Australian Government announced the commitment to develop and implement Australia’s first National Anti-Corruption Plan.
A key objective of the Plan is to strengthen Australia’s existing governance arrangements by developing a whole-of-government policy and plan on anti-corruption.

The Australian Government’s approach to combating corruption is based on a multi-agency approach, which vests responsibilities for anti-corruption policies and initiatives with a number of Commonwealth agencies.

A comprehensive National Anti-Corruption Plan will bring the relevant agencies together under a cohesive framework and strengthen the Government’s capacity to identify and address corruption risks.

The Australian Government has committed to comprehensive public consultation in the development of the Plan. To this end, the Government has conducted a number of public consultation forums, attending by a range of representatives from business, academia and non-government organizations. The Government also called for written public submissions on the Plan, which are available at http://www.ag.gov.au/anticorruptionplan. To facilitate the public consultation process, in March 2012 the Australian Government released a Discussion Paper on the ‘Commonwealth’s Approach to Combating Corruption’.

In addition to extensive public consultation, the Australian Government is conducting a risk profiling exercise to examine current and emerging corruption risks to the Commonwealth, and assess the adequacy of existing arrangements to address those risks.

The Government has indicated that the final Plan will outline the future directions of Commonwealth anti-corruption policy and will include the Government’s response to the UNCAC review, the G20 Action Plan and the result of stakeholder consultations. The Australian Government has announced that the final Plan will be publicly available in early 2013.
C. Implementation of selected articles

Chapter III. Criminalization and law enforcement

Article 15 Bribery of national public officials

Subparagraph (a)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:
(a) The promise, offering or giving, to a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia has made bribery of a commonwealth public official a criminal offence under the following legislation:

Criminal Code 1995

Section 135.1 (7) - Influencing a Commonwealth Public Official
A person is guilty of an offence if:
(a) the person does anything with the intention of dishonestly influencing a public official in the exercise of the official’s duties as a public official; and
(b) the public official is a Commonwealth public official; and
(c) the duties are duties as a Commonwealth public official.
Penalty: Imprisonment for 5 years.

Section 139.1 - Unwarranted demands of a Commonwealth public official
A person is guilty of an offence if:
(a) the person makes an unwarranted demand with menaces of another person; and
(b) the demand or the menaces are directly or indirectly related to:
   i. the other person’s capacity as a Commonwealth public official; or
   ii. any influence the other person has in the other person’s capacity as a Commonwealth public official; and
(c) the first-mentioned person does so with the intention of:
   i. obtaining a gain; or
   ii. causing a loss; or
   iii. influencing the official in the exercise of the official’s duties as a Commonwealth public official.
Penalty: Imprisonment for 12 years.

Section 141.1(1) - Bribery of a Commonwealth Public Official

Giving a bribe
(1) A person is guilty of an offence if:
(a) the person dishonestly:
   i. provides a benefit to another person; or
   ii. causes a benefit to be provided to another person; or
   iii. offers to provide, or promises to provide, a benefit to another person; or
   iv. causes an offer of the provision of a benefit, or a promise of the provision of a benefit,
to be made to another person; and
(b) the person does so with the intention of influencing a public official (who may be the other
person) in the exercise of the official's duties as a public official; and
(c) the public official is a Commonwealth public official; and
(d) the duties are duties as a Commonwealth public official.
Penalty:
- Individual - Imprisonment for 10 years and/or 10,000 penalty units.
- Body Corporate- 100,000 penalty units; or 3 times the value of the benefit obtained from the
conduct; or 10% of the annual turnover of the body corporate during the 12 month period in
which the offence occurred if the court cannot determine the value of the benefit obtained.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the
defendant knew:
(a) that the official was a Commonwealth public official; or
(b) that the duties were duties as a Commonwealth public official.

Section 142.1(1) - Corrupting benefits given to a Commonwealth public official
Giving a corrupting benefit
A person is guilty of an offence if:
(a) the person dishonestly:
   (i) provides a benefit to another person; or
   (ii) causes a benefit to be provided to another person; or
   (iii) offers to provide, or promises to provide, a benefit to another person; or
   (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit,
      to be made to another person; and
   (b) the receipt, or expectation of the receipt, of the benefit would tend to influence a public official
      (who may be the other person) in the exercise of the official's duties as a public official; and
   (c) the public official is a Commonwealth public official; and
   (d) the duties are duties as a Commonwealth public official.
Penalty: Imprisonment for 5 years.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the
defendant knew:
(a) that the official was a Commonwealth public official; or
(b) that the duties were duties as a Commonwealth public official.

As examples of implementation, Australia cited the Grant Russel Mullin and Edward Arthur Dewey
case\(^1\) that reflects criminalization of active bribery under Australian laws. This matter involved a
serious breach of trust placed in the defendant Mullins, by his employer, the Department of Defence.
There was a significant loss to the Commonwealth of more than $1.3 million from the unauthorised
disposal of 183 turbine wheels and spacers. The defendant Mullins, was employed as a Technical
Officer within the Air Lift Systems Programs Office that operated out of the Royal Australian Air
Force (RAAF) Base at Richmond, NSW. The defendant Dewey, was a businessman who was
Company Secretary and Director of EJ Aviation and NAC Australia. Dewey and Mullins developed a
private commercial relationship involving the unauthorised disposal of aircraft parts which were
RAAF property. Their dealings involved the disposal of 183 turbine wheels and spacers. At the time of
disposal these parts had up to another 12 years’ life left in RAAF aircraft engines. The RAAF did not
receive any payment for the disposal of the parts which were assessed to have a replacement value of
$US1,377,187. Dewey gave Mullins corrupt payments totalling $8,494. Mullins also requested gift
vouchers from Dewey. Mullins was charged with three offences contrary to the Criminal Code
for causing a loss to the Commonwealth, asking for a corrupt benefit as a Commonwealth public official
and receiving a corrupt benefit as a Commonwealth public official. Dewey was charged with causing a
loss to the Commonwealth and 3 counts of giving a corrupt benefit to a Commonwealth public

\(^1\) Source: : 2007-2008 CDPP Annual Report
official. On 30 November 2007 Mullins was sentenced to a total effective sentence of 3 years imprisonment to be served by way of periodic detention, to be released after 1 year and 9 months on a recognisance in the sum of $100 to be of good behaviour for 1 year and 9 months. He was also ordered to pay $1,560,689.58 in reparation. On 7 March 2008 Dewey was sentenced to a total effective sentence of 27 months imprisonment to be released forthwith on a recognisance of $1000 to be of good behaviour for a period of 16 months. He was also ordered to pay $1,560,689.58 in reparation.

Statistics for the period between 2010 and 2011 are available and regrouped in the table below:

**Criminal Code Act 1995- Statistics for 2010-11**

<table>
<thead>
<tr>
<th>Section</th>
<th>Defendants dealt with(a)</th>
<th>Defendants convicted</th>
<th>Defendants acquitted</th>
<th>Defendants with 'other' outcomes(b)</th>
<th>Matters currently on hand(c)</th>
</tr>
</thead>
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<tr>
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<td>141.1(1)</td>
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<td>0</td>
</tr>
<tr>
<td>142.1(1)</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
</tr>
</tbody>
</table>

Note: These statistics throughout this report relating to the *Criminal Code Act 1995* have been extracted from the CDPP’s Prosecutions Database.

a) ‘Defendants dealt with’ is the number of finalised trials, sentencees or summary hearings which are recorded in the CDPP’s Prosecutions Database for the 2010-11 financial year. This number will not reflect the number of ‘cases’ due to the fact that one ‘case’ can be made up of multiple summary hearings, multiple trials, or a combination of these prosecutorial ‘phases’. Furthermore, ‘defendants dealt with’ also excludes work undertaken by the Office in relation to assessment of briefs, committal hearings, bail applications, appeals and other types of applications. The concept of ‘defendants dealt with’ is a unit of measurement which is reported annually in the CDPP’s Annual Report and is considered to be a useful and informative indicator of the actual prosecutorial work undertaken by the CDPP. It is not intended to reflect either the number of cases, nor the actual number of defendants prosecuted.

b) ‘Other’ outcomes include, but are not limited to, where charges were discontinued, where a jury was unable to reach a verdict or where a warrant was issued for the arrest of the defendant after they failed to appear in court.

c) Matters currently on hand include all 'open' matters as at 03.11.2011, irrespective of what prosecutorial stage the matter is up to. That is, these figures include briefs currently being assessed, committal hearings currently underway, as well as defendants currently being dealt with in court.

(b) Observations on the implementation of the article

With regard to the question of the definition of “public official” as that term is used in the 1995 Criminal Code, Australia reported that the bribery offences cover Commonwealth public officials, and are intended to encompass a wide range of officials, including Members of Parliament and judicial officers. The definition does not, however, include state and territory officials. The terms “public official” and “commonwealth public official” are defined in the dictionary section of the Commonwealth Criminal Code 1995. With regard to off-shore territories and islands, the Commonwealth legal definition of “public official” applies.

Regarding the definitions of “dishonesty” and “benefit” as used in the 1995 Criminal Code, Australia reported that “dishonesty” is a term that is measured according to the standards of ordinary people and is a question for the trier of fact. A “benefit” can include any advantage, including, but not limited to,
a property advantage. The term “benefit” is intended to apply as broadly as possible. There is no exception for small facilitation payments for domestic bribery-related offenses.

In Australia, bribery of a Commonwealth public official is a criminal offence, and covers a wide array of public officials at the federal level and a range of conduct involving the giving of benefits, obtaining gains or causing losses. In addition, it is also a criminal offense for a public official to receive an undue advantage in exchange for influence, either actual or perceived, on the exercise of that official’s duties.

Australia reported that the terms “gain” and “loss” are broad in scope. “Gain” means a gain in property, whether temporary or permanent, and in services. “Loss” means a loss of property, or not getting what a person might otherwise expect to gain. Property includes both tangible and intangible forms, such as licenses or rights. The term “obtaining” includes with regard to a third person as well.

Australia reported that, pursuant to a decision of its High Court, the term “influencing” with regard to a public official has been defined by the courts to cover both acting and refraining from acting.

The reviewers were satisfied with the answers from Australia.

Article 15 Bribery of national public officials

Subparagraph (b)

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The solicitation or acceptance by a public official, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia has made it an offence for a Commonwealth public official to receive an undue advantage under the sections 139.2 – 142.2 of the Criminal Code 1995.

Criminal Code 1995
Section 141.1(3) - Bribery of a Commonwealth Public Official
Receiving a bribe
(3) A Commonwealth public official is guilty of an offence if:
(a) the official dishonestly:
   (i) asks for a benefit for himself, herself or another person; or
   (ii) receives or obtains a benefit for himself, herself or another person; or
   (iii) agrees to receive or obtain a benefit for himself, herself or another person; and
(b) the official does so with the intention:
   (i) that the exercise of the official’s duties as a Commonwealth public official will be influenced; or
   (ii) of inducing, fostering or sustaining a belief that the exercise of the official’s duties as a Commonwealth public official will be influenced.

Penalty:
- Individual -Imprisonment for 10 years and/or 10,000 penalty units.
- Body Corporate- 100,000 penalty units; or 3 times the value of the benefit obtained from the conduct; or 10% of the annual turnover of the body corporate during the 12 month period in which the offence occurred if the court cannot determine the value of the benefit obtained.

Section 142.1(3) - Corrupting benefits given to, or received by, a Commonwealth public official

Receiving a corrupting benefit

(3) A Commonwealth public official is guilty of an offence if:
(a) the official dishonestly:
   (i) asks for a benefit for himself, herself or another person; or
   (ii) receives or obtains a benefit for himself, herself or another person; or
   (iii) agrees to receive or obtain a benefit for himself, herself or another person;

and

(b) the receipt, or expectation of the receipt, of the benefit would tend to influence a Commonwealth public official (who may be the first-mentioned official) in the exercise of the official’s duties as a Commonwealth public official.

Penalty: Imprisonment for 5 years.

Benefit in the nature of a reward

(4) For the purposes of subsections (1) and (3), it is immaterial whether the benefit is in the nature of a reward.

Section 142.2 - Abuse of public office

(1) A Commonwealth public official is guilty of an offence if:
(a) the official:
   (i) exercises any influence that the official has in the official’s capacity as a Commonwealth public official; or
   (ii) engages in any conduct in the exercise of the official’s duties as a Commonwealth public official; or
   (iii) uses any information that the official has obtained in the official’s capacity as a Commonwealth public official; and

(b) the official does so with the intention of:
   (i) dishonestly obtaining a benefit for himself or herself or for another person;

or

   (ii) dishonestly causing a detriment to another person.

Penalty: Imprisonment for 5 years.

(2) A person is guilty of an offence if:
(a) the person has ceased to be a Commonwealth public official in a particular capacity; and
(b) the person uses any information that the person obtained in that capacity as a Commonwealth public official; and
(c) the person does so with the intention of:
   (i) dishonestly obtaining a benefit for himself or herself or for another person;

or

   (ii) dishonestly causing a detriment to another person.

Penalty: Imprisonment for 5 years.

Some examples include the Andrew Theophanous case (2003) VSCA 78 (20 June 2003). Andrew Theophanous is a former member of the Commonwealth Parliament. In May 2002 he was convicted of one count of conspiring to defraud the Commonwealth, one count of defrauding the Commonwealth and two counts of bribery. The offences were committed while he was an MP and relate to advice and assistance that Theophanous gave in relation to immigration matters. The case centred on allegations
he sought or obtained thousands of dollars to help Chinese nationals with visa applications. Theophanous was convicted and sentenced to three years imprisonment with a minimum term of 21 months.

Statistics for the period between 2010 and 2011 are compiled in the table below.


<table>
<thead>
<tr>
<th>Section</th>
<th>Defendants dealt with(a)</th>
<th>Defendants convicted</th>
<th>Defendants acquitted</th>
<th>Defendants with 'other' outcomes(b)</th>
<th>Matters currently on hand(c)</th>
</tr>
</thead>
<tbody>
<tr>
<td>141.1(3)</td>
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<td>142.2</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>

Note: These statistics throughout this report relating to the Criminal Code Act 1995 have been extracted from the CDPP's Prosecutions Database.

a) ‘Defendants dealt with’ is the number of finalised trials, sentences or summary hearings which are recorded in the CDPP’s Prosecutions Database for the 2010-11 financial year. This number will not reflect the number of ‘cases’ due to the fact that one ‘case’ can be made up of multiple summary hearings, multiple trials, or a combination of these prosecutorial ‘phases’. Furthermore, ‘defendants dealt with’ also excludes work undertaken by the Office in relation to assessment of briefs, committal hearings, bail applications, appeals and other types of applications. The concept of ‘defendants dealt with’ is a unit of measurement which is reported annually in the CDPP’s Annual Report and is considered to be a useful and informative indicator of the actual prosecutorial work undertaken by the CDPP. It is not intended to reflect either the number of cases, nor the actual number of defendants prosecuted.

b) ‘Other’ outcomes include, but are not limited to, where charges were discontinued, where a jury was unable to reach a verdict or where a warrant was issued for the arrest of the defendant after they failed to appear in court.

c) Matters currently on hand include all ‘open’ matters as at 03.11.2011, irrespective of what prosecutorial stage the matter is up to. That is, these figures include briefs currently being assessed, committal hearings currently underway, as well as defendants currently being dealt with in court.

The following table details the statistics for ‘corrupting benefits given/received by Commonwealth public officials’ related offences:

<table>
<thead>
<tr>
<th>Corrupting benefits given/received by a Commonwealth public official</th>
<th>Financial Year</th>
<th>Referrals accepted</th>
<th>Referrals rejected</th>
<th>Total referrals received</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>2009/2010</td>
<td>13</td>
<td>6</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>2010/2011</td>
<td>10</td>
<td>9</td>
<td>19</td>
</tr>
<tr>
<td></td>
<td>2011/2012</td>
<td>4</td>
<td>2</td>
<td>6*</td>
</tr>
</tbody>
</table>

*Note: as at 31 Oct 2011, one additional referral has been received that is currently under evaluation (neither accepted nor rejected at this stage)

(b) Observations on the implementation of the article
The same observations were made under article 15(a).

**Article 16 Bribery of foreign public officials and officials of public international organizations**

**Paragraph 1**

> 1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the promise, offering or giving to a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties, in order to obtain or retain business or other undue advantage in relation to the conduct of international business.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

The Australian Government takes the crime of foreign bribery seriously and continues to take measures to combat foreign bribery. For example, in 2010, Australia increased the penalties for this offence to a maximum penalty for an individual of 10 years’ imprisonment and/or a fine of 10,000 penalty units ($1.1 million). The maximum penalty for a body corporate was also increased to the greatest of the following:

- 100,000 penalty units ($11 million)
- 3 times the value of benefits obtained if the benefits can be ascertained, or
- 10% of the annual turnover if the value of the benefits cannot be ascertained.

Bribing or attempting to bribe a foreign public official is a serious crime and individuals or companies that bribe an official in a foreign country can be prosecuted under Australian law. The foreign bribery offence in the Australian *Criminal Code* conforms to the standards set by the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. The jurisdiction of the offence is broad, applying both to conduct within Australia, and to conduct by Australian citizens, residents and companies overseas. Individuals and companies that offer or pay bribes to foreign public officials are subject to effective, proportionate and dissuasive penalties.²

*Criminal Code 1995*

Section 70.1 - Definitions

*Definition of a foreign public official*

(a) an employee or official of a foreign government body; or
(b) an individual who performs work for a foreign government body under a contract; or
(c) an individual who holds or performs the duties of an appointment, office or position under a law of a foreign country or of part of a foreign country; or
(d) an individual who holds or performs the duties of an appointment, office or position created by custom or convention of a foreign country or of part of a foreign country; or
(e) an individual who is otherwise in the service of a foreign government body (including service as a member of a military force or police force); or
(f) a member of the executive, judiciary or magistracy of a foreign country or of part of a foreign country; or
(g) an employee of a public international organisation; or

² Note that the *Criminal Code 1995* uses the phrases ‘benefit that is not legitimately due’ in place of ‘undue advantage’ and ‘business advantage that is not legitimately due’ in place of ‘business or other undue advantage in relation to the conduct of international business’ as used in the Convention.
(h) an individual who performs work for a public international organisation under a contract; or
(i) a individual who holds the duties of an office or position in a public international organisation; or
(j) an individual who is otherwise in the service of a public international organisation.
(k) a member or officer of the legislature of a foreign country or of part of a foreign country; or
(l) an individual who:
   i. is an authorised intermediary of a foreign public official covered by any of the above paragraphs; or
   ii. holds himself or herself out to be the authorised intermediary of a foreign public official covered by any of the above paragraphs.

Section 70.2 - Bribing a Foreign Public Official
(1) A person is guilty of an offence if:
   (a) the person:
      i. provides a benefit to another person; or
      ii. causes a benefit to be provided to another person; or
      iii. offers to provide, or promises to provide, a benefit to another person; or
      iv. causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and
   (b) the benefit is not legitimately due to the other person; and
   (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:
      i. obtain or retain business; or
      ii. obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Penalty: Individual- Imprisonment for 10 years and/or 10,000 penalty units.

Body Corporate- 100,000 penalty units; or 3 times the value of the benefit obtained from the conduct; or 10% of the annual turnover of the body corporate during the 12 month period in which the offence occurred if the court cannot determine the value of the benefit obtained.

Note 1: For defences, see sections 70.3 and 70.4.
Note 2: Section 4B of the Crimes Act 1914 allows a court to impose a fine instead of imprisonment or in addition to imprisonment.

(1A) In a prosecution for an offence under subsection (1), it is not necessary to prove that business, or a business advantage, was actually obtained or retained.

Benefit that is not legitimately due
(2) For the purposes of this section, in working out if a benefit is not legitimately due to a person in a particular situation, disregard the following:
   (a) the fact that the benefit may be, or be perceived to be, customary, necessary or required, in the situation;
   (b) the value of the benefit;
   (c) any official tolerance of the benefit.

Business advantage that is not legitimately due
(3) For the purposes of this section, in working out if a business advantage is not legitimately due to a person in a particular situation, disregard the following:
   (a) the fact that the business advantage may be customary, or perceived to be customary, in the situation;
(b) the value of the business advantage;
(c) any official tolerance of the business advantage.

In terms of examples, there have been no finalised cases prosecuting foreign bribery. However, the AFP is currently investigating Securency International Pty Ltd (Securency) and Note Printing Australia (NPA) regarding allegations they paid money to offshore agents with political connections in Asia and Africa, with the aim of winning contracts to produce banknotes.

Under Division 70 of the Criminal Code Act 1995, Australian individuals and companies can be charged with criminal offences in Australia if they bribe public officials overseas.

The AFP investigation has run concurrently with investigations by international law enforcement, involving significant cooperation with the United Kingdom Serious Fraud Office, Malaysian Anti-Corruption Commission and Indonesian National Police.

This operation has resulted in Australia’s first arrests under foreign bribery legislation introduced on 17 December 1999. As it is an ongoing investigation it is not appropriate to comment further.

The following table details the statistics for ‘foreign bribery’ related offences

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Referrals accepted</th>
<th>Referrals rejected</th>
<th>Total referrals received</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009/2010</td>
<td>2</td>
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<tr>
<td>2011/2012</td>
<td>1</td>
<td>1</td>
<td>2</td>
</tr>
</tbody>
</table>

(b) Observations on the implementation of the article

Australia reported, with regard to 70.3 and 70.4, that it is a defence if the accused person can demonstrate that the benefit was a facilitation payment (Criminal Code 1995, section 70.4).

Australia reported that in early 2010, penalties were increased for both individuals and corporations. For persons, the maximum penalty is imprisonment for up to 10 years and/or $1.1 million AUD in fines. For corporations, the maximum penalty is a fine up to $11 million AUD or three times the value of the act of bribery. If the latter cannot be determined, the fine is $11 million or 10% of the annual turnover of the company, whichever is greater.

With regard to foreign bribery, Australia provided reference to an example from 2011. This represented Australia’s first foreign bribery prosecution. From 1999 to 2005, senior officials from Securency used international sales agents to bribe officials to secure bank note contracts. AFP charged the company and 9 officials with bribery of foreign public officials, and the case is currently pending in the courts.

Australia takes the crime of foreign bribery seriously and continues to take measures to combat it. In 2010, penalties were increased to a maximum for an individual of 10 years imprisonment and/or a fine of 10,000 penalty units ($1.1 million). The maximum penalty for a body corporate was also increased. The jurisdiction of the offence is broad, applying both to conduct within Australia, and to conduct by Australian citizens, residents and companies overseas. In addition, the definition of “foreign public official” extends to officials designated by law or custom. Individuals and companies that offer or pay bribes to foreign public officials are subject to effective, proportionate and dissuasive penalties.
Although passive bribery by foreign public officials, where a foreign public official solicits or accepts an undue advantage, has not been made a criminal offense in Australia, its laws provide for sharing of evidence with the respective government with a view to the official being prosecuted under its domestic laws.

The number of cases of foreign bribery having reached the criminal justice system remains small. Australia emphasized that foreign bribery is an enforcement priority, and consultations with the private sector confirmed that attention to foreign bribery has increased. This encouraging development was noted, and progress in the area of foreign bribery will be analysed in future reviews.

It was further observed that, while the foreign bribery statute criminalizes many forms of payment made to foreign government officials and employees, there is an exception for facilitation payments made to expedite or to secure the performance of a routine governmental action by a foreign official, political party or party official. In contrast, the principal domestic bribery statute contains no such exception. Notwithstanding the fact that the obligation of appropriate culpability to establish a criminal offense is fundamental to the legal system of Australia, as well as a constituent element of the offence established in accordance with article 16(1) of the Convention ("committed intentionally"), it was noted that the Convention contains no enumerated exception for facilitation payments. Accordingly, Australia should consider continuing to review its policies and approach on facilitation payments in order to effectively combat the phenomenon. Australia should also continue to encourage companies to prohibit or discourage the use of facilitation payments, for example through including rules on facilitation payments in internal company controls, ethics and compliance programmes or measures. Australia reported that the issue of facilitation payments is currently under review. The reviewers recommended that Australia 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.

(c) Success and good practices

The reviewers noted with appreciation that the definition of “foreign public official” extends to officials designated by law or custom. Moreover, there is a broad jurisdiction of the foreign bribery offence, which applies both to conduct within Australia, and to conduct by Australian citizens, residents and companies overseas.

Article 16 Bribery of foreign public officials and officials of public international organizations

Paragraph 2

2. Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the solicitation or acceptance by a foreign public official or an official of a public international organization, directly or indirectly, of an undue advantage, for the official himself or herself or another person or entity, in order that the official act or refrain from acting in the exercise of his or her official duties.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia has criminalised the bribery of domestic public officials and foreign public officials in relation to the conduct of Australians in accordance with the mandatory provisions of Articles 15 and 16 of the UNCAC and the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the Anti-Bribery Convention). Where an offence has no nexus to Australia, Australia considers that it is appropriate for State Parties to pursue the conduct of their
officials in their own jurisdictions, which is likely to be where the majority of the evidence is located. Australia provides assistance to other State Parties to assist with this process under mutual legal assistance arrangements and in accordance with Australia’s international cooperation obligations.

Where a foreign public official solicits or accepts an undue advantage, Australia’s laws provide for sharing of evidence about the conduct of the official with their government with a view to the official being prosecuted under their domestic laws.

Australia has been assessed twice on its implementation of the OECD Anti-Bribery Convention by the OECD Working Group on Bribery, in 1999 and 2006.

The 1999 Phase 1 review evaluated whether the legislation through which participants implement the OECD Anti-Bribery Convention meet the standard set by the Convention. The Working Group considered that the Australian legislation conformed to the standards set by the Convention and welcomed the legislation’s detail and specificity.

The 2006 Phase 2 review evaluated the structures put in place to enforce the laws and rules implementing the OECD Anti-Bribery Convention and assessed their application in practice. The Working Group was generally positive of Australia’s implementation of the OECD Anti Bribery Convention, and acknowledged the Australian Government’s strong commitment to combating foreign bribery. The report made recommendations for improvement focusing on three areas: improving public and private awareness of Australia’s foreign bribery offence, improving investigation and detection of foreign bribery and specific measures for preventing and detecting foreign bribery.

In the 2008 follow-up to the 2006 evaluation, the Working Group found that Australia had fully implemented 12 recommendations and partially implemented an additional 10 of the 22 recommendations. The two remaining recommendations relating to improved training for cash dealers and increased penalties for the foreign bribery offence have since been implemented.

Relevant OECD review reports have been submitted to the reviewers.

(b) Observations on the implementation of the article

Australia reported that it has considered the offence of passive bribery of foreign public officials, and decided that it presented a nexus problem under the law. As an alternative, Australia readily shares information of such cases back to the country of citizenship of the foreign public official for possible investigation and prosecution.

The reviewers were satisfied with the answers provided.

Article 17 Embezzlement, misappropriation or other diversion of property by a public official

Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally, the embezzlement, misappropriation or other diversion by a public official for his or her benefit or for the benefit of another person or entity, of any property, public or private funds or securities or any other thing of value entrusted to the public official by virtue of his or her position.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia has fully criminalised embezzlement of property by public officials. The main piece of
legislation that implements this article and covers the financial conduct of public officials is the
Financial Management and Accountability Act 1997, the relevant sections of the Act are:
- Section 10 - Public money must be promptly banked etc.
- Section 11 - Public money not to be paid into non-official account
- Section 12 - Receipt and spending of public money by outsiders
- Section 13 - Money not to be withdrawn from official account without authority
- Section 14 - Misapplication or improper use of public money
- Section 16 - Special Instructions by Finance Minister about handling etc. of special public money
- Section 26 - Drawing rights required for payment etc. of public money
- Section 40 - Custody etc. of securities
- Section 41 - Misapplication or improper use of public property
- Section 43 - Gifts of public property
- Section 60 - Misuse of Commonwealth credit card

The Commonwealth Authorities and Companies Act 1997 covers bodies corporate incorporated for a
public purpose that hold money on their own account.

The Criminal Code 1995 also details a number of offences that relate to the administration of
government more broadly, including misappropriation and other diversion of property offences. The
relevant offences contained in the Code include:
- Theft (section 131.1)
- Dishonest taking or retention of property (section 132.8)
- Obtaining property by deception (section 134.1)
- Obtaining a financial advantage by deception (section 134.2)
- General dishonesty (section 135.1)
- Obtaining a financial advantage (section 135.2)
- Conspiracy to defraud (section 135.4)
- False or misleading statements in applications (section 136.1)
- False or misleading information or documents (division 137), and
- Abuse of public office (section 142.2).

Financial Management and Accountability Act 1997
Part 3 - Collection, custody etc. of public money
Section 10 - Public money must be promptly banked etc.
An official or Minister who receives public money (including money that becomes public money upon
receipt) must bank it as required by the regulations or otherwise deal with it as required by the
regulations. For this purpose, money includes cheques and similar instruments.

Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

Section 11 - Public money not to be paid into non-official account
An official or Minister must not deposit public money in any account other than an official account.
For this purpose, money includes cheques and similar instruments.

Penalty: Imprisonment for 7 years.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

Section 12 - Receipt and spending of public money by outsiders
(1) An official or Minister must not enter into an agreement or arrangement for the receipt, custody
or payment of public money by an outsider unless:
(a) the Finance Minister has first given a written authorisation for the agreement or arrangement; or
(b) the agreement or arrangement is expressly authorised by this Act or by another Act.
Penalty: Imprisonment for 7 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(2) An outsider commits an offence if:
(a) the outsider receives or has custody of public money under an agreement or arrangement mentioned in subsection (1); and
(b) the outsider makes a payment of the public money; and
(c) that payment is not authorised by the agreement or arrangement.
Penalty: Imprisonment for 2 years.

Note: Section 27 allows a drawing right to be issued to an official or a Minister to debit an amount against an appropriation (as a result of a payment of public money by an outsider).

(3) In this section:
*outsider* means any person other than the Commonwealth, an official or a Minister.

Section 13 - Money not to be withdrawn from official account without authority
An official must not withdraw money from an official account except as authorised by the regulations.
Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Section 14 - Misapplication or improper use of public money
An official or Minister must not misapply public money or improperly dispose of, or improperly use, public money.
Penalty: Imprisonment for 7 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Section 16 - Special Instructions by Finance Minister about handling etc. of special public money
(1) The Finance Minister may, by legislative instrument, issue Special Instructions about special public money, including instructions about:
(a) the custody of special public money;
(b) the investment of special public money;
(c) the application of interest or other amounts derived from the investment of special public money;
(d) the application of special public money in paying the expenses involved in dealing with special public money.

(2) In case of inconsistency, Special Instructions override this Act, the regulations and the Finance Minister’s Orders. However, Special Instructions cannot be inconsistent with the terms of any trust that applies to the money concerned.

(3) An official or Minister must not contravene any Special Instruction.

Penalty: Imprisonment for 2 years.
Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

(4) In this section: *special public money* means public money that is not held on account of the Commonwealth or for the use or benefit of the Commonwealth.

Note: Money held by the Commonwealth on trust for another person is an example of special public money.

**Part 4 - Accounting, appropriations and payments**

Section 26 - Drawing rights required for payment etc. of public money
An official or Minister must not do any of the following except as authorised by a valid drawing right:
(a) make a payment of public money;
(b) request that an amount be debited against an appropriation;
(c) debit an amount against an appropriation.
Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

**Part 6 - Control and Management of Public Property**

Section 40 - Custody etc. of securities
An official who receives any bonds, debentures or other securities in the course of carrying out duties as an official must deal with them in accordance with the regulations.
Penalty: Imprisonment for 2 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Section 41 - Misapplication or improper use of public property
An official or Minister must not misapply public property or improperly dispose of, or improperly use, public property.
Penalty: Imprisonment for 7 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

Section 43 - Gifts of public property
An official or Minister must not make a gift of public property unless:
(a) the making of the gift is expressly authorised by law; or
(b) the Finance Minister has given written approval to the gift being made; or
(c) the Commonwealth acquired the property to use it as a gift.
Penalty: Imprisonment for 7 years.

Note: Chapter 2 of the *Criminal Code* sets out the general principles of criminal responsibility.

**Part 9 - Miscellaneous**

Section 60 - Misuse of Commonwealth credit card
(1) An official or Minister must not use a Commonwealth credit card, or a Commonwealth credit card number, to obtain cash, goods or services otherwise than for the Commonwealth.
Penalty: Imprisonment for 7 years.

(2) Subsection (1) does not apply to a particular use of a Commonwealth credit card or
Commonwealth credit card number if:
   (a) the use is authorised by the regulations; and
   (b) the Commonwealth is reimbursed in accordance with the regulations.

(3) In this section: Commonwealth credit card means a credit card issued to the Commonwealth to enable the Commonwealth to obtain cash, goods or services on credit.

Note: Chapter 2 of the Criminal Code sets out the general principles of criminal responsibility.

**Commonwealth Authorities and Companies Act 1997**

Section 26 - Good faith, use of position and use of information-criminal offences  

*Good faith-officers*

(1) An officer of a Commonwealth authority commits an offence if he or she:
   (a) is reckless; or
   (b) is intentionally dishonest;
   and fails to exercise his or her powers and discharge his or her duties:
   (c) in good faith in what he or she believes to be in the best interests of the Commonwealth authority; or
   (d) for a proper purpose.

Penalty for a contravention of this subsection: 2,000 penalty units or imprisonment for 5 years, or both.

*Use of position-officers and employees*

(2) An officer or employee of a Commonwealth authority commits an offence if he or she uses his or her position dishonestly:
   (a) with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the Commonwealth authority or to another person; or
   (b) recklessly as to whether the use may result in him or her or someone else directly or indirectly gaining an advantage, or in causing detriment to the Commonwealth authority or to another person.

Penalty for a contravention of this subsection: 2,000 penalty units or imprisonment for 5 years, or both.

*Use of information-officers and employees*

(3) A person who obtains information because he or she is, or has been, an officer or employee of a Commonwealth authority commits an offence if he or she uses the information dishonestly:
   (a) with the intention of directly or indirectly gaining an advantage for himself or herself, or someone else, or causing detriment to the Commonwealth authority or to another person; or
   (b) recklessly as to whether the use may result in himself or herself or someone else directly or indirectly gaining an advantage, or in causing detriment to the Commonwealth authority or to another person.

Penalty for a contravention of this subsection: 2,000 penalty units or imprisonment for 5 years, or both.

Mr Robinson’s case which relates to Section 134.1 of the Criminal Code Act 1995 -Obtaining a property by deception – was cited as an example of implementation. Mr Robinson was a commissioner of the (now abolished) Aboriginal and Torres Strait Islander Commission (ATSIC). It was alleged that, in November 2004, Mr Robinson authorised the sale of cars that belonged to ATSIC and used $45,000 of the proceeds of the sale to pay certain personal legal expenses. Mr Robinson was initially convicted of offences under the CAC Act in September 2008, but the Queensland Court of Appeal quashed that conviction and ordered a retrial. In April 2011, after a retrial, a jury found Mr Robinson
guilty: Judge Sarah Bradley sentenced him to 12 months’ imprisonment, to be released immediately upon entering into a $1,000 security agreement to be of good behaviour for three years. Her Honour did not make any reparation order for Mr Robinson to make any repayment.

Related statistical data for the period between 2010 and 2011 are compiled in the following tables:


<table>
<thead>
<tr>
<th>Section</th>
<th>Defendants dealt with(b)</th>
<th>Defendants convicted</th>
<th>Defendants acquitted</th>
<th>Defendants with 'other' outcomes(c)</th>
<th>Matters currently on hand(d)</th>
</tr>
</thead>
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Commonwealth Authorities and Companies Act 1997

<table>
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<tr>
<th>Section</th>
<th>Defendants dealt with(b)</th>
<th>Defendants convicted</th>
<th>Defendants acquitted</th>
<th>Defendants with 'other' outcomes(c)</th>
<th>Matters currently on hand(d)</th>
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</thead>
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Criminal Code Act 1995

<table>
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<th>Section</th>
<th>Defendants dealt with(b)</th>
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The following table details the ‘corrupting benefits given/received by Commonwealth public officials’ related offences. Note that these include investigations that may involve applications of the Financial Management and Accountability Act 1997, Commonwealth Authorities and Companies Act 1997 and Criminal Code legislation; however our statistical reporting does not distinguish between these offences.
Corrupting benefits given/received by a Commonwealth public official

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Referrals accepted</th>
<th>Referrals rejected</th>
<th>Total referrals received</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009/2010</td>
<td>13</td>
<td>6</td>
<td>19</td>
</tr>
<tr>
<td>2010/2011</td>
<td>10</td>
<td>9</td>
<td>19</td>
</tr>
<tr>
<td>2011/2012</td>
<td>4</td>
<td>2</td>
<td>6*</td>
</tr>
</tbody>
</table>

*Note: as at 31 Oct 2011, one referral has been received that is currently under evaluation (neither accepted nor rejected at this stage)

Australia outlined that the Department of Finance and Deregulation is currently conducting the Commonwealth Financial Accountability Review (CFAR) which is analysing the Commonwealth’s financial framework from first principles to ensure the framework supports high-quality resource management now and into the future. This includes the current penalties and sanctions regime under the framework.

Currently, the penalties and sanctions in the Commonwealth’s financial framework consist of:
- penalties for criminal misconduct (under the Financial Management and Accountability Act 1997 (FMA Act), the Commonwealth Authorities and Companies Act 1997 (the CAC Act), the Criminal Code Act 1995 (Criminal Code) and the Corporations Act 2001 (Corporations Act)
- civil penalties for misconduct not warranting criminal sanctions (applying to directors and, in some circumstances, employees subject to the CAC Act)
- sanctions under employment arrangements (such as the Public Service Act 1999 (PS Act)).

CFAR will be a multi-year project and will involve consultations with stakeholders internal and external to the public sector.

(b) Observations on the implementation of the article

Australia has criminalized embezzlement of property by public officials through the Financial Management and Accountability Act (1997), which includes provisions addressing the handling and misuse of public funds, custody issues and receipt of gifts. In addition, the Commonwealth Authorities and Companies Act (1997) covers bodies corporate incorporated for a public purpose that hold money on their own account. The Criminal Code also details offences that relate to the administration of government more broadly, including theft, obtaining property or financial advantage by deception, making of false statements on official documents and general dishonesty by public officials.

The reviewers were satisfied with the answers provided.

Article 18 Trading in influence

Subparagraph (a)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) The promise, offering or giving to a public official or any other person, directly or indirectly, of an undue advantage in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage for the original instigator of the act or for any other person;
(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Australia referred to the following legislation

**Criminal Code 1995**

s135.1(7) - General Dishonesty

**Influencing a Commonwealth Public Official**

(7) A person is guilty of an offence if:

(a) the person does anything with the intention of dishonestly influencing a public official in the exercise of the official's duties as a public official; and

(b) the public official is a Commonwealth public official; and

(c) the duties are duties as a Commonwealth public official.

Penalty: Imprisonment for 5 years.

(8) In a prosecution for an offence against subsection (7), it is not necessary to prove that the defendant knew:

(a) that the official was a Commonwealth public official; or

(b) that the duties were duties as a Commonwealth public official.

**Section 142.1(1) - Corrupting benefits given to a Commonwealth public official**

**Giving a corrupting benefit**

A person is guilty of an offence if:

(a) the person dishonestly:

(i) provides a benefit to another person; or

(ii) causes a benefit to be provided to another person; or

(iii) offers to provide, or promises to provide, a benefit to another person; or

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

(b) the receipt, or expectation of the receipt, of the benefit would tend to influence a public official (who may be the other person) in the exercise of the official's duties as a public official; and

(c) the public official is a Commonwealth public official; and

(d) the duties are duties as a Commonwealth public official.

Penalty: Imprisonment for 5 years.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew:

(a) that the official was a Commonwealth public official; or

(b) that the duties were duties as a Commonwealth public official.

Related examples and statistical data are provided under the article 18 (b) of UNCAC.

(b) **Observations on the implementation of the article**

The Criminal Code conforms to the requirements of UNCAC with regard to trading in influence, which encompasses both acting and refraining from acting.

**Article 18 Trading in influence**

**Subparagraph (b)**
Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The solicitation or acceptance by a public official or any other person, directly or indirectly, of an undue advantage for himself or herself or for another person in order that the public official or the person abuse his or her real or supposed influence with a view to obtaining from an administration or public authority of the State Party an undue advantage.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia referred to s.142.1(3) of the Criminal Code 1995.

_Criminal Code 1995_

s142.1(3) Corrupting benefits received by a Commonwealth public official

(3) A Commonwealth public official is guilty of an offence if:

(a) the official dishonestly:

(i) asks for a benefit for himself, herself or another person; or (ii) receives or obtains a benefit for himself, herself or another person; or

(iii) agrees to receive or obtain a benefit for himself, herself or another person; and

(b) the receipt, or expectation of the receipt, of the benefit would tend to influence a Commonwealth public official (who may be the first-mentioned official) in the exercise of the official's duties as a Commonwealth public official.

Penalty: Imprisonment for 5 years.

Benefit in the nature of a reward

(4) For the purposes of subsections (1) and (3), it is immaterial whether the benefit is in the nature of a reward.

Concerning existing cases of implementation of the provision under review, Australia mentioned the case of Grant Russell Mullins and Edward Arthur Dewey already provided in article 15 (a) above.

Australia also referred to the APS Values and Codes of conduct below.

_Australian Public Service Values_\(^1\)

- The APS is apolitical, performing its functions in an impartial and professional manner.
- The APS is a public service in which employment decisions are based on merit.
- The APS provides a workplace that is free from discrimination and recognises and utilises the diversity of the Australian community it serves.
- The APS has the highest ethical standards.
- The APS is openly accountable for its actions, within the framework of ministerial responsibilities to the government, the Parliament and the Australian public.
- The APS is responsive to the government in providing frank, honest, comprehensive, accurate and timely advice and in implementing the Government's policies and programs.
- The APS delivers services fairly, effectively, impartially and courteously to the Australian public and is sensitive to the diversity of the Australian public.
- The APS has leadership of the highest quality.
- The APS establishes workplace relations that value communication, consultation, cooperation and input from employees on matters that affect their workplace.
- The APS provides a fair, flexible, safe and rewarding workplace.
- The APS focuses on achieving results and managing performance.
The APS promotes equity in employment.
The APS provides a reasonable opportunity to all eligible members of the community to apply for APS employment.
The APS is a career-based service to enhance the effectiveness and cohesion of Australia's democratic system of government.
The APS provides a fair system of review of decisions taken in respect to APS employees.

**Australian Public Service Code of Conduct**

- An APS employee must behave honestly and with integrity in the course of APS employment.
- An APS employee must act with care and diligence in the course of APS employment.
- An APS employee, when acting in the course of APS employment, must treat everyone with respect and courtesy, and without harassment.
- An APS employee, when acting in the course of APS employment, must comply with all applicable Australian laws.
- An APS employee must comply with any lawful and reasonable direction given by someone in the employee's Agency who has authority to give the direction.
- An APS employee must maintain appropriate confidentiality about dealings that the employee has with any minister or minister's member of staff.
- An APS employee must disclose, and take reasonable steps to avoid, any conflict of interest (real or apparent) in connection with APS employment.
- An APS employee must use Commonwealth resources in a proper manner.
- An APS employee must not provide false or misleading information in response to a request for information that is made for official purposes in connection with the employee's APS employment.
- An APS employee must not make improper use of:
  - inside information or
  - the employee's duties, status, power or authority
- in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person.
- An APS employee must at all times behave in a way that upholds the APS Values and the integrity and good reputation of the APS.
- An APS employee on duty overseas must at all times behave in a way that upholds the good reputation of Australia.
- An APS employee must comply with any other conduct requirement that is prescribed by the regulations.

1 From Section 10(1) of the *Public Service Act 1999*

2 From Section 13 of the *Public Service Act 1999*

3 For this purpose, Australian law means:

a) any Act (including this Act), or any instrument made under an Act
b) any law of a state or territory, including any instrument made under such a law.

4 Regulation 2.1 imposes a duty on an APS employee not to disclose certain information without authority (ie information communicated in confidence or where disclosure could be prejudicial to the effective working of government). APS employees should familiarise themselves with the full text of PS Regulation 2.1.
Statistical data are compiled in the tables below.


<table>
<thead>
<tr>
<th>Section</th>
<th>Defendants dealt with(b)</th>
<th>Defendants convicted</th>
<th>Defendants acquitted</th>
<th>Defendants with 'other' outcomes(c)</th>
<th>Matters currently on hand(d)</th>
</tr>
</thead>
<tbody>
<tr>
<td>135.1</td>
<td>67</td>
<td>52</td>
<td>3</td>
<td>12</td>
<td>33</td>
</tr>
<tr>
<td>142.1(1)</td>
<td>2</td>
<td>0</td>
<td>0</td>
<td>2</td>
<td>0</td>
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<tr>
<td>142.1(3)</td>
<td>1</td>
<td>0</td>
<td>0</td>
<td>1</td>
<td>0</td>
</tr>
</tbody>
</table>

The following table details the statistics for ‘corrupting benefits given/received by Commonwealth public officials’ related offences

<table>
<thead>
<tr>
<th>Financial Year</th>
<th>Referrals accepted</th>
<th>Referrals rejected</th>
<th>Total referrals received</th>
<th>referrals</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009/2010</td>
<td>13</td>
<td>6</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>2010/2011</td>
<td>10</td>
<td>9</td>
<td>19</td>
<td></td>
</tr>
<tr>
<td>2011/2012</td>
<td>4</td>
<td>2</td>
<td>6*</td>
<td></td>
</tr>
</tbody>
</table>

*Note: as at 31 Oct 2011, one referral has been received that is currently under evaluation (neither accepted nor rejected at this stage)

(b) Observations on the implementation of the article

The reviewers were satisfied with the answers provided.

Article 19 Abuse of Functions

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, the abuse of functions or position, that is, the performance of or failure to perform an act, in violation of laws, by a public official in the discharge of his or her functions, for the purpose of obtaining an undue advantage for himself or herself or for another person or entity.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

There are a number of offences set out in the Criminal Code Act 1995 that establish abuse of functions by a commonwealth public official as a criminal offence.

The Commonwealth Criminal Code provides that a Commonwealth public official is guilty of an offence if the official is found to have abused his or her public office. Abuse of public office could occur in a number of ways, including where the official does so with the intention of dishonestly obtaining a benefit for themself or another person or dishonestly causing a detriment to another person, including:
- Exercising any influence that the official has in the official’s capacity as a Commonwealth public official (section 142.2(1)(a)(i))
- Engaging in any conduct in the exercise of the official’s duties as a Commonwealth public official (section 142.2(1)(a)(ii)), or
- Using any information that the official has obtained in the official’s capacity as a Commonwealth public official (section 142.2(1)(a)(iii)).

In addition, the Commonwealth Authorities and Companies Act 1997 (Cth) provides for the following:
- Subsection 26(1) - an officer of a Commonwealth authority commits an offence if he or she is reckless or intentionally dishonest and fails to exercise powers and discharge duties in good faith or for a proper purpose
- Subsection 26(2) - an officer or employee of a Commonwealth authority commits an offence if he or she uses his or her position dishonestly or recklessly to gain an advantage for himself or herself or another person, or to cause a detriment to the Commonwealth authority or another person, and
- Subsection 26(3) - a person commits an offence if he or she obtains information because he or she is, or has been, an officer or employee of a Commonwealth authority and uses it recklessly or dishonestly with the intention of gaining an advantage for himself or herself, or to someone else, or causing a detriment to the Commonwealth authority or another person.

The Commonwealth Fraud Control Guidelines issued under the Financial Management Act 1997, clearly define the Government’s requirement that all budget-funded agencies, and relevant Commonwealth Authorities and Companies Act funded bodies, put in place practices and procedures for effective fraud control. Agencies are to prepare fraud risk assessment and fraud control plans that comply with the Guidelines (paragraphs 6.1 and 7.1 of the Commonwealth Fraud Control Guidelines).

Agencies are to refer all instances of serious or complex fraud involving Commonwealth interests to the AFP unless they have the appropriate skills and resources needed to investigate criminal matters and meet the requirements of the AFP and CDPP (paragraph 10.11 of the Commonwealth Fraud Control Guidelines).

Law

Criminal Code Act 1995
Section 139.2 Unwarranted demands made by a Commonwealth public official
A Commonwealth public official is guilty of an offence if:
(a) the official makes an unwarranted demand with menaces of another person; and
(b) the demand or the menaces are directly or indirectly related to:
   (i) the official’s capacity as a Commonwealth public official; or
   (ii) any influence the official has in the official’s capacity as a Commonwealth public official; and
(c) the official does so with the intention of:
   (i) obtaining a gain; or
   (ii) causing a loss; or
   (iii) influencing another Commonwealth public official in the exercise of the other official’s duties as a Commonwealth public official.
Penalty: Imprisonment for 12 years.

Section 141.1 - Bribery of a Commonwealth public official
Receiving a bribe
(3) A Commonwealth public official is guilty of an offence if:
(a) the official dishonestly:
   (i) asks for a benefit for himself, herself or another person; or
   (ii) receives or obtains a benefit for himself, herself or another person; or
(iii) agrees to receive or obtain a benefit for himself, herself or another person; and
(b) the official does so with the intention:
   (i) that the exercise of the official’s duties as a Commonwealth public official will be
       influenced; or
   (ii) of inducing, fostering or sustaining a belief that the exercise of the official’s duties as a
       Commonwealth public official will be influenced.

Section 142.1 - Receiving a corrupting benefit
(3) A Commonwealth public official is guilty of an offence if:
   (a) the official dishonestly:
       (i) asks for a benefit for himself, herself or another person; or
       (ii) receives or obtains a benefit for himself, herself or another person; or
       (iii) agrees to receive or obtain a benefit for himself, herself or another person; and
   (b) the receipt, or expectation of the receipt, of the benefit would tend to influence a
       Commonwealth public official (who may be the first-mentioned official) in the exercise of
       the official’s duties as a Commonwealth public official.
   Penalty: Imprisonment for 5 years.
(4) For the purposes of subsections (1) and (3), it is immaterial whether the benefit is in the nature
    of a reward.

Section 142.2 - Abuse of public office
(1) A Commonwealth public official is guilty of an offence if:
   (a) the official:
       (i) exercises any influence that the official has in the official’s capacity as a
           Commonwealth public official; or
       (ii) engages in any conduct in the exercise of the official’s duties as a Commonwealth
           public official; or
       (iii) uses any information that the official has obtained in the official’s capacity as a
           Commonwealth public official; and
   (b) the official does so with the intention of:
       (i) dishonestly obtaining a benefit for himself or herself or for another person; or
       (ii) dishonestly causing a detriment to another person.
   Penalty: Imprisonment for 5 years.
(2) A person is guilty of an offence if:
   (a) the person has ceased to be a Commonwealth public official in a particular capacity; and
   (b) the person uses any information that the person obtained in that capacity as a
       Commonwealth public official; and
   (c) the person does so with the intention of:
       (i) dishonestly obtaining a benefit for himself or herself or for another person; or
       (ii) dishonestly causing a detriment to another person.
   Penalty: Imprisonment for 5 years.
(3) Paragraph (2)(a) applies to a cessation by a person:
   (a) whether or not the person continues to be a Commonwealth public official in some other
       capacity; and
   (b) whether the cessation occurred before, at or after the commencement of this section.

Policy/Other Measures – Administrative Law

The Public Service Act 1999 (the Act) includes the Australian Public Service (APS) Values (s 10) and
the APS Code of Conduct (s 13).

In accordance with the Act

- APS employees must comply with the APS Code of Conduct, including a requirement that
  APS employees behave in a way that upholds the APS Values (s 13(11))
- agency heads must promote the APS Values (s 12)
- agency heads and statutory office holders are bound by the APS Code of Conduct in the same way as APS employees (s 14)
- agency heads may impose sanctions on an APS employee who is found (in accordance with established procedures) to have breached the APS Code of Conduct (s 15(1))

The APS Code of Conduct includes the requirement that APS employees must behave honestly and with integrity in the course of APS employment (s 13(1)). The APS Code of Conduct and the APS Values are at Attachment A.

The APS Code of Conduct also creates a strict prohibition against the improper use of:

(a) inside information; or

(b) the employee's duties, status, power or authority;

in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person (s13(10)).

An APS employee must also comply with any other conduct requirement that is prescribed by regulations (section 13(3)). Public Service Regulation 2.1 imposes a duty on an APS employee not to disclose certain information without authority (Public Service Regulations 1999).

An Agency Head may impose sanctions on an APS employee who is found to have breached the APS Code of Conduct. These sanctions are in s 15(1) of the Act as follows:

(a) termination of employment
(b) reduction in classification
(c) re-assignment of duties
(d) reduction in salary
(e) deductions from salary, by way of fine
(f) a reprimand.

If an employee is dissatisfied with the conduct of an investigation by an agency head, they can seek to have the matter reviewed by the Merit Protection Commissioner.

Australia provided the following case as example of implementation of the provision under review in its legislation:

**Breach of section 13 of Public Service Act**

The case *RvTjanara Goreng-Goreng [2008] ACTSC 74 (18 August 2008)*: In this case, an APS employee was charged under s70(1) of the *Crimes Act 1914* with seven counts of disclosing information that it was not her duty to disclose under Public Service Regulation 2.1. The employee was sentenced to a $2000 fine and a placed on a three year good behaviour bond.

In terms of statistics, the Australian Public Service Commission (APSC) releases an annual State of the Service Report which details the number of public service employees investigated and found to have breached the APS Code of Conduct. Included in these statistics is the number of employees investigated and found to have breached section 13(10) of the Code of Conduct which states that APS employees must not make improper use of inside information or the employee’s status or authority to gain a benefit or advantage.

In 2009-10, 69 employees were investigated for a suspected breach of section 13(10) of the APS Code
of Conduct. Breaches were found to have occurred in 30% of the cases investigated.

In 2008-9, 94 employees were investigated for a potential breach of section 13(10) of the APS Code of Conduct. Breaches were found in 28% of cases.

The available evidence consistently indicates that misconduct in the APS is generally in the nature of isolated incidents of poor behaviour and judgement by individual APS employees rather than being indicative of underlying systemic issues, and that criminal or corrupt behaviour within the APS is uncommon.

(b) Observations on the implementation of the article

Australia reported that “exercise of official’s duties” under Article 15 covers both actions and failure to perform an act.

The Criminal Code prohibits a wide array of activity, including where the official unlawfully acts with the intention of dishonestly obtaining a benefit for themselves or another person or dishonestly causing a detriment to another person. In some cases, this can include conduct committed intentionally or recklessly, which goes beyond the minimum standards set forth in the Convention.

Article 20 Illicit Enrichment

Subject to its constitution and the fundamental principles of its legal system, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally, illicit enrichment, that is, a significant increase in the assets of a public official that he or she cannot reasonably explain in relation to his or her lawful income.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is partially in compliance with the provision described above.

An Illicit enrichment offence was considered during development of unexplained wealth powers in Crimes Legislation Amendment (Serious and Organised Crime) Act 2010. However, Australia does not consider it appropriate to implement such a criminal offence as it trespasses on the presumption of innocence. We understand that few countries who have undergone review in the first cycle have fully implemented this article of the Convention. Additionally, current arrangements provide a range of measures to prevent and address corruption of public officials, including capacity to restrain and confiscate unexplained wealth.

Under the Proceeds of Crime Act 2002 (the POC Act 2002), unexplained wealth can be restrained (section 20A) and confiscated (Part 2-6). Under these provisions, where there are reasonable grounds to suspect that a person’s total wealth exceeds the value of that wealth that was lawfully acquired, the court can compel the person to attend court and prove that his or her wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence, or a State offence with a federal aspect. If the person cannot demonstrate this, the court may order them to pay the proportion of wealth that they cannot demonstrate was legitimately obtained.

Other orders under the POC Act 2002 are discussed under Article 31.

Illicit enrichment that can be traced to a crime committed by a Commonwealth public official may be covered by the Financial Management and Accountability Act 1997 (see above).

The Criminal Code Act 1995 also contains a range of offences prohibiting public officials from
dishonestly obtaining a benefit for themselves. Additionally, Division 400 deals with money laundering (dealing in the proceeds or instruments of crime).

For example (penalties are higher for dealing with higher values of property or money):

400.8 Dealing in proceeds of crime etc.—money or property of any value
(1) A person is guilty of an offence if:
(a) the person deals with money or other property; and
(b) either:
   (i) the money or property is, and the person believes it to be, proceeds of crime; or
   (ii) the person intends that the money or property will become an instrument of crime.

Penalty: Imprisonment for 12 months, or 60 penalty units, or both.
(2) A person is guilty of an offence if:
(a) the person deals with money or other property; and
(b) either:
   (i) the money or property is proceeds of crime; or
   (ii) there is a risk that the money or property will become an instrument of crime; and
(c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires).

Penalty: Imprisonment for 6 months, or 30 penalty units, or both.
(3) A person is guilty of an offence if:
(a) the person deals with money or other property; and
(b) either:
   (i) the money or property is proceeds of crime; or
   (ii) there is a risk that the money or property will become an instrument of crime; and
(c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires).

Penalty: 10 penalty units.

Note: Section 400.2A affects the application of this section so far as it relates to a person dealing with money or other property that:
(a) is intended by the person to become an instrument of crime; or
(b) is at risk of becoming an instrument of crime.

Examples of cases related to the implementation of this provision are not available for the time being, for the Commonwealth unexplained wealth provisions in the Proceeds of Crime Act 2002 were introduced in 2009 and are yet to be tested.

(b) Observations on the implementation of the article

An illicit enrichment offence was considered during development of unexplained wealth powers in the Crimes Legislation Amendment (Serious and Organised Crime) Act (2010). Australia concluded that it would not be appropriate to implement such a criminal offence due to concerns that it may trespass on the presumption of innocence. Nevertheless, under the Proceeds of Crime Act (2002) (POCA), unexplained wealth can be restrained (section 20A) and confiscated (Part 2-6). Where there are reasonable grounds to suspect that a person’s total wealth exceeds the value of that wealth that was
lawfully acquired, the court can compel the person to prove that his or her wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence, or a State offence with a federal aspect. If the person cannot demonstrate this, the court may order them to pay the proportion of wealth that they cannot demonstrate was legitimately obtained.

(c) Successes and good practices

The reviewers were of the view that this was innovative approach to addressing concerns of unexplained wealth and illicit enrichment outside the scope of the criminal justice system. As these provisions are implemented in the context of the considerable protections afforded to the defendant under the Australian legal system, the effectiveness of these measures will be of interest to future reviews in addressing the problem of illicit enrichment.

Article 21 Bribery in the private sector

Subparagraph (a)

Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(a) The promise, offering or giving, directly or indirectly, of an undue advantage to any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is partially in compliance with the provision under review.

While there is no offence under the Corporations Act 2001 (‘the Act’) which deals directly with private sector bribery, there are provisions in that Act which may have some application. These provisions create offences which apply to directors and officers of companies and of responsible entities for managed investment schemes. The relevant provisions are outlined below in our response to Article 21(b). Accordingly, depending on the circumstances, private sector bribery may constitute a contravention of the identified provisions.

However, Chapter 2 of the Commonwealth Criminal Code (‘the Code’) applies to all offences in the Act by virtue of s1308A of the Act. This means the Code extends criminal responsibility for offences under the Act to those who ‘incite’ another person to commit an offence (s11.4) or those who conspire with another person to commit an offence (s11.5). This would capture the type of conduct refer to in Article 21(b).

(b) Observations on the implementation of the article

There is no offence under the Australian Corporations Act (2001) which deals directly with private sector bribery, although there are provisions in that Act which may have some application. Australia reported that companies must also maintain guidelines for preventing and reporting crimes or risk facing corporate liability for corrupt acts by employees.

Article 21 Bribery in the private sector

Subparagraph (b)
Each State Party shall consider adopting such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally in the course of economic, financial or commercial activities:

(b) The solicitation or acceptance, directly or indirectly, of an undue advantage by any person who directs or works, in any capacity, for a private sector entity, for the person himself or herself or for another person, in order that he or she, in breach of his or her duties, act or refrain from acting.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being partially in compliance with the provision under review.

The following sections of the Corporations Act 2001 create offences that could apply to the conduct described above depending on the facts of the case.

Directors’ duties
Section 184 of the Act makes it a criminal offence for a director, other officer or employee of a company to use their position dishonestly.

Corporations Act 2001
Section 184 - Good faith, use of position and use of information

Good faith-directors and other officers
1. A director or other officer of a corporation commits an offence if they:
   a. are reckless; or
   b. are intentionally dishonest;
   and fail to exercise their powers and discharge their duties:
   c. in good faith in the best interests of the corporation; or
   d. for a proper purpose.

Note: Section 187 deals with the situation of directors of wholly-owned subsidiaries.

Use of position-directors, other officers and employees
2. A director, other officer or employee of a corporation commits an offence if they use their position dishonestly:
   a. with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
   b. recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

Use of information-directors, other officers and employees
3. A person who obtains information because they are, or have been, a director or other officer or employee of a corporation commits an offence if they use the information dishonestly:
   a. with the intention of directly or indirectly gaining an advantage for themselves, or someone else, or causing detriment to the corporation; or
   b. recklessly as to whether the use may result in themselves or someone else directly or indirectly gaining an advantage, or in causing detriment to the corporation.

Directors guilty of an offence under section 184 face a maximum penalty of 2,000 penalty units (currently $220,000), 5 years imprisonment or both.
Duties in relation to management investment schemes and duties of the responsible entity

Sections 601FD and 601FE set out the duties of the officers and employees of entities responsible for the operation of a registered scheme (‘responsible entity’). A registered scheme is one where members funds are pooled to produce financial benefits consisting of rights or interests in property and the members do not have day-to-day control over the operation of the scheme.

Section 601FD(4) and 601FE(4) make it an offence for a person to intentionally or recklessly contravene s601FD(1) or 601FE(1) respectively. It is also an offence to be intentionally or recklessly involved in a contravention of s601FD(1) and 601FE(1).

**Section 601FD  Duties of officers of responsible entity**

1. An officer of the responsible entity of a registered scheme must:
   a. act honestly; and
   b. exercise the degree of care and diligence that a reasonable person would exercise if they were in the officer’s position; and
   c. act in the best interests of the members and, if there is a conflict between the members’ interests and the interests of the responsible entity, give priority to the members’ interests; and
   d. not make use of information acquired through being an officer of the responsible entity in order to:
      i. gain an improper advantage for the officer or another person; or
      ii. cause detriment to the members of the scheme; and
   e. **not make improper use of their position as an officer to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme; and**
   f. take all steps that a reasonable person would take, if they were in the officer’s position, to ensure that the responsible entity complies with:
      i. this Act; and
      ii. any conditions imposed on the responsible entity’s Australian financial services licence; and
      iii. the scheme’s constitution; and
      iv. the scheme’s compliance plan.

2. A duty of an officer of the responsible entity under subsection (1) overrides any conflicting duty the officer has under Part 2D.1.
3. A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.
4. A person must not intentionally or recklessly contravene, or be involved in a contravention of, subsection (1).

**Section 601FE  Duties of employees of responsible entity**

1. An employee of the responsible entity of a registered scheme must not:
   a. make use of information acquired through being an employee of the responsible entity in order to:
      i. gain an improper advantage for the employee or another person; or
      ii. cause detriment to members of the scheme; or
   b. **make improper use of their position as an employee to gain, directly or indirectly, an advantage for themselves or for any other person or to cause detriment to the members of the scheme.**

2. A duty of an employee of the responsible entity under subsection (1) overrides any conflicting duty the employee has under Part 2D.1.
3. A person who contravenes, or is involved in a contravention of, subsection (1) contravenes this subsection.
4. A person must not intentionally contravene, or be involved in a contravention of, subsection (1). Persons guilty of an offence under sections s601FD(4) or 601FE(4) face a maximum penalty of 2,000 penalty units (currently $220,000), 5 years imprisonment or both.

**Frauds by officers**

**Section 596 Frauds by officers**

1. A person who, while an officer or employee of a company:
   a. by false pretences or by means of any other fraud, induces a person to give credit to the company or to a related body corporate; or
   b. with intent to defraud the company or a related body corporate, or members or creditors of the company or of a related body corporate, makes or purports to make, or causes to be made or to be purported to be made, any gift or transfer of, or charge on, or causes or connives at the levying of any execution against, property of the company or of a related body corporate; or
   c. with intent to defraud the company or a related body corporate, or members or creditors of the company or of a related body corporate, engages in conduct that results in the concealment or removal of any part of the property of the company or of a related body corporate after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or a related body corporate; contravenes this section.

2. Absolute liability applies to so much of an offence based on paragraph (1)(c) as requires that an event occur after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or a related body corporate.

Persons guilty of an offence under sections ss596(1) face a maximum penalty of 1,00 penalty units (currently $11,000), 2 years imprisonment or both.

**Related party transactions**

Chapter 2E of the Act places strict controls on public companies, and entities controlled by public companies, giving financial benefits to entities or persons related to or associated with the public companies. There is no prohibition, as such, on financial benefits flowing to related parties. Rather, Ch 2E regulates the circumstances in which benefits may flow by requiring the public company to obtain member approval before the related party transaction can take place. Section 209(3) makes it an offence to be dishonestly involved in a contravention of the s208 which establishes the requirement to get member approval.

Persons guilty of an offence under section 209(3) face a maximum penalty of 2,000 penalty units (currently $220,000), 5 years imprisonment or both.

**Section 208 - Need for member approval for financial benefit**

(1) For a public company, or an entity that the public company controls, to give a financial benefit to a related party of the public company:
   (a) the public company or entity must:
      (i) obtain the approval of the public company’s members in the way set out in sections 217 to 227; and
      (ii) give the benefit within 15 months after the approval; or
   (b) the giving of the benefit must fall within an exception set out in sections 210 to 216.
Section 209 - Consequences of breach
(1) If the public company or entity contravenes section 208:
   (a) the contravention does not affect the validity of any contract or transaction
       connected with the giving of the benefit; and
   (b) the public company or entity is not guilty of an offence.

Note: A Court may order an injunction to stop the company or entity giving the benefit to the
related party (see section 1324).

(2) A person contravenes this subsection if they are involved in a contravention of section 208 by a
public company or entity.

Note 1: This subsection is a civil penalty provision.
Note 2: Section 79 defines involved.

(3) A person commits an offence if they are involved in a contravention of section 208 by a public
company or entity and the involvement is dishonest.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answers provided.

Article 22 Embezzlement of property in the private sector

Each State Party shall consider adopting such legislative and other measures as
may be necessary to establish as a criminal offence, when committed intentionally in the
course of economic, financial or commercial activities, embezzlement by a person who
directs or works, in any capacity, in a private sector entity of any property, private funds
or securities or any other thing of value entrusted to him or her by virtue of his or her
position

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia referred to section 596 of the Corporations Act 2001 which makes fraud by officers of a
corporation a criminal offence:

596 Frauds by officers
(1) A person who, while an officer or employee of a company:
   a. by false pretences or by means of any other fraud, induces a person to give credit to
      the company or to a related body corporate; or
   b. with intent to defraud the company or a related body corporate, or members or
      creditors of the company or of a related body corporate, makes or purports to make, or
      causes to be made or to be purported to be made, any gift or transfer of, or charge on,
      or causes or connives at the levying of any execution against, property of the company
      or of a related body corporate; or
   c. with intent to defraud the company or a related body corporate, or members or
      creditors of the company or of a related body corporate, engages in conduct that
      results in the concealment or removal of any part of the property of the company or of
      a related body corporate after, or within 2 months before, the date of any unsatisfied
      judgment or order for payment of money obtained against the company or a related
      body corporate;
contravenes this section.

(2) Absolute liability applies to so much of an offence based on paragraph (1)(c) as requires that an event occur after, or within 2 months before, the date of any unsatisfied judgment or order for payment of money obtained against the company or a related body corporate.

The provisions referred to in relation to article 21(b) which impose duties on officers of companies and responsible entities may also be applicable depending on the circumstances of any embezzlement.

The Hugh Charles Gordon\(^3\) case was cited as an example. The defendant was a director of Whet Investments Limited (Whet). Using his position, the defendant dishonestly obtained $473,570.29 from funds deposited with Whet by two investors. The defendant obtained the money to repay a personal loan of $500,000. The defendant also fraudulently removed whet assets, being the proceeds of the sale of mining equipment, office equipment and a motor vehicle, immediately prior to the appointment of an administrator. The defendant was charged with 1 count of using his position to dishonestly gain an advantage for himself pursuant to section 184(2)(a) of the Corporations Act and 3 counts of fraudulent removal of property of the company to the value of $100 or more pursuant to section 590(1)(c)(i) of the Corporations Act. On 27 May 2010 the defendant was sentenced to a total effective sentence of 18 months imprisonment to be served by way of periodic detention, to be released after serving 11 months on condition that he be of good behaviour for 2 years.

(b) Observations on the implementation of the article

The reviewers were satisfied that section 596 of the Corporations Act (2001) makes fraud by officers of a company a criminal offence.

Article 23 Laundering of proceeds of crime

Subparagraph 1 (a) (i)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(a) (i) The conversion or transfer of property, knowing that such property is the proceeds of crime, for the purpose of concealing or disguising the illicit origin of the property or of helping any person who is involved in the commission of the predicate offence to evade the legal consequences of his or her action;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia takes the laundering of proceeds of crime very seriously. The main provisions criminalising the laundering of proceeds of crime are located in Division 400 of the Criminal Code. In addition to this, Australia has a robust regime to detect and deter money laundering and terrorism financing. The legal framework comprises the Anti-Money Laundering and Counter-Terrorism Financing Act 2006, which establishes obligations that are supervised and regulated by the Australian Transaction Reports and Analysis Centre (AUSTRAC).

Australia’s money laundering offences were first introduced in 1987. In 2002, they were enhanced

\(^3\) Source: CDPP Annual Report 2009-10
and moved to the Criminal Code. In 2010, Australia introduced legislative amendments to the money laundering offences to further increase their effectiveness and to expand the geographical jurisdiction.

There is a wide range of penalties for the money laundering offences which depend on the amount of money laundered and the fault element involved. Penalties range from a maximum of one year to a maximum of 25 years imprisonment, and the court can also impose a fine of up to $1.65 million for individuals and $8.25 million for companies. The Criminal Code has six categories of offences broken down by the amount of money laundered: any value, $1,000, $10,000, $50,000, $100,000 and over $1,000,000. Within each category there are 3 offences based on mental state of the perpetrator - intent (or actual knowledge), recklessness and negligence.

In addition, the money laundering offences under the Criminal Code apply to both proceeds (ie, money or property that is derived or realised, directly or indirectly, from the commission of an indictable offence - an offence with a prison term of more than 12 months) and instrumentalities (ie, money or property used in or to facilitate the commission of an indictable offence). Importantly, the money laundering offences apply to the proceeds of crime derived from both Commonwealth indictable offences and foreign indictable offences.

To proceed with the money laundering charge, the Criminal Code law specifically states that there is no need for there to be a conviction for the predicate or underlying offence (s 400.13).

Criminal Code 1995
Section 400.2 Definition of deals with money or other property
A person deals with money or other property if the person does any of the following:
(a) receives, possesses, conceals or disposes of money or other property;
(b) imports money or other property into Australia;
(c) exports money or other property from Australia;
(d) engages in a banking transaction relating to money or other property.

400.2A Application of offences relating to possible instruments of crime
(1) This section affects the application of sections 400.3, 400.4, 400.5, 400.6, 400.7 and 400.8 so far as they relate to a person dealing with money or other property that:
(a) is intended by the person to become an instrument of crime; or
(b) is at risk of becoming an instrument of crime.

(2) Those sections apply if at least one of the circumstances described in subsections (3) and (4) exists.

(3) One circumstance is that money or other property is intended to become, or at risk of becoming, an instrument of crime in relation to an offence that is:
(a) a Commonwealth indictable offence; or
(b) a foreign indictable offence; or
(c) a State indictable offence that has a federal aspect; or
(d) an Australian Capital Territory indictable offence; or
(e) a Northern Territory indictable offence.

Note: The prosecution need not prove the existence of any fault element for the nature of the offence: see section 400.11.

(4) Another circumstance is that the dealing with the money or other property occurs:
(a) in the course of or for the purposes of importation of goods into, or exportation of goods from, Australia; or
(b) by means of a communication using a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution; or
(c) in the course of banking (other than State banking that does not extend beyond the
limits of the State concerned); or
(d) outside Australia.

(5) Absolute liability applies to subsections (3) and (4).

s400.3 Dealing in proceeds of crime etc - money or property worth $1,000,000 or more

(1) A person is guilty of an offence if:
   (a) the person deals with money or other property; and
   (b) either:
      i. the money or property is, and the person believes it to be, proceeds of crime; or
      ii. the person intends that the money or property will become an instrument of crime; and
   (c) at the time of the dealing, the value of the money and other property is $1,000,000 or more.

Penalty: Imprisonment for 25 years, or 1500 penalty units, or both.

(2) A person is guilty of an offence if:
   (a) the person deals with money or other property; and
   (b) either:
      i. the money or property is proceeds of crime; or
      ii. there is a risk that the money or property will become an instrument of crime; and
   (c) the person is reckless as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
   (d) at the time of the dealing, the value of the money and other property is $1,000,000 or more.

Penalty: Imprisonment for 12 years, or 720 penalty units, or both.

(3) A person is guilty of an offence if:
   (a) the person deals with money or other property; and
   (b) either:
      i. the money or property is proceeds of crime; or
      ii. there is a risk that the money or property will become an instrument of crime; and
   (c) the person is negligent as to the fact that the money or property is proceeds of crime or the fact that there is a risk that it will become an instrument of crime (as the case requires); and
   (d) at the time of the dealing, the value of the money and other property is $1,000,000 or more.

Penalty: Imprisonment for 5 years, or 300 penalty units, or both.

(4) Absolute liability applies to paragraphs (1)(c), (2)(d) and (3)(d).

Note: Section 400.10 provides for a defence of mistake of fact in relation to these paragraphs.

[NB: Sections 400.4-400.8 have the same wording as s400.3 but deal with different monetary values and have different penalties attached.]

s400.4 Dealing in proceeds of crime etc - money or property worth $100,000 or more

(1) Penalty: Imprisonment for 20 years &/or 1200 penalty units
(2) Penalty: Imprisonment for 10 years &/or 600 penalty units
(3) Penalty: Imprisonment for 4 years &/or 240 penalty units

s400.5 Dealing in proceeds of crime etc - money or property worth $50,000 or more

(1) Penalty: Imprisonment for 15 years &/or 900 penalty units
(2) Penalty: Imprisonment for 7 years &/or 420 penalty units
(3) Penalty: Imprisonment for 3 years &/or 180 penalty units

s400.6 Dealing in proceeds of crime etc - money or property worth $10,000 or more

(1) Penalty: Imprisonment for 10 years &/or 600 penalty units
(2) Penalty: Imprisonment for 5 years &/or 300 penalty units
(3) Penalty: Imprisonment for 2 years &/or 120 penalty units
s400.7 Dealing in proceeds of crime etc - money or property worth $1,000 or more

(1) Penalty: Imprisonment for 5 years &/or 300 penalty units
(2) Penalty: Imprisonment for 2 years &/or 120 penalty units
(3) Penalty: Imprisonment for 12 months &/or 60 penalty units

s400.8 Dealing in proceeds of crime etc - money or property of any value

(1) Penalty: Imprisonment for 12 months &/or 60 penalty units
(2) Penalty: Imprisonment for 6 months &/or 30 penalty units
(3) Penalty: 10 penalty units

400.9 Dealing with property reasonably suspected of being proceeds of crime etc.

(1) A person commits an offence if:
   (a) the person deals with money or other property; and
   (b) it is reasonable to suspect that the money or property is proceeds of crime; and
   (c) at the time of the dealing, the value of the money and other property is $100,000 or more.

Penalty: Imprisonment for 3 years, or 180 penalty units, or both.

(1A) A person commits an offence if:
   (a) the person deals with money or other property; and
   (b) it is reasonable to suspect that the money or property is proceeds of crime; and
   (c) at the time of the dealing, the value of the money and other property is less than $100,000.

Penalty: Imprisonment for 2 years, or 120 penalty units, or both.

(2) Without limiting paragraph (1)(b) or (1A)(b), that paragraph is taken to be satisfied if:
   (a) the conduct referred to in paragraph (1)(a) involves a number of transactions that are structured or arranged to avoid the reporting requirements of the Financial Transaction Reports Act 1988 that would otherwise apply to the transactions; or
   (aa) the conduct involves a number of transactions that are structured or arranged to avoid the reporting requirements of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 that would otherwise apply to the transactions; or
   (b) the conduct involves using one or more accounts held with ADIs in false names; or
   (ba) the conduct amounts to an offence against section 139, 140 or 141 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006; or
   (c) the value of the money and property involved in the conduct is, in the opinion of the trier of fact, grossly out of proportion to the defendant’s income and expenditure over a reasonable period within which the conduct occurs; or
   (d) the conduct involves a significant cash transaction within the meaning of the Financial Transaction Reports Act 1988, and the defendant:
      (i) has contravened his or her obligations under that Act relating to reporting the transaction; or
      (ii) has given false or misleading information in purported compliance with those obligations; or
   (da) the conduct involves a threshold transaction (within the meaning of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006) and the defendant:
      (i) has contravened the defendant’s obligations under that Act relating to reporting the transaction; or
      (ii) has given false or misleading information in purported compliance with those obligations; or
   (e) the defendant:
      (i) has stated that the conduct was engaged in on behalf of or at the request of another person; and
      (ii) has not provided information enabling the other person to be
identified and located.

(4) Absolute liability applies to paragraphs (1)(b) and (c) and (1A)(b) and (c).

(5) This section does not apply if the defendant proves that he or she had no reasonable grounds for suspecting that the money or property was derived or realised, directly or indirectly, from some form of unlawful activity.

Note: A defendant bears a legal burden in relation to the matter in subsection (5) (see section 13.4).

Examples of cases include the Bin Huang & See Hon (Paul) Siu case. The defendants were each recruited and directed by Zhen Chi (Peter) Chen to conduct cash transactions at various branches of banks in the Sydney metropolitan district involving numerous deposits of cash, each less than $10,000 with the intention of circumventing the reporting requirement under the Financial Transactions Reports Act 1988 and thereby avoiding the attention of law enforcement agencies. Huang made structured deposits of cash totalling $3,088,311 often using false names and addresses at over 60 bank branches during an 11 month period. Siu, also using false names and addresses, structured cash deposits totalling $556,400 at over 40 bank branches during a 3 month period. Huang pleaded guilty to an offence of dealing in proceeds of crime worth $1 million or more pursuant to section 400.3(1) of the Criminal Code and Siu pleaded guilty to an offence of dealing in proceeds of crime worth $100,000 or more pursuant to section 400.4(1) of the Criminal Code. On 9 March 2007 Huang was sentenced to imprisonment for 3 years with an order that he be released after serving 1 year and 9 months. Siu was sentenced to imprisonment for 2 years and 11 months with an order that he be released after serving 12 months. The Crown viewed the sentences imposed by the District Court of New South Wales to be manifestly inadequate and lodged separate appeals to the Court of Criminal Appeal against the sentences. The appeals were jointly heard by the Court of Criminal Appeal on 28 March 2007. On 4 September 2007 the Court of Criminal Appeal allowed the Crown appeals and quashed the sentences imposed by the court below. Huang was resentenced to 5 ½ years imprisonment with a non-parole period of 3 years and 4 months. Siu was resentenced to imprisonment for 5 years with a non-parole period of 2 ½ years.

Statistics were also provided.

<table>
<thead>
<tr>
<th>Year</th>
<th>Legislation and Section</th>
<th>Number of Charges</th>
</tr>
</thead>
<tbody>
<tr>
<td>2009-10</td>
<td>Criminal Code 1995 – Section 11.1 - Attempt</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Criminal Code 1995 – Section 11.2 – Complicity and common purpose</td>
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</tr>
<tr>
<td></td>
<td>Criminal Code 1995 – Section 11.2A – Joint Commission</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Criminal Code 1995 – Section 11.3 – Commission by Proxy</td>
<td>0</td>
</tr>
<tr>
<td></td>
<td>Criminal Code 1995 – Section 11.4 – Incitement</td>
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<td></td>
<td>Criminal Code 1995 – Section 11.5 – Conspiracy</td>
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<td></td>
<td>Criminal Code 1995 – Section 400.3 - Dealing in proceeds of crime etc</td>
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<td></td>
<td>– money or property worth $1,000,000 or more</td>
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<tr>
<td></td>
<td>Criminal Code 1995 – Section 400.4 - $1,000,000 or more</td>
<td>20</td>
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<tr>
<td></td>
<td>Criminal Code 1995 – Section 400.5 - $50,000 or more</td>
<td>5</td>
</tr>
</tbody>
</table>

4 Source: CDPP Annual Report 2007-08
(b) Observations on the implementation of the article

The main provisions criminalizing the laundering of proceeds of crime are contained in Division 400 of the Criminal Code. In addition, Australia has a robust regime to detect and deter money laundering and terrorism financing. The legal framework comprises the *Anti-Money Laundering and Counter-Terrorism Financing Act* (2006), which establishes obligations that are supervised and regulated by the Australian Transaction Reports and Analysis Centre (Austrac).

In 2010, Australia introduced legislative amendments to the money laundering offences to further increase their effectiveness and to expand geographical jurisdiction. The money laundering offences incorporate mental state elements of intent, recklessness and negligence, which go beyond the minimum requirements of article 23 of the Convention.

There is a wide range of penalties for money laundering offences, depending on the amount of money laundered and the fault element involved. Penalties range from a maximum of one year to a maximum of 25 years imprisonment, and the court can also impose a fine of up to $1.65 million for individuals and $8.25 million for companies.

In addition, the money laundering offences apply to both proceeds (i.e., money or property that is derived or realized, directly or indirectly, from the commission of an indictable offence - an offence with a prison term of more than 12 months) and instrumentalities (i.e., money or property used in or to facilitate the commission of an indictable offence). Importantly, the money laundering offences apply to the proceeds of crime derived from both Commonwealth indictable offences and foreign indictable offences. To proceed with the money laundering charge, there is no need for there to be a conviction for the predicate or underlying offence.

All “indictable offenses” count as predicate offenses, which means offenses with a penalty of at least
12 months imprisonment. It was noted that the range of indictable offenses at the Commonwealth level is comprehensive of offenses established in accordance with the Convention, in line with the requirement of article 23(b).

The reviewers were satisfied with the answers provided.

(c) **Successes and good practices**

The reviewers noted with appreciation that the money laundering offenses incorporate mental state elements of intent, recklessness and negligence, which go beyond the minimum requirements of article 23 of the Convention.

**Article 23 Laundering of proceeds of crime**

**Subparagraph 1 (a) (ii)**

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

   (a) (ii) The concealment or disguise of the true nature, source, location, disposition, movement or ownership of or rights with respect to property, knowing that such property is the proceeds of crime;

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Investigations into money laundering are made in partnership with the ACC and AUSTRAC, and in this financial year (2010-11) the partnership has focused on alternative remittance businesses which facilitate illicit money movements on behalf of organised crime syndicates. The AFP is also one of the six AUSTRAC partners contributing to AUSTRAC’s National Threat Assessment on money laundering, which is intended to provide a consolidated picture of the current money laundering environment as well as establish a baseline of key and emerging threats against which subsequent assessment can gauge changes in the Australian environment.

Australia referred to relevant provisions of the *Commonwealth Criminal Code 1995* that deal with Money Laundering (cited under article 23.1.a.i).

As example, Australia cited the *Sen Hung Chen, Chiu Yuan Hsiao, Hi Ngo, Thanh Hieu Truong* case. This matter involved large scale defrauding of the Commonwealth revenue which was very difficult to detect, investigate and prosecute due to the defendants’ systematic unauthorised use of passports and the forging of invoices and ships’ stamps. The investigation was successfully finalised due to the combined efforts of the AFP, Customs and the ATO and involved over 200 witnesses and thousands of documents.

Chen and Hsiao owned 2 duty free stores whose licenses restricted the sale of duty free goods to bona fide overseas travellers. They conspired with Ngo and Truong to sell cigarettes and tobacco products which were the subject of Customs or Excise duty into the domestic market without paying duty on the goods. To avoid alerting Commonwealth officials to the fact that the goods were being sold domestically, Chen and Hsiao created false invoices which purported to show that the goods had been sold to ships’ crew. They forged the signature of ships’ crew on the invoices and made unauthorised

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5 Source: CDPP Annual Report 2009-10
use of the passports of ships’ crew who visited the port of Brisbane. They also obtained forged ships’
/stamps to authenticate the invoices.

The second duty free store was set up as a response to increasing ACBS interest in the first store. Chen
and Hsiao attempted to distance themselves from that company by arranging for directorships and
shareholdings of the second store to be in the names of their employees. Chen and Hsiao also carried
out large scale money laundering activities through 12 accounts which they set up, some in their own
/names, some in the names of relatives and some using the names of their employees. These were in
addition to a number of accounts operated by them in the names of their companies. Almost all
deposits into these accounts were cash deposits under $10,000 so as to avoid the reporting conditions
of the Financial Transactions Reports Act 1988. While Hsiao made most of the deposits, the
employees were instructed by the defendants to make some deposits on the defendants’ behalf. The
defendants defrauded the Commonwealth of $8.28 million in revenue over 3½ years.

Chen and Hsiao were charged with 2 counts of conspiracy pursuant to section 135.4(3) of the Criminal
Code and 1 count of money laundering pursuant to section 400.3(1) of the Criminal Code. Ngo and
Truong were charged with 1 count of conspiracy pursuant to section 135.4(3) of the Criminal Code.

All defendants pleaded guilty and were sentenced on 28 August 2009 in the Supreme Court of
Queensland. Chen was sentenced to 6 years imprisonment in relation to each count of conspiracy and
10½ years imprisonment with a non-parole period of 7 years in relation to the money laundering
charge. Hsiao was sentenced to 5 years and 3 months imprisonment in relation to each count of
conspiracy and 7½ years imprisonment with a non-parole period of 3 years in relation to the money
/laundering charge. Ngo and Truong were both sentenced to 4½ years imprisonment with a non-parole
period of 3 years. Ngo and Truong appealed against the severity of their sentences to the Queensland
Court of Appeal. The Court of Appeal did not reduce their head sentences but reduced their non-parole
periods by 1 year.

Relevant statistics are compiled in the table below:


<table>
<thead>
<tr>
<th>Section</th>
<th>Defendants dealt with(b)</th>
<th>Defendants convicted</th>
<th>Defendants acquitted</th>
<th>Defendants with ‘other’ outcomes(c)</th>
<th>Matters currently on hand(d)</th>
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<td>9</td>
<td>1</td>
<td>8</td>
<td>8</td>
</tr>
</tbody>
</table>

7.

(b) Observations on the implementation of the article

Same observations under 23(1)(a).

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (i)

1. Each State Party shall adopt, in accordance with fundamental principles of its
domestic law, such legislative and other measures as may be necessary to establish as
criminal offences, when committed intentionally:
(b) Subject to the basic concepts of its legal system:

(i) The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with the provision under review.

The acquisition, possession or use of property, knowing, at the time of receipt, that such property is the proceeds of crime is a criminal offence under the following legislation.

Division 400 - Criminal Code 1995

Section 400.2 Definition of deals with money or other property
400.2A Application of offences relating to possible instruments of crime
s400.3 Dealing in proceeds of crime etc - money or property worth $1,000,000 or more
s400.4 Dealing in proceeds of crime etc - money or property worth $100,000 or more
s400.5 Dealing in proceeds of crime etc - money or property worth $50,000 or more
s400.6 Dealing in proceeds of crime etc - money or property worth $10,000 or more
s400.7 Dealing in proceeds of crime etc - money or property worth $1,000 or more
s400.8 Dealing in proceeds of crime etc - money or property of any value
400.9 Dealing with property reasonably suspected of being proceeds of crime etc.

Australia also referred to relevant provisions of the Commonwealth Criminal Code 1995 that deal with money-laundering.

Australia referred to the cases of Tanesh Bernard Dias and Man Hon MA.

Tanesh Bernard Dias, a foreign national, was a low to middle level operator of a Singapore based money laundering syndicate. The syndicate laundered cash derived from commercial narcotics trafficking. It used a method called ‘cuckoo smurfing’, which involved depositing cash into innocent third party bank accounts in Australia. This released the equivalent legitimate funds from the overseas money remitters also involved in the syndicate, which could then be forwarded to Europe as payment for the drugs. The defendant received approximately $8,115,560 from a drug syndicate, which he then counted and deposited. The bulk of the cash dealt with by the defendant was the proceeds of drug trafficking and related to the trafficking of 1.2 million ecstasy tablets in 2008. The defendant derived a personal benefit of approximately $23,000 from the transactions. The defendant entered Australia on a false passport. The defendant was charged with 1 count of recklessly dealing in the proceeds of crime where the value of the money was $1,000,000 or more pursuant to section 400.3(2) of the Criminal Code. The defendant pleaded guilty and was sentenced on 10 November 2010 in the County Court of Victoria to 7 years imprisonment with a non-parole period of 4½ years. The Judge declared that if the defendant had not pleaded guilty, he would have imposed a sentence of 8 years imprisonment with a non-parole period of 5½ years.

Man Hon MA: this prosecution resulted from Operation Avarice, a joint operation by various crime authorities into large scale credit and identity card fraud in NSW. It is the largest prosecution of its kind to have been conducted by the Melbourne Office. The defendant was supplied with false identification documentation and credit cards by a contact in Sydney. He then recruited, organised and instructed ‘shoppers’ to either withdraw large sums of cash from compromised bank accounts or make purchases using false credit cards. The defendant on-sold the goods purchased to the Sydney
contact, amongst others. As a result of the offending, approximately $160,000 was withdrawn directly from bank accounts. The value of the goods purchased using compromised credit cards could not be determined. The defendant’s operation was sophisticated and well organised. He had access to a banking call centre employee who supplied bank account details, including pass codes. The defendant was charged with 3 counts of dealing in personal financial information pursuant to section 480.4 of the Criminal Code; 1 count of dealing in proceeds of crime greater than $1,000 pursuant to section 400.7(1) of the Criminal Code; 1 count of dealing in proceeds of crime greater than $10,000 pursuant to section 400.6(1) of the Criminal Code; and 1 count of conspiracy to obtain property by deception pursuant to sections 221 and 81(1) of the Crimes Act (Vic). The defendant pleaded guilty and was sentenced in the County Court of Victoria on 6 December 2010 to 2 years imprisonment to be released after serving 12 months on condition that he be of good behaviour for 12 months.

Statistical information provided under subparas. 1 (a) (i) and (ii) are also applicable to the current provision.

(b) Observations on the implementation of the article

Same observations under 23(1)(a).

Article 23 Laundering of proceeds of crime

Subparagraph 1 (b) (ii)

1. Each State Party shall adopt, in accordance with fundamental principles of its domestic law, such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) Subject to the basic concepts of its legal system:

(ii) Participation in, association with or conspiracy to commit, attempts to commit and aiding, abetting, facilitating and counselling the commission of any of the offences established in accordance with this article.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The provisions in the Criminal Code automatically extend liability for Commonwealth criminal offences to persons who may not directly commit an offence but engage in other ancillary activities or jointly commit an offence with another person or persons. This includes people who

- attempt to commit an offence (attempt at section 11.1)
- are accomplices to the commission of an offence (complicity and common purpose at 11.2)
- jointly commit an offence (joint commission at section 11.2A)
- procure the commission of an offence by an agent (innocent agency at section 11.3)
- incite the commission of an offence (incitement at section 11.4), or
- conspire with another person to commit an offence (conspiracy at section 11.5).

These provisions will apply unless the legislation displays a contrary intention.

Criminal Code 1995
Part 2.4-Extensions of criminal responsibility
Division 11
11.1 Attempt
(1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

(2) For the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

(3A) Subsection (3) has effect subject to subsection (6A).

(4) A person may be found guilty even if:
   (a) committing the offence attempted is impossible; or
   (b) the person actually committed the offence attempted.

(5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

(6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.

(7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.2A (joint commission), section 11.3 (commission by proxy), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

11.2 Complicity and common purpose
(1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.

(2) For the person to be guilty:
   (a) the person’s conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
   (b) the offence must have been committed by the other person.

(3) For the person to be guilty, the person must have intended that:
   (a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
   (b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.

(3A) Subsection (3) has effect subject to subsection (6).

(4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
   (a) terminated his or her involvement; and
   (b) took all reasonable steps to prevent the commission of the offence.
(5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.

(6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).

(7) If the trier of fact is satisfied beyond reasonable doubt that a person either:
   (a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
   (b) is guilty of that offence because of the operation of subsection (1);
but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

11.2A Joint commission

Joint commission

(1) If:
   (a) a person and at least one other party enter into an agreement to commit an offence; and
   (b) either:
      (i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or
      (ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3));
the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

Offence committed in accordance with the agreement

(2) An offence is committed in accordance with the agreement if:
   (a) the conduct of one or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the joint offence) of the same type as the offence agreed to; and
   (b) to the extent that a physical element of the joint offence consists of a result of conduct-the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance.

Offence committed in the course of carrying out the agreement

(3) An offence is committed in the course of carrying out the agreement if the person is reckless about the commission of an offence (the joint offence) that another party in fact commits in the course of carrying out the agreement.

Intention to commit an offence

(4) For a person to be guilty of an offence because of the operation of this section, the person and at least one other party to the agreement must have intended that an offence would be committed under the agreement.

Agreement may be non-verbal etc.

(5) The agreement:
   (a) may consist of a non-verbal understanding; and
   (b) may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the joint offence was engaged in.

Termination of involvement etc.

(6) A person cannot be found guilty of an offence because of the operation of this section if, before the conduct constituting any of the physical elements of the joint offence concerned was engaged in,
the person:
(a) terminated his or her involvement; and
(b) took all reasonable steps to prevent that conduct from being engaged in.

Person may be found guilty even if another party not prosecuted etc.
(7) A person may be found guilty of an offence because of the operation of this section even if:
(a) another party to the agreement has not been prosecuted or has not been found guilty; or
(b) the person was not present when any of the conduct constituting the physical elements of the joint offence was engaged in.

Special liability provisions apply
(8) Any special liability provisions that apply to the joint offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of this section.

11.3 Commission by proxy
A person who:
(a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and
(b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it;
is taken to have committed that offence and is punishable accordingly.

11.4 Incitement
(1) A person who urges the commission of an offence is guilty of the offence of incitement.

(2) For the person to be guilty, the person must intend that the offence incited be committed.

(2A) Subsection (2) has effect subject to subsection (4A).

(3) A person may be found guilty even if committing the offence incited is impossible.

(4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

(4A) Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

(5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

Penalty:
(a) if the offence incited is punishable by life imprisonment-imprisonment for 10 years; or
(b) if the offence incited is punishable by imprisonment for 14 years or more, but is not punishable by life imprisonment-imprisonment for 7 years; or
(c) if the offence incited is punishable by imprisonment for 10 years or more, but is not punishable by imprisonment for 14 years or more-imprisonment for 5 years; or
(d) if the offence is otherwise punishable by imprisonment for 3 years or for the maximum term of imprisonment for the offence incited, whichever is the lesser; or
(e) if the offence incited is not punishable by imprisonment-the number of penalty units equal to the maximum number of penalty units applicable to the offence incited.
11.5 Conspiracy

(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the Crimes Act 1914.

(2) For the person to be guilty:
   (a) the person must have entered into an agreement with one or more other persons; and
   (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
   (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(2A) Subsection (2) has effect subject to subsection (7A).

(3) A person may be found guilty of conspiracy to commit an offence even if:
   (a) committing the offence is impossible; or
   (b) the only other party to the agreement is a body corporate; or
   (c) each other party to the agreement is at least one of the following:
       (i) a person who is not criminally responsible;
       (ii) a person for whose benefit or protection the offence exists; or
   (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

(4) A person cannot be found guilty of conspiracy to commit an offence if:
   (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
   (b) he or she is a person for whose benefit or protection the offence exists.

(5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
   (a) withdrew from the agreement; and
   (b) took all reasonable steps to prevent the commission of the offence.

(6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

(7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

11.6 References in Acts to offences

(1) A reference in a law of the Commonwealth to an offence against a law of the Commonwealth (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.
(2) A reference in a law of the Commonwealth (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.

(3) Subsection (1) or (2) does not apply if a law of the Commonwealth is expressly or impliedly to the contrary effect.

(4) In particular, an express reference in a law of the Commonwealth to:
   (a) an offence against, under or created by the Crimes Act 1914; or
   (b) an offence against, under or created by a particular provision of the Crimes Act 1914; or
   (c) an offence arising out of the first-mentioned law or another law of the Commonwealth; or
   (d) an offence arising out of a particular provision; or
   (e) an offence against, under or created by the Taxation Administration Act 1953;
does not mean that the first-mentioned law is impliedly to the contrary effect.

Note: Sections 11.2 (complicity and common purpose), 11.2A (joint commission), and 11.3 (commission by proxy) of this Code operate as extensions of principal offences and are therefore not referred to in this section.

Some examples include the cases of Mark Prchal, Jean Marc Raffaut, Carlos Antonio Rojas and Tomas Smetana.

Between October 2003 and December 2003 Raffaut, an accountant, prepared amended income tax returns in the name of his friend, Prchal for the 2001 and 2002 financial years and lodged them with the ATO. The amended returns contained false information in relation to dividend imputation credits from shares. As a result the ATO paid Prchal $35,038.87 in refunds to which he was not entitled. Raffaut and Prchal then agreed to extend the fraud by lodging false amended returns in the names of other taxpayers. Raffaut agreed to provide tax file numbers and personal details of genuine taxpayers to which he had access in the course of his employment. Rojas was recruited to attend at the offices of tax agents representing himself to be the various taxpayer identities. He was offered $200-$250 a day to do this. Smetana was recruited by Prchal to provide details of his bank accounts so that payment of the refunds from the false returns could be directed into those accounts. Smetana was to receive 8% of the proceeds of the refunds for his involvement.

During January 2004 amended returns were lodged with the ATO in respect of the 2001 and 2002 financial years in the names of 11 taxpayer identities. These returns contained false details in relation to family trust distributions, imputation credits and interest deductions. As a result of the lodgement of these false returns, refunds totalling $262,580.23 were paid by the ATO into 3 nominated bank accounts. Refunds totalling a further $162,121.89 were claimed, however payment was not made by the ATO. Prchal was charged with 1 count of obtaining a financial advantage by deception pursuant to section 134.2(1) of the Criminal Code and 1 count of conspiring to obtain a financial advantage by deception pursuant to sections 11.5(1) and 134.2(1) of the Criminal Code. Raffaut was charged with 1 count of aiding, abetting, counselling or procuring obtaining a financial advantage by deception pursuant to sections 11.2(1) and 134.2(1) of the Criminal Code and 1 count of conspiracy to obtain a financial advantage by deception pursuant to sections 11.5(1) and 134.2(1) of the Criminal Code. On 10 October 2008 in the County Court of Victoria in Melbourne Prchal and Raffaut were each sentenced to 2½ years imprisonment to be released after serving 12 months on condition that they be of good behaviour for 18 months. They were ordered to make reparation to the Commonwealth in the sum of $66,298.78 each, representing their portion of the outstanding balance of the total amount fraudulently obtained.

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Rojas was charged with 1 count of conspiring to obtain a financial advantage by deception pursuant to sections 11.5(1) and 134.2(1) of the Criminal Code. On 10 October 2008 in the County Court of Victoria in Melbourne Rojas was sentenced to 12 months imprisonment to be released forthwith on condition that he be of good behaviour for 12 months. He was ordered to make reparation to the Commonwealth in the sum of $31,259.91, representing the balance outstanding of the amount fraudulently obtained in relation to the count of conspiracy.

Smetana was charged with 1 count of recklessly dealing with proceeds of crime worth $100,000 or more pursuant to section 400.4(2) of the Criminal Code. On 10 October 2008 in the County Court of Victoria in Melbourne Smetana was sentenced to 12 months imprisonment to be released forthwith on condition that he be of good behaviour for 12 months. He was ordered to make reparation to the Commonwealth in the sum of $27,708.11, representing the balance outstanding after deduction of all amounts recovered as at the date of sentence from the total amount of refunds paid into his bank accounts. In sentencing the defendants the court re-emphasised the importance of general deterrence to discourage ‘serious and sophisticated offending involving large scale fraud upon the Commonwealth’.

The court accepted the prosecution submission that immediate custodial sentences were required in respect of the two principal offenders, Prchal and Raffaut, despite Prchal’s absence of relevant prior convictions and Raffaut’s absence of any prior convictions. The court noted that the involvement and implication of numerous innocent people and, in the case of Raffaut, the breach of trust that he owed to his employer and to his employer’s clients, were aggravating factors.

Prchal and Raffaut each lodged appeals against their sentences, however later abandoned those appeals.

(b) Observations on the implementation of the article

Same observations under 23(1)(a).

Article 23 Laundering of proceeds of crime

Subparagraphs 2 (a) and 2(b)

2. For purposes of implementing or applying paragraph 1 of this article:

(a) Each State Party shall seek to apply paragraph 1 of this article to the widest range of predicate offences;

(b) Each State Party shall include as predicate offences at a minimum a comprehensive range of criminal offences established in accordance with this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with the provisions described above.

The laundering of proceeds of crime offences (contained in Division 400 Criminal Code 1995) apply to a broad range of predicate offences. Offences that may be dealt with as an indictable offence, that is, are punishable by imprisonment for a period exceeding 12 months (section 4G of the Crimes Act 1914, are covered.

The predicate offence provisions in Article 23(2) are covered by section 400.2A of the Criminal Code 1995 when read together with the definitions of ‘proceeds of crime’, ‘Commonwealth indictable offence’ and foreign indictable offence’ (section 400.1(1)).

s 400.2A Application of offences relating to possible instruments of crime
(1) This section affects the application of sections 400.3, 400.4, 400.5, 400.6, 400.7 and 400.8 so far as they relate to a person dealing with money or other property that:
   (a) is intended by the person to become an instrument of crime; or
   (b) is at risk of becoming an instrument of crime.

(2) Those sections apply if at least one of the circumstances described in subsections (3) and (4) exists.

(3) One circumstance is that money or other property is intended to become, or at risk of becoming, an instrument of crime in relation to an offence that is:
   (a) a Commonwealth indictable offence; or
   (b) a foreign indictable offence; or
   (c) a State indictable offence that has a federal aspect; or
   (d) an Australian Capital Territory indictable offence; or
   (e) a Northern Territory indictable offence.

Note: The prosecution need not prove the existence of any fault element for the nature of the offence: see section 400.11.

(4) Another circumstance is that the dealing with the money or other property occurs:
   (a) in the course of or for the purposes of importation of goods into, or exportation of goods from, Australia; or
   (b) by means of a communication using a postal, telegraphic, telephonic or other like service within the meaning of paragraph 51(v) of the Constitution; or
   (c) in the course of banking (other than State banking that does not extend beyond the limits of the State concerned); or
   (d) outside Australia.

(5) Absolute liability applies to subsections (3) and (4).

Note: For absolute liability, see section 6.2.

s 400.2 Definition of deals with money or other property
A person deals with money or other property if the person does any of the following:
   (a) receives, possesses, conceals or disposes of money or other property;
   (b) imports money or other property into Australia;
   (c) exports money or other property from Australia;
   (d) engages in a banking transaction relating to money or other property.

400.1 Definitions

proceeds of crime means any money or other property that is wholly or partly derived or realised, directly or indirectly, by any person from the commission of an offence against a law of the Commonwealth, a State, a Territory or a foreign country that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

Commonwealth indictable offence means an offence against a law of the Commonwealth, or a law of a Territory (other than the Australian Capital Territory and the Northern Territory), that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

foreign indictable offence means an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would have constituted an offence against:
(a) a law of the Commonwealth; or
(b) a law of a State or Territory connected with the offence;
that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

Note: See subsection (3) for when a law of a State or Territory is connected with the offence.

(b) Observations on the implementation of the article

At request of the reviewers, a comprehensive list of offences established in accordance with the Convention was provided.

Offences established by Chapters 3 and 4 of UNCAC Australian Legislation

<table>
<thead>
<tr>
<th>Article 15 – Bribery of Public Officials</th>
<th>Legislation</th>
<th>Section</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Commonwealth Criminal Code 1995</td>
<td>135.1(7) – Influencing a Commonwealth public official</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>139.1 – Unwarranted demands of a Commonwealth public official</td>
<td>12 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>141.1(1) – Bribery of a Commonwealth public official – giving a bribe</td>
<td>10 years imprisonment and/or 10,000 penalty units</td>
</tr>
<tr>
<td></td>
<td></td>
<td>141.1(3) – Bribery of a Commonwealth public official – receiving a bribe</td>
<td>10 years imprisonment and/or 10,000 penalty units</td>
</tr>
<tr>
<td></td>
<td></td>
<td>142.1(1) – Corrupting benefits given to a Commonwealth public official</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>142.1(3) – Corrupting benefits given to, or received by, a Commonwealth public official</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>142.2 – Abuse of public office</td>
<td>5 years imprisonment</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 16 – Bribery of Foreign Officials</th>
<th>Legislation</th>
<th>Section</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Commonwealth Criminal Code 1995</td>
<td>70.2 – Bribing a foreign public official</td>
<td>10 years imprisonment and/or 10,000 penalty units</td>
</tr>
</tbody>
</table>

<table>
<thead>
<tr>
<th>Article 17 - Embezzlement</th>
<th>Legislation</th>
<th>Section</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>Commonwealth Criminal Code 1995</td>
<td>131.1 – Theft</td>
<td>10 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>132.8 – Dishonest taking or retention of property</td>
<td>2 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>134.1 – Obtaining property by deception</td>
<td>10 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>134.2 – Obtaining a financial advantage by deception</td>
<td>10 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>135.1 – General dishonesty</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>135.2 – Obtaining a financial advantage</td>
<td>12 months imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>135.4 – Conspiracy to defraud</td>
<td>10 years imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>136.1(1) - False or misleading statements in applications</td>
<td>12 months imprisonment</td>
</tr>
<tr>
<td></td>
<td></td>
<td>142.2 – Abuse of public office</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>Financial Management</td>
<td>10 – Public money must be promptly banked</td>
<td>2 years imprisonment</td>
</tr>
<tr>
<td>Act and Accountability Act 1997</td>
<td>etc</td>
<td></td>
<td></td>
</tr>
<tr>
<td>---------------------------------</td>
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</tr>
<tr>
<td>11 – public money not to be paid into non-official account</td>
<td>7 years imprisonment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>12 – Receipt and spending of public money by outsiders</td>
<td>7 years imprisonment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>13 – Money not to be withdrawn from official account without authority</td>
<td>2 years imprisonment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>14 – Misapplication or improper use of public money</td>
<td>7 years imprisonment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>16 – Special instructions by Finance Minister about handling etc of special public money</td>
<td>2 years imprisonment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>26 – Drawing rights required for payment etc of public money</td>
<td>2 years imprisonment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>40 – Custody etc of securities</td>
<td>2 years imprisonment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>41 – Misapplication or improper use of public property</td>
<td>7 years imprisonment</td>
<td></td>
<td></td>
</tr>
<tr>
<td>60 – Misuse of Commonwealth credit card</td>
<td>7 years imprisonment</td>
<td></td>
<td></td>
</tr>
</tbody>
</table>

**Commonwealth Authorities and Companies Act 1997**

| 26(1) – Good faith, use of position and use of information – Good faith-officers | 5 years imprisonment and/or 2,000 penalty units |
| 26(2) - Good faith, use of position and use of information – Use of position-officers and employees | 5 years imprisonment and/or 2,000 penalty units |
| 26(3) - Good faith, use of position and use of information – Use of information-officers and employees | 5 years imprisonment and/or 2,000 penalty units |

**Article 18 – Trading in Influence**

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Section</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth Criminal Code 1995</td>
<td>135.1(7) – General dishonesty</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>142.1(1) – Corrupting benefits given to a Commonwealth public official – giving a corrupting benefit</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>142.1(3) – Corrupting benefits received by a Commonwealth public official</td>
<td>5 years imprisonment</td>
</tr>
</tbody>
</table>

**Article 19 – Abuse of Functions**

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Section</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Commonwealth Criminal Code 1995</td>
<td>139.2 – Unwarranted demands made by a Commonwealth public official</td>
<td>12 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>141.1(3) – Bribery of a Commonwealth public official</td>
<td>10 years imprisonment and/or 10,000 penalty units</td>
</tr>
<tr>
<td></td>
<td>142.1(3) – Receiving a corrupting benefit</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>142.1 – Abuse of public office</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td>Commonwealth Authorities and Companies Act 1997</td>
<td>26(1) – Good faith, use of position and use of information – Good faith-officers</td>
<td>5 years imprisonment and/or 2,000 penalty units</td>
</tr>
<tr>
<td></td>
<td>26(2) - Good faith, use of position and use of information – Use of position-officers and employees</td>
<td>5 years imprisonment and/or 2,000 penalty units</td>
</tr>
<tr>
<td></td>
<td>26(3) - Good faith, use of position and use of information – Use of information-officers and employees</td>
<td>5 years imprisonment and/or 2,000 penalty units</td>
</tr>
</tbody>
</table>
### Article 21 – Bribery in the Private Sector

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Section</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Corporations Act 2001</strong></td>
<td>184 – Good faith, use of position and use of information</td>
<td>5 years imprisonment and/or $200,000</td>
</tr>
<tr>
<td></td>
<td>208 – Need for member approval for financial benefit</td>
<td>5 years imprisonment and/or 2,000 penalty units</td>
</tr>
<tr>
<td></td>
<td>209 – consequences of breach</td>
<td>5 years imprisonment and/or 2,000 penalty units</td>
</tr>
<tr>
<td></td>
<td>596 – Frauds by officers</td>
<td>2 years imprisonment and/or 1,000 penalty units</td>
</tr>
<tr>
<td></td>
<td>601FD – Duties of officers of responsible entity</td>
<td>5 years imprisonment and/or 2,000 penalty units</td>
</tr>
<tr>
<td></td>
<td>601FE – duties of employees of responsible entity</td>
<td>5 years imprisonment and/or 2,000 penalty units</td>
</tr>
</tbody>
</table>

### Article 22 – Private Sector Embezzlement

<table>
<thead>
<tr>
<th>Legislation</th>
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<th>Penalty</th>
</tr>
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</tbody>
</table>

### Article 23 – Money Laundering and Article 24 – Concealment

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Section</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Commonwealth Criminal Code 1995</strong></td>
<td>400.3(1) – dealing in proceeds for crime etc – money or property worth $1,000,000 or more – intentionally dealing with proceeds of crime</td>
<td>25 years imprisonment and/or 1,500 penalty units</td>
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<tr>
<td></td>
<td>400.3(2) - dealing in proceeds for crime etc – money or property worth $1,000,000 or more – reckless as to whether dealing with proceeds of crime</td>
<td>12 years imprisonment and/or 720 penalty units</td>
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<tr>
<td></td>
<td>400.3(3) - dealing in proceeds for crime etc – money or property worth $1,000,000 or more – negligent as to whether money could become proceeds of crime</td>
<td>5 years imprisonment and/or 300 penalty units</td>
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<tr>
<td></td>
<td>400.4(1) – dealing in proceeds for crime etc – money or property worth $100,000 or more – intentionally dealing with proceeds of crime</td>
<td>20 years imprisonment and/or 1,200 penalty units</td>
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<td>400.4(2) - dealing in proceeds for crime etc – money or property worth $100,000 or more – reckless as to whether dealing with proceeds of crime</td>
<td>10 years imprisonment and/or 600 penalty units</td>
</tr>
<tr>
<td></td>
<td>400.4(3) - dealing in proceeds for crime etc – money or property worth $100,000 or more – negligent as to whether money could become proceeds of crime</td>
<td>4 years imprisonment and/or 240 penalty units</td>
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<tr>
<td></td>
<td>400.5(1) – dealing in proceeds for crime etc – money or property worth $50,000 or more – intentionally dealing with proceeds of crime</td>
<td>15 years imprisonment and/or 900 penalty units</td>
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<td>400.5(2) - dealing in proceeds for crime etc – money or property worth $50,000 or more – reckless as to whether dealing with proceeds of crime</td>
<td>7 years imprisonment and/or 420 penalty units</td>
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<td>400.5(3) - dealing in proceeds for crime etc – money or property worth $50,000 or more – negligent as to whether money could become</td>
<td>3 years imprisonment and/or 180 penalty units</td>
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<tr>
<td>Proceeds of Crime</td>
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<tr>
<td>400.6(1) – dealing in proceeds for crime etc – money or property worth $10,000 or more – intentionally dealing with proceeds of crime</td>
<td>10 years imprisonment and/or 600 penalty units</td>
<td></td>
</tr>
<tr>
<td>400.6(2) - dealing in proceeds for crime etc – money or property worth $10,000 or more – reckless as to whether dealing with proceeds of crime</td>
<td>5 years imprisonment and/or 300 penalty units</td>
<td></td>
</tr>
<tr>
<td>400.6(3) - dealing in proceeds for crime etc – money or property worth $10,000 or more – negligent as to whether money could become proceeds of crime</td>
<td>2 years imprisonment and/or 120 penalty units</td>
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<tr>
<td>400.7(1) – dealing in proceeds for crime etc – money or property worth $1000 or more – intentionally dealing with proceeds of crime</td>
<td>5 years imprisonment and/or 300 penalty units</td>
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</tr>
<tr>
<td>400.7(2) - dealing in proceeds for crime etc – money or property worth $1000 or more – reckless as to whether dealing with proceeds of crime</td>
<td>2 years imprisonment and/or 120 penalty units</td>
<td></td>
</tr>
<tr>
<td>400.7(3) - dealing in proceeds for crime etc – money or property worth $1000 or more – negligent as to whether money could become proceeds of crime</td>
<td>12 months imprisonment and/or 60 penalty units</td>
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<tr>
<td>400.8(1) – dealing in proceeds for crime etc – money or property worth any value – intentionally dealing with proceeds of crime</td>
<td>12 months imprisonment and/or 60 penalty units</td>
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</tr>
<tr>
<td>400.8(2) - dealing in proceeds for crime etc – money or property worth any value – reckless as to whether dealing with proceeds of crime</td>
<td>6 months imprisonment and/or 30 penalty units</td>
<td></td>
</tr>
<tr>
<td>400.8(3) - dealing in proceeds for crime etc – money or property worth any value – negligent as to whether money could become proceeds of crime</td>
<td>10 penalty units</td>
<td></td>
</tr>
<tr>
<td>400.9(1) – Dealing with property reasonably suspected of being proceeds of crime etc – $100,000 or more</td>
<td>3 years imprisonment and/or 180 penalty units</td>
<td></td>
</tr>
<tr>
<td>400.9(2) – Dealing with property reasonably suspected of being proceeds of crime etc – less than $100,000</td>
<td>2 years imprisonment and/or 120 penalty units</td>
<td></td>
</tr>
</tbody>
</table>

### Article 25 – Obstruction of Justice

<table>
<thead>
<tr>
<th>Legislation</th>
<th>Section</th>
<th>Penalty</th>
</tr>
</thead>
<tbody>
<tr>
<td>Crimes Act 1914</td>
<td>36A – Intimidation of witnesses etc</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>37(1) – Corruption of witnesses</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>37(3)– Inducing false testimony</td>
<td>5 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>38 – Deceiving witnesses</td>
<td>2 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>40 – Preventing witnesses from attending court</td>
<td>1 year imprisonment</td>
</tr>
<tr>
<td></td>
<td>41 – Conspiracy to bring false accusation</td>
<td>10 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>42 – Conspiracy to defeat justice</td>
<td>10 years imprisonment</td>
</tr>
<tr>
<td></td>
<td>43 – attempting to pervert justice</td>
<td>10 years imprisonment</td>
</tr>
<tr>
<td>Commonwealth Criminal Code 1995</td>
<td>139.1 – Unwarranted demands of a Commonwealth public official</td>
<td>12 years</td>
</tr>
<tr>
<td></td>
<td>147.1 – Causing harm to a</td>
<td>10 years imprisonment or 13 years</td>
</tr>
<tr>
<td>Legislation</td>
<td>Section</td>
<td>Penalty</td>
</tr>
<tr>
<td>-------------------------------------------------</td>
<td>--------------------------</td>
<td>------------------------------------------------------------------------</td>
</tr>
<tr>
<td>Commonwealth Criminal Code 1995</td>
<td>11.1 - Attempt</td>
<td>Punishable as if the offence had been committed</td>
</tr>
<tr>
<td></td>
<td>11.2 – Complicity and common purpose</td>
<td>Punishable as if the offence had been committed</td>
</tr>
<tr>
<td></td>
<td>11.2A – Joint commission</td>
<td>Punishable as if the offence had been committed</td>
</tr>
<tr>
<td></td>
<td>11.3 – Commission by proxy</td>
<td>Punishable as if the offence had been committed</td>
</tr>
<tr>
<td></td>
<td>11.4 – Incitement</td>
<td>Punishable as if the offence had been committed</td>
</tr>
<tr>
<td></td>
<td>11.5 – Conspiracy</td>
<td>Punishable as if the offence to which the conspiracy relates had been committed</td>
</tr>
</tbody>
</table>

**Article 23 Laundering of proceeds of crime**

**Subparagraph 2 (c)**

2. For purposes of implementing or applying paragraph 1 of this article:

   (c) For the purposes of subparagraph (b) above, predicate offences shall include offences committed both within and outside the jurisdiction of the State Party in question. However, offences committed outside the jurisdiction of a State Party shall constitute predicate offences only when the relevant conduct is a criminal offence under the domestic law of the State where it is committed and would be a criminal offence under the domestic law of the State Party implementing or applying this article had it been committed there;

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.
This provision is consistent with the definition of *Foreign Indictable Offence* under s 400.1 of the *Criminal Code 1995*.

**Criminal Code 1995**

**Section 400.1 - Definitions**

*foreign indictable offence* means an offence against a law of a foreign country constituted by conduct that, if it had occurred in Australia, would have constituted an offence against:

(a) a law of the Commonwealth; or

(b) a law of a State or Territory connected with the offence;

that may be dealt with as an indictable offence (even if it may, in some circumstances, be dealt with as a summary offence).

The offences outlined above which implement Article 23(2)(c) apply to foreign indictable offences as predicate offences.

(b) **Observations on the implementation of the article**

Australia reported that in practice, it helps if there is a foreign indictment in order to count the foreign indictable offense as a predicate offense. Foreign offenses must be offenses in the foreign jurisdiction and indictable offenses in Australia to count as predicate offenses.

The reviewers were satisfied with the answers provided.

**Article 23 Laundering of proceeds of crime**

**Subparagraph 2 (d)**

2. For purposes of implementing or applying paragraph 1 of this article:

(d) Each State Party shall furnish copies of its laws that give effect to this article and of any subsequent changes to such laws or a description thereof to the Secretary-General of the United Nations;

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that copies of relevant laws will be sent to the Secretary-General of the United Nations pursuant to the provision under review.

(b) **Observations on the implementation of the article**

The reviewers were satisfied with the answers provided and anticipate that Australia will soon provide official versions of legislation, as required.

**Article 23 Laundering of proceeds of crime**

**Subparagraph 2 (e)**

2. For purposes of implementing or applying paragraph 1 of this article:

(e) If required by fundamental principles of the domestic law of a State Party, it may be provided that the offences set forth in paragraph 1 of this article do not apply to the persons who committed the predicate offence.
(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that this provision does not apply to its legislation.

Australia has been evaluated three times by the Financial Action Task Force (FATF) against the international standards to combat money laundering. In the last review in 2005 Australia received ‘largely compliant’ for Recommendation 1 relating to criminalising money-laundering. The FATF found that Australia had a comprehensive money laundering offence, but considered that the low level of money laundering prosecutions indicated that the regime was not being effectively implemented.

Australia’s money laundering offences, contained in Division 400 of the Criminal Code, were amended by the *Crimes Legislation Amendment (Serious and Organised Crime) Act (No. 2)* 2010. The amendments enhanced the ability of law enforcement agencies to investigate and prosecute money laundering in Australia and in a foreign country where proceeds of crime or instruments of crime relate to Australian indictable offences.

(b) **Observations on the implementation of the article**

Australia reported that a person can be convicted of both a money laundering offense and the underlying predicate offense or offenses. The reviewers were satisfied with the answer provided.

**Article 24 Concealment**

*Without prejudice to the provisions of article 23 of this Convention, each State Party shall consider adopting such legislative and other measures as may be necessary to establish as a criminal offence, when committed intentionally after the commission of any of the offences established in accordance with this Convention without having participated in such offences, the concealment or continued retention of property when the person involved knows that such property is the result of any of the offences established in accordance with this Convention.*

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that the provision under review has been implemented, referring to explanation given under article 23.

(b) **Observations on the implementation of the article**

The reviewers were satisfied with the answer provided.

**Article 25 Obstruction of Justice**

**Subparagraph (a)**

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:*

*(a) The use of physical force, threats or intimidation or the promise, offering or giving of an undue advantage to induce false testimony or to interfere in the giving of testimony or the production of evidence in a proceeding in relation to the commission of offences established in accordance with this Convention;*
(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

The *Crimes Act 1914* contains a number of provisions that bring article 25(a) in effect and make it an offence to interfere in the application of justice. The relevant provisions in the Crimes Act are:

- Section 36A - Intimidation of witnesses etc
- Section 37 - Corruption of witnesses
- Section 37(3) - Inducing false testimony
- Section 38 - Deceiving witnesses
- Section 39 - Destroying evidence
- Section 40 - Preventing witnesses from attending court
- Section 41 - Conspiracy to bring false accusation
- Section 42 - Conspiracy to defeat justice
- Section 43 - Attempting to pervert justice

*Crimes Act 1914*

**Division 3 - Evidence and Witnesses**

**Section 36A - Intimidation of witnesses etc**

1. A person who:
   a) threatens, intimidates or restrains; uses violence to or inflicts an injury on; causes or procures violence, damage, loss or disadvantage to; or causes or procures the punishment of a person
   b) for or on account of his having appeared, or being about to appear, as a witness in a judicial proceeding
   shall be guilty of an indictable offence.
   Maximum penalty: imprisonment for 5 years.

**Section 37 - Corruption of witnesses**

1. any person who:
   a) gives, confers, or procures, or promises or offers to give, confer, procure or attempt to procure, any property or benefit of any kind to, upon or for, any person, upon any agreement or understanding that any person called or to be called as a witness in any judicial proceeding shall give false testimony or withhold true testimony; or
   b) does an action with the intention of inducing a person called or to be called as a witness in any judicial proceeding to give false testimony, or to withhold true testimony; or
   c) asks, receives, or obtains, or agrees to receive or obtain, any property or benefit of any kind for himself, or any other person, upon any agreement or understanding that any person shall as a witness in any judicial proceeding give false testimony or withhold true testimony;
   shall be guilty of an indictable offence.
   Maximum penalty: imprisonment for 5 years.

**Section 37(3) - Inducing False Testimony**

3. A person commits an offence if:
   a. the person does an act; and
   b. the person does so with the intention of inducing a person called, or to be called, as a witness in a judicial proceeding:
      i. to give false testimony; or
      ii. to withhold true testimony;
   Maximum penalty: imprisonment for 5 years.
Section 38 - Deceiving Witnesses
(1) any person who practices any fraud or deceit, or intentionally makes or exhibits any false statement, representation, token, or writing, to any person called or to be called as a witness in any judicial proceeding, with intent to affect the testimony of that person as a witness, shall be guilty of an offence.
Maximum penalty: imprisonment for 2 years

Section 40 - Preventing witnesses from attending court
(1) a person who intentionally prevents another person who has been summoned to attend as a witness in a judicial proceeding from attending as a witness or from producing anything in evidence pursuant to the subpoena or summons shall be guilty of an offence.
Maximum penalty: imprisonment for 1 year

Division 4 - Perverting the course of justice
Section 41 - Conspiracy to bring false accusation
(1) A person commits an offence if:
   a. the person conspires with another person:
      i. to charge any person falsely with an offence; or
      ii. to cause any person to be falsely charged with an offence; and
   b. the offence referred to in paragraph (a) is an offence against a law of the Commonwealth; or a Territory.
Maximum penalty: Imprisonment for 10 years.

Section 42 - Conspiracy to defeat justice
(1) A person commits an offence if:
   a. the person conspires with another person to obstruct, to prevent, to pervert or to defeat the course of justice in relation to a judicial power; and
   b. the judicial power is the judicial power of the Commonwealth.
Maximum Penalty: Imprisonment for 10 years

43 Attempting to pervert justice
(1) A person commits an offence if:
   (a) the person attempts to obstruct, to prevent, to pervert or to defeat the course of justice in relation to a judicial power; and
   (b) the judicial power is the judicial power of the Commonwealth.
Penalty: Imprisonment for 10 years.
(2) Absolute liability applies to the paragraph (1)(b) element of the offence.
(3) For the person to be guilty of an offence against subsection (1), the person’s conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.
(4) A person may be found guilty of an offence against subsection (1) even if doing the thing attempted is impossible.

Australia provided the example of the Patrick John Fincham case. Patrick John Fincham was convicted of 4 offences covering two discrete courses of criminal conduct. First, he was convicted of 1 count of defrauding the Commonwealth pursuant to section 29D of the Crimes Act and 1 count of dishonestly obtaining Commonwealth property pursuant to section 134.1(1) of the Criminal Code. These offences related to the defendant’s lodgement of false Business Activity Statements (BAS) to the ATO thereby fraudulently obtaining $121,884.97. Secondly, he was convicted of 2 counts of attempting to pervert the course of justice pursuant to section 43 of the Crimes Act. The defendant
attempted to pervert the course of justice by providing false medical reports to the CDPP and the court in support of his applications to adjourn and discontinue the prosecution of the tax fraud offences. On 15 February 2008 in the County Court of Victoria the defendant was convicted and sentenced to a 3 year good behaviour bond and ordered to pay $121,884.97 reparation. The Director appealed against the inadequacy of this sentence and, due to the serious and aggravated nature of the offending, the Victorian Court of Appeal re-sentenced the offender on 28 September 2008 to 12 months imprisonment to be released on condition that he be of good behaviour for 3 years. The reparation order remained in place.

Statistical information is contained in the following table:

<table>
<thead>
<tr>
<th>Section</th>
<th>Defendants dealt with(b)</th>
<th>Defendants convicted</th>
<th>Defendants acquitted</th>
<th>Defendants with 'other' outcomes(c)</th>
<th>Matters currently on hand(d)</th>
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</thead>
<tbody>
<tr>
<td>36A</td>
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</tbody>
</table>

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 25 Obstruction of Justice

Subparagraph (b)

*Each State Party shall adopt such legislative and other measures as may be necessary to establish as criminal offences, when committed intentionally:

(b) The use of physical force, threats or intimidation to interfere with the exercise of official duties by a justice or law enforcement official in relation to the commission of offences established in accordance with this Convention. Nothing in this subparagraph shall prejudice the right of States Parties to have legislation that protects other categories of public official.*

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with the provision described above.

Under the *Criminal Code Act 1995*, a Commonwealth Public Official is defined broadly and includes an individual employed by the Commonwealth, a member of the Australian Federal Police, and a Commonwealth judicial officer. A Commonwealth judicial officer is also defined to include a judge, justice, magistrate or other judicial officer of a court of a State or Territory who acts in the exercise of federal jurisdiction or incidental to the exercise of federal jurisdiction.
Section 43 of the *Crimes Act 1914* makes it an offence to attempt to pervert justice in relation to the judicial power of the Commonwealth.

The *Criminal Code Act 1995* also contains offences related to threatening, obstructing or harming a Commonwealth public official:
- Section 139.1 of the *Criminal Code Act 1995* makes it an offence to make unwarranted demands of a Commonwealth public official.
- Section 147.1 of the *Criminal Code Act 1995* makes it an offence to cause harm to a Commonwealth public official.
- Section 147.2 of the *Criminal Code Act 1995* makes it an offence to threaten to cause harm to a Commonwealth public official.
- Section 149.1 of the *Criminal Code Act 2002* makes it an offence to obstruct a Commonwealth public official.

Crimes Act 1914

Section 43 - Attempting to pervert justice

(1) Any person who attempts, in any way not specially defined in this Act, to obstruct, prevent, pervert, or defeat, the course of justice in relation to the judicial power of the Commonwealth, shall be guilty of an offence.

Maximum penalty: imprisonment for 5 years

(2) For the purposes of an offence against subsection (1), absolute liability applies to the physical element of circumstance of the offence, that the judicial power is of the Commonwealth.

(3) For the person to be guilty of an offence against subsection (1), the person’s conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

(4) A person may be found guilty of an offence against subsection (1) even if doing the thing attempted is impossible.

Criminal Code 1995

Section 130.1 - Definitions

In this Chapter:

duty:

(a) in relation to a person who is a Commonwealth public official—means any authority, duty, function or power that:
   (i) is conferred on the person as a Commonwealth public official; or
   (ii) the person holds himself or herself out as having as a Commonwealth public official; and

(b) in relation to a person who is a public official—means any authority, duty, function or power that:
   (i) is conferred on the person as a public official; or
   (ii) the person holds himself or herself out as having as a public official.

Section 139.1 - Unwarranted demands of a Commonwealth public official

A person is guilty of an offence if:

(a) the person makes an unwarranted demand with menaces of another person; and
(b) the demand or the menaces are directly or indirectly related to:
   (i) the other person’s capacity as a Commonwealth public official; or
   (ii) any influence the other person has in the other person’s capacity as a Commonwealth public official; and

(c) the first-mentioned person does so with the intention of:
   (i) obtaining a gain; or
(ii) causing a loss; or
(iii) influencing the official in the exercise of the official’s duties as a Commonwealth public official.

Penalty: Imprisonment for 12 years.

Section 147.1 - Causing harm to a Commonwealth public official etc.
(1) A person (the first person) is guilty of an offence if:
   a. the first person engages in conduct; and
   b. the first person’s conduct causes harm to a public official; and
   c. the first person intends that his or her conduct cause harm to the official; and
   d. the harm is caused without the consent of the official; and
   e. the first person engages in his or her conduct because of:
      i. the official’s status as a public official; or
      ii. any conduct engaged in by the official in the official’s capacity as a public official; and
         ea. the public official is a Commonwealth public official; and
         eb. if subparagraph (e)(i) applies the status mentioned in that subparagraph was status as a Commonwealth public official; and
         ec. if subparagraph (e)(ii) applies the conduct mentioned in that subparagraph was engaged in by the official in the official’s capacity as a Commonwealth public official.

Penalty:
   f. if the official is a Commonwealth judicial officer or a Commonwealth law enforcement officer-imprisonment for 13 years; or
   g. in any other case-imprisonment for 10 years.

Section 147.2 - Threatening to cause harm to a Commonwealth public official etc.

Threatening to cause serious harm

(1) A person (the first person) is guilty of an offence if:
   a. the first person makes to another person (the second person) a threat to cause serious harm to the second person or to a third person; and
   b. the second person or the third person is a public official; and
   c. the first person:
      i. intends the second person to fear that the threat will be carried out; or
      ii. is reckless as to causing the second person to fear that the threat will be carried out; and
   d. the first person makes the threat because of:
      i. the official’s status as a public official; or
      ii. any conduct engaged in by the official in the official’s capacity as a public official; and
   (da) the official is a Commonwealth public official; and
   (db) if subparagraph (d)(i) applies the status mentioned in that subparagraph was status as a Commonwealth public official; and
   (dc) if subparagraph (d)(ii) applies the conduct mentioned in that subparagraph was engaged in by the official in the official’s capacity as a Commonwealth public official.

Penalty:
   e. if the official is a Commonwealth judicial officer or a Commonwealth law enforcement officer-imprisonment for 9 years; or
   f. in any other case-imprisonment for 7 years.

(1A) Absolute liability applies to the paragraphs (1)(da), (db) and (dc) elements of the offence.
Threatening to cause harm

(2) A person (the first person) is guilty of an offence if:
   (a) the first person makes to another person (the second person) a threat to cause harm to the second person or to a third person; and
   (b) the second person or the third person is a public official; and
   (c) the first person:
      (i) intends the second person to fear that the threat will be carried out; or
      (ii) is reckless as to causing the second person to fear that the threat will be carried out; and
   (d) the first person makes the threat because of:
      (i) the official’s status as a public official; or
      (ii) any conduct engaged in by the official in the official’s capacity as a public official; and
   (e) the official is a Commonwealth public official; and
   (f) if subparagraph (d)(i) applies-the status mentioned in that subparagraph was status as a Commonwealth public official; and
   (g) if subparagraph (d)(ii) applies-the conduct mentioned in that subparagraph was engaged in by the official in the official’s capacity as a Commonwealth public official.

Penalty: Imprisonment for 2 years

(2A) Absolute liability applies to the paragraphs (2)(e), (f) and (g) elements of the offence.

Section 149.1 - Obstruction of Commonwealth public officials

(1) A person is guilty of an offence if:
   (a) the person knows that another person is a public official; and
   (b) the first-mentioned person obstructs, hinders, intimidates or resists the official in the performance of the official’s functions; and
   (c) the official is a Commonwealth public official; and
   (d) the functions are functions as a Commonwealth public official.

Penalty: Imprisonment for 2 years.

(2) In a prosecution for an offence against subsection (1), it is not necessary to prove that the defendant knew:
   (a) that the official was a Commonwealth public official; or
   (b) that the functions were functions as a Commonwealth public official.

(3) For the purposes of this section, it is immaterial whether the defendant was aware that the public official was performing the official’s functions.

(4) Section 15.3 (extended geographical jurisdiction-category C) applies to an offence against subsection (1).

(5) The definition of duty in section 130.1 does not apply to this section.

(6) In this section:
   function:
      (a) in relation to a person who is a public official-means any authority, duty, function or power that is conferred on the person as a public official; or
      (b) in relation to a person who is a Commonwealth public official-means any authority, duty, function or power that is conferred on the person as a Commonwealth public official.

The table below provides information on the statistical data from 2010 to 2011.
<table>
<thead>
<tr>
<th>Section</th>
<th>Defendants dealt with(a)</th>
<th>Defendants convicted</th>
<th>Defendants acquitted</th>
<th>Defendants with 'other' outcomes(b)</th>
<th>Matters currently on hand(c)</th>
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</table>

Note: These statistics throughout this report relating to the Criminal Code Act 1995 have been extracted from the CDPP's Prosecutions Database.

a) ‘Defendants dealt with’ is the number of finalised trials, sentences or summary hearings which are recorded in the CDPP’s Prosecutions Database for the 2010-11 financial year. This number will not reflect the number of ‘cases’ due to the fact that one ‘case’ can be made up of multiple summary hearings, multiple trials, or a combination of these prosecutorial ‘phases’. Furthermore, ‘defendants dealt with’ also excludes work undertaken by the Office in relation to assessment of briefs, committal hearings, bail applications, appeals and other types of applications. The concept of ‘defendants dealt with’ is a unit of measurement which is reported annually in the CDPP’s Annual Report and is considered to be a useful and informative indicator of the actual prosecutorial work undertaken by the CDPP. It is not intended to reflect either the number of cases, nor the actual number of defendants prosecuted.

b) ‘Other’ outcomes include, but are not limited to, where charges were discontinued, where a jury was unable to reach a verdict or where a warrant was issued for the arrest of the defendant after they failed to appear in court.

c) Matters currently on hand include all ‘open’ matters as at 03.11.2011, irrespective of what prosecutorial stage the matter is up to. That is, these figures include briefs currently being assessed, committal hearings currently underway, as well as defendants currently being dealt with in court.

Additionally, the offences in the Crimes Act 1914 relating to perverting the course of justice were amended by the Law and Justice Legislation Amendment (Identity Crimes and other Measures) Act 2011. These amendments reframed these offences to align them with Chapter 2 of the Criminal Code Act 1995, increased penalties for certain offences and introduced absolute liability for jurisdictional elements.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 26 Liability of legal persons

1. Each State Party shall adopt such measures as may be necessary, consistent with its legal principles, to establish the liability of legal persons for participation in the offences established in accordance with this Convention.
2. Subject to the legal principles of the State Party, the liability of legal persons may be criminal, civil or administrative.
3. Such liability shall be without prejudice to the criminal liability of the natural persons who have committed the offences.
4. Each State Party shall, in particular, ensure that legal persons held liable in accordance with this article are subject to effective, proportionate and dissuasive criminal or non-criminal sanctions, including monetary sanctions.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with paras. 1 and 2 of article 26.

The Crimes Act 1914 (Section 4B) provides that a provision of the law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons. These provisions that make bodies corporate subject to offences and affects the sentence that can be imposed on a corporation.

Part 2.5 of the Criminal Code 1995 then sets out principles related to corporate criminal responsibility.

Crimes Act 1914
Section 4B - Pecuniary penalties—natural persons and bodies corporate
(1) A provision of a law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons.

... (3) Where a body corporate is convicted of an offence against a law of the Commonwealth, 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 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.

(3A) Where an Act (whether enacted before or after the commencement of this subsection) confers power to make an instrument (including rules, regulations or by-laws but not including a law of a Territory) and specifies the maximum pecuniary penalty that can be imposed for offences created by such an instrument, then:

... (b) where a body corporate is convicted of such an offence—the specifying of that penalty is not to be treated as an indication of a contrary intention for the purposes of applying subsection (3).

Criminal Code 1995
Section 12.1 - General Principles
1) This Code applies to bodies corporate in the same way as it applies to individuals. It so applies with such modifications as are set out in this Part and with such other modifications as are made necessary by the fact that criminal liability is being imposed on bodies corporate rather than individuals.

2) A body corporate may be found guilty of any offence, including one punishable by imprisonment. Note: Section 4B of the Crimes Act 1914 enables a fine to be imposed for offences that only specify imprisonment as a penalty.

Section 12.2 - Physical Elements
If a physical element of an offence is 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, the physical element must also be attributed to the body corporate.

Section 12.3 - Fault elements other than negligence
1) If intention, knowledge or recklessness is a fault element in relation to a physical element of an offence, that fault element must be attributed to a body corporate that expressly, tacitly or impliedly authorised or permitted the commission of the offence.

2) The means by which such an authorisation or permission may be established include:
   a. proving that the body corporate’s board of directors intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly...
authorised or permitted the commission of the offence; or
b. proving that a high managerial agent of the body corporate intentionally, knowingly or recklessly engaged in the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence; or
c. proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision; or
d. proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

3) Paragraph (2)(b) does not apply if the body corporate proves that it exercised due diligence to prevent the conduct, or the authorisation or permission.

4) Factors relevant to the application of paragraph (2)(c) or (d) include:
   a. whether authority to commit an offence of the same or a similar character had been given by a high managerial agent of the body corporate; and
   b. whether the employee, agent or officer of the body corporate who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a high managerial agent of the body corporate would have authorised or permitted the commission of the offence.

5) If recklessness is not a fault element in relation to a physical element of an offence, subsection (2) does not enable the fault element to be proved by proving that the board of directors, or a high managerial agent, of the body corporate recklessly engaged in the conduct or recklessly authorised or permitted the commission of the offence.

6) In this section:
   board of directors means the body (by whatever name called) exercising the executive authority of the body corporate.
   corporate culture means an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place.
   high managerial agent means an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy.

Section 12.4 - Negligence
1) The test of negligence for a body corporate is that set out in section 5.5.
2) If:
   a) negligence is a fault element in relation to a physical element of an offence; and
   b) no individual employee, agent or officer of the body corporate has that fault element; that fault element may exist on the part of the body corporate if the body corporate’s conduct is negligent when viewed as a whole (that is, by aggregating the conduct of any number of its employees, agents or officers).
3) Negligence may be evidenced by the fact that the prohibited conduct was substantially attributable to:
   a) inadequate corporate management, control or supervision of the conduct of one or more of its employees, agents or officers; or
   b) failure to provide adequate systems for conveying relevant information to relevant persons in the body corporate.

Section 12.6 - Intervening conduct or event
A body corporate cannot rely on section 10.1 (intervening conduct or event) in respect of a physical element of an offence brought about by another person if the other person is an employee, agent or officer of the body corporate.

With regard to para. 3 of article 26, Australia stated that it is in compliance.

Australia referred to section 4B of the Crime Act 1914 which provides that ‘a provision of a law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary
intention appears, be deemed to refer to bodies corporate as well as to natural persons.’

As such, any Commonwealth criminal offence established in accordance with the Convention will apply to a legal person unless the offence contains a contrary intention.

With regard to para. 4 of article 26, Australia stated that it is in compliance.

Australia referred to the Crime Act 1914 which provides that where a body corporate is convicted of an offence the court may impose a pecuniary penalty that is 5 times the amount of a penalty that could be imposed by a court on a natural person convicted of the same offence.

_Crimes Act 1914_

**Section 4B - Pecuniary Penalties - natural persons and body corporate**

1) A provision of a law of the Commonwealth relating to indictable offences or summary offences shall, unless the contrary intention appears, be deemed to refer to bodies corporate as well as to natural persons.

2) Where a natural person is convicted of an offence against a law of the Commonwealth punishable by imprisonment only, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding the number of penalty units calculated using the formula:

\[
\text{Term of Imprisonment} \times 5
\]

where:

*Term of Imprisonment* is the maximum term of imprisonment, expressed in months, by which the offence is punishable.

(2A) Where a natural person is convicted of an offence against a law of the Commonwealth in respect of which a court may impose a penalty of imprisonment for life, the court may, if the contrary intention does not appear and the court thinks it appropriate in all the circumstances of the case, impose, instead of, or in addition to, a penalty of imprisonment, a pecuniary penalty not exceeding 2,000 penalty units.

3) Where a body corporate is convicted of an offence against a law of the Commonwealth, 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 5 times the amount of the maximum pecuniary penalty that could be imposed by the court on a natural person convicted of the same offence.

(3A) Where an Act (whether enacted before or after the commencement of this subsection) confers power to make an instrument (including rules, regulations or by-laws but not including a law of a Territory) and specifies the maximum pecuniary penalty that can be imposed for offences created by such an instrument, then:

a) unless the contrary intention appears, the specified penalty is taken to be the maximum penalty that the instrument can prescribe for such offences by natural persons; and

b) where a body corporate is convicted of such an offence the specifying of that penalty is not to be treated as an indication of a contrary intention for the purposes of applying subsection (3).

4) Where under a law of the Commonwealth any forfeiture, penalty or reparation is paid to a person aggrieved, it is payable to a body corporate where the body corporate is the person aggrieved.

As examples, Australia provided the *Unlicensed Financial Services and Fraud by Stephen McArdle and Power Financial Planning* case.

McArdle was a director of a number of companies that made up the Power Loan group of companies. Power Loan was primarily involved in mortgage broking. It also had a financial planning limb to its business that utilised the services of licensed financial planners from another company. In about
October 2004 the properly authorised financial planners ended their relationship with Power Loan, leaving no one with an Australian Financial Service Licence (AFSL), nor any authorised representatives of an AFSL holder, and therefore an inability to provide financial services. McArdle was aware of this, and was also aware that Power Loan would have legal problems if it dealt in financial products without an AFSL.

Shortly after the financial planners left, McArdle was involved in establishing Power Financial Planning (PFP) which was created for the purpose of resuming the sale of financial products. McArdle was a director of PFP and entered into both marketing and commission arrangements on behalf of PFP with a group of companies that sold financial products (collectively referred to as ‘Kebbel’). Whilst Kebbel had an AFSL, it was only permitted to provide limited financial services. Kebbel advised McArdle of a method whereby PFP could supposedly become involved in the sale of financial products as a referrer, without breaching the law.

Kebbel provided McArdle with literature relating to products that it was authorised to sell. These included promissory notes issued by the Westpoint group. From December 2004 Power Loan employees were instructed to refer potential clients to marketers within the company so that investment in various financial products could be discussed with them. The marketers then assisted the clients to apply to purchase financial products and in many instances, made favourable comments about the products. The completed application forms and investment monies were then collected by the marketers and forwarded to McArdle, who then forwarded them to Kebbel. McArdle was involved in overseeing commission payments made by Kebbel to PFP, and distributing the payments to the marketers and others involved in the particular sale. McArdle instructed his marketers to advise the clients that PFP was acting as an agent for Kebbel and that PFP was not providing advice. Clients were required to complete a ‘no advice’ form confirming that they had not received any financial advice from the marketers/PFP.

McArdle was charged with aiding, abetting counselling or procuring PFP to carry on a financial services business when PFP did not hold an Australian financial services licence covering the provision of financial services pursuant to sections 911A(1) and 1311(1) of the Corporations Act.

McArdle pleaded not guilty and PFP pleaded guilty. McArdle’s trial ran for approximately 9 days in September 2010. Judgment was delivered on 12 November 2010.

The court found that between 1 January 2005 and 30 November 2005 PFP presented investors with financial product advice, accepted investment application forms from investors, forwarded those to Kebbel, arranged for loans to fund purchase of financial products and received commission payments from Kebbel for those services. The court held that any one of these activities may have been sufficient to constitute dealing in financial products, but in combination was clearly dealing in financial products, and found the charge proven. The behaviour was intentional and PFP/McArdle knew that it did not hold an AFSL. The court found McArdle guilty of aiding, abetting counselling or procuring the conduct of PFP by virtue of his involvement in the scheme.

The investments failed, generating significant losses to the investors. The court found that the losses to the investors who provided statements at trial were $961,000 although the total loss to investors was in the order of $10.3 million. The court also noted the hardship endured by the investors who provided victim impact statements to the court. Both defendants were sentenced in the SA Magistrates Court on 24 November 2010. PFP was convicted and fined $33,000. McArdle was sentenced to 1 year imprisonment to be released after serving 6 months on condition he be of good behaviour for 6 months. Both defendants were ordered to make reparation to the victims in this matter.

The judge on the sentence remarked that: “...strict compliance with the financial services law requires a provider to have adequate resources to supervise the compliance, to maintain competence to provide the financial services, to ensure that representatives are adequately trained and to have adequate risk management systems. There are also other requirements to have arrangements for compensating retail
clients for losses or damages suffered. All this is designed to achieve the main object of that chapter of the Corporations Act 2001, which is that consumers should be able to be confident and make informed decisions about financial products, that there is fairness, honesty and professionalism by those who provide the financial service and a reduction of systemic risk….it is clear that the failure of the company PFP to have a licence – with the awful consequences to the victims that have been demonstrated – goes to the heart of the reason why the licensing regime is in place.”

(b) Observations on the implementation of the article

Australia reported that Part 2.5 of the Criminal Code allows for the underlying criminal conduct to apply to both corporate liability and individual liability. This includes aiding and abetting liability. With regard to penalties, bodies corporate are only subject to pecuniary penalties, but may also be subject to forfeiture under the Proceeds of Crime Act. Under 12.3, it is a full defence to corporate liability in 2(b) offences that it exercised due diligence.

The reviewing experts were satisfied with the answers provided.

Article 27 Participation and attempt

Paragraph 1

1. Each State Party shall adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, participation in any capacity such as an accomplice, assistant or instigator in an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with this provision.

Australia referred to Part 2.4 of the Criminal Code 1995 which establishes extensions of criminal responsibility, including aiding, abetting, counselling or procuring the commission of an offence, joint commission, commission by proxy, incitement and conspiring to commit an offence.

Criminal Code 1995 - Part 2.4
Section 11.2 - Complicity and common purpose
1) A person who aids, abets, counsels or procures the commission of an offence by another person is taken to have committed that offence and is punishable accordingly.
2) For the person to be guilty:
   a) the person’s conduct must have in fact aided, abetted, counselled or procured the commission of the offence by the other person; and
   b) the offence must have been committed by the other person.
3) For the person to be guilty, the person must have intended that:
   a) his or her conduct would aid, abet, counsel or procure the commission of any offence (including its fault elements) of the type the other person committed; or
   b) his or her conduct would aid, abet, counsel or procure the commission of an offence and have been reckless about the commission of the offence (including its fault elements) that the other person in fact committed.
   (3A) Subsection (3) has effect subject to subsection (6).
4) A person cannot be found guilty of aiding, abetting, counselling or procuring the commission of an offence if, before the offence was committed, the person:
   a) terminated his or her involvement; and
   b) took all reasonable steps to prevent the commission of the offence.
5) A person may be found guilty of aiding, abetting, counselling or procuring the commission of an offence even if the other person has not been prosecuted or has not been found guilty.
6) Any special liability provisions that apply to an offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of subsection (1).

7) If the trier of fact is satisfied beyond reasonable doubt that a person either:
   a) is guilty of a particular offence otherwise than because of the operation of subsection (1); or
   b) is guilty of that offence because of the operation of subsection (1); but is not able to determine which, the trier of fact may nonetheless find the person guilty of that offence.

Section 11.2A Joint commission
(1) If:
   a) a person and at least one other party enter into an agreement to commit an offence; and
   b) either:
      (i) an offence is committed in accordance with the agreement (within the meaning of subsection (2)); or
      (ii) an offence is committed in the course of carrying out the agreement (within the meaning of subsection (3));

the person is taken to have committed the joint offence referred to in whichever of subsection (2) or (3) applies and is punishable accordingly.

Offence committed in accordance with the agreement
(2) An offence is committed in accordance with the agreement if:
   a) the conduct of one or more parties in accordance with the agreement makes up the physical elements consisting of conduct of an offence (the joint offence) of the same type as the offence agreed to; and
   b) to the extent that a physical element of the joint offence consists of a result of conduct that result arises from the conduct engaged in; and
   c) to the extent that a physical element of the joint offence consists of a circumstance-the conduct engaged in, or a result of the conduct engaged in, occurs in that circumstance.

Offence committed in the course of carrying out the agreement
(3) An offence is committed in the course of carrying out the agreement if the person is reckless about the commission of an offence (the joint offence) that another party in fact commits in the course of carrying out the agreement.

Intention to commit an offence
(4) For a person to be guilty of an offence because of the operation of this section, the person and at least one other party to the agreement must have intended that an offence would be committed under the agreement.

Agreement may be non-verbal etc.
(5) The agreement:
   a) may consist of a non-verbal understanding; and
   b) may be entered into before, or at the same time as, the conduct constituting any of the physical elements of the joint offence was engaged in.

Termination of involvement etc.
(6) A person cannot be found guilty of an offence because of the operation of this section if, before the conduct constituting any of the physical elements of the joint offence concerned was engaged in, the person:
   a) terminated his or her involvement; and
   b) took all reasonable steps to prevent that conduct from being engaged in.

Person may be found guilty even if another party not prosecuted etc.
(7) A person may be found guilty of an offence because of the operation of this section even if:
   a) another party to the agreement has not been prosecuted or has not been found guilty; or
b) the person was not present when any of the conduct constituting the physical elements of the joint offence was engaged in.

**Special liability provisions apply**

(8) Any special liability provisions that apply to the joint offence apply also for the purposes of determining whether a person is guilty of that offence because of the operation of this section.

**Section 11.3 - Commission by proxy**
A person who:

a) has, in relation to each physical element of an offence, a fault element applicable to that physical element; and

b) procures conduct of another person that (whether or not together with conduct of the procurer) would have constituted an offence on the part of the procurer if the procurer had engaged in it; is taken to have committed that offence and is punishable accordingly.

**Section 11.4 - Incitement**
1) A person who urges the commission of an offence is guilty of the offence of incitement.

2) For the person to be guilty, the person must intend that the offence incited be committed.

2A) Subsection (2) has effect subject to subsection (4A).

3) A person may be found guilty even if committing the offence incited is impossible.

4) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

4A) Any special liability provisions that apply to an offence apply also to the offence of incitement in respect of that offence.

5) It is not an offence to incite the commission of an offence against section 11.1 (attempt), this section or section 11.5 (conspiracy).

**Section 11.5 Conspiracy**
1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the *Crimes Act 1914*.

2) For the person to be guilty:

a) the person must have entered into an agreement with one or more other persons; and

b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and

c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

2A) Subsection (2) has effect subject to subsection (7A).

3) A person may be found guilty of conspiracy to commit an offence even if:

a) committing the offence is impossible; or

b) the only other party to the agreement is a body corporate; or

c) each other party to the agreement is at least one of the following:

   i. a person who is not criminally responsible;

   ii. a person for whose benefit or protection the offence exists; or
d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

4) A person cannot be found guilty of conspiracy to commit an offence if:
   a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
   b) he or she is a person for whose benefit or protection the offence exists.

5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
   a) withdrew from the agreement; and
   b) took all reasonable steps to prevent the commission of the offence.

6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

11.6 References in Acts to offences

(1) A reference in a law of the Commonwealth to an offence against a law of the Commonwealth (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.

(2) A reference in a law of the Commonwealth (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.

(3) Subsection (1) or (2) does not apply if a law of the Commonwealth is expressly or impliedly to the contrary effect.

(4) In particular, an express reference in a law of the Commonwealth to:
   a) an offence against, under or created by the Crimes Act 1914; or
   b) an offence against, under or created by a particular provision of the Crimes Act 1914; or
   c) an offence arising out of the first-mentioned law or another law of the Commonwealth; or
   d) an offence arising out of a particular provision; or
   e) an offence against, under or created by the Taxation Administration Act 1953;

    does not mean that the first-mentioned law is impliedly to the contrary effect.

Australia referred to the Nour Eddine Ghazri case. The defendant in this matter aided and abetted another person to import a consignment of tobacco into Australia without paying the necessary excise duty of $1,081,517.03.

On 24 December 2006 a shipping container arrived at Port Botany, NSW from Indonesia. The contents of the container were declared as 808 cartons of biscuits and soap. On 27 December 2006 $431.87 in duty was paid on the declared contents of the container. The next day the container was x-
rayed by Customs officers and was found to contain 508 boxes of tobacco, 200 boxes of biscuits and 100 boxes of soap. Some of the tobacco was placed back into the container. Later that day the defendant paid money into the freight company’s account. On 4 January 2007 a ‘managed delivery’ at a storage facility was carried out by the NSW Police. The defendant was present when the truck arrived, he arranged for others to attend to assist in the unloading of the container, opened the container and assisted in unloading it. When the NSW Police arrested the defendant he was in possession of documents relating to the import. The defendant was charged with one count of aiding, abetting, counselling or procuring a loss to a Commonwealth entity pursuant to section 135.1(3) of the Criminal Code (General Dishonesty). On 5 December 2008 the defendant was convicted and sentenced in the District Court of New South Wales in Sydney to 12 months imprisonment to be released forthwith on condition that he be of good behaviour for 2 years.

Statistics from 2009 to 2010 are compiled in the following table.

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<td>Obtaining a financial advantage by deception</td>
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<tr>
<td></td>
<td>Dealing in proceeds of crime – money or property worth $1,000,000 or more</td>
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</tbody>
</table>

(b) Observations on the implementation of the article

Physical elements means any of the acts taken after the mental state. The reviewing experts were satisfied with the answers provided.

Article 27 Participation and attempt

Paragraph 2

2. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, any attempt to commit an offence established in accordance with this Convention.
(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia referred to the Criminal Code 1995- Part 2.4.

_Criminal Code 1995 - Part 2.4
Section 11.1 - Attempt

1) A person who attempts to commit an offence is guilty of the offence of attempting to commit that offence and is punishable as if the offence attempted had been committed.

2) For the person to be guilty, the person’s conduct must be more than merely preparatory to the commission of the offence. The question whether conduct is more than merely preparatory to the commission of the offence is one of fact.

3) For the offence of attempting to commit an offence, intention and knowledge are fault elements in relation to each physical element of the offence attempted.

Note: Under section 3.2, only one of the fault elements of intention or knowledge would need to be established in respect of each physical element of the offence attempted.

3A) Subsection (3) has effect subject to subsection (6A).

4) A person may be found guilty even if:
   (a) committing the offence attempted is impossible; or
   (b) the person actually committed the offence attempted.

5) A person who is found guilty of attempting to commit an offence cannot be subsequently charged with the completed offence.

6) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of attempting to commit that offence.

6A) Any special liability provisions that apply to an offence apply also to the offence of attempting to commit that offence.

7) It is not an offence to attempt to commit an offence against section 11.2 (complicity and common purpose), section 11.2A (joint commission), section 11.3 (commission by proxy), section 11.5 (conspiracy to commit an offence) or section 135.4 (conspiracy to defraud).

11.6 References in Acts to offences

(1) A reference in a law of the Commonwealth to an offence against a law of the Commonwealth (including this Code) includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to such an offence.

(2) A reference in a law of the Commonwealth (including this Code) to a particular offence includes a reference to an offence against section 11.1 (attempt), 11.4 (incitement) or 11.5 (conspiracy) of this Code that relates to that particular offence.

(3) Subsection (1) or (2) does not apply if a law of the Commonwealth is expressly or impliedly to the contrary effect.

(4) In particular, an express reference in a law of the Commonwealth to:
   (a) an offence against, under or created by the _Crimes Act 1914_; or
(b) an offence against, under or created by a particular provision of the Crimes Act 1914; or

c) an offence arising out of the first-mentioned law or another law of the Commonwealth; or

d) an offence arising out of a particular provision; or

e) an offence against, under or created by the Taxation Administration Act 1953;

does not mean that the first-mentioned law is impliedly to the contrary effect.

Australia referred to the Mark William Rowson case. The defendant obtained fraudulent GST refunds from October 2002 to October 2004. The scheme involved the registration of two companies, Callards P/L & Pavon P/L, using the identities of 2 genuine persons as the nominated directors, without their knowledge. The listed places of business given for these companies were “virtual offices” set up at serviced office premises in Melbourne. Documentation was created and presented to the ATO via accounting firms Deloittes and Price Waterhouse purporting to show transactions between the companies totalling some $42 million in value. These transactions were detailed in Business Activity Statements submitted to the ATO in which GST refunds were claimed. As a result of the submission of these fraudulent claims, refunds totalling $2,453,102 were paid to Callards P/L by the ATO by way of electronic transfers of funds to a bank account in the name of Callards. Subsequently, the defendant, purporting to be the director of the company, attended at the bank and on numerous occasions withdrew large amounts of cash. Documentation seeking further GST refunds totalling some $1,334,173 was submitted to the ATO via Deloittes, however, these refunds were not paid by the ATO. Apart from a sum of $68,000, none of the monies were recovered. The defendant pleaded guilty to one count of obtaining a financial advantage by deception from a Commonwealth entity contrary to sub-section 134.2(1) of the Criminal Code and to one count of attempting to obtain a financial advantage from a Commonwealth entity contrary to sub-sections 11.1(1) & 134.2(1) of the Criminal Code. On 11 September 2006 the defendant was sentenced in the County Court of Victoria to a total effective sentence of three years and one day imprisonment, with 18 months to serve. The sentence was successfully appealed by the Director and the Court of Appeal upheld that appeal on 31 August 2007, increasing the total effective sentence to five years imprisonment, with three years to serve.

The Court re-affirmed that the pre-eminent sentencing consideration in cases of revenue fraud is that of general deterrence and, giving full weight to the principles of double jeopardy applicable to Crown appeals, nevertheless substantially increased both the effective head sentence and the pre-release period.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 27 Participation and attempt

Paragraph 3

3. Each State Party may adopt such legislative and other measures as may be necessary to establish as a criminal offence, in accordance with its domestic law, the preparation for an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being partially in compliance with the provision under review.

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8 Source: CDPP Annual Report 2008-09
Under section 11.5 of the *Criminal Code Act 1995* if a person conspires with another person to commit an offence (actual commission of the offence is not required, however an overt act pursuant to the parties agreement to commit the offence is required)

11.5 Conspiracy

(1) A person who conspires with another person to commit an offence punishable by imprisonment for more than 12 months, or by a fine of 200 penalty units or more, is guilty of the offence of conspiracy to commit that offence and is punishable as if the offence to which the conspiracy relates had been committed.

Note: Penalty units are defined in section 4AA of the *Crimes Act 1914*.

(2) For the person to be guilty:
   (a) the person must have entered into an agreement with one or more other persons; and
   (b) the person and at least one other party to the agreement must have intended that an offence would be committed pursuant to the agreement; and
   (c) the person or at least one other party to the agreement must have committed an overt act pursuant to the agreement.

(2A) Subsection (2) has effect subject to subsection (7A).

(3) A person may be found guilty of conspiracy to commit an offence even if:
   (a) committing the offence is impossible; or
   (b) the only other party to the agreement is a body corporate; or
   (c) each other party to the agreement is at least one of the following:
      (i) a person who is not criminally responsible;
      (ii) a person for whose benefit or protection the offence exists; or
   (d) subject to paragraph (4)(a), all other parties to the agreement have been acquitted of the conspiracy.

(4) A person cannot be found guilty of conspiracy to commit an offence if:
   (a) all other parties to the agreement have been acquitted of the conspiracy and a finding of guilt would be inconsistent with their acquittal; or
   (b) he or she is a person for whose benefit or protection the offence exists.

(5) A person cannot be found guilty of conspiracy to commit an offence if, before the commission of an overt act pursuant to the agreement, the person:
   (a) withdrew from the agreement; and
   (b) took all reasonable steps to prevent the commission of the offence.

(6) A court may dismiss a charge of conspiracy if it thinks that the interests of justice require it to do so.

(7) Any defences, procedures, limitations or qualifying provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(7A) Any special liability provisions that apply to an offence apply also to the offence of conspiracy to commit that offence.

(8) Proceedings for an offence of conspiracy must not be commenced without the consent of the Director of Public Prosecutions. However, a person may be arrested for, charged with, or remanded in custody or on bail in connection with, an offence of conspiracy before the necessary consent has been given.

(b) **Observations on the implementation of the article**
The reviewing experts consider Australia to be in full compliance with this provision and were satisfied with the answers provided.

**Article 28 Knowledge, intent and purpose as elements of an offence**

*Knowledge, intent or purpose required as an element of an offence established in accordance with this Convention may be inferred from objective factual circumstances.*

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated being in compliance with the provision under review.

Australia referred to the Evidence Act 1995 which provides that inferences may be drawn from demonstrations, experiments or inspections, and there is nothing to preclude inferences being drawn as to the mental as well as physical elements of an offence. The judge may also take into account matters of common knowledge, and draw inferences from a document or thing. Inferences in relation to knowledge, intent and purpose are similarly not precluded by the *Criminal Code Act 1995* (see in particular Part 2.6 - Proof of criminal responsibility).

**Evidence Act 1995**

**Section 53 - Views**

(1) A judge may, on application, order that a demonstration, experiment or inspection be held.

(2) A judge is not to make an order unless he or she is satisfied that:
   (a) the parties will be given a reasonable opportunity to be present; and
   (b) the judge and, if there is a jury, the jury will be present.

(3) Without limiting the matters that the judge may take into account in deciding whether to make an order, the judge is to take into account the following:
   (a) whether the parties will be present;
   (b) whether the demonstration, experiment or inspection will, in the court’s opinion, assist the court in resolving issues of fact or understanding the evidence;
   (c) the danger that the demonstration, experiment or inspection might be unfairly prejudicial, might be misleading or confusing or might cause or result in undue waste of time;
   (d) in the case of a demonstration-the extent to which the demonstration will properly reproduce the conduct or event to be demonstrated;
   (e) in the case of an inspection-the extent to which the place or thing to be inspected has materially altered.

(4) The court (including, if there is a jury, the jury) is not to conduct an experiment in the course of its deliberations.

(5) This section does not apply in relation to the inspection of an exhibit by the court or, if there is a jury, by the jury.

**Section 54 - Views to be evidence**

The court (including, if there is a jury, the jury) may draw any reasonable inference from what it sees, hears or otherwise notices during a demonstration, experiment or inspection.

**Section 144 - Matters of common knowledge**

(1) Proof is not required about knowledge that is not reasonably open to question and is:
   (a) common knowledge in the locality in which the proceeding is being held or generally; or
(b) capable of verification by reference to a document the authority of which cannot reasonably be questioned.

(2) The judge may acquire knowledge of that kind in any way the judge thinks fit.

(3) The court (including, if there is a jury, the jury) is to take knowledge of that kind into account.

(4) The judge is to give a party such opportunity to make submissions, and to refer to relevant information, relating to the acquiring or taking into account of knowledge of that kind as is necessary to ensure that the party is not unfairly prejudiced.

Section 183 - Inferences
If a question arises about the application of a provision of this Act in relation to a document or thing, the court may:

(a) examine the document or thing; and

(b) draw any reasonable inferences from it as well as from other matters from which inferences may properly be drawn.

Concerning existing facts, Australia mentioned that there are no cases that specifically address this issue. However, the High Court case of *Pledge v Roads and Traffic Authority* [2004] HCA 13 emphasises the significance of evidence obtained from a viewing in the context of a civil case for damages for a pedestrian hit by a car. Callinan and Heyden JJ stated at para. 49:

“The third error was the failure of the Court of Appeal to have sufficient regard to the utility of the trial judge's experiences in inspecting the site of the accident and driving along the road towards the accident site, particularly the enhanced utility accorded to it by s 54 of the Evidence Act. Abaros v Australian Postal Commission, a case relied on by Mr Pledge, and which affirmed the special position of the trial judge, was a case in which the trial judge had enjoyed an analogous advantage, of an in-court demonstration. Even before the enactment of the Evidence Act, appeals courts customarily accorded significance to a demonstration or view at first instance. It was not accorded the weight that it deserved here.”

The following are examples of issues which have been accepted by Australian courts to be matters of common knowledge:

- the nature of the internet and the world wide web – *Jones v Toben* [2002] FCA 1150 at [64] and [65] per Branson J
- that asbestos is dangerous and can be deadly – *Kent v Wotton & Byrne Pty Ltd* [2006] TASSC 8 at [12] per Blow J

The Macquarie Dictionary was held to be a document the authority of which cannot reasonably be questioned in *Applicant S1983 of 2003 v Minister for Immigration and Citizenship* [2007] FCA 854 at [27] per Branson J.

(b) Observations on the implementation of the article

Australia reported that the mental state of a criminal defendant can be inferred from the circumstantial evidence. This principle is well established in the common law. The reviewing experts were satisfied with the answers provided.

Article 29 Statute of limitations
Each State Party shall, where appropriate, establish under its domestic law a long statute of limitations period in which to commence proceedings for any offence established in accordance with this Convention and establish a longer statute of limitations period or provide for the suspension of the statute of limitations where the alleged offender has evaded the administration of justice.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia referred to Section 15B of the Crimes Act 1914 which outlines the statute of limitations periods in respect to all Commonwealth laws.

Section 15B - Time for commencement of prosecutions
(1) Subject to subsection (1B), a prosecution of an individual for an offence against any law of the Commonwealth may be commenced as follows:
   (a) if the maximum penalty which may be imposed for the offence in respect of an individual is, or includes, a term of imprisonment of more than 6 months in the case of a first conviction-at any time;
   (b) in any other case-at any time within one year after the commission of the offence.

(1A) A prosecution of a body corporate for an offence against any law of the Commonwealth may be commenced as follows:
   (a) if the maximum penalty which may be imposed for the offence in respect of a body corporate is, or includes, a fine of more than 150 penalty units in the case of a first conviction-at any time;
   (b) in any other case-at any time within one year after the commission of the offence.

(1B) A prosecution of an individual for an offence that is taken to have been committed because of section 11.2 or 11.2A of the Criminal Code, or against another law of the Commonwealth dealing with aiding and abetting, in relation to an offence committed by a body corporate may be commenced as follows:
   (a) if the maximum penalty which may be imposed for the principal offence in respect of a body corporate is, or includes, a fine of more than 150 penalty units in the case of a first conviction-at any time;
   (b) in any other case-at any time within one year after the commission of the offence by the individual.

(2) Notwithstanding any provision in any law of the Commonwealth passed before the commencement of this Act and providing any shorter time for the commencement of the prosecution, any prosecution for an offence against the law may be commenced at any time within one year after the commission of the offence.

(3) Where by any law of the Commonwealth any longer time than the time provided by this section is provided for the commencement of a prosecution in respect of an offence against that law, a prosecution in respect of the offence may be commenced at any time within that longer time.

(b) Observations on the implementation of the article

Australia reported that there is no statute of limitations for most corruption cases. Offences where the maximum penalty is less than six months would have a one-year statute of limitations. Australia reported no impediments posed to the prosecution of Convention offences.

Under Section 15B of the Crimes Act, a prosecution of an individual for an offence against any law of
the Commonwealth may be commenced at any time if the maximum penalty is a term of imprisonment of more than six months. A prosecution of a body corporate for an offence against any law of the Commonwealth may be commenced at any time if the maximum penalty is a fine of more than 150 penalty units (note that a “penalty unit” is defined in the Crimes Act 1914, section 4AA, as $110 AUD). In any other case involving an individual or body corporate, prosecution must begin within one year after the commission of the offence.

Noting that article 29 of the Convention requires establishing a “long” statute of limitations for offenses under the Convention, Australia’s approach to indictable offenses, which provides for no time bar to prosecution, was compliant with this article.

**Article 30 Prosecution, adjudication and sanctions**

**Paragraph 1**

1. Each State Party shall make the commission of an offence established in accordance with this Convention liable to sanctions that take into account the gravity of that offence.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

As outlined in responses to Articles 15-27, Australia has strong sanctions in place to address acts of corruption, including criminal, civil and administrative sanctions. As the cases below demonstrate, officials charged with corruption offences under the Criminal Code can be liable to significant terms of imprisonment and pecuniary penalties.

Further, *the Crimes Act 1914* contains the matters that courts will have regard to when sentencing an offender. Section 16A(2)(a) states that courts will have regard to the nature of the offence. These provisions apply to all offences established in accordance with the Convention.

**Crimes Act 1914**

Part 1B Sentencing, imprisonment and release of federal offenders.

Section 16A - Matters to which court to have regard when passing sentence etc.

1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

a) the nature and circumstances of the offence;

b) other offences (if any) that are required or permitted to be taken into account;

c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character-that course of conduct;

d) the personal circumstances of any victim of the offence;

e) any injury, loss or damage resulting from the offence;

f) the degree to which the person has shown contrition for the offence:

   (i) by taking action to make reparation for any injury, loss or damage resulting from the offence;

   (ii) in any other manner;

g) if the person has pleaded guilty to the charge in respect of the offence—that fact;

h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;

i) the deterrent effect that any sentence or order under consideration may have on the person;
j) the need to ensure that the person is adequately punished for the offence;
k) the character, antecedents, cultural background, age, means and physical or mental condition of the person;
l) the prospect of rehabilitation of the person;
m) the probable effect that any sentence or order under consideration would have on any of the person's family or dependants.

(3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order.

The Jeffrey Eric Page, Dale Lynch and Daryl Corker\(^9\) case was cited as an example. Jeffery Page was a senior executive within Australia Post managing the Parcels and Transport Business Unit for Victoria and Tasmania. He was paid secret commissions by Dale Lynch and Daryl Corker. Lynch and Corker conducted a panel beating business and, in return for payments to Page, secured a virtual monopoly on the Australia Post vehicle repair work in Melbourne. The bribes included cash of $20,000 to purchase a Harley Davidson motor cycle, a ride-on mower, windows for a holiday house and a lounge suite. This scheme operated for two years. Page was charged with various offences including the receipt of secret commissions and stealing Commonwealth property. Lynch and Corker were charged with giving secret commissions. Page was sentenced to four years imprisonment to be released after serving 18 months. Lynch and Corker were sentenced to three years imprisonment to be released after serving nine months. The DPP also took action to recover the proceeds of crime and ultimately obtained a pecuniary penalty order against Page for $105,000 as part of a negotiated settlement.

Grant Russell Mullins and Edward Arthur Dewey\(^10\)
This matter involved a serious breach of trust placed in the defendant Mullins, by his employer, the Department of Defence. There was also a significant loss to the Commonwealth of more than $1.3 million from the unauthorised disposal of 183 turbine wheels and spacers. Dewey and Mullins developed a private commercial relationship involving the unauthorised disposal of aircraft parts which were RAAF property. Their dealings involved the disposal of 183 turbine wheels and spacers. Mullins was charged with three offences contrary to the Criminal Code for causing a loss to the Commonwealth, asking for a corrupt benefit as a Commonwealth public official and receiving a corrupt benefit as a Commonwealth public official. Dewey was charged with causing a loss to the Commonwealth and 3 counts of giving a corrupt benefit to a Commonwealth public official. Mullins was sentenced to a total effective sentence of 3 years imprisonment to be served by way of periodic detention, to be released after 1 year and 9 months on a recognisance in the sum of $100 to be of good behaviour for 1 year and 9 months. He was also ordered to pay $1,560,689.58 in reparation. Dewey was sentenced to a total effective sentence of 27 months imprisonment to be released forthwith on a recognisance of $1000 to be of good behaviour for a period of 16 months. He was also ordered to pay $1,560,689.58 in reparation.

(b) Observations on the implementation of the article

The reviewers were of the view that Australia is in compliance with the provision under review.

Australia has strong criminal, civil and administrative sanctions in place to address acts of corruption, and courts are obligated to take into account the circumstances of the offense in determining an appropriate sentence. Crown immunity from criminal responsibility does not extend to public servants. The Commonwealth Department of Public Prosecutions (CDPP) is responsible for prosecution of

\(^{9}\) 2006-2007 CDPP Annual Report
\(^{10}\) 2007-2008 CDPP Annual Report
offences of laws against the Commonwealth. Decisions to prosecute are made in accordance with the Prosecution Policy of the Commonwealth, which sets forth the considerations required in deciding whether to prosecute a case, including the need for deterrence.

Article 30 Prosecution, adjudication and sanctions

Paragraph 2

2. Each State Party shall take such measures as may be necessary to establish or maintain, in accordance with its legal system and constitutional principles, an appropriate balance between any immunities or jurisdictional privileges accorded to its public officials for the performance of their functions and the possibility, when necessary, of effectively investigating, prosecuting and adjudicating offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with the provision described above. There is a strong Common Law presumption that the Crown is not criminally liable. However, Crown immunity from criminal responsibility does not extend to Crown servants. An officer, servant or agent of the Commonwealth who commits an offence has no immunity from criminal responsibility.

(b) Observations on the implementation of the article

The reviewers were of the view that Australia is in compliance with the provision under review.

(b) Successes and good practices

Concerning immunity from prosecution, Australia’s approach that no individual is immune from prosecution for corruption cases, including parliamentarians, deserves favourable mention, although certain evidentiary restrictions protect statements made on the floor of the parliament from being presented in a subsequent criminal prosecution.

Article 30 Prosecution, adjudication and sanctions

Paragraph 3

3. Each State Party shall endeavour to ensure that any discretionary legal powers under its domestic law relating to the prosecution of persons for offences established in accordance with this Convention are exercised to maximize the effectiveness of law enforcement measures in respect of those offences and with due regard to the need to deter the commission of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The discretionary legal principle is ensured in Australian laws. The Commonwealth Department of Public Prosecutions (CDPP) is responsible for prosecution of offences of laws against the Commonwealth. All decisions to prosecute are made in accordance with the Prosecution Policy of the Commonwealth.

Policy 2: The decision to prosecute:
(2.2) The decision whether or not to prosecute is the most important step in the prosecution process. In every case great care must be taken in the interests of the victim, the suspected offender and the community at large to ensure that the right decision is made. A wrong decision to prosecute or, conversely, a wrong decision not to prosecute, both tend to undermine the confidence of the community in the criminal justice system.

(2.3) It follows that the objectives previously stated - especially fairness and consistency - are of particular importance. However, fairness need not mean weakness and consistency need not mean rigidity. The criteria for the exercise of this discretion cannot be reduced to something akin to a mathematical formula; indeed it would be undesirable to attempt to do so. The breadth of the factors to be considered in exercising this discretion indicates a candid recognition of the need to tailor general principles to individual cases.

(2.10) Factors which may arise for consideration in determining whether the public interest requires a prosecution include:
(a) the seriousness or, conversely, the triviality of the alleged offence or that it is of a 'technical' nature only;
(g) the effect on public order and morale;
(h) the obsolescence or obscurity of the law;
(i) whether the prosecution would be perceived as counter-productive, for example, by bringing the law into disrepute;
(j) the availability and efficacy of any alternatives to prosecution;
(k) the prevalence of the alleged offence and the need for deterrence, both personal and general;
(l) whether the consequences of any resulting conviction would be unduly harsh and oppressive;
(m) whether the alleged offence is of considerable public concern;
(n) any entitlement of the Commonwealth or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken;
(o) the attitude of the victim of the alleged offence to a prosecution;
(p) the likely length and expense of a trial;
(q) whether the alleged offender is willing to co-operate in the investigation or prosecution of others, or the extent to which the alleged offender has done so;
(r) the likely outcome in the event of a finding of guilt having regard to the sentencing options available to the court;
(s) whether the alleged offence is triable only on indictment; and
(t) the necessity to maintain public confidence in such basic institutions as the Parliament and the courts.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 30 Prosecution, adjudication and sanctions

Paragraph 4

4. In the case of offences established in accordance with this Convention, each State Party shall take appropriate measures, in accordance with its domestic law and with due regard to the rights of the defence, to seek to ensure that conditions imposed in connection with decisions on release pending trial or appeal take into consideration the need to ensure the presence of the defendant at subsequent criminal proceedings.

(a) Summary of information relevant to reviewing the implementation of the article
Australia stated that it is in compliance with the provision under review.

This provision is implemented in Australia’s laws. State and Territory Bail Acts apply in relation to federal offenders. The relevant Bail Acts in State and Territory legislation contain provisions for the bail authority to take into account the likelihood of the offender appearing at trial when granting bail. The following State and Territory Acts apply bail applications:

NSW - Bail Act 1978 (NSW)
Victoria - Bail Act 1977
Tas - Bail Act 1994
QLD - Bail Act 1980
SA - Bail Act 1985
WA - Bail Act 1982
NT - Bail Act
ACT - Bail Act 1992

The Acts all acts contain similar provisions to the criteria to be considered in bail applications, and state that courts will take in to account the probability of the person appearing in court when determining a bail application.

**BAIL ACT 1978 (NSW)**

Section 32 - Criteria to be considered in bail applications

*(1) In making a determination as to the grant of bail to an accused person, an authorised officer or court shall take into consideration the following matters (so far as they can reasonably be ascertained), and the following matters only:*

(a) the probability of whether or not the person will appear in court in respect of the offence for which bail is being considered, having regard only to:

(i) the person’s background and community ties, as indicated (in the case of a person other than an Aboriginal person or a Torres Strait Islander) by the history and details of the person’s residence, employment and family situations and the person’s prior criminal record (if known), and

(ii) any previous failure to appear in court pursuant to a bail undertaking or pursuant to a recognizance of bail entered into before the commencement of this section, and

(iii) the circumstances of the offence (including its nature and seriousness), the strength of the evidence against the person and the severity of the penalty or probable penalty, and

(iv) any specific evidence indicating whether or not it is probable that the person will appear in court and

(b) the interests of the person, having regard only to:

(i) the period that the person may be obliged to spend in custody if bail is refused and the conditions under which the person would be held in custody, and

(ii) the needs of the person to be free to prepare for the person’s appearance in court or to obtain legal advice or both, and

(iii) the needs of the person to be free for any lawful purpose not mentioned in subparagraph (ii), and

(iv) whether or not the person is, in the opinion of the authorised officer or court, incapacitated by intoxication, injury or use of a drug or is otherwise in danger of physical injury or in need of physical protection,

(v) if the person is under the age of 18 years, or is an Aboriginal person or a Torres
Strait Islander, or has an intellectual disability or is mentally ill, any special needs of the person arising from that fact, and
(vi) if the person is a person referred to in section 9B (3), the nature of the person’s
criminal history, having regard to the nature and seriousness of any indictable offences of which the person has been previously convicted, the number of any previous such offences and the length of periods between those offences, and

(b1) the protection of:
(i) any person against whom it is alleged that the offence concerned was committed, and
(ii) the close relatives of any such person, and
(iii) any other person the authorised officer or court considers to be in need of protection because of the circumstances of the case,
(c) the protection and welfare of the community, having regard only to:
(i) the nature and seriousness of the offence, in particular whether the offence is of a
sexual or violent nature or involves the possession or use of an offensive weapon or instrument within the meaning of the Crimes Act 1900, and
(ii) whether or not the person has failed, or has been arrested for an anticipated failure, to observe a reasonable bail condition previously imposed in respect of the offence, and
(iii) the likelihood of the person interfering with evidence, witnesses or jurors, and
(iv) whether or not it is likely that the person will commit any serious offence while at liberty on bail, but the authorised officer or court may have regard to this likelihood only if permitted to do so under subsection (2), and
(v) if the offence for which bail is being considered is a serious offence, whether, at the time the person is alleged to have committed the offence, the person had been granted bail, or released on parole, in connection with any other serious offence, and
(vi) if the offence for which is being considered is an offence that involves the possession or use of an offensive weapon or instrument within the meaning of the Crimes Act 1900, any prior criminal record (if known) of the person in respect of such an offence.

(2) The authorised officer or court may, for the purposes of subsection (1) (c) (iv), have regard to whether or not it is likely that the person will commit one or more serious offences while at liberty on bail if the officer or court is satisfied that:
(a) the person is likely to commit the offences, and
(b) that likelihood, together with the likely consequences, outweighs the person’s general right to be at liberty.

(b) Observations on the implementation of the article

With regard to granting parole in corruption cases, although there was no written policy that requires the Attorney-General to take certain factors into account when determining parole, Australia assured that the nature and circumstances of the offense are taken into account in making such a decision, as required by article 30(5) of the Convention. The reviewers recommended that Australia consider adopting a written policy that sets forth the factors that the Attorney-General takes into account in the evaluation.

Article 30 Prosecution, adjudication and sanctions

Paragraph 5
5. Each State Party shall take into account the gravity of the offences concerned when considering the eventuality of early release or parole of persons convicted of such offences.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with this provision.

In relation to federal parolees, there is no discretion in relation to releasing a person on parole if the person has been sentenced to less than 10 years imprisonment (Crimes Act 1914 - section 19AL). The Attorney-General must release the person at the end of the non-parole period. However, the conditions placed on the person’s parole may reflect the gravity of the offence.

The Attorney-General does have discretion to release a person on parole if the person has been sentenced to 10 years imprisonment or more (Crimes Act 1914 - section 19AL).

Part IB of the Crimes Act does not specify any criteria or considerations that the Attorney-General is required to take into account when considering whether to release a federal offender on parole. However, as a matter of practice, the Attorney-General considers the nature and circumstances of the offence to which the offender’s sentence relates.

Crimes Act 1914
Section 19AL - Release on parole
(1) Subject to section 19AM, where there has been imposed on a person a federal sentence of, or federal sentences aggregating, more than 3 years but less than 10 years and a non-parole period has been fixed in relation to the sentence or sentences, the Attorney-General must, by order in writing, direct that the person be released from prison on parole:
   (a) at the end of the non-parole period; or
   (b) if the Attorney-General considers that in all the circumstances it would be appropriate to do so, on a specified day, not being earlier than 30 days before the end of the non-parole period.

(2) Subject to section 19AM, where there has been imposed on a person a federal life sentence or a federal sentence of, or federal sentences aggregating, 10 years or more and a non-parole period has been fixed in relation to the person in respect of the sentence or sentences, the Attorney-General must, by order in writing:
   (a) direct that the person be released from prison on parole:
      (i) at the end of the non-parole period; or
      (ii) if the Attorney-General considers that in all the circumstances it would be appropriate to do so, on a specified day, not being earlier than 30 days before the end of the non-parole period; or
   (b) direct that the person is not to be released on parole at, or at any time before, the end of the non-parole period.

(3) An order directing that a person not be released at, or at any time before, the end of the non-parole period:
   (a) must not be made later than 3 months before the end of the non-parole period; and
   (b) must include a statement of reasons why the order was made; and
   (c) if the Attorney-General proposes to reconsider, at a later time, the question of the release of the person on parole-must indicate when the Attorney-General proposes to reconsider the question;
and a copy of the order must be given to the person within 14 days after it was made.

(4) A parole order in relation to a federal sentence:
   (a) if the sentence is imprisonment for life in respect of that federal offence or any of
those federal offences—must specify the day on which the parole period ends, being a day not earlier than 5 years after the person is released on parole; and

(b) if it is proposed that, for any part of the parole period, the person should be subject to supervision—must specify the day on which the supervision period ends, being a day fixed in accordance with the requirements of the definition of supervision period in subsection 16(1).

(5) A parole order directing that a person be released from prison is sufficient authority for the release if, and only if, the person indicates, in writing, his or her acceptance of the conditions to which the order is subject by certifying to that effect either on the original parole order or on a copy of that order.

(b) Observations on the implementation of the article

Australia reported that it is the general practice that the gravity of the offence is taken into account in parole decisions. The reviewing experts were satisfied with the answers provided.

Article 30 Prosecution, adjudication and sanctions

Paragraph 6

6. Each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures through which a public official accused of an offence established in accordance with this Convention may, where appropriate, be removed, suspended or reassigned by the appropriate authority, bearing in mind respect for the principle of the presumption of innocence.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with the provision under review.

Australia referred to Reg 3.10 Suspension from duties (Act s 28) of the Public Service Regulations 1999.

Public Service Regulations 1999
Reg 3.10 Suspension from duties (Act s 28)
(1) An Agency Head may suspend an APS employee employed in the Agency from duties if the Agency Head believes on reasonable grounds that:
   a. the employee has, or may have, breached the Code of Conduct; and
   b. the employee's suspension is in the public, or the Agency's, interest.

(2) The suspension may be with remuneration.

(3) If the suspension is to be without remuneration, the period without remuneration is to be:
   a. not more than 30 days; or
   b. if exceptional circumstances apply - a longer period.

(4) The Agency Head must review the suspension at reasonable intervals.

Note that compliance with State and Commonwealth legislation is a required “conduct” (s13(4)), thus conviction for a Convention offence would constitute a breach of the APS Code of Conduct.

(b) Observations on the implementation of the article

The Standing Orders of the Parliament of Australia allow the Parliament to pass a suspension motion upon an individual member, the motion is passed by the Parliament if it receives a majority vote.
Australia reported that under the Public Service Act, a public official may be suspended or reassigned. For elected officials, public employment law applies, but suspension is done at the discretion of the Parliament. The reviewing experts were satisfied with the answers provided.

**Article 30 Prosecution, adjudication and sanctions**

**Subparagraph 7 (a)**

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(a) Holding public office; and

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that the provision under review is partially implemented.

The **Commonwealth Electoral Act 1918** contains a provision that disqualifies persons who have been convicted of bribery under the Act from sitting in either House of Parliament for 2 years from the date of the conviction.

The **Commonwealth of Australia Constitution Act** also contains a provision that disqualifies a person who is attainted of treason from sitting in either House of Parliament. It also disqualifies a person who is under sentence for any offence punishable under the law of the Commonwealth or of a State of one year or longer, however they may nominate once they have completed their sentence.

Persons who have a criminal record or who are convicted of a criminal offence are not automatically excluded from employment in the Australian Public Sector. However, if the criminal conviction is relevant to the specific requirements of a particular vacancy, it can be taken into account in making a decision whether to employ a person with such a record.

Offences committed while employed in the APS may result in action under the Code of Conduct and may, depending on the circumstances, lead to a decision to terminate the employment of the relevant individual.

**Commonwealth Electoral Act 1918**

Section 386 Disqualification for bribery and undue influence

Any person who:

(b) is convicted of an offence against:

i. section 326 or 327 of this Act or section 28 of the **Crimes Act 1914**; or

ii. an offence against section 11.1 of the **Criminal Code** that relates to an offence referred to in subparagraph (i); or

(c) is found by the Court of Disputed Returns to have committed or attempted to commit bribery or undue influence, within the meaning of Part XXII, when a candidate; shall, during a period of 2 years from the date of the conviction or finding, be incapable of being chosen or of sitting as a Member of either House of the Parliament.

**Section 326 - Bribery**

(1) A person shall not ask for, receive or obtain, or offer or agree to ask for, or receive or obtain, any property or benefit of any kind, whether for the same or any other person, on an understanding that:
(a) any vote of the first-mentioned person;
(b) any candidature of the first-mentioned person;
(c) any support of, or opposition to, a candidate, a group of candidates or a political party by the first-mentioned person;
(d) the doing of any act or thing by the first-mentioned person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector; or
(e) the order in which the names of candidates nominated for election to the Senate whose names are included in a group in accordance with section 168 appear on a ballot paper;

will, in any manner, be influenced or affected.

Penalty: $5,000 or imprisonment for 2 years, or both.

(2) A person shall not, with the intention of influencing or affecting:

(a) any vote of another person;
(b) any candidature of another person; or
(c) any support of, or opposition to, a candidate, a group of candidates or a political party by another person;
(d) the doing of any act or thing by another person the purpose of which is, or the effect of which is likely to be, to influence the preferences set out in the vote of an elector; or
(e) the order in which the names of candidates for election to the Senate whose names are included in a group in accordance with section 168 appear on a ballot paper;

give or confer, or promise or offer to give or confer, any property or benefit of any kind to that other person or to a third person.

Penalty: $5,000 or imprisonment for 2 years, or both.

(3) This section does not apply in relation to a declaration of public policy or a promise of public action.

Section 327 - Interference with political liberty etc.

(1) A person shall not hinder or interfere with the free exercise or performance, by any other person, of any political right or duty that is relevant to an election under this Act.

Penalty: $1,000 or imprisonment for 6 months, or both.

(2) A person must not discriminate against another person on the ground of the making by the other person of a donation to a political party, to a State branch or a division of a State branch of a political party, to a candidate in an election or by-election or to a group:

(a) by denying him or her access to membership of any trade union, club or other body;
(b) by not allowing him or her to work or to continue to work;
(c) by subjecting him or her to any form of intimidation or coercion;
(d) by subjecting him or her to any other detriment.

Penalty:

(a) if the offender is a natural person—$5,000 or imprisonment for 2 years, or both; or
(b) if the offender is a body corporate—$20,000.

(3) A law of a State or Territory has no effect to the extent to which the law discriminates against a member of a local government body on the ground that:

(a) the member has been, is, or is to be, nominated; or
(b) the member has been, is, or is to be, declared;

as a candidate in an election for the House of Representatives or the Senate.

(4) In subsection (3):
**member of a local government body** means a member of a local governing body established by or under a law of a State or Territory.

**Crimes Act 1914**
Section 28 - Interfering with political liberty

Any person who, by violence or by threats or intimidation of any kind, hinders or interferes with the free exercise or performance, by any other person, of any political right or duty, shall be guilty of an offence.
Penalty: Imprisonment for 3 years.

(b) **Observations on the implementation of the article**

The reviewing experts were satisfied with the answers provided, and observed that Australia is in full compliance with this provision.

**Article 30 Prosecution, adjudication and sanctions**

**Subparagraph 7 (b)**

7. Where warranted by the gravity of the offence, each State Party, to the extent consistent with the fundamental principles of its legal system, shall consider establishing procedures for the disqualification, by court order or any other appropriate means, for a period of time determined by its domestic law, of persons convicted of offences established in accordance with this Convention from:

(b) **Holding office in an enterprise owned in whole or in part by the State.**

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated being in compliance with the provision under review.

**Commonwealth Authorities and Companies Act 1997**
Section 27C - Disqualification order for contravention of civil penalty provision

(1) The Court may disqualify a person from managing bodies corporate for a period that the Court considers appropriate if:

(a) a declaration is made under clause 1 of Schedule 2 (civil penalty provision) that the person has contravened a civil penalty provision; and

(b) the Court is satisfied that the disqualification is justified.

(2) An application for a disqualification order under subsection (1) may be made by:

(a) the Finance Minister; or

(b) some other person authorised in writing by the Finance Minister, under this paragraph, to make the application.

Note Civil Penalty Provisions include:

- s24 Use of Position
- s25 Use of Information

(b) **Observations on the implementation of the article**

The reviewing experts were satisfied with the answers provided.

**Article 30 Prosecution, adjudication and sanctions**
Paragraph 8

8. Paragraph 1 of this article shall be without prejudice to the exercise of disciplinary powers by the competent authorities against civil servants.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with the provision under review.

Administrative Law - The Public Service Act 1999

*The Public Service Act 1999* (the Act) includes the Australian Public Service (APS) Values (s 10) and the APS Code of Conduct (s 13).

In accordance with the Act

- APS employees must comply with the Code of Conduct, including a requirement that APS employees behave in a way that upholds the APS Values (s 13(11))
- agency heads must promote the APS Values (s 12)
- agency heads and statutory office holders are bound by the Code of Conduct in the same way as APS employees (s 14)
- agency heads may impose sanctions on an APS employee who is found (in accordance with established procedures) to have breached the Code of Conduct (s 15(1))

The APS Code of Conduct includes the requirement that APS employees must behave honestly and with integrity in the course of APS employment (s 13(1)).

The APS Code of Conduct also creates a strict prohibition against the improper use of:

(a) inside information; or
(b) the employee's duties, status, power or authority;

in order to gain, or seek to gain, a benefit or advantage for the employee or for any other person (s13(10)).

An Agency Head may impose sanctions on an APS employee who is found to have breached the Code of Conduct. These sanctions are in s 15(1) of the Act as follows:

(a) termination of employment
(b) reduction in classification
(c) re-assignment of duties
(d) reduction in salary
(e) deductions from salary, by way of fine
(f) a reprimand.

If an employee is dissatisfied with the conduct of an investigation by an agency head, they can seek to have the matter reviewed by the Merit Protection Commissioner.

(b) Observations on the implementation of the article

Australia reported that public officials have been subject to official administrative proceedings after the criminal process has been completed. The results of the administrative proceedings could range from counselling to termination. There is no prejudice to the disciplinary proceeding following a
criminal conviction. One possible consequence is the forfeiture of the public official’s pension benefits to the extent of the State’s contribution.

(c) Successes and good practices

The reviewers noted with appreciation Australia’s positive efforts to ensure severe consequences for public officials who engage in corruption, including the possible forfeiture of the public sector contribution to the convicted official’s pension fund.

Article 30 Prosecution, adjudication and sanctions

Paragraph 10

10. States Parties shall endeavour to promote the reintegration into society of persons convicted of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

In Australia the purposes of parole are:
(1) the reintegration of the offender into the community
(2) the rehabilitation of the offender, and
(3) the protection of the community.

Federal offenders who are released on parole are supervised for up to three years by State and Territory parole officers following their release to enable their gradual reintegration of back into the community. The relevant provisions of the Crimes Act 1914 that cover the release of person on parole are Section 19AL and 19AN.

19AL Release on parole

1. Subject to section 19AM, where there has been imposed on a person a federal sentence of, or federal sentences aggregating, more than 3 years but less than 10 years and a non-parole period has been fixed in relation to the sentence or sentences, the Attorney-General must, by order in writing, direct that the person be released from prison on parole:
   (a) at the end of the non-parole period; or
   (b) if the Attorney-General considers that in all the circumstances it would be appropriate to do so, on a specified day, not being earlier than 30 days before the end of the non-parole period.

2. Subject to section 19AM, where there has been imposed on a person a federal life sentence or a federal sentence of, or federal sentences aggregating, 10 years or more and a non-parole period has been fixed in relation to the person in respect of the sentence or sentences, the Attorney-General must, by order in writing:
   (a) direct that the person be released from prison on parole:
      i. at the end of the non-parole period; or
      ii. if the Attorney-General considers that in all the circumstances it would be appropriate to do so, on a specified day, not being earlier than 30 days before the end of the non-parole period; or
   (b) direct that the person is not to be released on parole at, or at any time before, the end of the non-parole period.
3. An order directing that a person not be released at, or at any time before, the end of the non-parole period:
   (a) must not be made later than 3 months before the end of the non-parole period; and
   (b) must include a statement of reasons why the order was made; and
   (c) if the Attorney-General proposes to reconsider, at a later time, the question of the release of the person on parole—must indicate when the Attorney-General proposes to reconsider the question;

and a copy of the order must be given to the person within 14 days after it was made.

4. A parole order in relation to a federal sentence:
   (a) if the sentence is imprisonment for life in respect of that federal offence or any of those federal offences—must specify the day on which the parole period ends, being a day not earlier than 5 years after the person is released on parole; and
   (b) if it is proposed that, for any part of the parole period, the person should be subject to supervision—must specify the day on which the supervision period ends, being a day fixed in accordance with the requirements of the definition of supervision period in subsection 16(1).

5. A parole order directing that a person be released from prison is sufficient authority for the release if, and only if, the person indicates, in writing, his or her acceptance of the conditions to which the order is subject by certifying to that effect either on the original parole order or on a copy of that order.

19AN Parole order is subject to conditions

(1) A parole order under section 19AL:
   (a) is subject to the condition that the offender must, during the parole period, be of good behaviour and not violate any law; and
   (b) if, under subsection 19AL(4), the day on which a supervision period ends is fixed in the parole order—is subject to the condition that the offender must, during the supervision period, be subject to the supervision of a parole officer or other person specified in the order and obey all reasonable directions of that officer or other person; and
   (c) is subject to such other conditions (if any) as the Attorney-General specifies in the order.

(2) The Attorney-General may, at any time before the end of the parole period, by order in writing, amend a parole order by varying or revoking a condition of the parole order or by imposing additional conditions in the parole order.

(3) An amendment of the parole order does not have effect until notice in writing of the amendment is given to the offender, being notice given before the end of the parole period.

(b) Observations on the implementation of the article

With regard to granting parole in corruption cases, although there was no written policy that requires the Attorney-General to take certain factors into account when determining parole, Australia assured that the nature and circumstances of the offense are taken into account in making such a decision, as required by article 30(5) of the Convention.

Article 31 Freezing, seizure and confiscation

Subparagraph 1 (a)
1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:
   (a) Proceeds of crime derived from offences established in accordance with this Convention or property the value of which corresponds to that of such proceeds;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with the provision under review.

The Proceeds of Crime Act 2002 (POCA) which establishes a scheme for restraining and confiscating the proceeds and instruments of Commonwealth indictable offences, foreign indictable offences and indictable offences of Commonwealth concern. This includes:

- confiscation of the proceeds and instruments of crime following a person’s conviction for a Commonwealth indictable offence. This may occur by order of a court, or if a person is convicted of a serious offence (generally an offence punishable by at least three years in prison), property that is subject to a restraining order will forfeit automatically 6 months after the person is convicted.
- a non-conviction based stream under which confiscation action can be taken independently of the prosecution process, where the Court is satisfied that:
  - a person has committed a serious offence, or
  - the property is proceeds of an indictable offence or the instrument of a serious offence
- pecuniary penalty orders, which require a person to pay an amount equal to the profit derived from a crime
- literary proceeds orders, which require a person to pay the literary proceeds that he or she has derived from commercial exploitation of their notoriety from having committed a Commonwealth indictable offence or foreign indictable offence, and
- unexplained wealth orders, which require a person to pay a proportion of their wealth, where they cannot satisfy a court that that wealth was legitimately acquired.

All POC Act 2002 actions are civil proceedings.

- Forfeiture order provisions

There are a number of different forfeiture order provisions within the POCA depending on whether a person has been convicted of a crime and how serious the alleged conduct is. Some orders have a requirement that a restraining order be in place prior to forfeiture (further information on restraining orders is contained in the part on Article 31(2).

Section 47 - Forfeiture orders conduct constituting serious offences

(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
   (a) the *DPP applies for the order; and
   (b) the property to be specified in the order is covered by a *restraining order under section 18 that has been in force for at least 6 months; and
   (c) the court is satisfied that a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting one or more *serious offences.

Note: The order can be made before the end of the period of 6 months referred to in paragraph (1)(b) if it is made as a consent order: see section 316.

(2) A finding of the court for the purposes of paragraph (1)(c) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some *serious offence or other was committed.

(3) The raising of a doubt as to whether a person engaged in conduct constituting a *serious offence is not of itself sufficient to avoid a finding by the court under paragraph (1)(c).
Refusal to make a forfeiture order

(4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:
   (a) is an *instrument of a *serious offence other than a *terrorism offence; and
   (b) is not *proceeds of an offence;
if the court is satisfied that it is not in the public interest to make the order.

Section 48 - Forfeiture orders-convictions for indictable offences

(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
   (a) the *DPP applies for the order; and
   (b) a person has been convicted of one or more *indictable offences; and
   (c) the court is satisfied that the property to be specified in the order is *proceeds of one or more of the offences.

(2) A court with *proceeds jurisdiction may make an order that property specified in the order is forfeited to the Commonwealth if:
   (a) the *DPP applies for the order; and
   (b) a person has been convicted of one or more *indictable offences; and
   (c) subsection (1) does not apply; and
   (d) the court is satisfied that the property to be specified in the order is an *instrument of one or more of the offences.

(3) In considering whether it is appropriate to make an order under subsection (2) in respect of particular property, the court may have regard to:
   (a) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and
   (b) the use that is ordinarily made, or was intended to be made, of the property to be specified in the order; and
   (c) the gravity of the offence or offences concerned.

Note: Section 52 limits the court’s power to make a forfeiture order if one or more of the person’s convictions were due to the person absconding.

Section 49 - Forfeiture orders-property suspected of being proceeds of indictable offences etc.

(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
   (a) the *DPP applies for the order; and
   (b) the property to be specified in the order is covered by a *restraining order under section 19 that has been in force for at least 6 months; and
   (c) the court is satisfied that one or more of the following applies:
      (i) the property is *proceeds of one or more *indictable offences;
      (ii) the property is proceeds of one or more *foreign indictable offences;
      (iii) the property is proceeds of one or more *indictable offences of Commonwealth concern;
      (iv) the property is an instrument of one or more *serious offences; and
      (e) the court is satisfied that the DPP has taken reasonable steps to identify and notify persons with an *interest in the property.

(2) A finding of the court for the purposes of paragraph (1)(c):
   (a) need not be based on a finding that a particular person committed any offence; and
   (b) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some offence or other of a kind referred to in paragraph (1)(c) was committed.
(3) Paragraph (1)(c) does not apply if the court is satisfied that:
   (a) no application has been made under Division 3 of Part 2-1 for the property to be
       excluded from the *restraining order; or
   (b) any such application that has been made has been withdrawn.

Refusal to make a forfeiture order

(4) Despite subsection (1), the court may refuse to make an order under that subsection relating to
property that the court is satisfied:
   (a) is an *instrument of a *serious offence other than a *terrorism offence; and
   (b) is not *proceeds of an offence;

if the court is satisfied that it is not in the public interest to make the order.

92 Forfeiting restrained property without a forfeiture order if a person has been convicted of a serious
offence

(1) Property is forfeited to the Commonwealth at the end of the period applying under subsection (3)
if:
   (a) a person is convicted of a *serious offence; and
   (b) either:
      (i) at the end of that period, the property is covered by a *restraining order under
          section 17 or 18 against the person that relates to the offence; or
      (ii) the property was covered by such a restraining order against the person, but
           the order was revoked under section 44 or the property was excluded from the order
           under that section; and
   (c) the property is not subject to an order under section 94 excluding the property from
       forfeiture under this Part.

(2) It does not matter whether:
   (a) the *restraining order was made before or after the person’s conviction of the *serious
       offence; or
   (b) immediately before forfeiture, the property is the *person’s property or another
       person’s property.

(3) The period at the end of which the property is forfeited is:
   (a) the 6 month period starting on the *conviction day; or
   (b) if an *extension order is in force at the end of that period—the extended period
       relating to that extension order.

(4) This section does not apply if the person is taken to have been convicted of the offence because
the person *absconded in connection with the offence.

(5) A *restraining order in relation to a *related offence with which the person has been charged, or
is proposed to be charged, is taken, for the purposes of this section, to be a restraining order in
relation to the offence of which the person was convicted.

(6) If:
   (a) under section 44, a *restraining order that covered particular property is revoked, or
       particular property is excluded from a restraining order; and
   (b) the security referred to in paragraph 44(1)(e), or the undertaking referred to in
       paragraph 44(2)(e), in connection with the revocation or exclusion is still in force;

the property is taken, for the purposes of this section, to be covered by the restraining order.

- Pecuniary Penalty Order provisions

Pecuniary penalty orders can be either conviction or non-conviction based.
Section 116 - Making pecuniary penalty orders

(1) A court with *proceeds jurisdiction must make an order requiring a person to pay an amount to the Commonwealth if:
   
   (a) the *DPP applies for the order; and
   
   (b) the court is satisfied of either or both of the following:
       
       (i) the person has been convicted of an *indictable offence, and has derived *benefits from the commission of the offence;
       
       (ii) the person has committed a *serious offence.

Section 121 - Determining penalty amounts

(1) The amount that a person is ordered to pay to the Commonwealth under a *pecuniary penalty order (the penalty amount) is the amount the court determines under this Division.

(2) If the offence to which the order relates is not a *serious offence, the penalty amount is determined by:
   
   (a) assessing under Subdivision B the value of the benefits the person derived from the commission of the offence; and
   
   (b) subtracting from that value the sum of all the reductions (if any) in the penalty amount under Subdivision C.

(3) If the offence to which the order relates is a *serious offence, the penalty amount is determined by:
   
   (a) assessing under Subdivision B the value of the benefits the person derived from:
       
       (i) the commission of that offence; and
       
       (ii) subject to subsection (4), the commission of any other offence that constitutes unlawful activity; and
   
   (b) subtracting from that value the sum of all the reductions (if any) in the penalty amount under Subdivision C.

Note: Pecuniary penalty orders can be varied under Subdivision D to increase penalty amounts in some cases.

(4) Subparagraph (3)(a)(ii) does not apply in relation to an offence that is not a *terrorism offence unless the offence was committed:
   
   (a) within:
       
       (i) if some or all of the person’s property, or property suspected of being subject to the effective control of the person, is covered by a restraining order-the period of 6 years preceding the application for the restraining order; or
       
       (ii) otherwise-the period of 6 years preceding the application for the pecuniary penalty order; or
   
   (b) during the period since that application for the restraining order or the pecuniary penalty order was made

Subdivision B-The value of benefits derived from the commission of an offence

Section 122 - Evidence the court is to consider

(1) In assessing the value of benefits that a person has derived from the commission of an offence or offences (the illegal activity), the court is to have regard to the evidence before it concerning all or any of the following:
   
   (a) the money, or the value of the property other than money, that, because of the illegal activity, came into the possession or under the control of the person or another person;
   
   (b) the value of any other benefit that, because of the illegal activity, was provided to the person or another person;
   
   (c) if any of the illegal activity consisted of doing an act or thing in relation to a
*narcotic substance:
   (i) the market value, at the time of the offence, of similar or substantially similar narcotic substances; and
   (ii) the amount that was, or the range of amounts that were, ordinarily paid for the doing of a similar or substantially similar act or thing;
   (d) the value of the *person’s property before, during and after the illegal activity;
   (e) the person’s income and expenditure before, during and after the illegal activity.

(2) At the hearing of an application for a *pecuniary penalty order, a *police officer, or a *Customs officer, who is experienced in the investigation of narcotics offences may testify, to the best of the officer’s information, knowledge and belief:
   (a) with respect to the amount that was the market value of a *narcotic substance at a particular time or during a particular period; or
   (b) with respect to the amount, or the range of amounts, ordinarily paid at a particular time, or during a particular period, for the doing of an act or thing in relation to a narcotic substance.

(3) The officer’s testimony under subsection (2):
   (a) is admissible at the hearing despite any rule of law or practice relating to hearsay evidence; and
   (b) is prima facie evidence of the matters testified.

Section 123 - Value of benefits derived-non-serious offences
(1) If:
   (a) an application is made for a *pecuniary penalty order against a person in relation to an offence or offences (the illegal activity); and
   (b) the offence is not a *serious offence, or none of the offences are serious offences; and
   (c) at the hearing of the application, evidence is given that the value of the *person’s property during or after the illegal activity exceeded the value of the person’s property before the illegal activity;
   the court is to treat the value of the *benefits derived by the person from the commission of the illegal activity as being not less than the amount of the greatest excess.

(2) The amount treated as the value of the *benefits under this section is reduced to the extent (if any) that the court is satisfied that the excess was due to causes unrelated to the illegal activity.

Section 124 - Value of benefits derived-serious offences
(1) If:
   (a) an application is made for a *pecuniary penalty order against a person in relation to an offence or offences (the illegal activity); and
   (b) the offence is a *serious offence, or one or more of the offences are serious offences; and
   (c) at the hearing of the application, evidence is given that the value of the *person’s property during or after:
      (i) the illegal activity; or
      (ii) any other *unlawful activity that the person has engaged in that constitutes a *terrorism offence; or
      (iii) any other unlawful activity that the person has engaged in, within the period referred to in subsection (5), that does not constitute a terrorism offence;
   exceeded the value of the person’s property before the illegal activity and the other unlawful activity;
the court is to treat the value of the *benefits derived by the person from the commission of the illegal activity as being not less than the amount of the greatest excess.

(2) The amount treated as the value of the *benefits under subsection (1) is reduced to the extent (if any) that the court is satisfied that the excess was due to causes unrelated to:
   (a) the illegal activity; or
   (b) any other *unlawful activity that the person has engaged in that constitutes a *terrorism offence; or
   (c) any other unlawful activity that the person has engaged in, within the period referred to in subsection (5), that does not constitute a terrorism offence;

(3) If evidence is given, at the hearing of the application, of the person's expenditure during the period referred to in subsection (5), the amount of the expenditure is presumed, unless the contrary is proved, to be the value of a *benefit that, because of the illegal activity, was provided to the person.

(4) Subsection (3) does not apply to expenditure to the extent that it resulted in acquisition of property that is taken into account under subsection (1).

(5) The period for the purposes of subparagraph (1)(c)(iii), paragraph (2)(c) and subsection (3) is:
   (a) if some or all of the person's property, or property that is suspected of being subject to the *effective control of the person, is covered by a *restraining order-the period of 6 years preceding the application for the restraining order;
   (b) otherwise-the period of 6 years preceding the application for the *pecuniary penalty order;

and includes the period since that application for the restraining order or the pecuniary penalty order was made.

Subdivision C-Reducing penalty amounts
Section 130 - Reducing penalty amounts to take account of forfeiture and proposed forfeiture
The *penalty amount under a *pecuniary penalty order against a person is reduced by an amount equal to the value, as at the time of the making of the order, of any property that is *proceeds of the *unlawful activity to which the order relates if:
   (a) the property has been forfeited, under this Act or another law of the Commonwealth or under a law of a *non-governing Territory, in relation to the unlawful activity to which the order relates; or
   (b) an application has been made for a *forfeiture order that would cover the property.

Section 131 - Reducing penalty amounts to take account of tax paid
(1) The court must reduce the *penalty amount under a *pecuniary penalty order against a person by an amount that, in the court’s opinion, represents the extent to which tax that the person has paid is attributable to the *benefits to which the order relates.

(2) The tax may be tax payable under a law of the Commonwealth, a State, a Territory or a foreign country.

Section 132 - Reducing penalty amounts to take account of fines etc.
The court may, if it considers it appropriate to do so, reduce the *penalty amount under a *pecuniary penalty order against a person by an amount equal to the amount payable by the person by way of fine, restitution, compensation or damages in relation to an offence to which the order relates.

Furthermore, Australia provided information on the implementation of relevant legislation.
In the past five years, Australian authorities have facilitated the confiscation of assets in several matters involving foreign corruption offences, and the repatriation of those assets to the countries in which the corrupt conduct was perpetrated.

In July 2003, pursuant to a mutual legal assistance request from Indonesia, Australian authorities obtained restraining orders over financial assets held in bank accounts in two Australian States. In March 2004, these assets, amounting to A$642,540, were forfeited to the Australian Government. In April 2004, the Minister for Justice and Customs approved the repatriation of the confiscated assets to Indonesia.

In August 2005, the Australian Federal Police commenced an investigation into a Chinese citizen on the basis of financial intelligence and an Interpol Red Notice issued by China in respect of the alleged embezzlement of approximately A$1.6 million. Australian Federal Police investigations led to a restraining order over assets to the value of A$6.7 million located in Australia. Confiscation proceedings were settled in November 2006 and A$3.37 million was forfeited to the Australian Government. In June 2007, Australia repatriated these confiscated assets to China.

In 2006, in response to a referral from the Chinese authorities, the Australian Federal Police traced the proceeds of a major fraud in China (misappropriation of public monies by a public official) to assets in Australia. X and Y were the wives of two men alleged to have been involved in the misappropriation of the equivalent of millions of dollars in funding from government-sponsored housing construction companies in China. One of the two men had been convicted and sentenced for offences in China. X and Y emigrated to Australia and subsequently became permanent residents.

X and Y acquired significant property holdings in Australia which, it was argued, could be traced back to unlawful conduct of their husbands in China.

In June 2007, the CDPP obtained non-conviction based restraining orders over real property, money in bank accounts and shares owned or suspected of being effectively controlled by X and Y worth approximately $4.9 million. The restraining orders were based on a suspicion that X and Y had committed Australian offences by laundering the proceeds of offences alleged to have been committed by their husbands in China.

In March 2009, by consent, the District Court of Queensland made non-conviction based orders forfeiting property owned or controlled by Y valued at approximately $1.28 million. In July 2009, similar orders were made in respect of property owned or controlled by X valued at approximately $2.8 million. These orders were able to be obtained notwithstanding that there was insufficient evidence for either X or Y to be prosecuted for offences in Australia.

The forfeited monies were later returned to the government of China pursuant to equitable sharing provisions contained in the POC Act 2002.

Criminal Assets Taskforce:

In 2011 the Government established a multi-agency Criminal Assets Confiscation Taskforce, led by the Australian Federal Police (AFP), to identify and confiscate the benefits derived from criminal activity. The taskforce was formally launched in March 2011 and brought together the resources of the AFP, the Australian Tax Office, the Australian Crime Commission (ACC) and the Commonwealth Director of Public Prosecutions in a focused effort to identify and confiscate the benefits derived from criminal activity.

Statistics were also provided:

| POC Act 1987 pecuniary penalty orders | $400 |
Please note, these figures relate to all Commonwealth asset confiscation matters, not just those related to offences established under the Convention.

(b) **Observations on the implementation of the article**

Australia reported that indictable offences of Commonwealth concern applies to the laws of the states or territories. In addition, serious offenses are a subset of an indictable offenses. Australia reported that all Convention offenses are covered under the regime of asset forfeiture. Corporate liability has specific provisions labelling the offense as an indictable offense so that it is covered by the forfeiture regime.

Australia reported that Section 49(4) allows a court to refuse to order forfeiture of a particular item of property, provided it is also not the instrument of a terrorist offense or proceeds, if it is not in the public interest. This provides broad discretion to the judiciary, and can include primary residents of the home of the suspect and extended family or property was peripherally involved in the crime.

Forfeiting restrained property without a forfeiture order upon conviction operates akin to an automatic forfeiture provision.

**Article 31 Freezing, seizure and confiscation**

**Subparagraph 1 (b)**

1. Each State Party shall take, to the greatest extent possible within its domestic legal system, such measures as may be necessary to enable confiscation of:

   (b) Property, equipment or other instrumentalities used in or destined for use in offences established in accordance with this Convention.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

The Proceeds of Crime Act 2002 (the POCA) allows for the confiscation of instruments of offences, including where no conviction has been obtained. An instrument of an offence includes property that
Section 47 - Forfeiture orders—conduct constituting serious offences
(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
   (a) the *DPP applies for the order; and
   (b) the property to be specified in the order is covered by a *restraining order under section 18 that has been in force for at least 6 months; and
   (c) the court is satisfied that a person whose conduct or suspected conduct formed the basis of the restraining order engaged in conduct constituting one or more *serious offences.
Note: The order can be made before the end of the period of 6 months referred to in paragraph (1)(b) if it is made as a consent order: see section 316.

(2) A finding of the court for the purposes of paragraph (1)(c) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some *serious offence or other was committed.

(3) The raising of a doubt as to whether a person engaged in conduct constituting a *serious offence is not of itself sufficient to avoid a finding by the court under paragraph (1)(c).
Refusal to make a forfeiture order

(4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:
   (a) is an *instrument of a *serious offence other than a *terrorism offence; and
   (b) is not *proceeds of an offence;
if the court is satisfied that it is not in the public interest to make the order.

Section 48 - Forfeiture orders—convictions for indictable offences
(1) A court with *proceeds jurisdiction must make an order that property specified in the order is forfeited to the Commonwealth if:
   (a) the *DPP applies for the order; and
   (b) a person has been convicted of one or more *indictable offences; and
   (c) the court is satisfied that the property to be specified in the order is *proceeds of one or more of the offences.

(2) A court with *proceeds jurisdiction may make an order that property specified in the order is forfeited to the Commonwealth if:
   (a) the *DPP applies for the order; and
   (b) a person has been convicted of one or more *indictable offences; and
   (c) subsection (1) does not apply; and
   (d) the court is satisfied that the property to be specified in the order is an *instrument of one or more of the offences.

(3) In considering whether it is appropriate to make an order under subsection (2) in respect of particular property, the court may have regard to:
   (a) any hardship that may reasonably be expected to be caused to any person by the operation of the order; and
   (b) the use that is ordinarily made, or was intended to be made, of the property to be specified in the order; and
   (c) the gravity of the offence or offences concerned.
Note: Section 52 limits the court’s power to make a forfeiture order if one or more of the person’s convictions were due to the person absconding.

Section 49 - Forfeiture orders—property suspected of being proceeds of indictable offences etc.
(1) A court with *proceeds jurisdiction must make an order that property specified in the order is
forfeited to the Commonwealth if:

(a) the *DPP applies for the order; and

(b) the property to be specified in the order is covered by a *restraining order under section 19 that has been in force for at least 6 months; and

(c) the court is satisfied that one or more of the following applies:

(i) the property is *proceeds of one or more *indictable offences;

(ii) the property is proceeds of one or more *foreign indictable offences;

(iii) the property is proceeds of one or more *indictable offences of Commonwealth concern;

(iv) the property is an instrument of one or more *serious offences; and

(e) the court is satisfied that the DPP has taken reasonable steps to identify and notify persons with an *interest in the property.

(2) A finding of the court for the purposes of paragraph (1)(c):

(a) need not be based on a finding that a particular person committed any offence; and

(b) need not be based on a finding as to the commission of a particular offence, and can be based on a finding that some offence or other of a kind referred to in paragraph (1)(c) was committed.

(3) Paragraph (1)(c) does not apply if the court is satisfied that:

(a) no application has been made under Division 3 of Part 2-1 for the property to be excluded from the *restraining order; or

(b) any such application that has been made has been withdrawn.

Refusal to make a forfeiture order

(4) Despite subsection (1), the court may refuse to make an order under that subsection relating to property that the court is satisfied:

(a) is an *instrument of a *serious offence other than a *terrorism offence; and

(b) is not *proceeds of an offence;

if the court is satisfied that it is not in the public interest to make the order.

Section 329 - Meaning of proceeds and instrument

(1) Property is *proceeds of an offence if:

(a) it is wholly derived or realised, whether directly or indirectly, from the commission of the offence; or

(b) it is partly derived or realised, whether directly or indirectly, from the commission of the offence;

whether the property is situated within or outside *Australia.

(2) Property is an *instrument of an offence if:

(a) the property is used in, or in connection with, the commission of an offence; or

(b) the property is intended to be used in, or in connection with, the commission of an offence;

whether the property is situated within or outside *Australia.

(3) Property can be proceeds of an offence or an instrument of an offence even if no person has been convicted of the offence.

(4) *Proceeds or an *instrument of an *unlawful activity means proceeds or an instrument of the offence constituted by the act or omission that constitutes the unlawful activity.

As an example, Australia provided information on the Michael Studman – Statutory Forfeiture case. This matter was reported on page 53 of the 2004-2005 Annual Report. Since that time the matter has been appealed to the NSW Court of Appeal.
Michael Studman was a former employee of ITSA who used his position as an employee to steal monies and to otherwise commit a fraud in excess of $380,000. On 15 February 2005 Studman pleaded guilty to various offences against the Crimes Act 1914 and the Crimes Act 1900 (NSW). In April 2005, Studman filed an application seeking to prevent statutory forfeiture of property, which had been the subject of restraining orders under the POC Act 2002. Some of the restrained property was money which Studman had deposited into an account in a false name.

On 18 August 2005, Justice Hulme of the Supreme Court of NSW dismissed Studman’s application. His Honour found that the restrained property could not be excluded from restraint as it was the ‘proceeds of unlawful activity’, in particular, opening and operating a bank account in a false name. Studman appealed the decision of Hulme J to the NSW Court of Appeal. The Court delivered a unanimous judgment in October 2007.

As Studman had not sought an expedited hearing, his appeal was not heard until more than 15 months after his conviction date. By that time Studman’s property had been forfeited by operation of law to the Commonwealth, and there was no order the Court could have made to reverse this. As a result the Court dismissed Studman’s appeal on the primary ground that it was futile.

Significantly, however, the Court went on to say that it would have dismissed the appeal in any event. The Court reaffirmed the decision of Hulme J that the restrained property represented ‘proceeds of unlawful activity’. In respect of the money held in false name bank accounts, the Court (per McClellan J at CL) observed that “the right to the monies was derived directly from the commission of the offence [of opening an account in a false name]”. In addition, the Court found that the property in question could also be regarded as an ‘instrument’ of unlawful activity within the meaning of the POC Act 2002 and that none of the property could be regarded as being ‘lawfully acquired’. For these reasons, the Court found that it would not have excluded the restrained property from forfeiture in any event.

In addition to statistics provided for subpara. 1 (a) of the current article, other statistical data are compiled in the table below.

POC Act 2002: new orders and forfeitures in 2009–2010

<table>
<thead>
<tr>
<th></th>
<th>Number</th>
<th>Value</th>
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<tbody>
<tr>
<td>2009-2010 Restraining Orders</td>
<td>44</td>
<td>$21,149,910</td>
</tr>
<tr>
<td>Pecuniary Penalty Orders</td>
<td>18</td>
<td>$14,337,641</td>
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<tr>
<td>Forfeiture Orders</td>
<td>104</td>
<td>$8,178,063</td>
</tr>
<tr>
<td>Automatic Forfeiture under section 92</td>
<td>20</td>
<td>$2,928,676</td>
</tr>
<tr>
<td>Literary Proceeds Orders</td>
<td>--</td>
<td>--</td>
</tr>
</tbody>
</table>

These figures relate to all Commonwealth asset confiscation matters, not just those related to offences established under the Convention. These figures include proceeds of crime that have been confiscate, as well as instruments of crime.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answers provided.

Article 31 Freezing, seizure and confiscation

Paragraph 2

2. Each State Party shall take such measures as may be necessary to enable the identification, tracing, freezing or seizure of any item referred to in paragraph 1 of this article for the purpose of eventual confiscation.
(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Chapter 3 of the *Proceeds of Crime Act 2002* (the POCA) provides a number of information gathering tools to enable Australian authorities to identify and trace property.

Part 3.1-Examinations
The court may make an order in certain circumstances requiring any person to attend an examination to answer questions about the nature and location of certain property, and any activities that may demonstrate that they (or another person) have engaged in unlawful activity relevant to the making of an order under the POCA.

Division 1-Examination orders
Section 180 Examination orders relating to restraining orders
(1) If a *restraining order is in force, the court that made the restraining order, or any other court that could have made the restraining order, may make an order (an examination order) for the *examination of any person, including:
   (a) a person whose property is, or a person who has or claims an *interest in property that is, the subject of the restraining order; or
   (b) a person who is a *suspect in relation to the restraining order; or
   (c) the spouse or *de facto partner of a person referred to in paragraph (a) or (b);
   about the *affairs of a person referred to in paragraph (a), (b) or (c).

(2) The *examination order ceases to have effect if the *restraining order to which it relates ceases to have effect.

Section 180A Examination orders relating to applications for exclusion from forfeiture
(1) If an application for an order under section 73 or 94 for an *interest in property to be excluded from forfeiture is made, the court to which the application is made may make an order (an examination order) for the *examination of any person including:
   (a) a person who has or claims an interest in the property; or
   (b) the spouse or *de facto partner of a person referred to in paragraph (a);
   about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when:
   (a) the application is withdrawn; or
   (b) the court makes a decision on the application.

Section 180B - Examination orders relating to applications for compensation
(1) If an application for an order under section 77 or 94A (which deal with compensation) is made in relation to an *interest in property that has been or may be forfeited, the court to which the application is made may make an order (an examination order) for the *examination of any person including:
   (a) a person who has or claims an *interest in the property; or
   (b) the spouse or *de facto partner of a person referred to in paragraph (a);
   about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when:
   (a) the application is withdrawn; or
   (b) the court makes a decision on the application.

Section 180C - Examination orders relating to applications under section 102
(1) If an application for an order under section 102 (which deals with the recovery of property) is made under section 104 in relation to forfeited property, the court to which the application is made
may make an order (an *examination order) for the *examination of any person including:
   (a) a person who has or claims an *interest in the property; or
   (b) the spouse or *de facto partner of a person referred to in paragraph (a);
about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when:
   (a) the application is withdrawn; or
   (b) the court makes a decision on the application.

Section 180D - Examination orders relating to enforcement of confiscation orders
(1) If a *confiscation order has been made but not satisfied, the court that made the confiscation order may make an order (an *examination order) for the *examination of any person including:
   (a) a person against whom the confiscation order was made; or
   (b) the spouse or *de facto partner of a person referred to in paragraph (a);
about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when proceedings relating to the enforcement of the *confiscation order are finally determined, withdrawn or otherwise disposed of.

Section 180E - Examination orders relating to restraining orders revoked under section 44
(1) If a *restraining order is revoked under section 44 (which deals with giving security to revoke etc. a restraining order), the court that revoked the restraining order may make an order (an *examination order) for the *examination of any person including:
   (a) a person whose property was, or a person who had an *interest in property that was, the subject of the restraining order; or
   (b) the spouse or *de facto partner of a person referred to in paragraph (a);
about the *affairs of a person referred to in paragraph (a) or (b).

(2) The *examination order ceases to have effect when the *restraining order would have ceased to have effect, assuming it had not been revoked under section 44.

Section 181 - Examination orders relating to applications relating to quashing of convictions
(1) If an application relating to the *quashing of a person’s conviction of an offence is made, as mentioned in section 81, 107, 146 or 173, the court to which the application is made may make an order (an *examination order) for the *examination of any person, including:
   (a) the person whose conviction is quashed; or
   (b) a person whose property is, or a person who has an *interest in property that is, the subject of the forfeiture, *pecuniary penalty order or *literary proceeds order to which the application relates; or
   (c) the spouse or *de facto partner of a person referred to in paragraph (a) or (b);
about the *affairs of a person referred to in paragraph (a), (b) or (c).

(2) The *examination order ceases to have effect:
   (a) if the application is withdrawn; or
   (b) when the court makes a decision on the application.

Part 3.2 - Production Orders
A magistrate may make an order requiring a person to produce documents that are relevant to identifying, locating or quantifying certain property or necessary for the transfer of that property.

Section 202 - Making production orders
(1) A magistrate may make an order (a *production order) requiring a person to:
   (a) produce one or more *property-tracking documents to an *authorised officer; or
   (b) make one or more property-tracking documents available to an authorised officer for inspection.
(2) However:
   (a) the magistrate must not make a *production order unless the magistrate is satisfied by
       information on oath that the person is reasonably suspected of having possession or control of such
       documents; and
   (b) a production order cannot require documents that are not:
       (i) in the possession or under the control of a body corporate; or
       (ii) used or intended to be used in the carrying on of a business;
       to be produced or made available to an *authorised officer; and
   (c) a production order cannot require any accounting records used in the ordinary
       business of a *financial institution (including ledgers, day-books, cash-books and account books) to be
       produced to an *authorised officer.

(3) The *production order can only be made on application by an *authorised officer of an
*enforcement agency.

(4) The *authorised officer need not give notice of the application to any person.

(5) Each of the following is a property-tracking document:

   (a) a document relevant to identifying, locating or quantifying property of any person:
       (i) who has been convicted of, charged with, or whom it is proposed to charge
           with, an *indicatable offence; or
       (ii) whom there are reasonable grounds to suspect of having engaged in conduct
           constituting a *serious offence;
   (b) a document relevant to identifying or locating any document necessary for the
       transfer of property of such a person;
   (c) a document relevant to identifying, locating or quantifying:
       (i) *proceeds of an indictable offence, or an *instrument of an indictable offence,
           of which a person has been convicted or with which a person has been charged or is proposed to be
           charged; or
       (ii) proceeds of a serious offence, or an instrument of a serious offence, that a
           person is reasonably suspected of having committed;
       (ca) a document relevant to identifying, locating or quantifying property suspected of
           being:
           (i) proceeds of an indictable offence, a *foreign indictable offence or an *indicatable
               offence of Commonwealth concern; or
           (ii) an instrument of a serious offence;
           whether or not the identity of the person who committed the offence is known;
   (d) a document relevant to identifying or locating any document necessary for the
       transfer of property referred to in paragraph (c) or (ca);
   (e) a document relevant to identifying, locating or quantifying *literary proceeds in
       relation to an indictable offence or a *foreign indictable offence of which a person has been convicted
       or which a person is reasonably suspected of having committed;
   (ea) a document relevant to identifying, locating or quantifying the property of a person,
       if it is reasonable to suspect that the total value of the person’s *wealth exceeds the value of the
       person’s wealth that was *lawfully acquired;
   (eb) a document relevant to identifying or locating any document necessary for the
       transfer of property of such a person;
   (f) a document that would assist in the reading or interpretation of a document referred
       to in paragraph (a), (b), (c), (ca), (d) (e), (ea) or (eb).

(6) It is sufficient for the purposes of subparagraph (5)(c)(ii) or paragraph (5)(ca) that the document
is relevant to identifying, locating or quantifying *proceeds of some offence or other of a kind referred to
in that provision. It does not need to be relevant to identifying, locating or quantifying proceeds of a
particular offence.
Part 3-3 - Notices to financial institution

Certain law enforcement officials are able to provide a notice to a financial institution, which require a financial institution to advise of the existence of an account or a stored value card, and the balance, signatories, and any transactions over the last 6 months in relation to that account or card.

213  Giving notices to financial institutions

(1) An officer specified in subsection (3) may give a written notice to a *financial institution requiring the institution to provide to an *authorised officer any information or documents relevant to any one or more of the following:

(a) determining whether an *account is or was held by a specified person with the financial institution;
(b) determining whether a particular person is or was a signatory to an account;
(c) if a person holds an account with the institution, the current balance of the account;
(d) details of transactions on an account over a specified period of up to 6 months;
(e) details of any related accounts (including names of those who hold or held those accounts);

(ea) determining whether a *stored value card was issued to a specified person by a financial institution;

(eb) details of transactions made using such a card over a specified period of up to 6 months;

(f) a transaction conducted by the financial institution on behalf of a specified person.

(2) The officer must not issue the notice unless the officer reasonably believes that giving the notice is required:

(a) to determine whether to take any action under this Act; or
(b) in relation to proceedings under this Act.

(3) The officers who may give a notice to a *financial institution are:

(a) the Commissioner of the Australian Federal Police; or
(b) a Deputy Commissioner of the Australian Federal Police; or
(c) a senior executive AFP employee (within the meaning of the Australian Federal Police Act 1979) who is a member of the Australian Federal Police and who is authorised in writing by the Commissioner for the purposes of this section; or

(c.a) the Integrity Commissioner (within the meaning of the Law Enforcement Integrity Commissioner Act 2006); or

(d) the Chief Executive Officer of the Australian Crime Commission; or
(e) an examiner (within the meaning of the Australian Crime Commission Act 2002); or
(f) the Commissioner of Taxation; or
(g) the Chief Executive Officer of Customs; or
(h) the Chairperson of the Australian Securities and Investments Commission.

Part 3.4 - Monitoring Orders

A Judge (of a court with jurisdiction to deal with matters on indictment) may make an order that a financial institution provide information about transactions conducted during a particular period through an account held by a particular person with the institution or made using a stored value card issued to a particular person by a financial institution. This order may be made where the Judge is satisfied there are reasonable grounds to suspect:

- the account holder has or is about to commit a serious offence,
- the account holder was involved in the commission, or is about to be involved in the commission, of a serious offence
- the account holder has benefited or is about to benefit from a serious offence, or
- the account is being used to commit a money laundering offence.

219  Making monitoring orders
(1) A judge of a court of a State or Territory that has jurisdiction to deal with criminal matters on indictment may make an order (a monitoring order) that a *financial institution provide information about transactions:
   (a) conducted during a particular period through an *account held by a particular person with the institution; or
   (b) made using a *stored value card issued to a particular person by a financial institution.

(2) The judge must not make a *monitoring order unless the judge is satisfied that there are reasonable grounds for suspecting that:
   (a) the person who holds the *account or to whom the *stored value card was issued:
      (i) has committed, or is about to commit, a *serious offence; or
      (ii) was involved in the commission, or is about to be involved in the commission, of a serious offence; or
      (iii) has *benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a serious offence; or
   (b) the account or card is being used to commit an offence against Part 10.2 of the *Criminal Code (money laundering).

(3) It does not matter, for the purposes of paragraph (2)(b), whether the person holding the account or to whom the card was issued commits or is involved in the offence against Part 10.2 of the Criminal Code.

(4) The *monitoring order can only be made on application by an *authorised officer of an *enforcement agency.

Part 3.5 - Search and seizure
A Magistrate may issue a search warrant to search premises or a vehicle if the magistrate is satisfied there are reasonable grounds for suspecting that there is at the premises, or will be within the next 72 hours, tainted property evidential material. Tainted property includes the proceeds of an indictable offence, a foreign indictable offence or certain State and Territory offences, or the instrument of an indictable offence.

225 Issuing a search warrant
(1) A magistrate may issue a warrant to search *premises if the magistrate is satisfied by information on oath that there are reasonable grounds for suspecting that there is at the premises, or will be within the next 72 hours, *tainted property or *evidential material.

(2) If an application for a *search warrant is made under section 229 (applying for warrants by telephone or other electronic means), this section applies as if subsection (1) referred to 48 hours rather than 72 hours.

(3) The *search warrant can only be issued on application by an *authorised officer of an *enforcement agency.

Freezing and restraint of property
The POCA also allows for property to be frozen or restrained prior to a final confiscation order being made.

Part 2-1A - Freezing orders
The POCA was amended in February 2010 to include freezing orders as an acknowledgement that
money can be transferred and moved much more quickly than other property.

Freezing orders prevent a financial institution from processing withdrawals from a specified account for a certain period where a magistrate is satisfied that there are reasonable grounds to suspect that the balance of the account is proceeds of a Commonwealth indictable offence, a foreign indictable offence or certain other indictable offences or an instrument of a serious offence and the magistrate is satisfied that, unless an order is made, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of the proceeds or instruments of the offence.

Freezing orders are intended as a short-term measure (i.e. they are initially issued for 3 days) prior to a restraining order being made over property, to avoid frustration of restraining orders by offenders dissipating funds.

15B Making freezing orders

(1) A magistrate must order that a *financial institution not allow a withdrawal from an *account with the institution, except in the manner and circumstances specified in the order, if:

(a) an *authorised officer described in paragraph (a), (aa), (b) or (c) of the definition of authorised officer in section 338 applies for the order in accordance with Division 2; and

(b) there are reasonable grounds to suspect that the balance of the account:

(i) is *proceeds of an *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or

(ii) is wholly or partly an *instrument of a *serious offence; and

(c) the magistrate is satisfied that, unless an order is made under this section, there is a risk that the balance of the account will be reduced so that a person will not be deprived of all or some of such proceeds or such an instrument.

Note 1: Paragraphs (a), (aa), (b) and (c) of the definition of authorised officer in section 338 cover certain AFP members, certain members of the Australian Commission for Law Enforcement Integrity, certain members of the Australian Crime Commission and certain officers of Customs.

Note 2: The balance of the account may be proceeds of an offence even though the balance is only partly derived from the offence: see section 329.

(2) An order made under subsection (1) covers the balance of the *account from time to time.

Order need not be based on commission of particular offence.

(3) The reasonable grounds referred to in paragraph (1)(b), and the satisfaction referred to in paragraph (1)(c), need not be based on a finding as to the commission of a particular offence.

Part 2-1 - Restraining orders

Restraining orders are interim orders that prevent property from being disposed of or dealt with (except in a specified manner or circumstance) prior to a confiscation order being made. There are five types of restraining orders available:

1. Person directed (conviction based) - where it is proposed that a person be charged with an indictable offence or a person has been charged with or convicted of indictable offence (section 17)
2. Person directed (non-conviction based) - where a person is suspected of committing a serious offence (section 18)
3. Asset directed (non-conviction based) - where property is suspected of being proceeds of an indictable offence or instrument of a serious offence (section 19)
4. Person directed for literary proceeds (conviction/non-conviction based) - where a person is suspected of deriving literary proceeds in relation to indictable or foreign indictable offence (section
Section 17 - Restraining orders—people convicted of or charged with indictable offences

When a restraining order must be made

(1) A court with *proceeds jurisdiction must order that:
   (a) property must not be disposed of or otherwise dealt with by any person; or
   (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

   if:
   (c) the *DPP applies for the order; and
   (d) a person has been convicted of, or has been charged with, an *indictable offence, or it is proposed that he or she be charged with an indictable offence; and
   (e) any affidavit requirements in subsection (3) for the application have been met; and

   (f) (unless there are no such requirements) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:
   (a) all or specified property of the *suspect;
   (aa) all or specified bankruptcy property of the suspect;
   (b) all property of the suspect other than specified property;
   (ba) all bankruptcy property of the suspect other than specified bankruptcy property;
   (c) specified property of another person (whether or not that other person’s identity is known) that is subject to the *effective control of the suspect;
   (d) specified property of another person (whether or not that other person’s identity is known) that is *proceeds of the offence or an *instrument of the offence.

Affidavit requirements

(3) The application for the order must be supported by an affidavit of an *authorised officer stating:

   (a) if the *suspect has not been convicted of an indictable offence—that the authorised officer suspects that the suspect committed the offence; and
   (b) if the application is to restrain property of a person other than the suspect but not to restrain bankruptcy property of the suspect—that the authorised officer suspects that:

      (i) the property is subject to the *effective control of the suspect; or
      (ii) the property is *proceeds of the offence or an *instrument of the offence.

The affidavit must include the grounds on which the *authorised officer holds those suspicions.

Refusal to make a restraining order

(4) Despite subsection (1), the court may refuse to make a *restraining order in relation to an *indictable offence that is not a *serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Risk of property being disposed of etc.

(5) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.
Later acquisitions of property

(6) The court may specify that a *restraining order covers property that is acquired by the *suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

Section 18 - Restraining orders—people suspected of committing serious offences

When a restraining order must be made

(1) A court with *proceeds jurisdiction must order that:
   (a) property must not be disposed of or otherwise dealt with by any person; or
   (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;

   if:
   (c) the *DPP applies for the order; and
   (d) there are reasonable grounds to suspect that a person has committed a *serious offence; and
   (e) any affidavit requirements in subsection (3) for the application have been met;

   and
   (f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Note: A court can refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:
   (a) all or specified property of the *suspect;
   (aa) all or specified *bankruptcy property of the suspect;
   (b) all property of the suspect other than specified property;
   (ba) all bankruptcy property of the suspect other than specified bankruptcy property;
   (c) specified property of another person (whether or not that other person’s identity is known) that is subject to the *effective control of the suspect;
   (d) specified property of another person (whether or not that other person’s identity is known) that is:
      (i) in any case—*proceeds of the offence; or
      (ii) if the offence to which the order relates is a *serious offence—an *instrument of the offence.

Affidavit requirements

(3) The application for the order must be supported by an affidavit of an *authorised officer stating:
   (a) that the authorised officer suspects that the *suspect committed the offence; and
   (b) if the application is to restrain property of a person other than the suspect but not to restrain *bankruptcy property of the suspect that the authorised officer suspects that:
      (i) the property is subject to the *effective control of the suspect; or
      (ii) in any case—the property is *proceeds of the offence; or
      (iii) if the offence to which the order relates is a *serious offence—the property is an *instrument of the offence.

The affidavit must include the grounds on which the *authorised officer holds those suspicions.

Restraining order need not be based on commission of a particular offence

(4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular *serious offence.

Risk of property being disposed of etc.

(5) The court must make a *restraining order even if there is no risk of the property being disposed of
or otherwise dealt with.

Later acquisitions of property
(6) The court may specify that a *restraining order covers property that is acquired by the *suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

Section 19 - Restraining orders-property suspected of being proceeds of indictable offences etc.
When a restraining order must be made
(1) A court with *proceeds jurisdiction must order that:
   (a) property must not be disposed of or otherwise dealt with by any person; or
   (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;
   if:
   (c) the *DPP applies for the order; and
   (d) there are reasonable grounds to suspect that the property is:
      (i) the *proceeds of a *terrorism offence or any other *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern (whether or not the identity of the person who committed the offence is known); or
      (ii) an *instrument of a *serious offence; and
   (e) the application for the order is supported by an affidavit of an *authorised officer stating that the authorised officer suspects that:
      (i) in any case-the property is proceeds of the offence; or
      (ii) if the offence to which the order relates is a serious offence-the property is an *instrument of the offence;
      and including the grounds on which the authorised officer holds the suspicion;
   and
   (f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion stated in the affidavit on reasonable grounds.

Property that a restraining order may cover
(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is:
   (a) in any case-*proceeds of the offence; or
   (b) if the offence to which the order relates is a *serious offence-an *instrument of the offence.

Refusal to make a restraining order
(3) Despite subsection (1), the court may refuse to make a *restraining order in relation to an *indictable offence that is not a *serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Restraining order need not be based on commission of a particular offence
(4) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular offence.

Risk of property being disposed of etc.
(5) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

Section 20 - Restraining orders-people suspected of deriving literary proceeds from indictable
When a restraining order must be made

(1) A court with *proceeds jurisdiction must order that:
   (a) property must not be disposed of or otherwise dealt with by any person; or
   (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;
   if:
   (c) the *DPP applies for the order; and
   (d) there are reasonable grounds to suspect that a person has committed an *indictable offence or a *foreign indictable offence, and that the person has derived *literary proceeds in relation to the offence; and
   (e) any affidavit requirements in subsection (3) for the application have been met; and
   (f) (unless there are no such requirements) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that that property is any one or more of the following:
   (a) all or specified property of the *suspect;
   (aa) all or specified *bankruptcy property of the suspect;
   (b) all property of the suspect other than specified property;
   (ba) all bankruptcy property of the suspect other than specified bankruptcy property;
   (c) specified property of another person (whether or not that other person’s identity is known) that is subject to the *effective control of the suspect.

Affidavit requirements

(3) The application for the order must be supported by an affidavit of an *authorised officer stating:
   (a) if the *suspect has not been convicted of the offence that the authorised officer suspects that the suspect committed the offence; and
   (b) that the authorised officer suspects that the suspect derived *literary proceeds in relation to the offence; and
   (d) if the application is to restrain property of a person other than the suspect but not to restrain *bankruptcy property of the suspect that the authorised officer suspects that the property is subject to the *effective control of the suspect.

The affidavit must include the grounds on which the *authorised officer holds those suspicions.

Refusal to make a restraining order

(4) Despite subsection (1), the court may refuse to make a *restraining order in relation to an *indictable offence that is not a *serious offence if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

Restraining order need not be based on commission of a particular offence

(5) The reasonable grounds referred to in paragraph (1)(d) need not be based on a finding as to the commission of a particular *indictable offence or *foreign indictable offence (as the case requires).

Risk of property being disposed of etc.

(6) The court must make a *restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

Later acquisitions of property
(7) The court may specify that a *restraining order covers property that is acquired by the *suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

Section 20A - Restraining orders-unexplained wealth

When a restraining order must be made

(1) A court with *proceeds jurisdiction may order that:
  (a) property must not be disposed of or otherwise dealt with by any person; or
  (b) property must not be disposed of or otherwise dealt with by any person except in the manner and circumstances specified in the order;
  if:
  (c) the *DPP applies for the order; and
  (d) there are reasonable grounds to suspect that a person’s *total wealth exceeds the value of the person’s *wealth that was *lawfully acquired; and
  (e) any affidavit requirements in subsection (3) for the application have been met; and
  (f) the court is satisfied that the *authorised officer who made the affidavit holds the suspicion or suspicions stated in the affidavit on reasonable grounds; and
  (g) there are reasonable grounds to suspect either or both of the following:
     (i) that the person has committed an offence against a law of the Commonwealth, a *foreign indictable offence or a *State offence that has a federal aspect;
     (ii) that the whole or any part of the person’s wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

Property that a restraining order may cover

(2) The order must specify, as property that must not be disposed of or otherwise dealt with, the property specified in the application for the order, to the extent that the court is satisfied that there are reasonable grounds to suspect that property is any one or more of the following:
  (a) all or specified property of the *suspect;
  (b) all or specified *bankruptcy property of the suspect;
  (c) all property of the suspect other than specified property;
  (d) all bankruptcy property of the suspect other than specified bankruptcy property;
  (e) specified property of another person (whether or not that other person’s identity is known) that is subject to the *effective control of the suspect.

Affidavit requirements

(3) The application for the order must be supported by an affidavit of an *authorised officer stating:
  (a) that the authorised officer suspects that the *total wealth of the *suspect exceeds the value of the suspect’s *wealth that was *lawfully acquired; and
  (b) if the application is to restrain property of a person other than the suspect but not to restrain *bankruptcy property of the *suspect that the authorised officer suspects that the property is subject to the *effective control of the suspect; and
  (c) that the authorised officer suspects either or both of the following:
     (i) that the suspect has committed an offence against a law of the Commonwealth, a *foreign indictable offence or a *State offence that has a federal aspect;
     (ii) that the whole or any part of the suspect’s wealth was derived from an offence against a law of the Commonwealth, a foreign indictable offence or a State offence that has a federal aspect.

The affidavit must include the grounds on which the authorised officer holds those suspicions.

Legal expenses

(3A) Without limiting the manner and circumstances that may be specified in an order under paragraph (1)(b), the court may order that specified property may be disposed of or otherwise dealt with for the purposes of meeting a person’s reasonable legal expenses arising from an application
(3B) The court may make an order under subsection (3A) despite anything in section 24.

(3C) The court may require that a costs assessor certify that legal expenses have been properly incurred before permitting the payment of expenses from the disposal of any property covered by an order under subsection (3A) and may make any further or ancillary orders it considers appropriate.

Refusal to make a restraining order
(4) Despite subsection (1), the court may refuse to make a restraining order if the court is satisfied that it is not in the public interest to make the order.

Note: A court can also refuse to make a restraining order if the Commonwealth refuses to give an undertaking: see section 21.

(4A) If the court refuses to make a restraining order under subsection (1), it may make any order as to costs it considers appropriate, including costs on an indemnity basis.

Risk of property being disposed of etc.
(5) The court may make a restraining order even if there is no risk of the property being disposed of or otherwise dealt with.

Later acquisitions of property
(6) The court may specify that a restraining order covers property that is acquired by the suspect after the court makes the order. Otherwise, no property that is acquired after a court makes a restraining order is covered by the order.

Statistics: Restraining Orders by Offence Type

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<th>Number</th>
<th>Value</th>
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<td></td>
<td>Laundering</td>
<td>11</td>
<td>$8,342,465</td>
</tr>
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</table>

(b) Observations on the implementation of the article

Australia reported that under Part 3-3, law enforcement officials may use the subpoena process to provide access to records over a period longer than 6 months if the proceedings have begun. In most cases, law enforcement would employ other enforcement or investigation mechanisms, such as a production order or search warrant. A magistrate could also order property tracking documents to identify property or instrumentalities of offenses, among other things. Search warrants may be obtained on reasonable grounds with respect to evidence and location.

Under Part 2-1A, almost all freezing orders are made ex parte. There is no requirement to give notice of such an application, and the magistrate must find reasonable grounds to order the freeze. The order is delivered to the subject party after it has been obtained.

Part 2-1 on Restraining Orders is governed by a complex scheme of duration and expiration, contained in Section 45. In general, the 28-day rule is standard.

Article 31 Freezing, seizure and confiscation

Paragraph 3
3. Each State Party shall adopt, in accordance with its domestic law, such legislative and other measures as may be necessary to regulate the administration by the competent authorities of frozen, seized or confiscated property covered in paragraphs 1 and 2 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia referred to the *Proceeds of Crime Act 2002* (the POCA) which sets out how restrained and forfeited property may be dealt with. The Official Trustee (Insolvency and Trustee Services Australia) is responsible for, where required by the POCA, the administration of restrained and forfeited property. The powers and duties of the Official Trustee are set out in Chapter 4 of the POCA.

Section 38 - Court may order Official Trustee to take custody and control of property

The court may order the *Official Trustee to take custody and control of property, or specified property, covered by a *restraining order if the court is satisfied that this is required.*

Division 4-Effect of forfeiture orders

Section 69 - When can the Commonwealth begin dealing with forfeited property?

(1) The Commonwealth, and persons acting on its behalf, can only dispose of, or otherwise deal with, property specified in a *forfeiture order after, and only if the order is still in force at, the later of the following times:

(a) when:
   (i) if the period provided for lodging an appeal against the order has ended without such an appeal having been lodged-that period ends; or
   (ii) if an appeal against the order has been lodged-the appeal lapses or is finally determined;

(b) if the order was made in relation to a person’s conviction of an offence when:
   (i) if the period provided for lodging an appeal against the conviction has ended without such an appeal having been lodged-that period ends; or
   (ii) if an appeal against the conviction has been lodged-the appeal lapses or is finally determined.

(2) However, such disposals and dealings may occur earlier with the leave of the court and in accordance with any directions of the court.

(3) For the purposes of paragraph (1)(b):

   (a) if the person is to be taken to have been convicted of the offence because of paragraph 331(1)(b)-an appeal against the finding of the person guilty of the offence is taken to be an appeal against the conviction; and

   (b) if the person is to be taken to have been convicted of the offence because of paragraph 331(1)(c)-an appeal against the person’s conviction of the other offence referred to in that paragraph is taken to be an appeal against the conviction.

Section 70 - How must the Commonwealth deal with forfeited property?

(1) If the *forfeiture order is still in force at the later time mentioned in subsection 69(1), the *Official Trustee must, on the Commonwealth’s behalf and as soon as practicable:

   (a) dispose of any property specified in the order that is not money; and

   (b) apply:
   (i) any amounts received from that disposal; and
   (ii) any property specified in the order that is money;

   to payment of its remuneration and other costs, charges and expenses of the kind referred to in subsection 288(1) payable to or incurred by it in connection with the disposal and with the *restraining order that covered the property; and

   (c) credit the remainder of the money and amounts received to the *Confiscated Assets
Account as required by section 296.

(2) However, if the *Official Trustee is required to deal with property specified in a *forfeiture order but has not yet begun:
   (a) the Minister; or
   (b) a *senior Departmental officer authorised by the Minister for the purposes of this subsection;
may direct that the property be alternatively disposed of, or otherwise dealt with, as specified in the direction.
(3) Such a direction could be that property is to be disposed of in accordance with the provisions of a specified law.
Note: The quashing of a conviction of an offence relating to a forfeiture may prevent things being done under this section: see section 86.

Section 100 - How must forfeited property be dealt with?
(1) If subsection 99(1) no longer prevents disposal of or dealing with particular property forfeited under section 92, the *Official Trustee must, on the Commonwealth’s behalf and as soon as practicable:
   (a) dispose of any of the forfeited property that is not money; and
   (b) apply:
      (i) any amounts received from that disposal; and
      (ii) any of the forfeited property that is money;
 to payment of its remuneration and other costs, charges and expenses of the kind referred to in subsection 288(1) payable to or incurred by it in connection with the disposal and with the *restraining order that covered the property; and
   (c) credit the remainder of the money and amounts received to the *Confiscated Assets Account as required by section 296.

(2) However, if the *Official Trustee has not yet begun to deal with property forfeited under section 92, as required by this section:
   (a) the Minister; or
   (b) a *senior Departmental officer authorised by the Minister for the purposes of this subsection;
may direct that the property be disposed of, or otherwise dealt with, as specified in the direction.

(3) Such a direction could be that property is to be disposed of in accordance with the provisions of a specified law.
Note: The quashing of a conviction of an offence relating to the forfeiture will prevent things being done under this section: see section 112.

Section 267 - Property to which the Official Trustee’s powers and duties under this Part apply
(1) The powers conferred on the *Official Trustee under this Part may be exercised, and the duties imposed on the Official Trustee under this Part are to be performed, in relation to property if a court orders the Official Trustee to take custody and control of the property under section 38.
(2) This property is controlled property.
(3) However, powers conferred on the *Official Trustee under Division 4 may be exercised, and the duties imposed on the Official Trustee under Division 4 are to be performed, in relation to any property that is the subject of a *restraining order, whether or not the property is *controlled property.

Section 276 - Preserving controlled property
The *Official Trustee may do anything that is reasonably necessary for the purpose of preserving the *controlled property, including the following:
   (a) becoming a party to any civil proceedings affecting the property;
   (b) ensuring that the property is insured;
   (c) realising or otherwise dealing with any of the property that is securities or
investments;
(d) if any of the property is a business:
   (i) employing, or terminating the employment of, persons in the business; or
   (ii) doing anything necessary or convenient to carry on the business on a sound
   commercial basis.

(b) Observations on the implementation of the article

Australia reported that “restrained property” becomes “controlled property” under the applicable law if the court orders that the trustee take possession of the property. Controlled property therefore means property under the control of the trustee.

Article 31 Freezing, seizure and confiscation

Paragraph 4

4. If such proceeds of crime have been transformed or converted, in part or in full, into other property, such property shall be liable to the measures referred to in this article instead of the proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Under the definition of ‘proceeds’ in sections 329 and 330 of the Proceeds of Crime Act 2002, property which has been transformed or converted in full or in part into other property is still considered the proceeds of crime and can be forfeited as described above.

330 When property becomes, remains and ceases to be proceeds or an instrument
(1) Property becomes *proceeds of an offence if it is:
   (a) wholly or partly derived or realised from a disposal or other dealing with proceeds of
   the offence; or
   (b) wholly or partly acquired using proceeds of the offence;
including because of a previous application of this section.

As example of implementation, Australia referred to the X case11. Between 2000 and 2003, X was a registered tax agent who, it was alleged, had promoted and operated tax evasion schemes involving the use of offshore entities. In March 2006, the DPP commenced civil proceedings against X under the POC Act 2002. At the time X was an undischarged bankrupt and held no assets in his own name. Nonetheless, eight items of real estate - owned through trusts, and through X’s wife and daughter (a minor) - were able to be restrained on the grounds that they were suspected of being subject to X’s effective control. Some of these assets had been purchased during the charge period. On 22 December 2006, the DPP obtained final orders requiring X to pay a pecuniary penalty of $900,000 to the Commonwealth in respect of benefits obtained by him. This order was able to be enforced in full under the POC Act 2002 through sale of the assets under X’s effective control.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answers provided.

11Source: CDPP Annual Report 2006-07
Article 31 Freezing, seizure and confiscation

Paragraph 5

5. If such proceeds of crime have been intermingled with property acquired from legitimate sources, such property shall, without prejudice to any powers relating to freezing or seizure, be liable to confiscation up to the assessed value of the intermingled proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Under the Proceeds of Crime Act parties can apply for their legitimately acquired property to be excluded from restraint or forfeiture. If legitimately obtained property has been forfeited, the relevant party can apply for compensation to the value of the legitimately acquired property. Different provisions of the Act apply depending on what stage proceedings are at and the provision that the property would be forfeited under (or has been forfeited under).

Section 29 - Excluding property from certain restraining orders

1) The court to which an application for a *restraining order under section 17, 18 or 19 was made must, when the order is made or at a later time, exclude a specified *interest in property from the order if:

(a) an application is made under section 30 or 31; and
(b) the court is satisfied that the relevant reason under subsection (2) or (3) for excluding the interest from the order exists.

Note: Section 32 may prevent the court from hearing the application until the DPP has had a reasonable opportunity to conduct an examination of the applicant.

2) The reasons for excluding a specified *interest in property from a *restraining order are:

(a) for a restraining order under section 17 if the offence, or any of the offences, to which the order relates is a *serious offence-the interest is neither *proceeds nor an *instrument of unlawful activity; or
(b) for a restraining order under section 17 if paragraph (a) does not apply-the interest is neither proceeds nor an instrument of the offence, or any offence, to which the order relates; or
(c) for a restraining order under section 18-the interest is neither:
   (i) in any case-proceeds of unlawful activity; nor
   (ii) if an offence to which the order relates is a serious offence-an *instrument of any serious offence; or
(d) for a restraining order under section 19-the interest is neither:
   (i) in any case-proceeds of an *indictable offence, a *foreign indictable offence or an *indictable offence of Commonwealth concern; nor
   (ii) if an offence to which the order relates is a serious offence-an *instrument of any serious offence.

Note: One of the circumstances in which property ceases to be proceeds of an offence or unlawful activity involves acquisition of the property by an innocent third party for sufficient consideration: see paragraph 330(4)(a).

3) If the offence, or each offence, to which a *restraining order relates is a *serious offence that is an offence against section 15, 24, 29 or 31 of the Financial Transaction Reports Act 1988 or section 53, 59, 136, 137, 139, 140, 141, 142 or 143 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006, a further reason for excluding a specified *interest in property from the order is that each of the following requirements is met:

(a) there are no reasonable grounds to suspect that the interest is *proceeds of the
offence, or any of the offences;
(b) there is a *suspect in relation to the order, but he or she has not been convicted of, or charged with, the offence, or any of the offences;
(c) the conduct in question was not for the purpose of, in preparation for, or in contemplation of, any other *indictable offence, any *State indictable offence or any *foreign indictable offence;
(d) the interest could not have been covered by a restraining order if none of the offences had been serious offences.

(4) However, the court must not exclude a specified *interest in property from a *restraining order under section 17 or 18 unless it is also satisfied that neither a *pecuniary penalty order nor a *literary proceeds order could be made against:
(a) the person who has the interest; or
(b) if the interest is not held by the *suspect but is under his or her *effective control-the suspect.

Section 73 - Making exclusion orders
(1) A court that made a *forfeiture order, or that is hearing, or is to hear, an application (a *forfeiture application) for a forfeiture order, must make an order excluding a specified *interest in property from forfeiture (an *exclusion order) if:
(a) a person applies for the exclusion order; and
(b) the forfeiture order, or the forfeiture application, specifies property in which the applicant has an interest; and
(c) if the forfeiture order was (or the forfeiture order applied for would be) made under section 47 or 49-the court is satisfied that the applicant’s interest in the property is neither of the following:
(i) *proceeds of unlawful activity;
(ii) an offence on which the order was (or would be) based is a *serious offence-
(d) if the forfeiture order was (or the forfeiture order applied for would be) made under section 48-the court is satisfied that the applicant’s interest in the property is neither proceeds nor an instrument of any of the offences to which the forfeiture order or forfeiture application relates.

(2) An *exclusion order must:
(a) specify the nature, extent and value (at the time of making the order) of the *interest concerned; and
(b) direct that the interest be excluded from the operation of the relevant *forfeiture order; and
(c) if the interest has vested (in law or equity) in the Commonwealth under this Part and is yet to be disposed of-direct the Commonwealth to transfer the interest to the applicant; and
(d) if the interest has vested (in law or equity) in the Commonwealth under this Part and has been disposed of-direct the Commonwealth to pay the applicant an amount equal to the value specified under paragraph (a).

Section 77 - Making compensation orders
(1) A court that made a *forfeiture order, or that is hearing, or is to hear, an application for a forfeiture order, must make an order under subsection (2) (a *compensation order) if:
(a) a person (the *applicant) has applied for a compensation order; and
(b) the court is satisfied that the applicant has an *interest in property specified in the forfeiture order or in the application for the forfeiture order; and
(c) the court is satisfied that a proportion of the value of the applicant’s interest was not derived or realised, directly or indirectly, from the commission of any offence; and
(d) the court is satisfied that the applicant’s interest is not an instrument of any offence; and
(e) in the case of a court that is hearing or is to hear an application for a forfeiture order-
the court makes the forfeiture order.

(2) A *compensation order must:
   (a) specify the proportion found by the court under paragraph (1)(c); and
   (b) direct the Commonwealth, once the property has vested absolutely in it, to:
      (i) if the property has not been disposed of-dispose of the property; and
      (ii) pay the applicant an amount equal to that proportion of the difference between
           the amount received from disposing of the property and the sum of any payments of the kind referred
           to in paragraph 70(1)(b) in connection with the *forfeiture order.

Section 94 - Excluding property from forfeiture under this Part
(1) The court that made a *restraining order referred to in paragraph 92(1)(b) must make an order
    excluding particular property from forfeiture under this Part if:
    (a) a person (the applicant) has applied for an order under this section; and
    (b) the court is satisfied that the applicant has an *interest in property covered by the
        restraining order; and
    (d) a person has been convicted of a *serious offence to which the restraining order
        relates; and
    (e) the court is satisfied that the applicant’s interest in the property is neither *proceeds
        of *unlawful activity nor an *instrument of unlawful activity; and
    (f) the court is satisfied that the applicant’s interest in the property was lawfully
        acquired.

(2) To avoid doubt, an order under this section cannot be made in relation to property if the property
    has already been forfeited under this Part.

(3) The person must give written notice to the *DPP of both the application and the grounds on which
    the order is sought.

(4) The *DPP may appear and adduce evidence at the hearing of the application.

(5) The *DPP must give the applicant notice of any grounds on which it proposes to contest the
    application. However, the DPP need not do so until it has had a reasonable opportunity to conduct
    *examinations in relation to the application.

(6) The application must not be heard until the *DPP has had a reasonable opportunity to conduct
    *examinations in relation to the application.

94A Compensating for proportion of property not derived or realised from commission of any offence
(1) The court that made a *restraining order referred to in paragraph 92(1)(b) must make an order that
    complies with subsection (2) if:
    (a) a person (the applicant) has applied for an order under this section; and
    (b) the court is satisfied that the applicant has an *interest in property covered, or that
        was at any time covered, by the restraining order; and
    (c) a person has been convicted of a *serious offence to which the restraining order
        relates; and
    (d) the court is satisfied that a proportion of the value of the applicant’s interest was not
        derived or realised, directly or indirectly, from the commission of any offence; and
    (e) the court is satisfied that the applicant’s interest is not an *instrument of any offence.

(2) An order under this section must:
    (a) specify the proportion found by the court under paragraph (1)(d); and
    (b) direct the Commonwealth, once the property has vested absolutely in it, to:
       (i) if the property has not been disposed of-dispose of the property; and
       (ii) pay the applicant an amount equal to that proportion of the difference between
           the
the amount received from disposing of the property and the sum of any payments of the kind referred to in paragraph 100(1)(b) in connection with the forfeiture.

(3) A person who claims an *interest in property covered by a *restraining order referred to in paragraph 92(1)(b) may apply to the court that made the restraining order for an order under this section at any time.

(4) However, if the property has already been forfeited under this Part, the person cannot, unless the court gives leave, apply under subsection (3) if he or she:
   (a) either:
      (i) was given a notice under subsection 92A(1) in relation to the property; or
      (ii) was not given such a notice because of subsection 92A(2); and
   (b) did not make the application under subsection (3) before that forfeiture.

(5) The court may give the person leave to apply if the court is satisfied that:
   (a) the person had a good reason for not making the application before the forfeiture; or
   (b) the person now has evidence relevant to the application that was not available before the forfeiture; or
   (c) there are special grounds for granting the leave.

(6) The person must give written notice to the *DPP of both the application and the grounds on which the order is sought.

(7) The *DPP may appear and adduce evidence at the hearing of the application.

(8) The *DPP must give the applicant notice of any grounds on which it proposes to contest the application. However, the DPP need not do so until it has had a reasonable opportunity to conduct *examinations in relation to the application.

(9) The application must not be heard until the *DPP has had a reasonable opportunity to conduct *examinations in relation to the application.

Section 102 - Court may make orders relating to transfer of forfeited property etc.
If property is forfeited to the Commonwealth under section 92, the court that made the *restraining order referred to in paragraph 92(1)(b) must, if:
   (a) a person who claims an *interest in the property applies under section 104 for an order under this section; and
   (b) the court is satisfied that:
      (i) the applicant had an interest in the property before the forfeiture of the property; and
      (ii) the applicant’s interest in the property is neither *proceeds of unlawful activity nor an *instrument of unlawful activity; and
      (iii) the applicant’s interest in the property was lawfully acquired;
make an order:
   (c) declaring the nature, extent and value of the applicant’s interest in the property; and
   (d) either:
      (i) if the interest is still vested in the Commonwealth-directing the Commonwealth to transfer the interest to the applicant; or
      (ii) directing the Commonwealth to pay to the applicant an amount equal to the value declared under paragraph (c).

Australia cited the Kelli Lowe case\textsuperscript{12} as an example. Between June 1992 and February 2004 in the United Kingdom, Michael Hart, a financial adviser, stole money from his clients totalling in excess of

\textsuperscript{12} Source: CDPP Annual Report 2007-08
£550,000. Part of this sum, an amount of £173,000, was subsequently gifted by him to an Australian citizen, Kelli Lowe. Lowe and her husband then used part of that sum to help build a residence on the Gold Coast in Queensland. There was no evidence to indicate that Lowe had known that the monies received from Hart were proceeds of crime, however Lowe had not provided any goods or services in exchange for the gift.

On 19 November 2004 Michael Hart was convicted in England of 14 counts of theft. On the same date the Norwich Crown Court in England made a confiscation order in respect of Hart in the amount of £556,600.36.

In September 2007 the CDPP commenced civil action under the *POC Act 2002* to restrain the Gold Coast property of the Lowes on the basis that it was partly the proceeds of a foreign indictable offence committed by Hart in the UK.

In April 2008 an amount of AUD$281,796 was forfeited from the Lowes, which represented the value of the proportion of the Lowes’ property which had been acquired with the proceeds of crime.

(b) **Observations on the implementation of the article**

Australia reported that property used to conceal illegally acquired property would be property included as part of the offense. An exclusion order would not apply in such a case. In addition, legitimately acquired property used as an instrumentality of an offence can be subject to forfeiture, in the discretion of the court.

**Article 31 Freezing, seizure and confiscation**

**Paragraph 6**

6. Income or other benefits derived from such proceeds of crime, from property into which such proceeds of crime have been transformed or converted or from property with which such proceeds of crime have been intermingled shall also be liable to the measures referred to in this article, in the same manner and to the same extent as proceeds of crime.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Under the definition of ‘proceeds’ in sections 329 and 330 of the Proceeds of Crime Act 2002, income and benefits which have been derived from:

- the proceeds of crime
- property which the proceeds of crime has been transformed or converted into, or
- intermingled property

is also considered proceeds of crime.

It may be liable to forfeiture as previously outlined.

**Section 329 - Meaning of proceeds and instrument**

(1) Property is *proceeds* of an offence if:

(a) it is wholly derived or realised, whether directly or indirectly, from the commission of the offence; or

(b) it is partly derived or realised, whether directly or indirectly, from the commission of the offence;

whether the property is situated within or outside *Australia.*
Section 330 - When property becomes, remains and ceases to be proceeds or an instrument
(1) Property becomes proceeds of an offence if it is:
(a) wholly or partly derived or realised from a disposal or other dealing with proceeds of the offence;
(b) wholly or partly acquired using proceeds of the offence;
including because of a previous application of this section.

Australia referred to the Kelli Lowe case regarding civil confiscation. Between June 1992 and February 2004 in the United Kingdom Michael Hart, a financial adviser, stole money from his clients totalling in excess of £550,000. Part of this sum, an amount of £173,000, was subsequently gifted by him to an Australian citizen, Kelli Lowe. Lowe and her husband then used part of that sum to help build a residence on the Gold Coast in Queensland. There was no evidence to indicate that Lowe had known that the monies received from Hart were proceeds of crime, however Lowe had not provided any goods or services in exchange for the gift.

On 19 November 2004 Michael Hart was convicted in England of 14 counts of theft. On the same date the Norwich Crown Court in England made a confiscation order in respect of Hart in the amount of £556,600.36.

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In April 2008 an amount of AUD $281,796 was forfeited from the Lowes, which represented the value of the proportion of the Lowes’ property which had been acquired with the proceeds of crime.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 31 Freezing, seizure and confiscation

7. For the purpose of this article and article 55 of this Convention, each State Party shall empower its courts or other competent authorities to order that bank, financial or commercial records be made available or seized. A State Party shall not decline to act under the provisions of this paragraph on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with this provision, referring to explanation given to para. 2 of article 31. Under the provisions of Chapter 3 referred to above (3-1, 3-2, 3-3, 3-4 and 3-5), particular Australian courts, judicial officers or specified persons may order financial institutions and persons to produce bank, financial or commercial records. The powers are:
- Examinations (a person can be ordered to produce documents)
- Notices to financial institutions
- Monitoring orders
- Search warrants, and
- Production orders.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answer provided.
Article 31 Freezing, seizure and confiscation

Paragraph 8

8. States Parties may consider the possibility of requiring that an offender demonstrate the lawful origin of such alleged proceeds of crime or other property liable to confiscation, to the extent that such a requirement is consistent with the fundamental principles of their domestic law and with the nature of judicial and other proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

As noted above, a person whose property has been restrained or forfeited may apply for the property to be excluded from restraint or forfeitures. The applicant bears the onus of demonstrating that the property was lawfully acquired.

As noted above, in February 2010 the Parliament passed legislation introducing new unexplained wealth provisions which target wealth that a person cannot demonstrate that he or she has lawfully acquired. Under the unexplained wealth provisions, once a court is satisfied that an authorised officer has reasonable grounds to suspect that a person’s total wealth exceeds the value of the person’s wealth that was lawfully acquired, the court can compel the person to attend court and prove, on the balance of probabilities, that their wealth was not derived from offences with a connection to Commonwealth power. If a person cannot demonstrate this, the court may order them to pay to the Commonwealth the difference between their total wealth and their legitimate wealth.

Proceeds of Crime Act 2002

Section 179B - Making an order requiring a person to appear

(1) A court with *proceeds jurisdiction may make an order (a *preliminary unexplained wealth order) requiring a person to appear before the court for the purpose of enabling the court to decide whether or not to make an *unexplained wealth order in relation to the person if:

(a) the *DPP applies for an unexplained wealth order in relation to the person; and
(b) the court is satisfied that an *authorised officer has reasonable grounds to suspect that the person’s *total wealth exceeds the value of the person’s *wealth that was *lawfully acquired; and
(c) any affidavit requirements in subsection (2) for the application have been met.

Affidavit requirements

(2) An application for an *unexplained wealth order in relation to a person must be supported by an affidavit of an *authorised officer stating:

(a) the identity of the person; and

(b) that the authorised officer suspects that the person’s *total wealth exceeds the value of the person’s *wealth that was *lawfully acquired; and

(c) the following:

(i) the property the authorised officer knows or reasonably suspects was lawfully acquired by the person;

(ii) the property the authorised officer knows or reasonably suspects is owned by the person or is under the *effective control of the person.

The affidavit must include the grounds on which the authorised officer holds the suspicions referred to in paragraphs (b) and (c).

(3) The court must make the order under subsection (1) without notice having been given to any person if the *DPP requests the court to do so.
Section 179E - Making an unexplained wealth order

(1) A court with proceeds jurisdiction may make an order (an unexplained wealth order) requiring a person to pay an amount to the Commonwealth if:

(a) the court has made a preliminary unexplained wealth order in relation to the person; and

(b) the court is not satisfied that the whole or any part of the person’s wealth was not derived from one or more of the following:

(i) an offence against a law of the Commonwealth;
(ii) a foreign indictable offence;
(iii) a State offence that has a federal aspect.

(2) The court must specify in the order that the person is liable to pay to the Commonwealth an amount (the person’s unexplained wealth amount) equal to the amount that, in the opinion of the court, is the difference between:

(a) the person’s total wealth; and

(b) the sum of the values of the property that the court is satisfied was not derived from one or more of the following:

(i) an offence against a law of the Commonwealth;
(ii) a foreign indictable offence;
(iii) a State offence that has a federal aspect;

reduced by any amount deducted under section 179J (reducing unexplained wealth amounts to take account of forfeiture, pecuniary penalties etc.).

(3) In proceedings under this section, the burden of proving that a person’s wealth is not derived from one or more of the offences referred to in paragraph (1)(b) lies on the person.

(4) To avoid doubt, when considering whether to make an order under subsection (1), the court may have regard to information not included in the application.

(5) To avoid doubt, subsection (3) has effect despite section 317.

(6) Despite subsection (1), the court may refuse to make an order under that subsection if the court is satisfied that it is not in the public interest to make the order.

Furthermore, Australia stated that the unexplained wealth provisions are yet to be tested.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answer provided.

Article 31 Freezing, seizure and confiscation

Paragraph 9

9. The provisions of this article shall not be so construed as to prejudice the rights of bona fide third parties.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Third parties may apply for property to be excluded from restraint or forfeiture where the property was lawfully acquired and is not subject to the effective control of the suspect. Where property is subject to a forfeiture order, third parties may also apply for compensation to the value of lawfully acquired property. A dependant of a person whose property has been forfeited may apply for a payment to relieve hardship caused by the forfeiture (this is not available where the proceeds of an indictable offence for which a property has been convicted is forfeited). (Chapter 2 of the Proceeds of Crime Act 2002).
Australia also provided a link to the independent review of the POCA, which was conducted in 2006 by Tom Sherman AO.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answer provided.

Article 32 Protection of witnesses, experts and victims

Paragraph 1

1. Each State Party shall take appropriate measures in accordance with its domestic legal system and within its means to provide effective protection from potential retaliation or intimidation for witnesses and experts who give testimony concerning offences established in accordance with this Convention and, as appropriate, for their relatives and other persons close to them.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

There are a number of legislative mechanisms that operate to protect persons giving evidence in Court.

1. The Witness Protection Act 1994 (WPA)

The WPA is concerned with offences under national law, and provides a statutory basis for the provision of assistance to:

a. persons who have given, or agreed to give, evidence on behalf of the Crown in right of the Commonwealth or of a State or Territory in proceedings for an offence or prescribed proceedings; or
b. persons who have otherwise given, or agreed to give, evidence in relation to a criminal offence; or
c. persons who have made a statement in relation to an offence; or
d. persons who may require protection and assistance for any other reason; and
e. persons who are related to or associated with such persons.

The WPA created the National Witness Protection Program (NWPP), and gave the Australian Federal Police (AFP) Commissioner the responsibility for the maintenance of the program.

2. State witness protection acts

There are equivalent Acts to the Commonwealth Witness Protection Act for each State and Territory jurisdiction. These are considered complementary witness protection law for the purposes of the WPA.

- Australian Capital Territory - Witness Protection Act 1996
- Northern Territory - Witness Protection (Northern Territory) Act 2002
- Queensland - Witness Protection Act 2000
- South Australia - Witness Protection Act 1996
- Tasmania - Witness Protection Act 2000
- Victoria - Witness Protection Act 1999
3. Witness protection provisions in other areas of legislation

- At the Commonwealth level, the Criminal Code Act 1995 has similar provisions that can apply. For example, under section 474.17, it is an offence to use a carriage service to menace, harass or cause offence.

- Under section 8 of the Australian Federal Police Act 1979 one of the prescribed functions of the Australian Federal Police is to perform those functions conferred by the WPA, as well as those conferred by complementary witness protection laws in each State and Territory.

- There may be additional protections available at the State/Territory level in specific circumstances. For example, section 338.2 in the Crime and Misconduct Act 2001 allows the Crime and Misconduct Commission (CMC) in Qld to provide witness protection for a person whose safety may be at risk, either because the person is assisting the CMC, or has assisted the CMC in the performance of its functions.

4. Bail and witness protection provisions

- There are additional protections for witnesses offered through the setting of bail conditions for accused persons. Each State/Territory has legislation that administers the granting of bail, for example, the ACT Bail Act 1992. Most jurisdictions provide that the Court can take into account, in granting bail to a person, the likelihood of that person harassing or endangering the safety or welfare of a person, or interfering with evidence, intimidating a witness or obstructing the course of justice.

- Under section 15AB of the Crimes Act 1914, the matters to be considered in certain bail applications include the potential impact of granting bail on any witness, or potential witness, in proceedings relating to the alleged offence, or offence.

Furthermore, Australia provided information on the National Witness Protection Program (NWPP).

The NWPP is maintained by the Commissioner of the AFP, and provides protection and assistance to witnesses identified as being at risk because of assistance they have given to police and other law enforcement agencies in significant criminal prosecutions. In providing that protection and assistance the NWPP employs operating methodologies designed to ensure the safe integration of witnesses, and their families participating in the program, back into the community.

The NWPP operates on a legislative basis and does not perform protection functions outside of the statutory provisions under the WPA.

- In the financial year ending 30 June 2005 the NWPP provided protection and assistance to 51 people;
- In the financial year ending 30 June 2006 the NWPP managed 19 active witness protection operations, providing protection and assistance to 39 people;
- In the financial year ending 30 June 2007 the NWPP managed 28 active witness protection operations, providing protection and assistance to 75 people;
- In the financial year ending 30 June 2008 the NWPP managed 25 active witness protection operations, providing protection and assistance to 66 people;
- In the financial year ending 30 June 2009 the NWPP managed 34 active witness protection operations, providing protection and assistance to 78 people; and
- In the financial year ending 30 June 2010 the NWPP managed 14 active witness protection operations, providing protection and assistance to 25 people.
- In the financial year ending 30 June 2011 the NWPP managed 10 active witness protection operations, providing protection and assistance to 14 people.
The AFP cannot publish further details of the NWPP for the safety of those witnesses included in the NWPP and for the integrity of the program itself.

The NWPP is administered and operated by the AFP. Basic administration costs and the salaries of members and staff members involved in witness protection activities are met from the AFP budget.

Expenditure related to the National Witness Protection Program is outlined in the table below.

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<thead>
<tr>
<th>Financial Year ending</th>
<th>Total Expenditure</th>
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These figures do not include the base salaries or composites of the Witness Protection personnel operating and administering the program.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answers provided.

Article 32 Protection of witnesses, experts and victims

Subparagraph 2 (a)

2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

(a) Establishing procedures for the physical protection of such persons, such as, to the extent necessary and feasible, relocating them and permitting, where appropriate, non-disclosure or limitations on the disclosure of information concerning the identity and whereabouts of such persons;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The following list provides some examples of legislation and measures that make specific provisions for the protection of vulnerable witnesses.

1. The Witness Protection Act 1994 (WPA)

Section 28 of the WPA allows for the identity of a participant not to be disclosed in court proceedings. This includes provisions to hold proceedings in private and suppress the publication of evidence given by the witness, in order to protect their identity and security where necessary.
2. The National Witness Protection Program (NWPP)

The NWPP is maintained by the Commissioner of the AFP, and provides protection and assistance to witnesses identified as being at risk because of assistance they have given to police and other law enforcement agencies in significant criminal prosecutions. In providing that protection and assistance the NWPP employs operating methodologies designed to ensure the safe integration of witnesses, and their families participating in the program, back into the community.

The NWPP is maintained by the Commissioner of the AFP, and provides protection and assistance to witnesses identified as being at risk because of assistance they have given to police and other law enforcement agencies in significant criminal prosecutions. The Witness Protection Act 1994 section 13 provides that "the Commissioner is to take such action as the Commissioner considers necessary and reasonable to protect the witnesses' safety and welfare while also protecting the safety of the Commissioner, Deputy Commissioner, AFP employees and special members of the Australian Federal Police." Section 13 also provides the types of actions that can be taken in providing that protection and assistance. The NWPP employs operating methodologies designed to ensure the safe integration of witnesses, and their families participating in the program, back into the community.


Section 34 of the ACCA outlines provisions for the protection of witnesses, including the making of provisions to ensure the safety of a witness who may be subject to intimidation or harassment as a result of giving evidence.


Section 93.2 of the Criminal Code 1995 (Cth) allows a judge or magistrate at any time before or during a hearing of an application or proceedings before a federal court if satisfied that it is in the interest of the security or defence of the Commonwealth, to:

(1) order that some or all of the members of the public be excluded during the whole or a part of the hearing; or

(2) order that no report of the whole or a specified part of, or relating to, the application or proceedings be published; or

(3) make such order and give such directions as he or she thinks necessary for ensuring that no person, without the approval of the court, has access (whether before, during or after the hearing) to any affidavit, exhibit, information or other document used in the application or the proceedings that is on the file in the court or in the records of the court.

5. Crimes Act 1914

Section 15ME of the Crimes Act 1914 allows the chief officer of a law enforcement agency to provide a witness identity protection certificate for an operative (witness) if that operative is (a) required to give evidence; and (b) disclosure of that person’s identity is likely to endanger their safety (or that of another person), and/or prejudice any current or future investigation/activity relating to security.

Section 85B of the Crimes Act 1914 provides that at any hearing before a federal court, Territory court or a court exercising federal jurisdiction, the Court may order members of the public be excluded from a hearing, or order that part or whole of the proceeding not be published. The Court may also make any such order or give directions considered necessary for ensuring that no person has access to any of the affidavits, exhibits, information or other documents used in the proceedings.

Part 1AD of the Crimes Act requires a child witness’ evidence to be given by closed circuit television unless the facilities are not available, the child is sixteen or over and chooses not to give evidence by this means, or the court orders that the child is not to give evidence by this means, because it is not in
the interests of justice to do so. If a child witness under sixteen gives evidence in a courtroom, the court must make arrangements to restrict contact (including visual contact) between the child and defendant and may make arrangements to restrict contact between the child witness and members of the public. One or more adults may accompany a child who is giving evidence in a proceeding (whether via closed circuit television or otherwise). The adult/s must not prompt the child or otherwise influence the child’s answers or disrupt the questioning of the child.

The Crimes Act also allows, with leave of the court, the tender of a video recording of a police interview of a child witness as evidence-in-chief in proceedings for sexual, people trafficking and slavery offences, on condition that the child witness is made available for cross-examination and re-examination.

The Crimes Act prevents self represented defendants from directly questioning a child complainant, only allows such defendants to directly question other child witnesses (aside from the complainant) with leave of the court and disallows the inappropriate or aggressive cross-examination of children by any person.

Evidence of a child’s sexual reputation or sexual experiences is inadmissible in proceedings without written leave of the court. If evidence of the child’s sexual reputation is admitted into evidence, it must not be treated as relevant to the child’s credibility. Evidence of a child’s sexual experiences will only be admissible if the court is satisfied that the evidence is substantially relevant to the proceedings and, if the evidence relates to the credibility of a child witness, the evidence has substantial probative value. A judge must not suggest to a jury in proceedings involving child witnesses that the law regards children as an unreliable class of witness or that the law requires greater or lesser weight to be given to evidence that is given by closed circuit television, video recording or in the presence of an accompanying adult.

It is an offence to publish, without leave of the court, any matter that identifies or is likely to lead to the identification of a child witness or complainant.

6. State Examples

- The Evidence Act 1929 (SA), section 13A, provides special arrangements for protecting vulnerable witnesses when giving evidence in criminal proceedings, including services such as relocation, or giving evidence in such a manner as to protect identity and safety;

- The Criminal Procedure Act 1986 (NSW), section 306S, details ways in which evidence of a vulnerable person may be given;

- The Child Protection Act 1999 (QLD), section 99V, make provisions to protect children giving evidence or expressing views in court or tribunal proceedings.

- Under the NSW Witness Protection Act 1995, s16 the Court may close the Court to protect witnesses from identification.


Under section 19 of this Act, the Court may make such orders as the court considers appropriate in relation to the disclosure or protection of national security information. This could include orders to protect witness’s identity or holding in camera hearings.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answers provided.

Article 32 Protection of witnesses, experts and victims

Subparagraph 2 (b)
2. The measures envisaged in paragraph 1 of this article may include, inter alia, without prejudice to the rights of the defendant, including the right to due process:

   (b) Providing evidentiary rules to permit witnesses and experts to give testimony in a manner that ensures the safety of such persons, such as permitting testimony to be given through the use of communications technology such as video or other adequate means.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Evidence law is an area where the Commonwealth, States and Territories all have responsibilities. The Commonwealth and State and Territory jurisdictions all have legislation which provides for the protection of vulnerable witnesses when giving evidence. This includes procedures for giving evidence by closed circuit television or pre-recorded testimony. The definition of vulnerable witness is not uniform across jurisdictions. The following list provides some legislative examples that make specific provisions for the giving of evidence by vulnerable witnesses:

- New South Wales – Criminal Procedure Act 1986 Part 6
- Northern Territory – Evidence Act Part 11B
- Queensland – Evidence Act 1977 section 21A
- South Australia – Evidence Act 1929 sections 13 and 13A;
- Victoria - Criminal Procedure Act 2009 Part 8.2
- Western Australia – Evidence Act 1906.

The Commonwealth Crimes Act 1914 and the Criminal Code 1995 provides for the protection of vulnerable witnesses when giving evidence. Part 1AD, Divisions 4 and 5 provide for child witnesses to give evidence by CCTV or video recordings. This includes procedures for giving evidence by closed circuit television or pre-recorded testimony, as detailed above at point 5 under Question 132.

Commonwealth Crimes Act 1914
Division 4—Special facilities for child witnesses to give evidence

Section 15YI  Closed-circuit television

(1) A child witness’ evidence in a proceeding must be given by means of closed-circuit television unless:

   (a) the child is at least 16 and chooses not to give evidence by that means; or
   (b) the court orders that the child is not to give evidence by that means; or
   (c) the court is not equipped with facilities for evidence to be given by means of closed-circuit television.

Note: Section 15YI provides for alternative arrangements if a child witness does not give evidence by means of closed-circuit television.

(2) The court must not make an order under paragraph (1)(b) unless satisfied that it is not in the interests of justice for the child witness’ evidence to be given by means of closed-circuit television.

(3) This section does not affect the operation of any law in relation to the competence of a person to give evidence.
Section 15YJ Giving evidence by closed-circuit television
(1) If the child witness’ evidence is given by means of closed-circuit television from a location outside a courtroom:
   (a) that location is taken to be part of the courtroom in which the proceeding is being held; and
   (b) the court may order that a court officer be present at that location; and
   (c) the court may order that another person be present with the child:
      (i) to act as an interpreter; or
      (ii) to assist the child with any difficulty in giving evidence associated with a disability; or
      (iii) to provide the child with other support.
(2) An order under paragraph (1)(b) or (c) does not limit the operation of section 15YM.
(3) The court may adjourn the proceeding, or a part of the proceeding, to a court or other place that is equipped with facilities for evidence to be given by means of closed-circuit television if:
   (a) the court is not equipped with facilities for evidence to be given by means of closed-circuit television; or
   (b) the court otherwise considers it appropriate to do so.

Section 15YK Viewing evidence given by closed-circuit television
If the child witness’ evidence is given by means of closed-circuit television, the facilities used are to be operated in such a way that the people who have an interest in the proceeding can see the child, and any person present with the child, on one or more television monitors.

Section 15YL Alternative arrangements for giving evidence
(1) If a child witness’ evidence in a proceeding is not to be given by means of closed-circuit television, the court:
   (a) must make arrangements in order to restrict contact (including visual contact) that the child may have with any defendant while giving evidence; and
   (b) may make arrangements in order to restrict contact (including visual contact) that the child may have with members of the public while giving evidence.
(2) The arrangements may include either of the following:
   (a) using screens;
   (b) planning seating arrangements for people who have an interest in the proceeding, including:
      (i) the level at which they are seated; and
      (ii) the people in the child’s line of vision.
(3) This section does not apply if the child is at least 16 and chooses not to give evidence under the arrangements.

Division 5—Use of video recordings
Section 15YM Use of video recordings
(1) A video recording of an interview of a child witness in a proceeding may be admitted as evidence in chief if:
   (a) a constable, or a person of a kind specified in the regulations, conducted the interview; and
   (b) the court gives leave.
(2) The court must not give leave if satisfied that it is not in the interest of justice for the child’s evidence in chief to be given by a video recording.
(3) An application for leave under this section:
   (a) must be in writing; and
(b) must not be determined before the court has considered such submissions and other evidence as it thinks necessary for determining the application.

(4) The child witness must be available for cross-examination and re-examination if he or she gives evidence in chief by a video recording.
Note: Division 4 provides for this evidence to be given using closed-circuit television or other arrangements.

Section 15YN Admissibility of evidence given using video recordings
(1) The admissibility of the evidence given by video recording is not affected by the fact that it is evidence of previous representations that the child witness made in the interview that was being recorded.

(2) Evidence given by video recording under section 15YM is not admissible if the court is satisfied that:
   (a) any defendant in the proceeding (other than the child witness if the child is a defendant); or
   (b) the defendant’s lawyer (if any);
was not given a reasonable opportunity to listen to and view the recording.

(3) The court may refuse to admit the whole or part of the contents of a recording adduced as evidence under section 15YM.

Commonwealth Criminal Code 1995
Subdivision D—Video link evidence
Section 273.10 When court may take evidence by video link
In a proceeding for an offence against this Division, the court may, on application by a party to the proceeding, direct that a witness give evidence by video link if:
   (a) the witness will give the evidence from outside Australia; and
   (b) the witness is not a defendant in the proceeding; and
   (c) the facilities required by section 273.11 are available or can reasonably be made available; and
   (d) the court is satisfied that attendance of the witness at the court to give the evidence would:
      (i) cause unreasonable expense or inconvenience; or
      (ii) cause the witness psychological harm or unreasonable distress; or
      (iii) cause the witness to become so intimidated or distressed that his or her reliability as a witness would be significantly reduced; and
   (e) the court is satisfied that it is consistent with the interests of justice that the evidence be taken by video link.

(b) Observations on the implementation of the article
The reviewing experts were satisfied with the answers provided.

Article 32 Protection of witnesses, experts and victims
Paragraph 3

3. States Parties shall consider entering into agreements or arrangements with other States for the relocation of persons referred to in paragraph 1 of this article.

(a) Summary of information relevant to reviewing the implementation of the article
Australia stated that it is in compliance with the provision under review.
Australia referred to Witness Protection Act 1994 (WPA) and National Witness Protection Program (NWPP). The WPA enables the inclusion of foreign witnesses on the NWPP. Such persons may need to live outside their country of origin pending or following a trial.

- Under Section 10 of the WPA, foreign nationals or residents can be considered for inclusion in the NWPP at the request of the appropriate authority of a foreign country (foreign authority). While the primary role of the NWPP is the provision of long-term protection by change if identity and relocation, foreign witnesses can be offered short term protection in certain circumstances.

- Consideration for the inclusion of foreign witnesses in the NWPP is a two-stage process involving both the relevant Minister and the AFP Commissioner. If the Minister is satisfied that the foreign authority has supplied all the relevant material necessary to support the application, and that the circumstances are appropriate, he/she can then refer that request onto the Commissioner for consideration.

- If the Commissioner decides that the witness is suitable for inclusion in the NWPP, and the Minister, after considering a report from the Commissioner recommending the inclusion of the witness into the NWPP, has decided it is appropriate in the circumstances, the Commissioner is to include that person into the NWPP provided that two conditions are satisfied:
  1. the person has been granted a visa for entry into Australia; and
  2. the Commissioner has entered into an arrangement with the foreign authority for the purpose of making services under the NWPP available to the authority.

If it is considered necessary to relocate witnesses overseas the Commonwealth Government would negotiate that relocation with the relevant foreign government.

Details of the actual movement of witnesses into or out of Australia cannot be reported without the possibility of compromising either the safety of the individuals concerned or the integrity of the NWPP. The movement of witnesses into or out of Australia remains an active element of the NWPP.

Two international witnesses were included into the NWPP under Section 10 during the 2006 - 2007 reporting period.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answers provided.

Article 32 Protection of witnesses, experts and victims

Paragraph 4

4. The provisions of this article shall also apply to victims insofar as they are witnesses.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia referred to legal measures given to para. 1 of the article 32 above.

The NWPP does not differentiate between witnesses and victims, all are considered to be ‘participants’.

Whilst the NWPP regards all persons included within the witness protection program as ‘participants’;
the security and safety of participants is paramount during their inclusion. As such, the presentation of evidence via audio-visual technology (in accordance with jurisdictional Evidence legislation) is a consideration. However, the utilisation of such technology is at the discretion of the Courts.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answers provided.

Article 32 Protection of witnesses, experts and victims

Paragraph 5

5. Each State Party shall, subject to its domestic law, enable the views and concerns of victims to be presented and considered at appropriate stages of criminal proceedings against offenders in a manner not prejudicial to the rights of the defence.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

During sentencing, a 'victim impact statement' (VIS) may be provided to the court. This is a statement that provides details to the court of the harm suffered by a victim resulting from the offence. Generally, a victim impact statement can be tendered as a written statement. Some jurisdictions also allow the information to be presented orally. The shape, form and content provided in a victim impact statement varies dependent upon the governing legislative scheme.

Although federally the VIS is not specifically legislated for, the Commonwealth Crimes Act 1914 s16A makes provision for the court giving consideration to:

(d) the personal circumstances of any victim of the offence and
(e) any injury, loss or damage resulting from the offence;

There are provisions in all Australian jurisdictions that enable victim impact statements to be considered by a court prior to sentencing:

- Australia Capital Territory - Crimes (Sentencing) Act 2005 (ACT)
- New South Wales - Crimes (Sentencing Procedure) Act 1999 (NSW) ; Crimes (Sentencing Procedure) Regulation 2005 (NSW)
- Northern Territory - Sentencing Act (NT)
- Queensland - Penalties and Sentences Act 1992 (Qld); Criminal Offence Victims Act 1995 (Qld) Juvenile Justice Act 1992 (Qld)
- South Australia - Indictable Offences Criminal Law (Sentencing) Act 1988 (SA), General Criminal Law (Sentencing) Act 1988 (SA); Supreme Court Criminal Rules 1992 (SA); Magistrates Court Rules 1992 (SA)
- Tasmania - Indictable Offences Sentencing Act 1997 (Tas), see also Sentencing Act 1997 (Tas); Part 2 Criminal Rules 2006; Summary jurisdiction Justices Rules 2003 (Tas).
- Victoria - Sentencing Act 1991 (Vic)
- Western Australia - Sentencing Act 1995 (WA)

In terms of procedural safeguards for the defendant, the VIS is provided to the court and to the defendant some time before the court case. In some jurisdictions, the defendant or their lawyer may call a victim for cross-examination as to the contents of the statement. Where the defendant is self-represented and they wish to cross-examine a person on their statement, they will need permission from the Court to do so. They must indicate to the Court beforehand the nature of their proposed cross-examination.
Australia referred to information under para 4 of Article 30 for information on bail provisions which take into account the interests of the victim when determining bail.

Australia stated that all States and Territories, and the Commonwealth, have enacted victim support schemes, through various government departments. These provide counselling and support services, part of which is providing assistance with preparing and presenting a VIS.

- Australian Capital Territory - Victims Services Scheme (VSS) as part of Victim Support ACT
- New South Wales - NSW Department of Justice and Attorney General is home to 'Victims Services'
- Northern Territory - The Northern Territory is serviced by Victims of Crime NT Inc
- Queensland - Various community groups funded through the Department of Families or Queensland Health
- South Australia - Victim Support Service Incorporated, a non-government body
- Tasmania - Lifeline provides Victims of Crimes services
- Victoria - Victims Referral and Assistance Service, through the Department of Justice
- Western Australia - The WA Victim Support Service is a branch of the Courts Division of the Department of Justice

Most States, Territories and the Federal Government also have support services supplied through their Departments of Public Prosecution.

Australian Government Agencies do not record or keep statistics on the number of victims who have presented their views in criminal justice proceedings.

The WPA requires the Minister for Home Affairs to report to both houses of parliament on the operation of the NWPP at the end of each financial year. Subsection 30(2) of the WPA requires that an annual report be prepared which advises both Houses of Parliament on the general operations, performance and effectiveness of the NWPP. The report must be prepared in a manner that does not prejudice the effectiveness or security of the NWPP.

(b) Observations on the implementation of the article

Australia reported that the CDPP has a victims-of-crime policy. There are requirements for prosecutors to keep victims informed and listen to their views about a criminal case. There are ready resources for victims online for how to engage in the process, the policy and steps in the process.

Article 33 Protection of reporting persons

\[\text{Each State Party shall consider incorporating into its domestic legal system appropriate measures to provide protection against any unjustified treatment for any person who reports in good faith and on reasonable grounds to the competent authorities any facts concerning offences established in accordance with this Convention.}\]

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is partially in compliance with the provision under review.

Whistleblower protection in the Commonwealth public sector is provided by law, including under section 16 of the Public Service Act 1999 (Cth) and section 16 of the Parliamentary Service Act 1999 (Cth). These Acts provide that a person must not victimise, or discriminate against, an Australian Public Service (APS) or Parliamentary Service employee because that employee has reported breaches (or alleged breaches) of the APS Code of Conduct or the Parliamentary Service Code of Conduct to an authorised person.
Regulation 2.4 of the *Public Service Regulations 1999 (Cth)* requires an APS Agency Head to establish procedures for dealing with a report made by an APS employee under the *Public Service Act*, including the provision of information about protections available under section 16 of that Act.

Specific protections are also available to persons required to give information or produce documents to the Integrity Commissioner for the purposes of an investigation of a corruption issue involving a former or current staff member of a law enforcement agency (section 81 of the *Law Enforcement Integrity Commissioner Act 2006 (Cth)*).

Each of Australia’s States and Territories also provides public sector whistleblowing protection, including:

- Public Interest Disclosure Act 2002 (Tas)
- Public Interest Disclosure Act 2003 (WA)
- *Whistleblowers Protection Act 1993 (SA)*
- *Whistleblowers Protection Act 2001 (Vic)*
- Public Interest Disclosure Act 2010 (Qld)
- Public Interest Disclosure Act 1994 (ACT)
- Public Interest Disclosure Act 1994 (NSW)
- Public Interest Disclosure Act 2010 (NT)

Whistleblower protection in the private sector is provided by law, including under Part 9.4AAA of the *Corporations Act 2001 (Cth)*, the *Banking Act 1959 (Cth)*, the *Insurance Act 1973 (Cth)*, the *Life Insurance Act 1995 (Cth)* and the *Superannuation Industry (Supervision) Act 1993 (Cth)*.

The protections under the *Corporations Act 2001 (Cth)* apply to all companies registered with the Australian Securities and Investments Commission, some 1.75 million entities, and are currently the subject of a potential revision process.

The Australian Competition and Consumer Commission applies an *ACCC immunity policy for cartel conduct* for whistleblowers revealing cartel conduct based on its powers under the *Competition and Consumer Act 2010 (Cth)*.

Furthermore, Australia provided the following information on the implementation of relevant legislation.

For public sector whistleblowing, complete details regarding whistleblowing reports received by the Public Service Commissioner and finalised outcomes stretching from 2007-08 to 2009-10 are available via the Australian Public Service Commission, and can be provided to the review team upon request.

During 2009-10, the Australian Public Service Commissioner received eight whistleblowing reports from APS employees and 19 complaints from non-public servants, including private citizens and former public servants.

23 matters were finalised in 2009-10, including five matters carried over from the previous year. 12 were referred to an agency head for consideration, three investigated under the whistleblowing power, one was subject to a Code of Conduct inquiry and seven required no further action or were referred elsewhere.

In 2009-10, the complaints from public servants concerned agency recruitment processes, including allegations of patronage and cronyism; performance management decisions; and alleged misreporting.

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of data or information by colleagues. The complaints from members of the public generally alleged that agency decision-makers had failed to comply with their legislative obligations or had not exercised their decision-making powers properly.

In relation to private sector whistleblowing, although individual cases are protected, for privacy reasons and to conceal the identity of whistleblowers, the Australian Securities and Investments Commission notified that between the introduction of the legislation in 2005, and October 2009, at least four individuals had successfully received protections under Part 9.4AAA of the Corporations Act 2001 (Cth).


A Public Interest Disclosure Bill is being developed to establish further whistleblowing protections in the Commonwealth public sector. This Bill would give effect to the Government response of 17 March 2010 to the HRSCLCA Report.

In terms of private sector whistleblowing, a review undertaken by the Commonwealth of the operation of Part 9.4AAA of the Corporations Act 2001 (Cth) found that while the provisions had provided important protections, some of the processes required to receive protection may have been too cumbersome for potential whistleblowers. An Options Paper outlining possible reforms was issued in October 2009 and roundtables with stakeholders held in March 2010. The Government will consider possible legislative options later in 2011. While the Government considers that potentially there are restrictions that could be liberalised, there is no evidence to date that anyone has specifically suffered any persecution as a result of the current legislative approach.

(b) Observations on the implementation of the article

Australia regards its ongoing and recurrent consideration of whistleblower protection to meet the requirements of the Convention. Specific legislative mechanisms exist for public sector whistleblower protection as well as private whistleblower protection. General workplace relations law/industrial relations law – including the Fair Work Act of 2009 – applies to private sector whistleblower protection. Protections exist in that Act for persons who report misconduct or corruption in the private sector. The provisions and breadth of the application of these provisions have not yet been tested in the courts, however. In addition, there is an Inspectorate to whom persons can bring their own actions or complaints of adverse treatment. This covers some private sector and some public sector workers.

Australia reported that the Commonwealth is currently developing legislation for public sector whistleblower protection.

Protection procedures for addressing public sector whistleblower complaints are required to be established by the Agency Heads. Every APS agency in the country has established them. Under development is a comprehensive scheme to provide a channel for public sector disclosures regarding allegations of unacceptable conduct. The intent is to have a high quality of protections available and to make disclosures and the quality of the response to the disclosures higher. This includes reporting back to the whistleblower what has been done in response to the reporting.

The Integrity Commissioner addresses cases where the whistleblower is dissatisfied with the internal result. The issue for the Integrity Commissioner is whether there is an actual question to pursue, not to pursue it themselves. Specific protections exist for persons who refer cases to the Integrity Commissioner.
In relation to private sector whistleblowers revealing corruption the matter varies depending on whether it affects a corporation with which they have a privacy agreement. If not there are no restrictions on who they may reveal this to, including the media or Parliament, although in general it might be expected they would report these occurrences to the AFP. In the case of an employee or someone similar who is covered by a privacy obligation, Part 9.4AAA of the Corporations Act provides protections if the whistleblower provides the information to the Australian Securities and Investments Commission (ASIC, which is the public authority in this case), the company’s auditor, a director of the company, or a person authorised by the company to receive disclosures (and meets other criteria). While nothing directly prevents the whistleblower revealing this information to the media or Parliament the company may later take action against them for taking this action. ASIC’s website provides information for potential whistleblowers.

With regard to reporting restrictions, there is a range of laws providing for secrecy of particular provisions, especially with regard to intelligence and foreign affairs. The Inspector General of Intelligence and Security has the role of dealing with concerns of members of the security services. It will never be lawful to disclose intelligence information outside of government.

The reviewers recommended that Australia adopt and implement the 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.

**Article 34 Consequences of acts of corruption**

*With due regard to the rights of third parties acquired in good faith, each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to address consequences of corruption. In this context, States Parties may consider corruption a relevant factor in legal proceedings to annul or rescind a contract, withdraw a concession or other similar instrument or take any other remedial action.*

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Australia has several remedies in place to address acts of corruption, including criminal, civil and administrative sanctions. As the cases below demonstrate, officials charged with corruption offences under the Criminal Code can be liable to terms of imprisonment and pecuniary penalties.

Further, as discussed in Article 35 below, Australia’s legal system provides for persons to seek compensation for wrongs against them through initiating civil proceedings in a court of law. Remedies may be available under statute or common law, including tort, contract, or another common law principle.

**Rescission of Contracts**

Contract law in Australia is governed by the common law. A number of decisions from Australian courts have affected the circumstances where legal action can be taken regarding contracts. A contract can be rescinded on the grounds of a fraudulent misrepresentation. Fraudulent misrepresentation occurs when one party makes representation with intent to deceive and with the knowledge that it is false. An action for fraudulent misrepresentation allows for a remedy of damages and rescission of the contract. One can also sue for fraudulent misrepresentation in a tort action.

For an action to be successful, some criteria must be met in order to prove a misrepresentation. These include:

- A false statement of fact has been made,
- The statement was directed at the suing party and
The statement had acted to induce the suing party to contract

On discovering the fraud, the victimised party can affirm the contract and sue for damages. They might instead repudiate the contract, tender back what he or she has received, and recover what they have parted with, or its value.

Superannuation Orders
The Crimes (Superannuation Benefits) Act (C(SB) Act) provides for the recovery of employer-funded superannuation contributions where employees of the Commonwealth or Commonwealth agencies have been convicted of corruption offences. The recovery of these funds is based on the notion that an employee convicted of a corruption offence has failed to fulfil his or her contractual duties.

Orders are available for the recovery of:
  a. employer contributions or benefits held in a superannuation scheme [section 19(3) of the C(SB) Act]; and
  b. the employer component of benefits that have been paid to the person under any superannuation scheme [section 19(4) of the C(SB) Act].

‘Corruption offence’
Corruption offence is defined in section 2 of the C(SB) Act as being an offence by a person who was an employee at the time it was committed, being an offence:
  a. whose commission involved an abuse by the person of his or her office as such an employee; or
  b. that, having regard to the powers and duties of such an employee, was committed for a purpose that involved corruption; or
  c. that was committed for the purpose of perverting, or attempting to pervert, the course of justice.

‘Minister authorisation’
Section 16 of the C(SB) Act provides the Minister with authority to authorise the DPP to apply to the appropriate court for a superannuation order in respect of the person where satisfied that the person who was an employee is convicted of an offence and that the offence is a corruption offence.

Example of implementation: Grant Russell Mullins and Edward Arthur Dewey

This matter involved a serious breach of trust placed in the defendant Mullins, by his employer, the Department of Defence. There was also a significant loss to the Commonwealth of more than $1.3 million from the unauthorised disposal of 183 turbine wheels and spacers.

Dewey and Mullins developed a private commercial relationship involving the unauthorised disposal of aircraft parts which were RAAF property. Their dealings involved the disposal of 183 turbine wheels and spacers. Mullins was charged with three offences contrary to the Criminal Code for causing a loss to the Commonwealth, asking for a corrupt benefit as a Commonwealth public official and receiving a corrupt benefit as a Commonwealth public official. Dewey was charged with causing a loss to the Commonwealth and 3 counts of giving a corrupt benefit to a Commonwealth public official.

Mullins was sentenced to a total effective sentence of 3 years imprisonment to be served by way of periodic detention, to be released after 1 year and 9 months on a recognisance in the sum of $100 to be of good behaviour for 1 year and 9 months. He was also ordered to pay $1,560,689.58 in reparation.

Dewey was sentenced to a total effective sentence of 27 months imprisonment to be released forthwith on a recognisance of $1000 to be of good behaviour for a period of 16 months. He was also ordered to pay $1,560,689.58 in reparation.

14 2007-2008 CDPP Annual Report
(b) Observations on the implementation of the article

To rescind a contract, there must be an element of fraud or misrepresentation. This would include corrupt activities.

Contract law in Australia is governed by the common law. A number of decisions from Australian courts have affected the circumstances where legal action can be taken regarding contracts. A contract can be rescinded on the grounds of fraud or a fraudulent misrepresentation. Fraudulent misrepresentation occurs when one party makes representation with intent to deceive and with the knowledge that it is false. An action for fraudulent misrepresentation allows for a remedy of damages and rescission of the contract. One can also sue for fraudulent misrepresentation in a tort action.

For an action to be successful, some criteria must be met in order to prove a misrepresentation. These include:

(a) a fraudulent statement of fact has been made,
(b) The fraud was directed at the suing party and
(c) The fraud had acted to induce the suing party to contract

Chief Executive Instructions

1. Chief Executive’s Instructions (CEIs) are issued by the Agency heads, in accordance with the Financial Management and Accountability Act.

2. The CEIs are the primary source of information and advice on the internal financial management practices of the Department. Other departmental policies and procedures which may be issued must not be inconsistent with the CEIs.

3. The CEIs cover a range of matters including:
   (d) the receipt and custody of public money
   (e) spending, and committing to spend, public money
   (f) the use, management and disposal of public property, and
   (g) the accountability for assets and liabilities.

4. The instructions relate to financial and property management matters within the responsibility of the Department. In accordance with the FMA legislation, all officials in the Department must comply with the CEIs. The term ‘officials’ includes:
   (h) all public servants employed by the Department
   (i) other public servants performing functions for the Department, and
   (j) other persons in the Department, such as certain contractors.

5. Non-compliance with the CEIs and the FMA legislation may carry penalties ranging from disciplinary procedures to imprisonment.

Section 52 of the Financial Management and Accountability Act 1997 provides that Agencies heads may issue Chief Executive Instructions that promote the proper use of Agency resources. Every Commonwealth agency has issued a set of CEIs.

When selecting a successful bidder in a procurement process, the chief executive instructions issued under the Financial Management and Accountability Act, state that the relevant official must disclose any conflict of interest. Therefore, the official is always required to disclose any potential conflict of interest. If an employee selects a successful bidder and has not disclosed a personal interest the Government cannot rescind the contract unless he successful bidder has also conspired with the employee.
Excerpt from Attorney-General’s Department Chief Executive Instructions

i. Approving proposals to spend public money

(i) Only delegated officers (5.1 delegates) can approve proposals to spend public money. Financial delegations and authorisations can be found on AGNet. Chapter 1 provides more information on delegations and authorisations.

6. In exercising a delegation under FMA Regulation 9 to approve a proposal to spend public money, the 5.1 delegate must be aware of, and comply with, a range of legislative provisions, government policies and departmental instructions, policies and procedures. In particular, the 5.1 delegate must:

(i) comply with:

a. any directions and conditions placed upon him or her by the Secretary
b. the provisions of this chapter of the CEIs, and
c. the provisions and intent of the FMA Regulations, in particular FMA Regulations 7 to 12 inclusive

(k) conduct their duties in relation to spending public money ethically and in accordance with the APS Values and Code of Conduct

(l) ensure that all details relevant to the spending are complete, accurate and documented

(m) ensure that any primary approvals required are obtained prior to approving proposals to spend public money (primary approvals requirements are listed in Schedule 3 of the Spend Public Money delegations)

(n) ensure that proposals involving expenditure not covered by an existing appropriation receive FMA Regulation 10 approval (FGPM 4), unless the potential excess expenditure relates to contingent liabilities which are considered immaterial and remote (see sections 11.4 and 11.5 for more information on contingent liabilities)

(o) be satisfied that there are sufficient uncommitted funds available within the current appropriation and, if applicable, within uncommitted forward estimates approved under FMA Regulation 10

(p) ensure that, where a proposal to spend public money is one for the expenditure of Special Public Money, the proposal is consistent with the terms under which the money is held by the Commonwealth and compliant with any special instructions issued by the Finance Minister in relation to Special Public Money in accordance with Section 16 of the FMA Act

(q) only approve expenditure in relation to their duties and functions within the Department, and
(r) not approve any expenditure which could reasonably be seen to involve the provision of a benefit to him or her personally, such as his or her travel, training, conferences or communication which could be used by him or her for incidental private purposes. Such expenditure must be approved by another 5.1 delegate more senior to the official or, in the case of personal benefit by an SES Band 1 or above, an alternate SES officer.

Article 35 Compensation for damage

*Each State Party shall take such measures as may be necessary, in accordance with principles of its domestic law, to ensure that entities or persons who have suffered damage as a result of an act of corruption have the right to initiate legal proceedings against those responsible for that damage in order to obtain compensation.*

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia’s legal system provides for natural persons and legal persons to seek compensation for wrongs against them through initiating civil proceedings in a court of law. Remedies may be available under statute or common law, including tort, contract, or another common law principle.

Compensation for defective administration can be awarded by a court in circumstances defined by common law doctrines, such as negligence, negligent misstatement and false imprisonment. An action for damages against the Commonwealth would usually be heard by a State Supreme Court or, less commonly, by the Federal Court or the High Court.

An example of remedies available under statute is the *Commonwealth Authorities and Companies Act 1997*. This Act contains civil penalties for negligence, default or breach of trust or breach of duty for officers in Commonwealth authorities. Following a successful civil proceeding a pecuniary order for up to $200,000 may be made or the Commonwealth may seek compensation for damages including profits arising from the civil breach (schedule 2 of the *Commonwealth Authorities and Companies Act 1997*).

**Commonwealth Authorities and Companies Act 1997**

**Schedule 2-Civil consequences of contravening civil penalty provisions**

**Section 1 - Declarations of contravention**

(1) If a Court is satisfied that a person has contravened 1 of the following provisions, it must make a declaration of contravention:

(a) subsections 22(1) and 23(1) and (2), 24(1) and (2), 25(1) and (2) (officers’ duties);

(b) subsection 11(1) (annual reporting rules for Commonwealth authorities);

(c) subsection 20(4) (accounting records for Commonwealth authorities);

(d) subsection 30(3) (aligning accounting periods for subsidiaries of Commonwealth authorities);

(e) subsection 36(1B) (annual reports for Commonwealth companies).

These provisions are the *civil penalty provisions*.

Note: Once a declaration has been made, the Finance Minister can then seek a pecuniary penalty order (clause 3) or a disqualification order (section 27C).

(2) A declaration of contravention must specify the following:

(a) the Court that made the declaration;

(b) the civil penalty provision that was contravened;
(c) the person who contravened the provision;
(d) the conduct that constituted the contravention;
(e) the Commonwealth authority or Commonwealth company to which the conduct related.

Section 2 - Declaration of contravention is conclusive evidence
A declaration of contravention is conclusive evidence of the matters referred to in subclause 1(2).

Section 3 - Pecuniary penalty orders
(1) A Court may order a person to pay the Commonwealth a pecuniary penalty of up to $200,000 if:
   (a) a declaration of contravention by the person has been made under clause 1; and
   (b) the contravention:
      (i) materially prejudices the interests of the Commonwealth authority or Commonwealth company; or
      (ii) materially prejudices the ability of the Commonwealth authority or Commonwealth company to pay its creditors; or
      (iii) is serious.

(2) The penalty is a civil debt payable to the Commonwealth. The Commonwealth may enforce the order as if it were an order made in civil proceedings against the person to recover a debt due by the person. The debt arising from the order is taken to be a judgment debt.

(b) Observations on the implementation of the article
The reviewing experts were satisfied with the answers provided.

Article 36 Specialized authorities

Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies or persons specialized in combating corruption through law enforcement. Such body or bodies or persons shall be granted the necessary independence, in accordance with the fundamental principles of the legal system of the State Party, to be able to carry out their functions effectively and without any undue influence. Such persons or staff of such body or bodies should have the appropriate training and resources to carry out their tasks.

(a) Summary of information relevant to reviewing the implementation of the article
Australia stated that it is in compliance with the provision under review.

Australia has numerous independent agencies, such as the Australian Crime Commission, the Australian Commission for Law Enforcement Integrity, the Commonwealth Ombudsman and the Australian Federal which have been established in order to prevent corruption. As previously stated in Section 1-General Information, Australia has a multi-agency approach to corruption which vests responsibility for combating corruption in a number of Commonwealth Agencies.

Independent specialized bodies include:

Australian Federal Police
- Under the Commonwealth Fraud Control Guidelines (issued under Regulation 19 of the Financial Management and Accountability Act 1997), Commonwealth agencies are to refer all matters of serious and complex fraud against the Commonwealth to the AFP. This includes all bribery and corruption matters.
- Bribery and corruption matters require particular sensitivity and discretion, but the same basic
investigative methodology applies to all matters. Where specialist technical skills such as computer forensics might be required, the AFP has skilled technical investigators available.

- The AFP currently has the powers to investigate allegations of corruption under Commonwealth legislation. The AFP may also utilise powers under Section 3AA of the Crimes Act 1914 to investigate and refer charges for offences committed under state law where there is a sufficient Commonwealth nexus within an AFP investigation. This may include offences of corruption.

**Australian Commission for Law Enforcement Integrity (ACLEI)**

- The Law Enforcement Integrity Commissioner Act 2006 (LEIC Act) commenced operation on 30 December 2006. The LEIC Act established a new independent office of Integrity Commissioner, supported by a statutory agency, the Australian Commission for Law Enforcement Integrity (ACLEI).

- The Integrity Commissioner has jurisdiction to investigate allegations against the AFP, ACC (including secondees) and since 1 January 2011, the Australian Customs and Border Protection Service (ACPBS), reflecting the central role these agencies play in Commonwealth law enforcement and the particularly high corruption-risk environments in which they operate.

- The legislative framework allows that jurisdiction to be extended to other law enforcement agencies by regulation, if there is a perceived need. The Integrity Commissioner’s jurisdiction was extended to the ACPBS in this way, effective from 1 January 2011.

- The LEIC Act provides for the independent assessment and investigation of corruption issues while recognising the continuing responsibility that law enforcement agency heads have for the integrity of their own staff members.

- The Integrity Commissioner gives priority to dealing with serious corruption and systemic corruption, and focuses particularly on detecting and investigating indications of any corrupt link between public officials and criminal groups that may undermine the effectiveness of legitimate law enforcement measures.

- The Integrity Commissioner has powers similar to a Royal Commission, to conduct public or private hearings, and summon any person to produce documents or things or attend a hearing to give evidence under oath, even when giving such evidence would be self-incriminatory.

- ACLEI investigators can access other powers used in law enforcement, such as telephone interception, electronic surveillance, undercover and controlled operations, search warrants, and passport confiscation.

- Other special ACLEI powers include: the power to enter the premises of a law enforcement agency without prior warning to carry on an investigation and seize articles; and the power to apply to a judge for the arrest of a person refusing or attempting to evade giving evidence.

- The Integrity Commissioner is empowered to make arrangements for the protection of witnesses and others who may be at risk of physical harm relating to an ACLEI investigation.

**Australian Crime Commission**

- The Australian Crime Commission Act 2002 (the Act) provides for the conferral of functions, duties and powers on the ACC under State legislation.

- All States have enacted the necessary legislation to allow the ACC, with the consent of the ACC Board, to undertake investigations or intelligence operations into any circumstances or allegation, that a serious and organised crime has been, is being, or may in the future be, committed against a law of the Commonwealth or a law of a State or Territory.

**Australian Public Service Commission**

The Public Service Act 1999 (the Act) defines the powers, functions and responsibilities of agency heads, the Public Service Commissioner and the Merit Protection Commissioner.

The Act also establishes a statutory Code of Conduct that, among other things, requires all agency heads and APS employees to act honestly and with integrity, and not use their employment improperly for personal gain.
Under section 15 of the Act, agency heads are responsible for establishing procedures for determining whether an APS employee in the agency has breached the Code of Conduct, and for imposing sanctions, in accordance with the provisions of the Act.

Under section 41 of the Act, the Public Service Commissioner can inquire into allegations of breaches of the Code of Conduct by agency heads and report his or her findings to the appropriate Minister, including, where relevant, recommendations for sanctions.

The Commissioner is also required to evaluate the extent to which agencies incorporate and uphold the APS Values and to evaluate the adequacy of systems and procedures in agencies for ensuring compliance with the APS Code of Conduct.

Under section 50 of the Act, the Merit Protection Commissioner can inquire into allegations of breaches of the Code of Conduct by the Public Service Commissioner, and report his or her findings to the appropriate authority, including, where relevant, recommendations for sanctions.

Investigations of misconduct within APS agencies from time to time reveal evidence of criminal behaviour. In such cases it is open to the investigating agency to refer that evidence to the relevant police authority for separate consideration.

The Public Service Commissioner and the Merit Protection Commissioner are statutory office holders under the Public Service Act 1999. They can only be removed from office by the Governor General in accordance with sections 47 and 54 of the Act respectively.

The Commonwealth Ombudsman

The office of Commonwealth Ombudsman was established by the Ombudsman Act 1976. The office was created as part of a comprehensive reform of Australian administrative law in the 1970s. The Ombudsman plays an important role, along with courts and administrative tribunals, in examining government administrative action.

The Ombudsman is impartial and independent - not an advocate for complainants or for agencies.

Major statutory roles

The Commonwealth Ombudsman has three major statutory roles directed at safeguarding the community in their dealings with Australian Government agencies.

1. The first role, under the Ombudsman Act, is to investigate complaints from individuals, groups or organisations about the administrative actions of Australian Government officials and agencies.

2. The second role, also under the Ombudsman Act, is to undertake investigations of administrative action on an ‘own motion’ basis - that is, on the initiative of the Ombudsman, though prompted often by the insight gained from handling individual complaints.

In either case, the Ombudsman can report findings to parliament, recommend that remedial action be taken by an agency, either specifically in an individual case, or generally by a change to legislation or administrative policies or procedures.

3. The third role is to inspect the records of agencies such as the Australian Federal Police and the Australian Crime Commission to ensure compliance with legislative requirements applying to selected law enforcement and regulatory activities. This role is specified in the relevant legislation, such as the Telecommunications (Interception and Access) Act 1979.

Specialist roles

The Ombudsman Act also confers a number of specialist roles on the Ombudsman:

- Defence Force Ombudsman - handling complaints by serving and former members of the Australian Defence Force relating to their service
- Immigration Ombudsman - handling complaints about immigration administration
- Law Enforcement Ombudsman - oversight of the handling of complaints about the conduct and practices of the Australian Federal Police and its members
Postal Industry Ombudsman - handling complaints about Australia Post and private postal operators registered with the Postal Industry Ombudsman scheme

Taxation Ombudsman - handling complaints about the Australian Taxation Office.

Other legislation confers some additional functions on the Ombudsman. For example, under the Migration Act 1958 the Ombudsman must assess the appropriateness of the arrangements for a person who has been in immigration detention for two years or more.

The Commonwealth Ombudsman is also the Ombudsman for the Australian Capital Territory (ACT) under the Ombudsman Act 1989 and is funded for this function through an agreement with the ACT Government.

Commonwealth Fraud Control Guidelines

The Australian Government issued the Commonwealth Fraud Control Guidelines to establish the policy framework and articulate the Government’s expectations for effective fraud control for all agencies and their employees. The Guidelines place obligations on agencies and their CEOs in relation to fraud risk assessments, fraud control plans, awareness and training, handling of fraud cases and reporting.

The Guidelines are part of the wider Australian Government’s financial management framework, which create an overarching requirement to manage an agency’s affairs efficiently, effectively and ethically. The Guidelines aim to reduce the incidence of fraud and reduce the opportunity for fraud against the Commonwealth to occur.

The Guidelines are binding on Government agencies and are developed by the Attorney-General’s Department and issued by the Minister for Home Affairs under Regulation 16A of the Financial Management and Accountability Regulations 1997. The revised Guidelines were issued on 24 March 2011. The revised Guidelines placed a greater emphasis on fraud prevention and instilling a culture of fraud awareness in Government agencies.

Australian Federal Police

The AFP is an independent statutory body of government, and has a strong integrity framework which includes effective prevention strategies and robust Professional Standards investigations teams. Stringently enforced guidelines ensure AFP members adhere to legislation, rules and regulations that govern their employment. These rules cover matter such as privacy, conflicts of interest, corruption and illegal behaviour. Guidelines, measures and prevention strategies include (but are not limited to):

- Fraud control and anti-corruption plan 2009 - 2011 (see Attachment B)
- AFP Professional Standards portfolio and investigations teams.

Australian Commission for Law Enforcement Integrity

The Law Enforcement Integrity Commission Act (LEIC Act) contains measures to maintain ACLEI’s integrity and to ensure that the Integrity Commissioner and ACLEI remain free from political interference. For example, the Minister may ask the Integrity Commissioner to conduct a public inquiry, but cannot direct how inquiries or investigations will be conducted.

In addition, under the LEIC Act, the Integrity Commissioner:

- is appointed by the Governor-General and cannot be removed arbitrarily;
- may not hold office for more than five years;
- can commence investigations on his or her own initiative; and
- can make public statements and can release reports publicly.

The Parliamentary Joint Committee on the Australian Commission for Law Integrity (the Committee), reports to both Houses of Parliament on matters relating to ACLEI. The Committee comprises five
Members of Parliament and five Senators, the Committee members are from a range of political parties. The Committee monitors and reviews ACLEI's work, and examines each annual report and any special reports produced by the Integrity Commissioner.

In addition the LEIC Act makes provisions for dealing with issues that relate to the conduct of the Integrity Commissioner or ACLEI current or former staff members.

**Australian Crime Commission**

To ensure appropriate management and accountability the Australian Crime Commission is governed by the following:

- **the ACC Board**
  - The ACC Board is responsible for providing strategic direction to the ACC and approving the use of the ACC’s special coercive powers.

- **The Minister for Justice**
  - The ACC reports to the Minister for Justice
  - The Minister for Justice can issue public directions and guidelines to the ACC with respect to the performance of its functions.

- **The Inter-Governmental Committee on the ACC**
  - The IGC-ACC oversees the strategic direction, and monitors generally the work of the ACC and ACC Board, receives reports from the ACC Board for transmission to the Governments represented on the IGC-ACC, and transmits those reports accordingly.
  - The IGC-ACC has a particular responsibility to monitor the authorisation of the use of coercive powers including a power to revoke determinations of the Board that authorise the use of coercive powers.

- **The Parliamentary Joint Committee on Law Enforcement**
  - The Parliamentary Joint Committee on Law Enforcement is established by statute and, among other functions, monitors and reviews the performance of the ACC.

**The Commonwealth Ombudsman**

- The Ombudsman does not receive any direction from any public authority which would compromise its independence and performs its functions independently of any public authority over which jurisdiction is held
- The Ombudsman has the necessary powers to investigate complaints by any person or body of persons who considers that an act done or omitted, or any decision, advice or recommendation made by any public authority within its jurisdiction has resulted in maladministration, violation of rights, unfairness, abuse or injustice by a public authority
- The Ombudsman has the necessary powers to investigate on own-motion any matter about a public authority within its jurisdiction
- The Ombudsman has the power to make recommendations in order to remedy or to prevent any of the conduct described above, and, where appropriate, to propose administrative or legislative reforms for better governance
- The Ombudsman may report publicly to Parliament
- The Ombudsman is appointed for a defined period and can only be dismissed, for cause, by a duly authorised officer.
Furthermore, Australia also provided the Anti-Corruption and Fraud Control Plan 2009-2011 (see attachment).

(b) Observations on the implementation of the article

The review team met with Philip Moss, the Integrity Commissioner, who is supported by ACLEI. Established in 2006 – the office just passed the 5-year mark. The Commissioner is appointed for a term of five years. He is responsible for providing assurance that ACC, AFP and customs officials act with integrity. On 1 January 2011, customs officials fell under the jurisdiction of the Commissioner. Corrupt conduct includes abuse of office, perversions of justice or abuse of any other kind in the position the person holds. There is no further definition of corruption in the legislation. Therefore, corruption is defined very broadly to allow for maximum flexibility.

The focus is on serious corruption cases. Lower level corruption can be dealt with by the agencies themselves under the jurisdiction of the Commissioner. Cases are divided into “corruption issue” and “significant corruption issue”, the latter of which requires the Commissioner to review and determine how to proceed. The Commissioner can investigate directly (with limited resources) or jointly with the agency – or leave it to the agency in its entirety and provide a report to the Commissioner. The Commissioner can also ask another agency to join in the investigation of the other agency.

Other agencies as well as members of the public may refer cases directly to the Commissioner. ACLEI is not a complaint-clearing office, however. The interest is predominantly the integrity of the agencies themselves. Therefore, it is very important to manage the expectations of the public.

The powers of the Commissioner are quite broad, including information gathering, intelligence, surveillance, electronic surveillance, and are used under the legislation available. In addition, the Commissioner has the power to conduct a coercive hearing – meaning that a summons is issued, and the person must respond by attending a meeting/hearing, and answer questions put to them and tell the truth. There is no right to refuse to comply. Consequences can include criminal contempt proceedings if there is non-compliance with a 12-month maximum penalty. Several protections apply in the coercive hearing; for instance, any self-incriminatory statement cannot be used as evidence against the individual in later criminal proceedings. However, statements made in a coercive hearing by a law enforcement officer can be used to discipline or suspend the target officer.

Independence of the Commissioner is assured by appointment by the Governor General so as to be free from political interference. Appointment is made on the recommendation of the Government. Grounds for dismissal of the Commissioner require Parliament to pass a resolution.

The priority of the Office has been on the link between organized crime and law enforcement agencies. The Office has grown from 9 staff to 24 presently. Every year, the budget has been increased and that has led to additional staffing. An independent review of ACLEI is ongoing to assess whether resources are sufficient to have taken on the additional jurisdiction of the customs protection area. This represents the building-block approach to ACLEI’s growth. Resources can also be taken from other agencies, in particular investigations to cover surveillance needs or other investigatory expenses. An ACLEI surveillance team is about to be established.

The Commissioner reported no challenges to the Office’s independence or undue influence on the position of the Commissioner. Vulnerabilities and risks appear low. The Commissioner is fully prepared to call any person, including the heads of agencies, to appear before the Commissioner to answer questions. Senior-level corruption is viewed by the Commissioner as the main purpose of the office. At times, it becomes a question of prioritization, but high-level allegations are the priority.

The Commissioner has own-initiative power to commence an investigation, if he sees fit to do so. This has happened several times. The Minister can also refer questions of public inquiry to the Commissioner, but this has not happened yet.
Of the agencies, the AFP is most experienced and proficient at internal integrity initiatives. The ACC is at the next level, continuing to develop internal measures to combat corruption, including an ACLEI-assisted move from a rules-based to a values-based system of prevention. Customs and Border Protection is the least developed in its own integrity arrangements. ACLEI working closely with them to recognize corruption risks and put in place appropriate measures. There is interest in developing a culture of reporting among officials.

The Commissioner answers to a parliamentary joint committee, which oversees the Commissioner’s work and provides a report every 12 months to the larger Parliament. The committee is often interested in the use of coercive and investigatory powers to ensure those powers are being used properly. There was a recent recommendation from the committee that additional agencies be brought within ACLEI’s jurisdiction. The Government has tabled a response in terms of the review of ACLEI, and the question of expanded jurisdiction is under review.\(^{15}\)

In cases where the investigation involves staff of ACLEI, legislation requires that the Minister be informed if the allegation is against the Commissioner or staff. The Minister then appoints a Special Investigator to pursue the allegations, who has the same powers as the Commissioner. This has happened three times, with no substantiation of corrupt conduct. It was important to test the propositions, however.

The AFP conducts specialized training in integrity and professionalism as needs arise. All complaints of corruption are referred to the Commissioner. Vetting procedures are very thorough in the AFP, depending on the level of access to sensitive information and secrecy. There is a range of checks and balances built into the system to ensure that evidence and witnesses – and sources – are dealt with in a professional way consistent with principles of integrity and professionalism. All agencies must have fraud control policies and anti-corruption measures. Their own internal affairs divisions will be responsible for spotting corruption and reporting it through the chain.

Discussions were held regarding the Australian Government’s approach to corruption, which is based on the idea that no single body should be solely responsible for anti-corruption. Instead, the strong constitutional foundation is enhanced by a range of bodies and government initiatives designed to promote accountability and transparency. All Government agencies must maintain plans for preventing and reporting corruption. The reviewers were satisfied with this approach and concluded that article 36 was fully implemented.

The reviewers were informed of the current 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 reviewers acknowledged this effort, and encouraged Australia to continue this consultative process.

\(^{15}\) The Government’s tabled response from February 2012 notes the recommendation made by the ACLEI PJC and states that before considering whether to add new agencies under ACLEI’s jurisdiction, it considers it appropriate to allow ACLEI 12-18 months to consolidate its existing jurisdiction following the addition of the Australian Customs and Border Protection Service.

The Minister for Home Affairs announced in February 2012 that the first year of the ACLEI oversight of the Customs would be reviewed. The review examined the work ACLEI has undertaken with Customs since it was brought under its jurisdiction on 1 January 2011. The review is still currently underway and has not yet been made publicly available. Subsequently, the Minister for Home Affairs announced that AUSTRAC, CrimTRAC and DAFF-Biosecurity have been added to ACLEI’s jurisdiction. (http://www.ministerhomeaffairs.gov.au/MediaReleases/Pages/2012/Second%20Quarter/28-April-2012---Next-stage-of-reforms-to-crackdown-on-organised-crime---Making-Commonwealth-law-enforcement-more-corruption.aspx).
Article 37 Cooperation with law enforcement authorities

Paragraph 1

1. Each State Party shall take appropriate measures to encourage persons who participate or who have participated in the commission of an offence established in accordance with this Convention to supply information useful to competent authorities for investigative and evidentiary purposes and to provide factual, specific help to competent authorities that may contribute to depriving offenders of the proceeds of crime and to recovering such proceeds.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The Office of the Commonwealth Director of Public Prosecutions (CDPP) is an independent prosecuting service established by Parliament to prosecute alleged offences against Commonwealth law and to deprive offenders of the proceeds and benefits of criminal activity. The CDPP is established under the Director of Public Prosecutions Act 1983 (the DPP Act).

Section 9 (6D) of the DPP Act provides that the CDPP can give a person an undertaking that they will not be prosecuted and section 9(6F) provides that such an undertaking may be subject to conditions.

The Policy of the Commonwealth provides further guidance for the CDPP when determining when such an undertaking should be made.

Director of Public Prosecutions Act 1983

Section 9 - Power’s of Director

(6) The Director may, if he or she considers it appropriate to do so, give to a person an undertaking that:

(a) an answer that is given, or a statement or disclosure that is made, by the person in the course of giving evidence in specified proceedings;
(b) the fact that the person discloses or produces a document or other thing in specified proceedings; or
(ba) any information, document or other thing that is obtained as a direct or indirect consequence of an answer that is given, a statement or disclosure that is made, or a document or other thing that is disclosed or produced, in specified proceedings;
will not be used in evidence against the person, and where the Director gives such an undertaking:

(c) an answer that is given, or a statement or disclosure that is made, by the person in the course of giving evidence in the specified proceedings;
(d) the fact that the person discloses or produces a document or other thing in the specified proceedings; or
(e) any information, document or other thing that is obtained as mentioned in paragraph (ba);

as the case may be, is not admissible in evidence against the person in any civil or criminal proceedings in a federal court or in a court of a State or Territory, other than proceedings in respect of the falsity of evidence given by the person.

(6D) The Director may, if the Director considers it appropriate to do so, give to a person an undertaking that the person will not be prosecuted (whether on indictment or summarily):

(a) for a specified offence against a law of the Commonwealth; or
(b) in respect of specified acts or omissions that constitute, or may constitute, an offence against a law of the Commonwealth.

(6E) Where the Director gives to a person an undertaking under subsection (6D), no criminal
proceedings shall be instituted in a federal court or in a court of a State or Territory against the person in respect of such an offence or in respect of such acts or omissions.

(6F) An undertaking under subsection (6D) may be subject to such conditions (if any) as the Director considers appropriate.

Prosecution Policy of the Commonwealth

The *Prosecution Policy of the Commonwealth* is a public document which sets out guidelines for the making of decisions in the prosecution process. It applies to all Commonwealth prosecutions whether or not conducted by the Commonwealth Director of Public Prosecutions. The *Prosecution Policy* has been tabled in Parliament.\(^{16}\)

Section 6 “Some other decisions in the prosecution process”

*Undertakings under sections 9(6), 9(6B) or 9(6D) of the DPP Act*

6.1 This section is concerned with the broad considerations involved in deciding whether to give an accomplice an undertaking under the Act in order to secure that person's testimony for the prosecution.

6.2 A decision whether to call an accomplice to give evidence for the prosecution frequently presents conflicting considerations calling for the exercise of careful judgment in the light of all the available evidence. Inevitably, however, there will be instances where there is a weakness in the prosecution evidence that makes it desirable, or even imperative, to call an accomplice for the prosecution if that accomplice appears to be the only available source of the evidence needed to strengthen the weakness.

6.3 In conjunction with the question whether to call an accomplice the question may arise whether that accomplice should also be prosecuted. In this regard, unless the accomplice has been dealt with in respect of his or her own participation in the criminal activity the subject of the charge against the defendant, he or she will be in a position to claim the privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce into evidence. Where, however, an accomplice has been given an undertaking under the Act that undertaking will override what would otherwise be an allowable claim of privilege.

6.4 As a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a reduction in the sentence that would otherwise have been appropriate. Such a reduction may be substantial. However, this course may not be practicable in all cases.

6.5 In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others (for example, by granting them immunity from prosecution). However, it has long been recognised that in some cases granting an immunity from prosecution may be appropriate in the interests of justice.

6.6 An undertaking under the Act will only be given provided the following conditions are met:
   a. the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant or is essential to fully disclose the nature and scope of the offending and that evidence is not available from other sources. In this regard, the stronger the case without the evidence the accomplice can give, the less appropriate it will be to grant an undertaking to the accomplice; and
   b. the accomplice can reasonably be regarded as significantly less culpable than the defendant.

6.7 The central issue in deciding whether to give an accomplice an undertaking under the Act is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person’s testimony in the prosecution of another. In determining where the balance lies, account should be taken of the following matters:

a. the degree of involvement of the accomplice in the criminal activity in question compared with that of the defendant;

b. the strength of the prosecution evidence against the defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would reflect the defendant's criminality;

c. the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies - apart from taking into account such matters as the availability of corroborative evidence, and the weight that the arbiter of fact is likely to give to the accomplice's testimony, it will also be necessary to consider the likely effect on the prosecution case if the accomplice does not come up to proof;

d. the need to assess whether the prosecution’s evidence is likely to be strengthened if an accomplice testifies, which requires the prosecution to consider a range of factors, including examination of corroborative evidence; assessment of the weight the fact finder will place on the evidence; and an assessment of whether the evidence itself is cogent, complete and truthful;

e. the likelihood of any weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness);

f. whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice, and whether it would be in the public interest that the accomplice be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the Act; and

g. whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment.

6.8 Where an accomplice receives any concession from the prosecution in order to secure his or her evidence, for example, whether as to choice of charge, or the grant of an undertaking under the Act the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed to the Court and to the defence.

Example: Ted Ball, Gavin Watson, Neil Vest and Martin Batchelor

Ted Ball and Gavin Watson were the State Manager and Sales Manager of National 1 Pty Ltd, an Australia-wide stationery company, in the Australian Capital Territory. Ball and Watson provided corrupting benefits to Neil Vest and Martin Batchelor, who were Commonwealth public officials.

Watson agreed to give evidence for the prosecution and was granted an undertaking that he would not be prosecuted for his role in the offences under the DPP Act. All defendants entered pleas of guilty to the charges. Batchelor and Vest were each sentenced in the Supreme Court of the Australian Capital Territory on 31 July 2007 to a total effective sentence of nine months imprisonment to be served by way of periodic detention. Batchelor and Vest also consented to the forfeiture under the Proceeds of Crime Act 2002 of a number of items of property being the corrupting benefits they had received.

Ball was sentenced to a total effective 12 months imprisonment and 18 months community service. Ball was release upon giving security in the sum of $1,000 by recognizance that he was of good behaviour for a period of three years.

17 Source: 2006-2007 CDPP Annual Report
(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answers provided.

Article 37 Cooperation with law enforcement authorities

Paragraph 2

2. Each State Party shall consider providing for the possibility, in appropriate cases, of mitigating punishment of an accused person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The Crimes Act 1914 provides general principles the courts must have regard to when passing sentence. Section 16A(2)(h) includes the degree to which the person has cooperated with law enforcement agencies in the investigation of the offence or of other offences.

Crimes Act 1914

Division 2-General sentencing principles
Section 16A - Matters to which court to have regard when passing sentence etc.
(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:
   (a) the nature and circumstances of the offence;
   (b) other offences (if any) that are required or permitted to be taken into account;
   (c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character-that course of conduct;
   (d) the personal circumstances of any victim of the offence;
   (e) any injury, loss or damage resulting from the offence;
   (f) the degree to which the person has shown contrition for the offence:
      (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
      (ii) in any other manner;
   (fa) the extent to which the person has failed to comply with:
      (i) any order under subsection 23CD(1) of the Federal Court of Australia Act 1976; or
      (ii) any obligation under a law of the Commonwealth; or
      (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the Judiciary Act 1903;
   about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;
   (g) if the person has pleaded guilty to the charge in respect of the offence-that fact;
   (h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
   (j) the deterrent effect that any sentence or order under consideration may have on the person;
   (k) the need to ensure that the person is adequately punished for the offence;
(m) the character, antecedents, age, means and physical or mental condition of the person;
(n) the prospect of rehabilitation of the person;
(p) the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants.

(2A) However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:
(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
(b) aggravating the seriousness of the criminal behaviour to which the offence relates.

(2B) In subsection (2A):

- **criminal behaviour** includes:
  - (a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
  - (b) any fault element relating to such a physical element.

(3) Without limiting the generality of subsections (1) and (2), in determining whether a sentence or order under subsection 19B(1), 20(1) or 20AB(1) is the appropriate sentence or order to be passed or made in respect of a federal offence, the court must have regard to the nature and severity of the conditions that may be imposed on, or may apply to, the offender, under that sentence or order.

(b) **Observations on the implementation of the article**

The reviewing experts were satisfied with the answers provided.

**Article 37 Cooperation with law enforcement authorities**

**Paragraph 3**

3. Each State Party shall consider providing for the possibility, in accordance with fundamental principles of its domestic law, of granting immunity from prosecution to a person who provides substantial cooperation in the investigation or prosecution of an offence established in accordance with this Convention.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Section 9 (6D) of the DPP Act provides that the CDPP can give a person an undertaking that they will not be prosecuted and section 9(6F) provides that such an undertaking may be subject to conditions. Section 9 (6B) provides that any evidence given where such an undertaking has been made will not be used in evidence against the person in any civil or criminal proceedings under a law of the Commonwealth.

The Policy of the Commonwealth provides further guidance for the CDPP when determining when such an undertaking should be made.

**Director of Public Prosecutions Act 1983**

**Section 9 - Power’s of Director**

(6) The Director may, if he or she considers it appropriate to do so, give to a person an undertaking that:

- (a) an answer that is given, or a statement or disclosure that is made, by the person in the
course of giving evidence in specified proceedings;
(b) the fact that the person discloses or produces a document or other thing in specified proceedings; or
   (ba) any information, document or other thing that is obtained as a direct or indirect consequence of an answer that is given, a statement or disclosure that is made, or a document or other thing that is disclosed or produced, in specified proceedings;
will not be used in evidence against the person, and where the Director gives such an undertaking:
   (c) an answer that is given, or a statement or disclosure that is made, by the person in the course of giving evidence in the specified proceedings;
(d) the fact that the person discloses or produces a document or other thing in the specified proceedings; or
   (e) any information, document or other thing that is obtained as mentioned in paragraph (ba);
as the case may be, is not admissible in evidence against the person in any civil or criminal proceedings in a federal court or in a court of a State or Territory, other than proceedings in respect of the falsity of evidence given by the person.

(6B) The Director may, if the Director considers it appropriate to do so, give to a person an undertaking that:
   (a) an answer that is given, or a statement or disclosure that is made, by the person in the course of giving evidence in State or Territory proceedings;
   (b) the fact that the person discloses or produces a document or other thing in State or Territory proceedings; or
   (c) any information, document or other thing that is obtained as a direct or indirect consequence of an answer that is given, a statement or disclosure that is made, or a document or other thing that is disclosed or produced in State or Territory proceedings;
will not be used in evidence against the person in any civil or criminal proceedings under a law of the Commonwealth, and where the Director gives such an undertaking:
   (d) an answer that is given, or a statement or disclosure that is made, by the person in the course of giving evidence in the State or Territory proceedings;
   (e) the fact that the person discloses or produces a document or other thing in the State or Territory proceedings; or
   (f) any information, document or other thing that is obtained as mentioned in paragraph (c);
as the case may be, is not admissible in evidence against the person in any civil or criminal proceedings under a law of the Commonwealth in a federal court or in a court of a State or Territory, other than proceedings in respect of the falsity of evidence given by the person.

(6D) The Director may, if the Director considers it appropriate to do so, give to a person an undertaking that the person will not be prosecuted (whether on indictment or summarily):
   (a) for a specified offence against a law of the Commonwealth; or
   (b) in respect of specified acts or omissions that constitute, or may constitute, an offence against a law of the Commonwealth.

(6E) Where the Director gives to a person an undertaking under subsection (6D), no criminal proceedings shall be instituted in a federal court or in a court of a State or Territory against the person in respect of such an offence or in respect of such acts or omissions.

(6F) An undertaking under subsection (6D) may be subject to such conditions (if any) as the Director considers appropriate.

Prosecution Policy of the Commonwealth

The *Prosecution Policy of the Commonwealth* is a public document which sets out guidelines for the
making of decisions in the prosecution process. It applies to all Commonwealth prosecutions whether or not conducted by the Commonwealth Director of Public Prosecutions. The Prosecution Policy has been tabled in Parliament\(^\text{18}\).

Section 6 “Some other decisions in the prosecution process”

Undertakings under sections 9(6), 9(6B) or 9(6D) of the DPP Act

6.1 This section is concerned with the broad considerations involved in deciding whether to give an accomplice an undertaking under the Act in order to secure that person’s testimony for the prosecution.

6.2 A decision whether to call an accomplice to give evidence for the prosecution frequently presents conflicting considerations calling for the exercise of careful judgment in the light of all the available evidence. Inevitably, however, there will be instances where there is a weakness in the prosecution evidence that makes it desirable, or even imperative, to call an accomplice for the prosecution if that accomplice appears to be the only available source of the evidence needed to strengthen the weakness.

6.3 In conjunction with the question whether to call an accomplice the question may arise whether that accomplice should also be prosecuted. In this regard, unless the accomplice has been dealt with in respect of his or her own participation in the criminal activity the subject of the charge against the defendant, he or she will be in a position to claim the privilege against self-incrimination in respect of the very matter the prosecution wishes to adduce into evidence. Where, however, an accomplice has been given an undertaking under the Act that undertaking will override what would otherwise be an allowable claim of privilege.

6.4 As a general rule an accomplice should be prosecuted irrespective of whether he or she is to be called as a witness, subject of course to the usual evidentiary and public interest considerations being satisfied. Upon pleading guilty the accomplice who is prepared to co-operate in the prosecution of another can expect to receive a reduction in the sentence that would otherwise have been appropriate. Such a reduction may be substantial. However, this course may not be practicable in all cases.

6.5 In principle it is desirable that the criminal justice system should operate without the need to grant any concessions to persons who participated in alleged offences in order to secure their evidence in the prosecution of others (for example, by granting them immunity from prosecution). However, it has long been recognised that in some cases granting an immunity from prosecution may be appropriate in the interests of justice.

6.6 An undertaking under the Act will only be given provided the following conditions are met:

\begin{enumerate}
\item the evidence that the accomplice can give is considered necessary to secure the conviction of the defendant or is essential to fully disclose the nature and scope of the offending and that evidence is not available from other sources. In this regard, the stronger the case without the evidence the accomplice can give, the less appropriate it will be to grant an undertaking to the accomplice; and
\item the accomplice can reasonably be regarded as significantly less culpable than the defendant.
\end{enumerate}

6.7 The central issue in deciding whether to give an accomplice an undertaking under the Act is whether it is in the overall interests of justice that the opportunity to prosecute the accomplice in respect of his or her own involvement in the crime in question should be foregone in order to secure that person’s testimony in the prosecution of another. In determining where the balance lies, account should be taken of the following matters:

\begin{enumerate}
\item the degree of involvement of the accomplice in the criminal activity in question compared with that of the defendant;
\end{enumerate}

b. the strength of the prosecution evidence against the defendant without the evidence it is expected the accomplice can give and, if some charge or charges could be established against the defendant without the accomplice's evidence, the extent to which those charges would reflect the defendant's criminality;

c. the extent to which the prosecution's evidence is likely to be strengthened if the accomplice testifies - apart from taking into account such matters as the availability of corroborative evidence, and the weight that the arbiter of fact is likely to give to the accomplice's testimony, it will also be necessary to consider the likely effect on the prosecution case if the accomplice does not come up to proof;

d. the need to assess whether the prosecution’s evidence is likely to be strengthened if an accomplice testifies, which requires the prosecution to consider a range of factors, including examination of corroborative evidence; assessment of the weight the fact finder will place on the evidence; and an assessment of whether the evidence itself is cogent, complete and truthful;

e. the likelihood of any weakness in the prosecution case being strengthened other than by relying on the evidence the accomplice can give (for example, the likelihood of further investigations disclosing sufficient independent evidence to remedy the weakness);

f. whether there is or is likely to be sufficient admissible evidence to substantiate charges against the accomplice, and whether it would be in the public interest that the accomplice be prosecuted but for his or her preparedness to testify for the prosecution if given an undertaking under the Act; and

g. whether, if the accomplice were to be prosecuted and then testify, there is a real basis for believing that his or her personal safety would be at risk while serving any term of imprisonment.

6.8 Where an accomplice receives any concession from the prosecution in order to secure his or her evidence, for example, whether as to choice of charge, or the grant of an undertaking under the Act the terms of the agreement or understanding between the prosecution and the accomplice should be disclosed to the Court and to the defence.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answers provided.

Article 37 Cooperation with law enforcement authorities

Paragraph 4

4. Protection of such persons shall be, mutatis mutandis, as provided for in article 32 of this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated it is in compliance with the provision under review.

A number of legal protections exist for the persons mentioned are provided under articles 32 and 33.

(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answer provided.

Article 37 Cooperation with law enforcement authorities
Paragraph 5

5. Where a person referred to in paragraph 1 of this article located in one State Party can provide substantial cooperation to the competent authorities of another State Party, the States Parties concerned may consider entering into agreements or arrangements, in accordance with their domestic law, concerning the potential provision by the other State Party of the treatment set forth in paragraphs 2 and 3 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Under s26 of the *Mutual Assistance in Criminal Matters Act 1987*, an Australian who gives evidence in a foreign country cannot be detained or prosecuted for offences committed in that country before they left Australia.

The same applies for a person from a foreign country who gives evidence in Australia (s19).

Australia is able to make and receive mutual assistance requests without the need for a treaty relationship. However, where Australia has a treaty-based mutual assistance relationship with another State, it is standard practice for the treaty to include a ‘safe conduct’ provision. Such provisions provide that a person who is giving evidence or assisting with an investigation in the jurisdiction of the other Party cannot be subject to any restriction of their personal liberty or subject to any civil suit relating to conduct that preceded the person’s departure from the Requested Party.

All treaties to which Australia is a party, including those on mutual assistance, are available on line\(^{19}\).

*Mutual Assistance in Criminal Matters Act 1987*

Section - 19 Immunities

(1) Where a person is in Australia:

(a) pursuant to a request under section 16; or

(b) to give evidence in a proceeding, or to give assistance in relation to an investigation, pursuant to a request made by or on behalf of the Attorney-General (not being a request under section 16) for international assistance in a criminal matter;

the person, subject to subsection (2), shall not:

(c) be detained, prosecuted or punished in Australia for any offence that is alleged to have been committed, or that was committed, before the person’s departure from the foreign country pursuant to the request;

(d) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the person’s departure from the foreign country pursuant to the request, being a civil suit to which the person could not be subjected if the person were not in Australia;

(e) be required to give evidence in any proceeding in Australia other than the proceeding to which the request relates (if any).

(f) be required, in the proceeding to which the request relates (if any), to answer any question that the person would not be required to answer in a proceeding in the foreign country relating to a criminal matter; or

(g) be required, in the proceeding to which the request relates (if any), to produce any document or article that the person would not be required to produce in a proceeding in the foreign country relating to a criminal matter.

(1A) A duly authorised foreign law immunity certificate is admissible in proceedings as *prima facie* evidence of the matters stated in the certificate.

(2) Subsection (1) ceases to apply to a person if:
(a) the person has left Australia; or
(b) the person has had the opportunity of leaving Australia and has remained in Australia otherwise than for:
   (i) the purpose to which the request relates;
   (ii) the purpose of giving evidence in a proceeding in Australia certified by the Attorney-General, in writing, to be a proceeding in which it is desirable that the person give evidence; or
   (iii) the purpose of giving assistance in relation to an investigation in Australia certified by the Attorney-General, in writing, to be an investigation in relation to which it is desirable that the person give assistance.

(2A) Paragraph (1)(f) or (g) does not apply in a case where its application would be inconsistent with a provision of a mutual assistance treaty between Australia and the foreign country concerned.

(3) A certificate given by the Attorney-General for the purposes of subparagraph (2)(b)(ii) or (iii) has effect from the day specified in the certificate (which may be a day before the day on which the certificate is given).

(4) This section binds the Crown in right of the Commonwealth, of each of the States and of Norfolk Island.

Section 26 - Requests for giving of evidence at hearings in foreign countries

(1) Where:
(a) a proceeding relating to a criminal matter has commenced in a foreign country;
(b) the foreign country requests the attendance at a hearing in connection with the proceeding of a federal prisoner or a State prisoner who is in Australia (whether or not in custody);
(c) there are reasonable grounds to believe that the prisoner is capable of giving evidence relevant to the proceeding; and
(d) the Attorney-General is satisfied that:
   (i) the prisoner has consented to giving evidence in the foreign country; and
   (ii) the foreign country has given adequate (whether or not unqualified) undertakings in respect of the matters referred to in subsection (3);
the Attorney-General may, in his or her discretion;
(e) in a case where the prisoner is being held in custody:
   (i) if the prisoner is a federal prisoner and is not also a State prisoner-direct that the prisoner be released from prison for the purpose of travelling to the foreign country to give evidence at the proceeding;
   (ii) if the prisoner is a federal prisoner and also a State prisoner-direct, subject to the obtaining of any approvals required to be obtained from an authority of the relevant State, that the prisoner be released from prison for the purpose of travelling to the foreign country to give evidence at the proceeding; and
   (iii) in any case, subject to the making or giving of any necessary directions or approvals in relation to the release of the prisoner-make arrangements for the travel of the prisoner to the foreign country in the custody of a police or prison officer appointed by the Attorney-General for the purpose; or
(f) in a case where the prisoner, having been released from custody on a parole or other order or licence to be at large, is not being held in custody:
   (i) if the prisoner is a federal prisoner and is not also a State prisoner-approve the travel of the prisoner to the foreign country to give evidence at the proceeding and obtain such approvals, authorities, permissions or variations to the parole or other order or licence to be at large as may be required;
   (ii) if the prisoner is a federal prisoner and also a State prisoner-subject to the obtaining of any approvals, authorities or permissions required to be obtained from an authority of the
relevant State and the making of any necessary variations to the parole or other order or licence to be at large, approve the travel of the prisoner to the foreign country to give evidence at the proceeding and obtain such approvals, authorities, permissions or variations to the parole or other order or licence to be at large made or granted, as the case may be, under a law of the Commonwealth or of a Territory as may be required; and

(iii) in any case, subject to the obtaining of any necessary approvals, authorities, permissions or variations of the parole or other order or licence to be at large, make arrangements for the travel of the prisoner to the foreign country.

(2) Where:

(a) a proceeding relating to a criminal matter has commenced in a foreign country;
(b) the foreign country requests the attendance at a hearing in connection with the proceeding of a person (not being a federal prisoner or a State prisoner) who is in Australia;
(c) there are reasonable grounds to believe that the person is capable of giving evidence relevant to the proceeding; and
(d) the Attorney-General is satisfied that:

(i) the person has consented to giving evidence in the foreign country; and
(ii) the foreign country has given adequate (whether or not unqualified) undertakings in respect of the matters referred to in subsection (3);
the Attorney-General may, in his or her discretion, make arrangements for the travel of the person to the foreign country.

(3) The matters in relation to which undertakings are to be given by a foreign country for the purpose of a request that a person give evidence in the foreign country are:

(a) that the person shall not:

(i) be detained, prosecuted or punished for any offence against the law of the foreign country that is alleged to have been committed, or that was committed, before the person’s departure from Australia;
(ii) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the person’s departure from Australia, being a civil suit to which the person could not be subjected if the person were not in the foreign country; or
(iii) be required to give evidence in any proceeding in the foreign country other than the proceeding to which the request relates,
unless:
(iv) the person has left the foreign country; or
(v) the person has had the opportunity of leaving the foreign country and has remained in that country otherwise than for the purpose of giving evidence in the proceeding to which the request relates;
(b) that any evidence given by the person in the proceeding to which the request relates will be inadmissible or otherwise disqualified from use in the prosecution of the person for an offence against a law of the foreign country other than the offence of perjury in relation to the giving of that evidence;
(c) that the person will be returned to Australia in accordance with arrangements agreed by the Attorney-General;
(d) in a case where the person is being held in custody in Australia and the Attorney-General requests the foreign country to make arrangements for the keeping of the person in custody while the person is in the foreign country:

(i) the making of appropriate arrangements for that purpose;
(ii) that the person will not be released from custody in the foreign country unless the Attorney-General notifies an appropriate authority of the foreign country that the person is entitled to be released from custody under Australian law; and
(iii) if the person is released in the foreign country as mentioned in subparagraph (ii) that the person’s accommodation and expenses pending the completion of the proceeding to which the request relates will be paid for by the foreign country; and
(e) such other matters (if any) as the Attorney-General thinks appropriate.
(b) Observations on the implementation of the article

The reviewing experts were satisfied with the answer provided.

(c) Successes and good practices

The reviewers noted with satisfaction Australia’s position that no individual is immune from prosecution for corruption cases, including parliamentarians, although certain evidentiary restrictions protect statements made on the floor of the parliament from being presented in a subsequent criminal prosecution.

Article 38 Cooperation between national authorities

Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between, on the one hand, its public authorities, as well as its public officials, and, on the other hand, its authorities responsible for investigating and prosecuting criminal offences. Such cooperation may include:

(a) Informing the latter authorities, on their own initiative, where there are reasonable grounds to believe that any of the offences established in accordance with articles 15, 21 and 23 of this Convention has been committed; or
(b) Providing, upon request, to the latter authorities all necessary information.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with the provisions under review.

The transparent and accountable nature of Australia’s public service encourages cooperation between public authorities and investigating authorities in the prosecution of an offence.

An Australian Government department or agency can refer a matter to the AFP in the State or Territory where the suspected offence/s occurred if it:

- identifies any serious breach of federal legislation
- considers the matter is appropriate for referral to the AFP
- requires AFP assistance or advice in relation to an investigation being conducted by that department or agency into suspected breaches of Federal legislation

How a referral is made:

All referrals are made using AFP Referral Form. Referrals are then sent to the AFP Operations Monitoring Centre in the State or Territory where the suspected offences occurred. The referral includes all relevant referral information and documents (letter and attachments). Referrals may be sent by email or post, or delivered by hand.

Referral of politically sensitive matters:

All matters of a politically sensitive nature (not limited to fraud) that require AFP assistance should be raised with the Minister responsible for the AFP by the relevant Minister or Department at the time of referral. This enables the Government to be informed at the earliest juncture of potentially politically contentious matters that may require investigation by the AFP.

Under present arrangements, the Minister for Home Affairs is responsible for the AFP.

However the Minister does not have the power, or responsibility, to decide what allegations the AFP will, or will not, investigate. The procedure to inform the Minister for Home Affairs is designed to
make him aware of significant matters affecting his portfolio. The decision to seek an AFP investigation will, unless the matter also affects other portfolios, remain that of the complainant agency or Minister.

The purpose of this procedure is to ensure that there is a coherent, consistent approach by the Government of the day and the AFP. The Minister for Home Affairs will be informed of the investigation's outcome once it has been finalised.

These procedures are incorporated in the Memoranda of Understanding entered into by the AFP and various Departments and Agencies.

All referral letters to the AFP must, as a minimum, include the following:

- copies of all documents relevant to the referral
- action being requested of the AFP
- if the department or agency wants the AFP to consider a joint investigation, details should be included (such as which resources they are able to provide)
- the suspected breaches including specific legislation offence(s)
- details of the suspected offender(s) including name, date of birth, location (where known)
- the suspect's criminal history, if known, and information relating to circumstances where they have previously come to the department or agency's attention
- a chronological account of the facts or evidence supporting the suspected breach(es)
- value of the revenue loss or potential losses for the department or agency
- a summary of all enquiries or investigations already undertaken by the department or agency
- details of witnesses
- if the suspect(s) is aware of the department or agency's investigation/allegation
- references to any specific legislative provisions including consent to prosecute or time limitation regarding commencement of prosecution
- copies of relevant legal advice sought by, and provided to, the department or agency
- significance or impact of the referral to the department or agency
- the department or agency case reference number and other reference details, including the operation's name
- details of the department or agency's nominated case officer and/or contact person including their contact details

Where search warrants or operational action is proposed, departments and agencies are required to provide Standard Tactical Plans or similar planning documentation with the referral documents.

(b) Observations on the implementation of the article

Australia reported that there are standard procedures for entities that are not departments or agencies. Reports can be done through the operations coordination centre. Procedures are available publicly on the website. Regarding non-departments or non-agencies, they are responsible to the same oversight and regulatory agencies as others.

Regarding complaints sent to multiple agencies, the AFP reported that it has broad presence and works closely with other law enforcement and state agencies. Such complaints generally are funneled to the AFP if it is a Commonwealth corruption allegation. Internally, there is a regular intelligence analysis. Integrity databases are kept separately. Alerts will pop up referring to contact details of other officers.

The public prosecutor does not direct investigative activity, but can help to advise and shape the investigation, sharing needs and approaches so that the evidence is sufficiently elaborated. Investigators respond to requests for follow up from the prosecutor’s office.

With regard to referral letters that are deficient in some way, the AFP will follow up and go back to the complainant to get more information so that the referral letter can be elaborated.
Article 39 Cooperation between national authorities and the private sector

Paragraph 1

1. Each State Party shall take such measures as may be necessary to encourage, in accordance with its domestic law, cooperation between national investigating and prosecuting authorities and entities of the private sector, in particular financial institutions, relating to matters involving the commission of offences established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with the provision under review.

The strong regulatory and co-regulatory framework governing Australia’s private sector (under the Corporations Act 2001, the Australian Securities and Investments Act 2001, the ASX Corporate Governance Council’s Corporate Governance Principles and Recommendations as well as individual corporate Codes of Conduct by its nature encourages cooperation between the private sector and relevant law enforcement bodies.

With regard to financial institutions, under section 16 of the Financial Transactions Reports Act 1988, ‘cash dealers’ are required to report suspicious or significant cash transactions to AUSTRAC for the purposes of detecting criminal offences. Section 16(4) requires that cash dealers give further information to relevant authorities if requested. Part 3 of the Act also details the requirements for ‘cash dealers’ when opening and maintaining accounts.

Part 3 of the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 details the reporting obligations for financial institutions including the requirement to report suspicious transaction in section 41. Similarly, under the Proceeds of Crime Act 2002 (Part 3) financial institutions are required to provide information and documents to authorised officers upon request.

Financial Transactions Reports Act 1988 – Section 16(4)
(4) Where a cash dealer communicates information to the AUSTRAC CEO under subsection (1) or (1A), the cash dealer shall, if requested to do so by:
   a. the AUSTRAC CEO;
   b. a relevant authority; or
   c. an investigating officer who is carrying out an investigation arising from, or relating to the matters referred to in, the information contained in the report;
   give such further information as is specified in the request to the extent to which the cash dealer has that information.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006 – Section 41
41 Reports of suspicious matters
Suspicious matter reporting obligation
(1) A suspicious matter reporting obligation arises for a reporting entity in relation to a person (the first person) if, at a particular time (the relevant time):
   a) the reporting entity commences to provide, or proposes to provide, a designated service to the first person; or
   b) both:
      i. the first person requests the reporting entity to provide a designated service to the first person; and
      ii. the designated service is of a kind ordinarily provided by the reporting entity; or
   c) both:
i. the first person inquires of the reporting entity whether the reporting entity would be willing or prepared to provide a designated service to the first person; and

ii. the designated service is of a kind ordinarily provided by the reporting entity;

and any of the following conditions is satisfied:

d) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that the first person is not the person the first person claims to be;

e) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that an agent of the first person who deals with the reporting entity in relation to the provision or prospective provision of the designated service is not the person the agent claims to be;

f) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service:

i. may be relevant to investigation of, or prosecution of a person for, an evasion, or an attempted evasion, of a taxation law; or

ii. may be relevant to investigation of, or prosecution of a person for, an evasion, or an attempted evasion, of a law of a State or Territory that deals with taxation; or

iii. may be relevant to investigation of, or prosecution of a person for, an offence against a law of the Commonwealth or of a State or Territory; or

iv. may be of assistance in the enforcement of the Proceeds of Crime Act 2002 or regulations under that Act; or

v. may be of assistance in the enforcement of a law of a State or Territory that corresponds to the Proceeds of Crime Act 2002 or regulations under that Act;

g) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that the provision, or prospective provision, of the service is preparatory to the commission of an offence covered by paragraph (a), (b) or (c) of the definition of financing of terrorism in section 5;

h) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service may be relevant to the investigation of, or prosecution of a person for, an offence covered by paragraph (a), (b) or (c) of the definition of financing of terrorism in section 5;

i) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that the provision, or prospective provision, of the service is preparatory to the commission of an offence covered by paragraph (a) or (b) of the definition of money laundering in section 5;

j) at the relevant time or a later time, the reporting entity suspects on reasonable grounds that information that the reporting entity has concerning the provision, or prospective provision, of the service may be relevant to the investigation of, or prosecution of a person for, an offence covered by paragraph (a) or (b) of the definition of money laundering in section 5.

Report

(2) If a suspicious matter reporting obligation arises for a reporting entity in relation to a person, the reporting entity must give the AUSTRAC CEO a report about the matter within:

a) if paragraph (1)(d), (e), (f), (i) or (j) applies—3 business days after the day on which the reporting entity forms the relevant suspicion; or

b) if paragraph (1)(g) or (h) applies—24 hours after the time when the reporting entity forms the relevant suspicion.

(3) A report under subsection (2) must:

a) be in the approved form; and

b) contain such information relating to the matter as is specified in the AML/CTF Rules; and
c) contain a statement of the grounds on which the reporting entity holds the relevant suspicion.

(b) Observations on the implementation of the article

The reviewers had a meeting with representatives of the AFP at the country visit. The AFP is the main law enforcement authority, with about 800 staff and present in 36 countries. All staff has to go through a screening of profile. Cases are assigned to staff taking into account their profile as well as their competence/experience.

About 80 reports come daily to the AFP from other agencies. If there is a complaint, the AFP staff put the case in the complaint system. If there is an allegation of misconduct by an AFP agent, the AFP refers the allegation to ACLEI. The Ombudsman can look at the AFP’s work and investigate any time.

Meetings were not held with AUSTRAC - the Financial Intelligence Unit of Australia that is based in Sydney. AUSTRAC is a vital part of the AFP’s operations, for financial movements both nationally and internationally. Suspicious transactions are to be highlighted and reported for all transactions over $10,000, but other transactions can be flagged as well. AFP officers work even within AUSTRAC.

Article 39 Cooperation between national authorities and the private sector

Paragraph 2

2. Each State Party shall consider encouraging its nationals and other persons with a habitual residence in its territory to report to the national investigating and prosecuting authorities the commission of an offence established in accordance with this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The AFP and State police services have telephone and internet services to report crime. Crime Stoppers Australia, the National Security Hotline and the Australian Crime Commission’s Organised Crime Hotline provide for the anonymous reporting of crime. These services are available 7 days. A caller need not give their name which enables the caller to overcome any fear of involvement or retaliation, by remaining anonymous at all times. Calls are not recorded or traced.

Crime Stoppers Australia

Operating throughout Australia, Crime Stoppers has become an integral part of policing with the information gathered and supplied by the community essential to crime fighting and crime prevention.

Crime Stoppers Australia comprises a board of directors who represent their respective States or Territories as well as key members of the Government and private enterprise who are able to make a contribution to the safety of Australians.

Crime Stoppers Australia includes the following stakeholders:

- Police forces from each State and Territory in Australia
- State and Territory Governments
- Australian Federal Police
- Australian Government – Department of Home Affairs
- The media
The community – all the people who call this country - home

Crime Stoppers relies on members of the public to call when they have information that may help stop, solve or prevent criminal activity in the community. Callers are never asked to identify themselves and there is no equipment in Crime Stoppers offices that records voices or traces telephone numbers. Anonymity is guaranteed. Members of the community who call Crime Stoppers receive a code number that allows them to claim a reward, if desired, once an arrest has been made.

Community members also participate in the day-to-day operations and financial support of the program. Volunteer directors serve on the Crime Stoppers board and are responsible for operating the non-profit corporation, raising funds and approving appropriate reward payments when crimes are solved.

Members of the public also support Crime Stoppers at public events and through various other fundraising activities.

As part of the mutual obligation between the community, the police and the media, local media outlets are responsible for promoting Crime Stoppers by publicizing unsolved crimes and assisting with appeals to raise funds for the program.

Newspapers, radio and television stations in the community undertake to frequently broadcast a “Crime of the Week” to highlight an unsolved case. This appeal can include a video re-enactment of a crime to give the public a visual portrayal of what occurred and some ideas about the information investigators may require in order to solve an incident.

To encourage the public to be engaged and alert participants in crime fighting in their community, the media also regularly promotes the special Crime Stoppers phone number.

A coordinator is appointed by the Police to run the Crime Stoppers program on a daily basis with additional staff operating an office that takes tips on the Crime Stoppers line. The Police are required to investigate the various Crime Stoppers tips from the public and report back to the coordinator when a case is solved.

(b) Observations on the implementation of the article

The AFP does not hold statistics of corruption allegations reported by citizens.

The AFP explained that the Crime Stoppers hotline allows for anonymous reports, which are assessed by the local police service. Moreover, allegations of corruption can be reported to the relevant Ombudsman’s office and can be anonymous, but it would be desirable to have corroborating information and/or evidence. The general evaluation period is 28 days for a particular complaint, subject to the complexities of the inquiry.

Article 40 Bank secrecy

Each State Party shall ensure that, in the case of domestic criminal investigations of offences established in accordance with this Convention, there are appropriate mechanisms available within its domestic legal system to overcome obstacles that may arise out of the application of bank secrecy laws.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.
The Australian Federal Police (AFP) is responsible for investigating criminal matters, and as such bank secrecy is not an issue.

There are legislative provisions that can be applied that compel an authorised deposit-taking institution (ADI) by law to disclose information to a law enforcement agency for a criminal investigation, and to prevent the dishonest use of such information. Some examples of this include:

- **Proceeds of Crime Act 2002** (Chapter 3) - examples include section 218 which creates an offence for failing to comply with a s213 notice (instructing a financial institution to provide information), or s224, which creates an offence for failing to comply with a monitoring order (s219, instructing a financial institution to provide transaction details); and
- **Banking Act 1959** - section 52E(2)(b) authorises the disclosure of confidential information to a member of the AFP.

**Proceeds of Crime Act 2002**

Section 213 - Giving notices to financial institutions

(1) An officer specified in subsection (3) may give a written notice to a financial institution requiring the institution to provide to an authorised officer any information or documents relevant to any one or more of the following:

- (a) determining whether an account is or was held by a specified person with the financial institution;
- (b) determining whether a particular person is or was a signatory to an account;
- (c) if a person holds an account with the institution, the current balance of the account;
- (d) details of transactions on an account over a specified period of up to 6 months;
- (e) details of any related accounts (including names of those who hold or held those accounts);
- (ea) determining whether a stored value card was issued to a specified person by a financial institution;
- (eb) details of transactions made using such a card over a specified period of up to 6 months;
- (f) a transaction conducted by the financial institution on behalf of a specified person.

(2) The officer must not issue the notice unless the officer reasonably believes that giving the notice is required:

- (a) to determine whether to take any action under this Act; or
- (b) in relation to proceedings under this Act.

(3) The officers who may give a notice to a financial institution are:

- (a) the Commissioner of the Australian Federal Police; or
- (b) a Deputy Commissioner of the Australian Federal Police; or
- (c) a senior executive AFP employee (within the meaning of the Australian Federal Police Act 1979) who is a member of the Australian Federal Police and who is authorised in writing by the Commissioner for the purposes of this section; or
- (ca) the Integrity Commissioner (within the meaning of the Law Enforcement Integrity Commissioner Act 2006); or
- (d) the Chief Executive Officer of the Australian Crime Commission; or
- (e) an examiner (within the meaning of the Australian Crime Commission Act 2002); or
- (f) the Commissioner of Taxation; or
- (g) the Chief Executive Officer of Customs; or
- (h) the Chairperson of the Australian Securities and Investments Commission.

Section 218 - Failing to comply with a notice

(1) A person is guilty of an offence if:

- (a) the person is given a notice under section 213; and
- (b) the person fails to comply with the notice:
Penalty: Imprisonment for 6 months or 30 penalty units, or both.

Note: Sections 137.1 and 137.2 of the *Criminal Code* also create offences for providing false or misleading information or documents.

(2) It is a defence to an offence against subsection (1) if:
   (a) the person fails to comply with the notice only because the person does not provide the information or a document within the period specified in the notice; and
   (b) the person took all reasonable steps to provide the information or document within that period; and
   (c) the person provides the information or document as soon as practicable after the end of that period.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2) (see subsection 13.3(3) of the *Criminal Code*).

**Section 219 - Making monitoring orders**

(1) A judge of a court of a State or Territory that has jurisdiction to deal with criminal matters on indictment may make an order (a **monitoring order**) that a *financial institution* provide information about transactions:
   (a) conducted during a particular period through an *account* held by a particular person with the institution; or
   (b) made using a *stored value card* issued to a particular person by a financial institution.

(2) The judge must not make a *monitoring order* unless the judge is satisfied that there are reasonable grounds for suspecting that:
   (a) the person who holds the *account* or to whom the *stored value card* was issued:
      (i) has committed, or is about to commit, a *serious offence*; or
      (ii) was involved in the commission, or is about to be involved in the commission, of a serious offence; or
   (iii) has *benefited directly or indirectly, or is about to benefit directly or indirectly, from the commission of a serious offence*; or
   (b) the account or card is being used to commit an offence against Part 10.2 of the *Criminal Code* (money laundering).

(3) It does not matter, for the purposes of paragraph (2)(b), whether the person holding the account or to whom the card was issued commits or is involved in the offence against Part 10.2 of the *Criminal Code*.

(4) The *monitoring order* can only be made on application by an *authorised officer* of an *enforcement agency*.

**Banking Act 1959**

**Section 52E - Confidentiality requirement for company, company officers and employees and auditors**

(1) A person (the **offender**) commits an offence under this subsection if:
   (a) a person (the **discloser**) makes a disclosure of information that qualifies for protection under this Division; and
   (b) the disclosure is made to:
      (i) an auditor of, or a member of an audit team conducting an audit of, the body corporate or a related body corporate within the meaning of subsection 52A(3); or
      (ii) a director or senior manager of the body corporate or a related body corporate within the meaning of subsection 52A(3); or
      (iii) a person authorised by the body corporate to receive disclosures of that kind; and
   (c) the offender is:
      (i) an auditor, or a member of an audit team conducting an audit, of the body corporate or a related body corporate; or
(ii) a director or senior manager of the body corporate or a related body corporate; or

(iii) a person authorised by the body corporate to receive disclosures of that kind; or

(iv) the body corporate or a related body corporate; or

(v) an officer or employee of the body corporate or a related body corporate; and

(d) the offender discloses any of the following information (the **confidential information**):

(i) the information referred to in paragraph (a);

(ii) the identity of the discloser;

(iii) information that is likely to lead to the identification of the discloser; and

(e) the confidential information is information that the offender obtained directly or indirectly because of the disclosure referred to in paragraph (a); and

(f) either:

(i) the offender is the person to whom the disclosure referred to in paragraph (a) is made; or

(ii) the offender is a person to whom the confidential information is disclosed in contravention of this section and the offender knows that the disclosure of the confidential information to the offender was unlawful or made in breach of confidence; and

(g) the disclosure referred to in paragraph (d) is not authorised under subsection (2).

Penalty: 25 penalty units.

(2) The disclosure referred to in paragraph (1)(d) is authorised under this subsection if:

(a) it is made to APRA; or

(b) it is made to a member of the Australian Federal Police (within the meaning of the *Australian Federal Police Act 1979*); or

(c) it is made to someone else with the consent of the discloser.

(3) In this section, **officer** has the same meaning as it has in the *Corporations Act 2001*.

Australia stated that whilst the AFP does not record or keep statistics on the applications of bank secrecy laws, the AFP works closely with other government agencies and financial institutions, in order to facilitate the flow and sharing of information when dealing with criminal investigations.

(b) **Observations on the implementation of the article**

It was reported that the AFP hosts joint banking teams to conduct an investigation. In the opinion of law enforcement, bank secrecy does not present an investigative barrier in money-laundering cases.

**Article 41 Criminal record**

*Each State Party may adopt such legislative or other measures as may be necessary to take into consideration, under such terms as and for the purpose that it deems appropriate, any previous conviction in another State of an alleged offender for the purpose of using such information in criminal proceedings relating to an offence established in accordance with this Convention.*

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Australian courts can take the fact of similar convictions having been recorded elsewhere when sentencing a person for an offence. Section 16A of the Crimes Act provides that a court must take into account, inter alia, a course of conduct, if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or similar character.
**Crimes Act 1914**

**Division 2-General sentencing principles**

**Section 16A - Matters to which court to have regard when passing sentence etc.**

(1) In determining the sentence to be passed, or the order to be made, in respect of any person for a federal offence, a court must impose a sentence or make an order that is of a severity appropriate in all the circumstances of the offence.

(2) In addition to any other matters, the court must take into account such of the following matters as are relevant and known to the court:

(a) the nature and circumstances of the offence;
(b) other offences (if any) that are required or permitted to be taken into account;
(c) if the offence forms part of a course of conduct consisting of a series of criminal acts of the same or a similar character-that course of conduct;
(d) the personal circumstances of any victim of the offence;
(e) any injury, loss or damage resulting from the offence;
(f) the degree to which the person has shown contrition for the offence:
   (i) by taking action to make reparation for any injury, loss or damage resulting from the offence; or
   (ii) in any other manner;
(fa) the extent to which the person has failed to comply with:
   (i) any order under subsection 23CD(1) of the *Federal Court of Australia Act 1976*;
   or
   (ii) any obligation under a law of the Commonwealth; or
   (iii) any obligation under a law of the State or Territory applying under subsection 68(1) of the *Judiciary Act 1903*;
   about pre-trial disclosure, or ongoing disclosure, in proceedings relating to the offence;
(g) if the person has pleaded guilty to the charge in respect of the offence—that fact;
(h) the degree to which the person has co-operated with law enforcement agencies in the investigation of the offence or of other offences;
(i) the deterrent effect that any sentence or order under consideration may have on the person;
(j) the need to ensure that the person is adequately punished for the offence;
(k) the character, antecedents, age, means and physical or mental condition of the person;
(n) the prospect of rehabilitation of the person;
(p) the probable effect that any sentence or order under consideration would have on any of the person’s family or dependants.

(2A) However, the court must not take into account under subsection (1) or (2) any form of customary law or cultural practice as a reason for:

(a) excusing, justifying, authorising, requiring or lessening the seriousness of the criminal behaviour to which the offence relates; or
    (b) aggravating the seriousness of the criminal behaviour to which the offence relates.

(2B) In subsection (2A):  

*criminal behaviour* includes:

(a) any conduct, omission to act, circumstance or result that is, or forms part of, a physical element of the offence in question; and
(b) any fault element relating to such a physical element.

(b) **Observations on the implementation of the article**

Australia does not have a database that keeps criminal records of previous conviction in another State.
CrimTrack is the database used across Australia to keep track of national criminal records. Foreign convictions may be covered by CrimTrack if Australia is notified of them. Australia can also obtain information about foreign convictions from Interpol.

**Article 42 Jurisdiction**

**Subparagraphs 1 and 2**

1. Each State Party shall adopt such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when:

   (a) The offence is committed in the territory of that State Party; or
   (b) The offence is committed on board a vessel that is flying the flag of that State Party or an aircraft that is registered under the laws of that State Party at the time that the offence is committed.

2. Subject to article 4 of this Convention, a State Party may also establish its jurisdiction over any such offence when:

   (a) The offence is committed against a national of that State Party; or
   (b) The offence is committed by a national of that State Party or a stateless person who has his or her habitual residence in its territory; or
   (c) The offence is one of those established in accordance with article 23, paragraph 1 (b) (ii), of this Convention and is committed outside its territory with a view to the commission of an offence established in accordance with article 23, paragraph 1 (a) (i) or (ii) or (b) (i), of this Convention within its territory; or
   (d) The offence is committed against the State Party.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Measures necessary to establish jurisdiction over offences established in accordance with the Convention when the offence is committed in the Commonwealth of Australia’s Territory have been adopted under Part 2.7 of the *Criminal Code 1995*. The *Criminal Code* also provides for varying levels of geographical jurisdiction over offences established in accordance with the Convention. In addition to the standard and extended geographical jurisdiction provisions in Part 2.7 of the *Criminal Code*, the money laundering and foreign bribery offences contain their own jurisdictional provisions. Section 400.15 provides that the Division 400 money laundering offences apply to conduct occurring in Australia, proceeds or instruments of crime relating to Australian indictable offences, conduct by Australian citizens, residents and bodies corporate, and ancillary offences relating to primary offences occurring in Australia. Section 70.5 provides that the foreign bribery offence applies to conduct within Australia, and to conduct by Australian citizens, residents and companies overseas.

*Criminal Code 1995*

**Part 2.7 - Geographical Jurisdiction**

14.1 **Standard geographical jurisdiction**

1. This section may apply to a particular offence in either of the following ways:

   (a) unless the contrary intention appears, this section applies to the following offences:

      (i) a primary offence, where the provision creating the offence commences at or after the commencement of this section;

      (ii) an ancillary offence, to the extent to which it relates to a primary offence covered by subparagraph (i);

   (b) if a law of the Commonwealth provides that this section applies to a particular
offence—this section applies to that offence.

Note: In the case of paragraph (b), the expression *offence* is given an extended meaning by subsections 11.2(1) and 11.2A(1), section 11.3 and subsection 11.6(1).

(2) If this section applies to a particular offence, a person does not commit the offence unless:

(a) the conduct constituting the alleged offence occurs:
   (i) wholly or partly in Australia; or
   (ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
   (i) wholly or partly in Australia; or
   (ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(c) all of the following conditions are satisfied:
   (i) the alleged offence is an ancillary offence;
   (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
   (iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression *offence* is given an extended meaning by subsection 11.2(1), section 11.3 and subsection 11.6(1).

400.15 Geographical jurisdiction

(1) A person does not commit an offence against this Division unless:

(a) the conduct constituting the alleged offence occurs:
   (i) wholly or partly in Australia; or
   (ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(b) the conduct constituting the alleged offence occurs wholly outside Australia (but not on board an Australian aircraft or an Australian ship) and the money or other property:
   (i) is proceeds of crime; or
   (ii) is intended to become an instrument of crime; or
   (iii) is at risk of becoming an instrument of crime;

in relation to a Commonwealth indictable offence, a State indictable offence, an Australian Capital Territory indictable offence or a Northern Territory indictable offence; or

(c) the conduct constituting the alleged offence occurs wholly outside Australia and:
   (i) at the time of the alleged offence, the person is an Australian citizen; or
   (ii) at the time of the alleged offence, the person is a resident of Australia; or
   (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or

(d) all of the following conditions are satisfied:
   (i) the alleged offence is an ancillary offence;
   (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
   (iii) the conduct constituting the primary offence to which the ancillary offence relates occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

70.5 Territorial and nationality requirements

(1) A person does not commit an offence against section 70.2 unless:

(a) the conduct constituting the alleged offence occurs:
   (i) wholly or partly in Australia; or
   (ii) wholly or partly on board an Australian aircraft or an Australian ship; or

(b) the conduct constituting the alleged offence occurs wholly outside Australia and:
   (i) at the time of the alleged offence, the person is an Australian citizen; or
   (ii) at the time of the alleged offence, the person is a resident of Australia; or
   (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory.
The Commonwealth of Australia may exercise extraterritorial jurisdiction in certain circumstances when an offence is committed by a national of the Commonwealth of Australia or a stateless person who has his or her habitual residence in Australia under the Crimes Overseas Act 1964.

The Criminal Code provides a default rule for the geographical reach of all Commonwealth offences (section 14.1) and allows Commonwealth offences to have extended geographical application through four categories (sections 15.1 to 15.4). The standard geographical jurisdiction that applies is quite broad and is usually sufficient to meet policy objectives. Some offences require extended geographical jurisdiction in order to cover conduct that typically occurs overseas, such as the bribery of foreign public officials or the laundering of proceeds of crime. The Attorney-General’s consent is required to commence proceedings if the conduct constituting the offence occurs wholly in a foreign country, and the person alleged to have committed the offence is not an Australian citizen or a body corporate incorporated under a law of the Commonwealth or of a State or Territory (section 16.1 of the Criminal Code).

(b) **Observations on the implementation of the article**

Australia stated that geographical jurisdiction “in the territory of Australia” include tiny islands.

The territory of Australia includes the eight States and Territories, namely

- New South Wales
- Queensland
- South Australia
- Tasmania
- The Australian Capital Territory
- The Northern Territory
- Victoria, and
- Western Australia.

It also includes a number of external territories, namely

- Cocos (Keeling) Islands
- Christmas Island
- Ashmore and Cartier Islands
- Coral Sea Islands
- Heard and McDonald Islands
- The Australian Antarctic Territory, and
- Norfolk Island.

Australia reported that it has conducted a review of relevant legislation, and concluded that the dishonesty-based offenses have category D, the broadest jurisdiction under the Criminal Code. Extended jurisdiction applies whether conduct occurs in or out of Australia. Extensions of criminal responsibility provisions as well, procured the commission of the offense.

The reviewers were satisfied that Australian jurisdiction is established in accordance with the Convention requirements.

**Criminal Code 1995**

**Division 15—Extended geographical jurisdiction**

**15.1 Extended geographical jurisdiction—category A**

1) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:

(b) the conduct constituting the alleged offence occurs:
(ii) wholly or partly in Australia; or
(iii) wholly or partly on board an Australian aircraft or an Australian ship; or
(c) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
(ii) wholly or partly in Australia; or
(iii) wholly or partly on board an Australian aircraft or an Australian ship; or
(d) the conduct constituting the alleged offence occurs wholly outside Australia and:
(ii) at the time of the alleged offence, the person is an Australian citizen; or
(iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
(e) all of the following conditions are satisfied:
(i) the alleged offence is an ancillary offence;
(ii) the conduct constituting the alleged offence occurs wholly outside Australia;
(iii) a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression *offence* is given an extended meaning by subsections 11.2(1) and 11.2A(1), section 11.3 and subsection 11.6(1).

Defence—primary offence

2) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:
(a) the alleged offence is a primary offence; and
(b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
(c) the person is neither:
   (i) an Australian citizen; nor
   (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
   (d) there is not in force in:
      (i) the foreign country where the conduct constituting the alleged offence occurs; or
      (ii) the part of the foreign country where the conduct constituting the alleged offence occurs
      a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the first-mentioned offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3).

3) For the purposes of the application of subsection 13.3(3) to an offence, subsection (2) of this section is taken to be an exception provided by the law creating the offence.

Defence—ancillary offence

4) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:
(a) the alleged offence is an ancillary offence; and
(b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
(c) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
(d) the person is neither:
   (i) an Australian citizen; nor
   (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
(e) there is not in force in:
   (i) the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur; or
   (ii) the part of the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur;

a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the primary offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

5) For the purposes of the application of subsection 13.3(3) to an offence, subsection (4) of this section is taken to be an exception provided by the law creating the offence.

15.2 Extended geographical jurisdiction—category B

1) If a law of the Commonwealth provides that this section applies to a particular offence, a person does not commit the offence unless:
   (a) the conduct constituting the alleged offence occurs:
      (i) wholly or partly in Australia; or
      (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
   (b) the conduct constituting the alleged offence occurs wholly outside Australia and a result of the conduct occurs:
      (i) wholly or partly in Australia; or
      (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
   (c) the conduct constituting the alleged offence occurs wholly outside Australia and:
      (i) at the time of the alleged offence, the person is an Australian citizen; or
      (ii) at the time of the alleged offence, the person is a resident of Australia; or
      (iii) at the time of the alleged offence, the person is a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; or
   (d) all of the following conditions are satisfied:
      (i) the alleged offence is an ancillary offence;
      (ii) the conduct constituting the alleged offence occurs wholly outside Australia;
      (iii) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly or partly in Australia or wholly or partly on board an Australian aircraft or an Australian ship.

Note: The expression *offence* is given an extended meaning by subsections 11.2(1) and 11.2A(1), section 11.3 and subsection 11.6(1).

Defence—primary offence

(2) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:
   (aa) the alleged offence is a primary offence; and
   (a) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and
   (b) the person is neither:
      (i) an Australian citizen; nor
      (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and
   (c) there is not in force in:
      (i) the foreign country where the conduct constituting the alleged offence occurs; or
(ii) the part of the foreign country where the conduct constituting the alleged
offence occurs;

a law of that foreign country, or a law of that part of that foreign country, that creates
an offence that corresponds to the first-mentioned offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See
subsection 13.3(3).

(3) For the purposes of the application of subsection 13.3(3) to an offence, subsection (2) of this
section is taken to be an exception provided by the law creating the offence.

Defence—ancillary offence

(4) If a law of the Commonwealth provides that this section applies to a particular offence, a person is
not guilty of the offence if:

(a) the alleged offence is an ancillary offence; and

(b) the conduct constituting the alleged offence occurs wholly in a foreign country, but
not on board an Australian aircraft or an Australian ship; and

(c) the conduct constituting the primary offence to which the ancillary offence relates, or
a result of that conduct, occurs, or is intended by the person to occur, wholly in a foreign country, but
not on board an Australian aircraft or an Australian ship; and

(d) the person is neither:

(i) an Australian citizen; nor

(ii) a body corporate incorporated by or under a law of the Commonwealth or of a
State or Territory; and

(e) there is not in force in:

(i) the foreign country where the conduct constituting the primary offence to which
the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur;

or

(ii) the part of the foreign country where the conduct constituting the primary
offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the
person to occur;

a law of that foreign country, or a law of that part of that foreign country, that creates
an offence that corresponds to the primary offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See
subsection 13.3(3).

(5) For the purposes of the application of subsection 13.3(3) to an offence, subsection (4) of this
section is taken to be an exception provided by the law creating the offence.

15.3 Extended geographical jurisdiction—category C

(1) If a law of the Commonwealth provides that this section applies to a particular offence, the
offence applies:

(a) whether or not the conduct constituting the alleged offence occurs in Australia; and

(b) whether or not a result of the conduct constituting the alleged offence occurs in
Australia.

Note: The expression offence is given an extended meaning by subsections 11.2(1) and
11.2A(1), section 11.3 and subsection 11.6(1).

Defence—primary offence

(2) If a law of the Commonwealth provides that this section applies to a particular offence, a person is
not guilty of the offence if:

(aa) the alleged offence is a primary offence; and
(a) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(b) the person is neither:
   (i) an Australian citizen; nor
   (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and

(c) there is not in force in:
   (i) the foreign country where the conduct constituting the alleged offence occurs; or

   (ii) the part of the foreign country where the conduct constituting the alleged offence occurs;

   a law of that foreign country, or that part of that foreign country, that creates an offence that corresponds to the first-mentioned offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (2). See subsection 13.3(3).

(3) For the purposes of the application of subsection 13.3(3) to an offence, subsection (2) of this section is taken to be an exception provided by the law creating the offence.

Defence—ancillary offence

(4) If a law of the Commonwealth provides that this section applies to a particular offence, a person is not guilty of the offence if:

(a) the alleged offence is an ancillary offence; and

(b) the conduct constituting the alleged offence occurs wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(c) the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur, wholly in a foreign country, but not on board an Australian aircraft or an Australian ship; and

(d) the person is neither:
   (i) an Australian citizen; nor
   (ii) a body corporate incorporated by or under a law of the Commonwealth or of a State or Territory; and

(e) there is not in force in:
   (i) the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur; or

   (ii) the part of the foreign country where the conduct constituting the primary offence to which the ancillary offence relates, or a result of that conduct, occurs, or is intended by the person to occur;

   a law of that foreign country, or a law of that part of that foreign country, that creates an offence that corresponds to the primary offence.

Note: A defendant bears an evidential burden in relation to the matters in subsection (4). See subsection 13.3(3).

(5) For the purposes of the application of subsection 13.3(3) to an offence, subsection (4) of this section is taken to be an exception provided by the law creating the offence.

15.4 Extended geographical jurisdiction—category D

If a law of the Commonwealth provides that this section applies to a particular offence, the offence applies:

(a) whether or not the conduct constituting the alleged offence occurs in Australia; and

(b) whether or not a result of the conduct constituting the alleged offence occurs in Australia.
Note: The expression *offence* is given an extended meaning by subsections 11.2(1) and 11.2A(1), section 11.3 and subsection 11.6(1).

**Article 42 Jurisdiction**

**Paragraph 3**

3. *For the purposes of article 44 of this Convention, each State Party shall take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite such person solely on the ground that he or she is one of its nationals.*

**a) Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Australia allows its nationals to be extradited, provided the other conditions set out in the *Extradition Act 1988* are fulfilled. However, if Australia did refuse to extradite one of its nationals on the basis of nationality, Section 45 of the Extradition Act allows for that person to be prosecuted in Australia subject to certain conditions.

**EXTRADITION ACT 1988 - SECT 45**

**Prosecution, instead of extradition, of certain Australian citizens**

(1) Where:

(a) a person who is an Australian citizen engages in conduct outside Australia;
(b) the person subsequently enters, or is brought into, a State or Territory;
(c) the conduct does not, apart from this subsection, constitute an offence against a law in force in the State or Territory; and
(d) if, at the time when the person engaged in the conduct outside Australia, the person had engaged in the conduct, or equivalent conduct, in the State or Territory, the person would have committed an offence against a law in force in the State or Territory;

the person commits an offence against this subsection punishable, upon conviction, by the same penalty as would have been applicable if the person had committed the offence referred to in paragraph (d).

(2) Subsection (1) applies in relation to:

(a) conduct engaged in by a person; and
(b) the entry by a person, or the bringing of a person, into a State or Territory; either before or after the commencement of this Act.

(3) Proceedings for the offence shall not take place except with the consent in writing of the Attorney-General.

(4) The Attorney-General shall only give his or her consent under subsection (3) in relation to the offence if:

(a) an extradition country has sought the surrender of the person in respect of an extradition offence, or offences including an extradition offence, constituted by the conduct referred to in paragraph (1)(a);
(b) the Attorney-General has determined under section 22 that the person is not to be surrendered to the extradition country; and
(c) in so far as the Attorney-General made that determination not to surrender in relation to the extradition offence constituted by the conduct referred to in paragraph (1)(a), the Attorney-General did so only because:
(i) the person was an Australian citizen when the person engaged in the conduct;
(ii) the Attorney-General was satisfied that the extradition country would not, if the person were a national of that country who had engaged in the conduct or equivalent conduct in Australia, have surrendered the person to Australia in relation to an offence constituted by the conduct or the equivalent conduct; and
(iii) the Attorney-General intended to give his or her consent under subsection (3) in respect of an offence constituted by the conduct or equivalent conduct.

(5) Notwithstanding that consent has not been given in relation to proceedings for an offence in accordance with subsection (3):
   (d) a person may be arrested for the offence, and a warrant for the arrest of a person for the offence may be issued and executed;
   (e) a person may be charged with the offence; and
   (f) a person so charged may be remanded in custody or on bail.

Australia also has jurisdiction over the offences in this Convention when the offence is committed in its territory under Part 2.7 of the Criminal Code 1995.

As Australia does not, as a matter of policy, refuse to extradite its nationals on the basis of nationality, it is not aware of the prosecution in lieu of extradition provisions ever being used.

(b) Observations on the implementation of the article

Australia provided extradition statistics since 2002 (see tables under article 44).

Article 42 Jurisdiction

Paragraph 4

4. Each State Party may also take such measures as may be necessary to establish its jurisdiction over the offences established in accordance with this Convention when the alleged offender is present in its territory and it does not extradite him or her.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Under section 45 of the Extradition Act 1988, the Attorney-General can consent to the prosecution of Australian citizens in Australia where Australia has refused extradition. However, this can only be done in certain circumstances, including if the person was an Australian citizen at the time the alleged offence was committed and the other country would not extradite its own national in similar circumstances.

Following a comprehensive review of extradition and mutual assistance laws, the Australian Government introduced the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 into Parliament on 6 July 2011. Item 47 in Division 6 in Schedule 2 of the Bill proposes to amend section 45 of the Extradition Act 1988 to extend the circumstances in which persons may be prosecuted in Australia as an alternative to extradition. The Bill would enable a person to be prosecuted in any circumstances where Australia has refused extradition, regardless of whether they are an Australian citizen.

To facilitate prosecution in-lieu of extradition in Australia of a person for an offence committed overseas, the Bill creates a nominal offence under the Extradition Act. This nominal offence is committed if a magistrate remands the person under section 15 of the Extradition Act, and the person
previously engaged in conduct outside Australia which would have constituted an offence under Australian law if it had occurred in Australia at that time. Absolute liability attaches to these elements, so that the prosecution will not be required to establish mental culpability in relation to these elements. That is, the prosecution will not need to prove that the person knew or was reckless as to the fact that their conduct would have constituted an offence in Australia. However, the prosecution will still need to prove that all of the elements of the offence itself are established. For example, if a person has allegedly committed the offence of murder outside Australia, the prosecution need not prove that the person knew that their conduct would have constituted an offence in Australia. The prosecution would, however, need to establish all the elements of the offence of murder under Australian law.

The Bill has passed the House of Representatives and is scheduled for debate in the Senate. The Bill will become law if the Bill passes both houses of Parliament and receives royal assent.

EXTRADITION ACT 1988

45 Prosecution, instead of extradition, of certain Australian citizens

(1) Where:
   (a) a person who is an Australian citizen engages in conduct outside Australia;
   (b) the person subsequently enters, or is brought into, a State or Territory;
   (c) the conduct does not, apart from this subsection, constitute an offence against a law in force in the State or Territory; and
   (d) if, at the time when the person engaged in the conduct outside Australia, the person had engaged in the conduct, or equivalent conduct, in the State or Territory, the person would have committed an offence against a law in force in the State or Territory; the person commits an offence against this subsection punishable, upon conviction, by the same penalty as would have been applicable if the person had committed the offence referred to in paragraph (d).

(2) Subsection (1) applies in relation to:
   (a) conduct engaged in by a person; and
   (b) the entry by a person, or the bringing of a person, into a State or Territory; either before or after the commencement of this Act.

(3) Proceedings for the offence shall not take place except with the consent in writing of the Attorney-General.

(4) The Attorney-General shall only give his or her consent under subsection (3) in relation to the offence if:
   (a) an extradition country has sought the surrender of the person in respect of an extradition offence, or offences including an extradition offence, constituted by the conduct referred to in paragraph (1)(a);
   (b) the Attorney-General has determined under section 22 that the person is not to be surrendered to the extradition country; and
   (c) in so far as the Attorney-General made that determination not to surrender in relation to the extradition offence constituted by the conduct referred to in paragraph (1)(a), the Attorney-General did so only because:
      (i) the person was an Australian citizen when the person engaged in the conduct;
      (ii) the Attorney-General was satisfied that the extradition country would not, if the person were a national of that country who had engaged in the conduct or equivalent conduct in Australia, have surrendered the person to Australia in relation to an offence constituted by the conduct or the equivalent conduct; and
      (iii) the Attorney-General intended to give his or her consent under subsection (3) in respect of an offence constituted by the conduct or equivalent conduct.
(5) Notwithstanding that consent has not been given in relation to proceedings for an offence in accordance with subsection (3):
   (a) a person may be arrested for the offence, and a warrant for the arrest of a person for the offence may be issued and executed;
   (b) a person may be charged with the offence; and
   (c) a person so charged may be remanded in custody or on bail.

EXTRADITION AND MUTUAL ASSISTANCE IN CRIMINAL MATTERS LEGISLATION AMENDMENT BILL 2011

Division 6—Prosecution instead of extradition

Extradition Act 1988

47 Subsections 45(1), (2) and (3)
Repeal the subsections, substitute:

Offence

(1) A person commits an offence if:
   (a) a magistrate in a State or Territory remands the person under section 15; and
   (b) the person engaged in conduct outside Australia at an earlier time; and
   (c) the conduct, or equivalent conduct, would have constituted an offence (the *notional Australian offence*) against a law of the Commonwealth, or the State or Territory, if the conduct or equivalent conduct had occurred in the State or Territory at the earlier time.

Note: This subsection creates an offence distinct from the notional Australian offence.

Absolute liability

(2) Absolute liability applies to paragraphs (1)(a) and (b), and to the circumstance in paragraph (1)(c) that the conduct, or equivalent conduct, referred to in that paragraph would have constituted the notional Australian offence if the conduct or equivalent conduct had occurred in the State or Territory at the earlier time.

Note: Paragraph (3)(a) provides for physical and fault elements etc. to apply in determining whether conduct would have constituted the notional Australian offence.

Determining whether conduct would have constituted notional Australian offence

(3) In determining whether the conduct, or equivalent conduct, referred to in paragraph (1)(c) would have constituted the notional Australian offence:
   (a) the physical elements and fault elements (however described), if any, that apply in relation to the notional Australian offence have effect; and
   (b) any defences or special liability provisions (however described) that apply in relation to the notional Australian offence have effect; and
   (c) any procedures or limitations (however described) that apply in relation to the prosecution of the notional Australian offence have effect; and
   (d) if the conduct outside Australia consisted of 2 or more acts or omissions, regard may be had to all, some or only one of those acts or omissions.

(3A) Subsection (3) does not limit the *Judiciary Act 1903*.

Note: Division 1 of Part X, and subsection 79(1), of the *Judiciary Act 1903* apply various State or Territory laws in relation to persons charged with offences against Commonwealth laws.
Penalty for offence

(3B) The maximum penalty for an offence against subsection (1) is the maximum penalty that applied to the notional Australian offence at the time the conduct referred to in paragraph (1)(b) was engaged in.

Offence is indictable

(3C) An offence against subsection (1) is an indictable offence.

Attorney-General’s consent to prosecution of offence

(3D) Proceedings for an offence against subsection (1) must not be commenced without the Attorney-General’s written consent.

Note: The heading to section 45 is replaced by the heading “Prosecution of persons instead of extradition”.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 42 Jurisdiction

Paragraph 5

5. If a State Party exercising its jurisdiction under paragraph 1 or 2 of this article has been notified, or has otherwise learned, that any other States Parties are conducting an investigation, prosecution or judicial proceeding in respect of the same conduct, the competent authorities of those States Parties shall, as appropriate, consult one another with a view to coordinating their actions.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated being in compliance with this provision, referring to legislation given to articles 48-50 relating to international cooperation.

Australia’s International Crime Cooperation Central Authority facilitates cooperation and information exchange with other central authorities in relation to mutual assistance and extradition processes. Australia’s membership of Interpol also facilitates such information exchange between law enforcement agencies. Similarly, ASIC’s bilateral and multilateral MOUs and AUSTRAC’s bilateral MOUs with international agencies provide a mechanism to share relevant information and intelligence. The Australian Crime Commission also cooperates with international organisations

(b) Observations on the implementation of the article

The experts were satisfied with the answer provided.

Article 42 Jurisdiction

Paragraph 6

6. Without prejudice to norms of general international law, this Convention shall not exclude the exercise of any criminal jurisdiction established by a State Party in accordance with its domestic law.
(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that this Convention does not exclude the exercise of any criminal jurisdiction established in accordance with Australian law.

(b) **Observations on the implementation of the article**

The reviewers were satisfied with the answer provided.

**Chapter IV. International cooperation**

**Article 44 Extradition**

**Paragraph 1**

1. This article shall apply to the offences established in accordance with this Convention where the person who is the subject of the request for extradition is present in the territory of the requested State Party, provided that the offence for which extradition is sought is punishable under the domestic law of both the requesting State Party and the requested State Party.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia has implemented its extradition obligations under the UNCAC in the *Extradition (Convention against Corruption) Regulations 2005* (*the Regulations*). The Regulations apply Australia’s *Extradition Act 1988* to the States Parties to UNCAC subject to the Convention, meaning that UNCAC can be the basis for the consideration of requests from States Parties for the extradition of persons from Australia for offences covered by the Convention.

Consistent with dual criminality requirements under the Extradition Act, the conduct constituting the offence for which extradition is sought must constitute an offence against the law of Australia - s16 (2) (a) (ii) and s19 (2) (c)).

**Extradition Act 1988 - Section 16(2)**

The Attorney-General shall not give the notice:

a) unless the Attorney-General is of the opinion:

   i. that the person is an extraditable person in relation to the extradition country; and

   ii. that, if the conduct of the person constituting the extradition offence, or any of the extradition offences, for which surrender of the person is sought, or equivalent conduct, had taken place in Australia at the time at which the extradition request was received, the conduct or the equivalent conduct would have constituted an extradition offence in relation to Australia; or

**Section 19(2)(c)**

(2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:
(a)...

(b)...

c) the magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and

Australia has provided examples of the implementation of relevant provisions. There are two recent cases where dual criminality issues were raised and resolved. One matter involved a request made under a bilateral extradition treaty and accordingly it was not necessary to rely on UNCAC. The other matter involved a request made by a country which was not a Party to UNCAC at the time the request was made and with which Australia did not at that time have a bilateral extradition relationship. Accordingly, Australia was not able to take action on the request.

Australia has 38 extradition treaties with the following countries: Argentina, Austria, Belgium, Brazil, Chile, Ecuador, Finland, France, Germany, Greece, Hong Kong SAR China, Hungary, Indonesia, India, Ireland, Israel, Italy, Korea, Latvia, Luxembourg, Malaysia, Mexico, Monaco, Netherlands, Norway, Paraguay, Philippines, Poland, Portugal, South Africa, Spain, Sweden, Switzerland, Turkey, UAE, USA, Uruguay, Venezuela. Treaties signed with China and Pakistan have not yet been in force.

(b) Observations on the implementation of the article

At the country visit, the reviewers subsequently heard presentations on the process for extradition beginning from the time that the request is made through the determination of extraditability, as well as on the main content of the Extradition Bill. Some cases were also featured as examples to explain the process in practical terms.

Australia provided the following extradition statistics.

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<th>Corruption-related extradition requests received by Australia from 1 July 2002</th>
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<th>Corruption-related extradition requests made by Australia from 1 July 2002</th>
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<td>2011-2012 financial year</td>
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</table>
Extradition requests made by Australia 2004-05 to 2010-11

Extradition requests made to Australia 2004-05 to 2010-2011

Australia does not make extradition conditional on the existence of a bilateral extradition treaty. In the absence of a bilateral treaty, Australia can extradite to any country designated under law as an “extradition country” or to any state party to a multilateral convention with extradition obligations for the offenses covered by that convention. To date, 31 countries have been declared extradition countries in the absence of a bilateral extradition treaty. Australia is also a party to the London Scheme for Extradition within the Commonwealth (2002).
Dual criminality, a prerequisite to extradition from Australia, is determined based on the conduct underlying the extradition request. The offence for which extradition is sought must be punishable by at least 12 months imprisonment or as otherwise agreed by treaty. There are no treaty-based exceptions to the dual criminality determination. In cases where the requesting country is asserting extraterritorial jurisdiction over the crime, it may the case that Australia can only extradite where it would also have extraterritorial jurisdiction. If extradition is sought for offences that are not “extradition offences”, an accessory extradition can occur if the person has consented to extradition in relation to those offenses.

Australia refuses requests on death penalty grounds. Australia has never refused a request subject to one of the UNCAC offenses. Since 2003 Australia has only refused to extradite in two cases.

Extradition must be refused, among other reasons, for political offences as well as for military offences that are not also offences under the ordinary criminal law of Australia.

There are 3 stages in the extradition process. First, the Attorney General, or in some cases the Minister of Justice, decides whether to accept a request. A magistrate then decides whether the person can be extradited. Then the Attorney General or the Ministry of Justice will decide whether the person should be surrendered. Appeals are possible against each decision.

(c) Successes and good practices

At the country visit, the reviewers noted Australia’s efficient use of an electronic database to track incoming and outgoing extradition requests, allowing its case officers to monitor the progresses of requests and identify appropriate follow up actions. The reviewers commended this practice, and agreed that this could be brought to the attention of other countries as a good practice.

Article 44 Extradition

Paragraph 2

2. Notwithstanding the provisions of paragraph 1 of this article, a State Party whose law so permits may grant the extradition of a person for any of the offences covered by this Convention that are not punishable under its own domestic law.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that dual criminality is a prerequisite to extradition under Australia’s Extradition Act 1988 (see s 16(2)(a)(ii) and s 19(2)(c)). However, as a party to the UNCAC, Australia has criminalised all of the mandatory offences contained within the Convention.

Extradition Act 1988 - Section 16(2)

The Attorney-General shall not give the notice:

a) unless the Attorney-General is of the opinion:

i. that the person is an extraditable person in relation to the extradition country; and

ii. that, if the conduct of the person constituting the extradition offence, or any of the extradition offences, for which surrender of the person is sought, or equivalent conduct, had taken place in Australia at the time at which the extradition request was received, the conduct or the equivalent conduct would have constituted an extradition offence in relation to Australia; or
Section 19(2)(c)

(2) For the purposes of subsection (1), the person is only eligible for surrender in relation to an extradition offence for which surrender of the person is sought by the extradition country if:

(a)...
(b)...
(c) the magistrate is satisfied that, if the conduct of the person constituting the offence in relation to the extradition country, or equivalent conduct, had taken place in the part of Australia where the proceedings are being conducted and at the time at which the extradition request in relation to the person was received, that conduct or that equivalent conduct would have constituted an extradition offence in relation to that part of Australia; and

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 44 Extradition

Paragraph 3

3. If the request for extradition includes several separate offences, at least one of which is extraditable under this article and some of which are not extraditable by reason of their period of imprisonment but are related to offences established in accordance with this Convention, the requested State Party may apply this article also in respect of those offences.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated the provision under review is partially implemented. Although Australia’s Extradition Act 1988 generally applies in respect of offences for which the maximum penalty is imprisonment for a period of not less than 12 months (s 5 of the Act), there is provision under the Act for consent to ‘accessory extradition’ (s 20 of the Act). In circumstances where a person has consented to being extradited in relation to particular extradition offences, or where a person has been found eligible for surrender in extradition proceedings in relation to particular extradition offences, the person may consent to being surrendered for other offences for which the requesting country has sought extradition, but which are not “extradition offences” for the purposes of the Act (ie are offences punishable by a period of less than 12 months).

The Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 proposes amendments to the Extradition Act 1988 and Mutual Assistance in Criminal Matters Act 1987 and was introduced into the Parliament on 6 July 2011. The Bill will allow a person to consent to being surrendered for offences which are “extradition offences” (ie are offences punishable by a period of not less than 12 months) but are not listed in the Attorney-General’s notice under section 16, accepting the extradition request in respect of that offence. An offence may be an “extradition offence” but not listed in the Attorney-General’s notice under section 16, because the conditions for issuing a section 16 notice in respect of that offence, such as dual criminality may not be satisfied. The Bill requires a magistrate to be satisfied that no extradition objections exist and the Minister still retains a general discretion to refuse extradition.

EXTRADITION ACT 1988

Section 20 - Consent to accessory extradition

(1) Where:

(a) either:
i. in proceedings under section 18, a person consents in accordance with that section to being surrendered to an extradition country in relation to an extradition offence or extradition offences; or

ii. in proceedings under subsection 19(1), a magistrate determines that a person is eligible for surrender to an extradition country in relation to an extradition offence or extradition offences; and

(b) the extradition country has requested that the person also be surrendered for an offence that is not an extradition offence or offences that are not extradition offences;

the magistrate shall, in those proceedings, ask the person whether he or she consents to being surrendered to the country in respect of the offence or any of the offences referred to in paragraph (b).

(2) Where the person gives his or her consent to being so surrendered, the magistrate shall, unless he or she considers that the consent was not given voluntarily, advise the Attorney-General in writing of the offence or offences in respect of which the person has so consented.

Australia does not have relevant examples.

(b) Observations on the implementation of the article

Australia reports that the 2011 draft Bill was passed by Parliament on 20 February 2012 and will enter into force in Australia on 20 September 2012. The reviewers were satisfied with the steps Australia is taking to fully implement an optional provision of the Convention.

Relevant provisions of the draft law are quoted below.

Division 4—Consent to accessory extradition

Extradition Act 1988

44 After section 19

Insert:

19A Consent to accessory extradition—extradition offences not specified in subsection 16(1) notice etc.

Scope

(1) This section applies if:

(a) a notice under subsection 16(1) has been given in relation to a person in respect of whom an extradition request has been made by an extradition country; and

(b) either:

(i) in proceedings under section 18, the person consents in accordance with that section to being surrendered to the extradition country in relation to the extradition offence or all of the extradition offences to which the notice relates; or

(ii) in proceedings under subsection 19(1), a magistrate determines that the person is eligible for surrender to the extradition country in relation to one or more of the extradition offences to which the notice relates; and

(c) the extradition country requested in the extradition request that the person be surrendered for one or more extradition offences (the additional extradition offences) that are not specified in the notice.

Consent to being surrendered in respect of the additional extradition offences

(2) If the magistrate is satisfied that there is no extradition objection in relation to any of the additional extradition offences, the magistrate must, in those proceedings, ask the person whether
he or she consents to being surrendered to the extradition country in respect of the additional extradition offences.

(3) Before asking the person whether he or she consents to being surrendered in respect of the additional extradition offences, the magistrate must:
   (a) either:
      (i) be satisfied that the person is legally represented; or
      (ii) if the magistrate is not so satisfied—give the person an adequate opportunity
           to be legally represented; and
   (b) inform the person that, if the person is surrendered, the person may be tried and
       sentenced in the extradition country for any additional extradition offence in relation to which
       the person gives consent; and
   (c) inform the person that the person may be tried and sentenced in the extradition
       country even though, had the conduct of the person constituting the additional extradition
       offences, or equivalent conduct, taken place in Australia at the time the extradition request
       concerned was received, that conduct may not have constituted an extradition offence in relation to
       Australia.

Magistrate to advise Attorney-General of consent

(4) If the person gives his or her consent to being so surrendered, the magistrate must, unless he or she considers that the consent was not given voluntarily, advise the Attorney-General in writing of the additional extradition offences in respect of which the person has so consented.

Note: The heading to section 20 is altered by adding at the end “—offences that are not extradition

45 Subsection 22(1) (definition of qualifying extradition offence)

Repeal the definition, substitute:

 qualification extradition offence, in relation to an eligible person, means the following:
   (a) if paragraph (a) of the definition of eligible person applies—any extradition offence in relation to which the person consented in accordance with section 18;
   (b) if paragraph (b) of the definition of eligible person applies—any extradition offence in relation to which:
      (i) the magistrate referred to in that paragraph; or
      (ii) the court that conducted the final proceedings under section 21;
   (c) in any case—any extradition offence in relation to which the person has consented in accordance with section 19A.

Article 44 Extradition

Paragraph 4

4. Each of the offences to which this article applies shall be deemed to be included
   as an extraditable offence in any extradition treaty existing between States Parties. States Parties undertake to include such offences as extraditable offences in every extradition treaty to be concluded between them. A State Party whose law so permits, in case it uses
   this Convention as the basis for extradition, shall not consider any of the offences established in accordance with this Convention to be a political offence.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it fully implemented the provision under review.

Australia has criminalised all of the mandatory offences of the UNCAC. Most of Australia’s bilateral treaties are not list-based; i.e. their application is not restricted to offences specifically listed in the treaty. If Australia has a non-list based bilateral extradition treaty with another country and the other country submits an extradition request for an UNCAC offence, Australia would be able to consider the
request without reference to UNCAC. In the case of list-based bilateral treaties, even if the relevant corruption offence did not appear in the treaty list, Australia could nonetheless consider a request for extradition made by the bilateral treaty partner, whether in the exercise of its discretion under the treaty or under UNCAC by virtue of the *Extradition (Convention against Corruption) Regulations 2005*.

The *Extradition (Convention against Corruption) Regulations 2005* specify that the Extradition Act applies to parties to the Convention subject to the terms of the Convention. The Act does not expressly exclude corruption offences from the political offence exception to extradition.

Australia referred to the examples provided under article 44.2.

(b) Observations on the implementation of the article

At their request, the reviewers were provided with the *Extradition (Convention Against Corruption) Regulations 2005*.

4 Extradition countries

For the definition of *extradition country* in section 5 of the Act, a country, or a colony, territory or protectorate of a country, for which the Convention is in force is an extradition country.

*Note 1* For when the Convention enters into force for a State, see Article 68 of the Convention in Schedule 1.


5 Application of the Act

The Act applies, subject to the Convention, to an extradition country mentioned in regulation 4.

Article 44 Extradition

Paragraph 5

5. If a State Party that makes extradition conditional on the existence of a treaty receives a request for extradition from another State Party with which it has no extradition treaty, it may consider this Convention the legal basis for extradition in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

Australia does not make extradition conditional on the existence of a treaty. Moreover, Australia considers the Convention as the legal basis for extradition in respect to any offence to which article 44 applies.

The *Extradition (Convention against Corruption) Regulations 2005* enable Australia to receive an extradition request from another State Party to UNCAC for an UNCAC offence and consider that request in accordance with the *Extradition Act 1988*. Under Regulation 4, States Parties to UNCAC are declared to be extradition countries for the purposes of the Extradition Act.

*Extradition (Convention against Corruption) Regulations 2005*

Section 4-Extradition countries

For the definition of *extradition country* in section 5 of the Act, a country, or a colony, territory or protectorate of a country, for which the Convention is in force is an extradition country.

There is no relevant example.
(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 44 Extradition

Paragraph 6

6. A State Party that makes extradition conditional on the existence of a treaty shall:

   (a) At the time of deposit of its instrument of ratification, acceptance or approval of or accession to this Convention, inform the Secretary-General of the United Nations whether it will take this Convention as the legal basis for cooperation on extradition with other States Parties to this Convention; and

   (b) If it does not take this Convention as the legal basis for cooperation on extradition, seek, where appropriate, to conclude treaties on extradition with other States Parties to this Convention in order to implement this article.

(a) Summary of information relevant to reviewing the implementation of the article

Australia also makes extradition conditional on the existence of a treaty.

Australia is able to conduct extradition in the absence of a treaty provided that the requesting country is declared to be an extradition country in regulations made under the Extradition Act.

Under the Extradition (Convention against Corruption) Regulations 2005, States Parties to UNCAC are declared to be extradition countries for the purposes of the Extradition Act.

While many of Australia’s bilateral extradition relationships are based on a treaty (Australia has 37 bilateral extradition treaties), it is possible for Australia’s Extradition Act to be applied to a country in the absence of a treaty. For example, Australia does not have a bilateral extradition treaty with Denmark; however, Denmark has been declared to be an ‘extradition country’ under the Extradition (Denmark) Regulations.

(b) Observations on the implementation of the article

The reviewers observed that this provision is not applicable, given that Australia can conduct extradition without existence of treaties, in general and in particular cases with ‘extradition countries’.

Article 44 Extradition

Paragraph 7

7. States Parties that do not make extradition conditional on the existence of a treaty shall recognize offences to which this article applies as extraditable offences between themselves.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The Extradition (Convention against Corruption) Regulations 2005 (‘the Regulations’) apply Australia’s Extradition Act 1988 to the States Parties to UNCAC subject to the Convention.
Accordingly, UNCAC can be the basis for the consideration of requests from States Parties for the extradition of persons from Australia for offences covered by the Convention.

Under section 55 of the *Extradition Act 1988*, the Governor-General may make regulations declaring a country to be an ‘extradition country’ for the purposes of the Act. A country can be declared to be an extradition country in regulations in the absence of a treaty.

For countries, declared to be extradition countries, provided the UNCAC offence for which extradition is sought meets the dual criminality requirement and minimum penalty thresholds in the Act (please see responses to articles 44.1 and 44.3); the offence will be considered to be an extraditable offence.

Australia has criminalised all of the mandatory UNCAC offences.

There have been no relevant examples.

(b) Observations on the implementation of the article

At the country visit, the reviewers were informed that the following countries were declared as extradition countries: Bosnia and Herzegovina, Cambodia, Canada, Cook Islands, Czech Republic, Denmark, Estonia, Iceland, Japan, Jordan, Kiribati, Kyrgyzstan, Lebanon, Lithuania, Marshall Islands, Montenegro, Mauri, Papua New Guinea, Samoa, Serbia, Slovakia, Solomon Islands, Thailand, Tonga, Tuvalu, United Kingdom, and Vanuatu.

**Article 44 Extradition**

**Paragraph 8**

8. Extradition shall be subject to the conditions provided for by the domestic law of the requested State Party or by applicable extradition treaties, including, inter alia, conditions in relation to the minimum penalty requirement for extradition and the grounds upon which the requested State Party may refuse extradition.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is fully compliant with the provision under review.

In Australia, the extradition process is governed by the *Extradition Act 1988*, regulations made under that Act, and bilateral and applicable multilateral treaties. As indicated above, under the Extradition Act an extradition offence is an offence for which the maximum penalty is imprisonment for a period of not less than 12 months. A person may only be surrendered under the Extradition Act if certain requirements are satisfied. These requirements include consideration of any mandatory or discretionary grounds for refusal of a request under an extradition treaty.

With regard to conditions and grounds of refusal of extradition requests, Australia indicated that it has had very limited experience with extradition matters involving corruption. In other contexts, Australia has on occasion refused extradition requests, including on the ground that surrender would be incompatible with humanitarian considerations, on the ground of triviality of the alleged offence, and on the ground that the alleged criminal conduct should more appropriately be investigated under Australia’s criminal justice system.

(b) Observations on the implementation of the article

Upon request of the reviewers, Australia cited the case below.
Extradition request from Croatia – extradition objection raised in eligibility proceedings

Mr Dragan Vasiljković is the subject of an extradition request from Croatia. He is wanted to face prosecution in relation to three war crimes offences allegedly committed during the conflict in the former Yugoslavia. Mr Vasiljković was provisionally arrested by Australian authorities on 19 January 2006.

On 12 April 2007, a Magistrate determined Mr Vasiljković to be eligible for surrender to Croatia. Mr Vasiljković sought review in the Federal Court of Australia of the magistrate’s decision, alleging (among other grounds) that an extradition objection existed because his extradition was sought by Croatia for an impermissible purpose, or because he would be prejudiced at his trial or punished by reason of his race, nationality or political opinions. In particular, Mr Vasiljković referred to the practice of Croatian courts to consider service with the Croatian forces as a mitigating factor on sentence and argued that, because this mitigating factor would not be applied to him (as he served with Serbian forces), he would be punished, detained or deprived of his liberty by reason of his political opinion. The High Court of Australia ultimately considered the matter and found that Mr Vasiljković had not established he would be punished in Croatia by reason of his political opinion.

It is now a matter for the Minister for Justice to determine whether Mr Vasiljković should be surrendered to Croatia. The Minister will consider representations made by Mr Vasiljković as to why he should not be surrendered to Croatia.

Extradition request from Indonesia – extradition objection raised before the Minister, judicial review sought of Minister’s determination

Mr Ariawan is the subject of an extradition request from Indonesia. Mr Ariawan is the former President Director of the PT Bank Surya in Indonesia and is alleged, in conjunction with the former Vice President Commissioner of the Bank, to have misused bank funds. He was convicted in absentia of a corruption offence and sentenced to life imprisonment. He and his co-accused were also ordered to pay compensation of approximately AUS$183 million.

On 28 November 2008, Mr Ariawan was provisionally arrested pursuant to an extradition request from Indonesia. On 16 September 2009, a magistrate determined that Mr Ariawan was eligible for surrender to Indonesia, and on 17 December 2010, the then Minister for Justice determined that Mr Ariawan be surrendered to Indonesia. Mr Ariawan has sought judicial review of the Minister’s determination on numerous grounds, in particular, that the Minister failed to have regard to Mr Ariawan’s claim that he was tried in absentia because of his Chinese ethnicity, which would constitute an “extradition objection” precluding his extradition to Indonesia.

The Federal Court of Australia heard Mr Ariawan’s application in September 2011 and has reserved judgment.

Article 44 Extradition

Paragraph 9

9. States Parties shall, subject to their domestic law, endeavour to expedite extradition procedures and to simplify evidentiary requirements relating thereto in respect of any offence to which this article applies.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is fully compliant with the provision under review.
Most of Australia’s extradition relationships are conducted on a “no evidence” basis (with the exception of our relationships with the United States (probable cause), Canada (record of the case) and a few countries in respect of which the standard remains applicable).

Australia’s Extradition Act currently makes provision for the extradition process to be expedited in circumstances where a person consents to surrender (s 18 of the Act).

The Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 contains amendments which will further streamline the extradition process. The Bill will allow a person sought for extradition to “waive” the extradition process (subject to certain safeguards). This means that following arrest, a person may elect to remove himself/herself immediately from the extradition process and be surrendered to the requesting country following consideration by the Minister of certain specified matters relating to Australia’s obligations under international law.

As examples of the implementation of relevant legislation, it was indicated that Australia’s current legislative framework governing extradition has been in place since 1988. Since 1988, Australia’s preferred basis for extradition relationships under bilateral treaties has been the “no evidence” basis.

(b) Observations on the implementation of the article

In addition to undergoing a full extradition process, an individual has the option to consent to extradition; and if the Bill is adopted will also be able to waive extradition proceedings. Both reduce the time necessary for return of an individual.

Absent waiver or consent, Australia said that it could not accurately determine how long an extradition case is likely to take, as appeal to a court is possible at each stage of the extradition process.

Article 44 Extradition

Paragraph 10

10. Subject to the provisions of its domestic law and its extradition treaties, the requested State Party may, upon being satisfied that the circumstances so warrant and are urgent and at the request of the requesting State Party, take a person whose extradition is sought and who is present in its territory into custody or take other appropriate measures to ensure his or her presence at extradition proceedings.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is fully compliant with the provision under review.

Under section 12 of the Extradition Act 1988, a magistrate in Australia can issue a warrant for the provisional arrest of a person, pending the receipt of a full formal extradition request.

Once the person is arrested, he/she is required to be brought before a magistrate as soon as practicable to be remanded in custody or on bail for such period(s) as may be necessary for the conduct of extradition proceedings (see s 15 of the Act).

A magistrate may not remand a person on bail unless there are special circumstances justifying such remand (s 15(6) of the Act).

Extradition Act 1988

s15 - Remand

(1) A person who is arrested under a provisional arrest warrant shall be brought as soon as practicable before a magistrate in the State or Territory in which the person is arrested.
The person shall be remanded by a magistrate in custody, or, subject to subsection (6), on bail, for such period or periods as may be necessary for proceedings under section 18 or 19, or both, to be conducted.

(6) A magistrate shall not remand a person on bail under this section unless there are special circumstances justifying such remand.

Australia’s current legislative framework governing extradition has been in place since 1988.

(b) Observations on the implementation of the article

At the country visit, the reviewers were provided with explanations on provisional measures, and examples of the Operation Rune (Christian Boillot case) and the Bruce Allan Hall cases. In the second case, there was a “page alert” implemented through all airports in Australia to make sure that the person in question, if he was in Australia at that time, could not leave Australia.

Article 44 Extradition

Paragraph 11

11. A State Party in whose territory an alleged offender is found, if it does not extradite such person in respect of an offence to which this article applies solely on the ground that he or she is one of its nationals, shall, at the request of the State Party seeking extradition, be obliged to submit the case without undue delay to its competent authorities for the purpose of prosecution. Those authorities shall take their decision and conduct their proceedings in the same manner as in the case of any other offence of a grave nature under the domestic law of that State Party. The States Parties concerned shall cooperate with each other, in particular on procedural and evidentiary aspects, to ensure the efficiency of such prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is fully compliant with the provision under review.

It is Australian Government policy not to refuse surrender of Australian citizens solely on the ground of their nationality. However, section 45 of the Extradition Act 1988 would allow for prosecution in lieu of extradition if extradition were to be refused on the basis of Australian citizenship.

EXTRADITION ACT 1988 - SECT 45

Prosecution, instead of extradition, of certain Australian citizens

(1) Where:
   (a) a person who is an Australian citizen engages in conduct outside Australia;
   (b) the person subsequently enters, or is brought into, a State or Territory;
   (c) the conduct does not, apart from this subsection, constitute an offence against a law in force in the State or Territory; and
   (d) if, at the time when the person engaged in the conduct outside Australia, the person had engaged in the conduct, or equivalent conduct, in the State or Territory, the person would have committed an offence against a law in force in the State or Territory;
   the person commits an offence against this subsection punishable, upon conviction, by the same penalty as would have been applicable if the person had committed the offence referred to in paragraph (d).

(2) Subsection (1) applies in relation to:
(a) conduct engaged in by a person; and
(b) the entry by a person, or the bringing of a person, into a State or Territory;
either before or after the commencement of this Act.

(3) Proceedings for the offence shall not take place except with the consent in writing of the Attorney-General.
(4) The Attorney-General shall only give his or her consent under subsection (3) in relation to the offence if:
(a) an extradition country has sought the surrender of the person in respect of an extradition offence, or offences including an extradition offence, constituted by the conduct referred to in paragraph (1)(a);
(b) the Attorney-General has determined under section 22 that the person is not to be surrendered to the extradition country; and
(c) in so far as the Attorney-General made that determination not to surrender in relation to the extradition offence constituted by the conduct referred to in paragraph (1)(a), the Attorney-General did so only because:
   i. the person was an Australian citizen when the person engaged in the conduct;
   ii. the Attorney-General was satisfied that the extradition country would not, if the person were a national of that country who had engaged in the conduct or equivalent conduct in Australia, have surrendered the person to Australia in relation to an offence constituted by the conduct or the equivalent conduct; and
   iii. the Attorney-General intended to give his or her consent under subsection (3) in respect of an offence constituted by the conduct or equivalent conduct.
(5) Notwithstanding that consent has not been given in relation to proceedings for an offence in accordance with subsection (3):
(a) a person may be arrested for the offence, and a warrant for the arrest of a person for the offence may be issued and executed;
(b) a person may be charged with the offence; and
(c) a person so charged may be remanded in custody or on bail.

It is Australian Government policy not to refuse surrender of Australian citizens solely on the ground of nationality. Accordingly, the potential for a prosecution to be conducted in lieu of extradition under s 45 of the Extradition Act does not generally arise. Further, as indicated above, Australia has dealt with very few extradition requests in respect of corruption offences and nationality has not been relied upon to refuse extradition in those cases.

(b) Observations on the implementation of the article

With respect to extradition, if an Australian has engaged in conduct within the territory of Australia that would nevertheless be an extraditable offense and the national is not extradited, he/she be can be prosecuted in Australia for that conduct following denial of an extradition. If the Bill is adopted, Australia will be able to prosecute in lieu of extradition even if the individual is not an Australian national.

Article 44 Extradition

Paragraph 12

12. Whenever a State Party is permitted under its domestic law to extradite or otherwise surrender one of its nationals only upon the condition that the person will be returned to that State Party to serve the sentence imposed as a result of the trial or proceedings for which the extradition or surrender of the person was sought and that State Party and the State Party seeking the extradition of the person agree with this option and other terms that they may deem appropriate, such conditional extradition or
surrender shall be sufficient to discharge the obligation set forth in paragraph 11 of this article.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

There is no such limitation on surrender under Australia’s extradition law; nor is it Australian Government policy that surrender should be subject to any such condition.

(b) Observations on the implementation of the article

Conditional surrender can be envisaged under the current law. There has been no relevant cases, but Australia already explored this possibility in one case.

Article 44 Extradition

Paragraph 13

13. If extradition, sought for purposes of enforcing a sentence, is refused because the person sought is a national of the requested State Party, the requested State Party shall, if its domestic law so permits and in conformity with the requirements of such law, upon application of the requesting State Party, consider the enforcement of the sentence imposed under the domestic law of the requesting State Party or the remainder thereof.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is not in compliance with the provision under review.

It is Australian Government policy not to refuse surrender of Australian citizens solely on the ground of their nationality. The Extradition Act 1988 does not make any provision for enforcement of a foreign sentence in Australia in lieu of extradition to serve the sentence in the requesting country.

However, an imprisoned person may be eligible to serve their sentence in another country under the Transfer of Prisoners Scheme. The Scheme is consent-based and allows Australians imprisoned overseas, and foreign nationals imprisoned in Australia, to apply to serve the balance of their sentence in their home country. The Scheme operates completely independently of the extradition process.

(b) Observations on the implementation of the article

Australia reported that there has been 11 cases that apply the Transfer of Prisoners Scheme.

Article 44 Extradition

Paragraph 14

14. Any person regarding whom proceedings are being carried out in connection with any of the offences to which this article applies shall be guaranteed fair treatment at all stages of the proceedings, including enjoyment of all the rights and guarantees provided by the domestic law of the State Party in the territory of which that person is present.

(a) Summary of information relevant to reviewing the implementation of the article
Australia stated that it is in compliance with the provision under review.

Australia is a party to the *International Covenant on Civil and Political Rights*. Article 14 of this Covenant guarantees a person the right to a fair trial, consistent with the terms of this paragraph.

Due process is observed at all stages of the consideration of an extradition request. Persons subject to extradition proceedings in Australia have the right to seek judicial review of every decision made in the extradition process. Persons sought for extradition are also always given the opportunity to make representations as to whether they should be surrendered prior to the final surrender determination by the Minister for Justice.

Guideline 8 of Part 4 of the *National Commonwealth Legal Aid Guidelines* allows for the grant to an applicant of assistance for the purposes of proceedings before a magistrate to determine eligibility for surrender and any subsequent review proceedings.

The *Extradition Act 1988* currently applies a whole range of human rights safeguards to the extradition process. These include the refusal to extradite where the person has already been acquitted or pardoned of the offence, or has undergone punishment for the offence, or there is the possibility of the imposition of the death penalty, torture, or a discriminatory or prejudicial prosecution. The Extradition Act also recognises the rights of the individual with respect to conditions of imprisonment.

Extradition Act 1988

s53 - Conditions of imprisonment

The laws of a State or Territory with respect to:

(a) the conditions of imprisonment of persons imprisoned in that State or Territory to await trial for offences against the law of that State or Territory;

(b) the treatment of such persons during imprisonment; and

(c) the transfer of such persons from prison to prison; apply, so far as they are capable of application, in relation to persons who have been committed to prison in that State or Territory under this Act.

apply, so far as they are capable of application, in relation to persons who have been committed to prison in that State or Territory under this Act.

Australia’s current legislative framework governing extradition has been in place since 1988.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 44 Extradition

Paragraph 15

15. Nothing in this Convention shall be interpreted as imposing an obligation to extradite if the requested State Party has substantial grounds for believing that the request has been made for the purpose of prosecuting or punishing a person on account of that person’s sex, race, religion, nationality, ethnic origin or political opinions or that compliance with the request would cause prejudice to that person’s position for any one of these reasons.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.
A person may not be surrendered to a requesting country under Australia’s *Extradition Act 1988* if an extradition objection exists under s 7 of the Act.

For the purposes of the Extradition Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:

- the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country;

- on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions.

The Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 will extend the scope of these extradition objections to include discrimination on the basis of sex or sexual orientation.

**EXTRADITION ACT 1988**

**Section 7 - Meaning of *extradition objection***

For the purposes of this Act, there is an extradition objection in relation to an extradition offence for which the surrender of a person is sought by an extradition country if:

(a) the extradition offence is a political offence in relation to the extradition country;

(b) the surrender of the person, in so far as it purports to be sought for the extradition offence, is actually sought for the purpose of prosecuting or punishing the person on account of his or her race, religion, nationality or political opinions or for a political offence in relation to the extradition country;

(c) on surrender to the extradition country in respect of the extradition offence, the person may be prejudiced at his or her trial, or punished, detained or restricted in his or her personal liberty, by reason of his or her race, religion, nationality or political opinions;

(d) assuming that the conduct constituting the extradition offence, or equivalent conduct, had taken place in Australia at the time at which the extradition request for the surrender of the person was received, that conduct or equivalent conduct would have constituted an offence under the military law, but not also under the ordinary criminal law, of Australia; or

(e) the person has been acquitted or pardoned by a competent tribunal or authority in the extradition country or Australia, or has undergone the punishment provided by the law of that country or Australia, in respect of the extradition offence or another offence constituted by the same conduct as constitutes the extradition offence.

There have been no relevant examples.

(b) **Observations on the implementation of the article**

At the country visit, the reviewers were provided with some examples of “extradition objections”. These “extradition objections” can be raised by the fugitive both in court and before the Minister.

**Article 44 Extradition**
Paragraph 16

16. States Parties may not refuse a request for extradition on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The definition of “offence” under the Extradition Act 1988 (s 5) expressly includes ‘an offence against a law relating to taxation, customs duties or other revenue matter or relating to foreign exchange control’.

EXTRADITION ACT 1988
Section 5 - Interpretation

... 

offence includes an offence against a law relating to taxation, customs duties or other revenue matter or relating to foreign exchange control.

As a general principle, underpinned by the Extradition Act, Australia does not refuse extradition on the basis that the offence for which extradition is sought involves a fiscal matter.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 44 Extradition

Paragraph 17

17. Before refusing extradition, the requested State Party shall, where appropriate, consult with the requesting State Party to provide it with ample opportunity to present its opinions and to provide information relevant to its allegation.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

It is Australia’s standard practice to consult with a requesting country at a preliminary stage in an effort to ensure that an extradition request meets the requirements of Australia’s Extradition Act 1988 and relevant treaty requirements.

If Australia were considering the possible refusal of an extradition request, Australia would give the requesting country the opportunity to provide supplementary information to address issues of concern.

Australia liaises with the requesting country on an ongoing basis throughout an extradition process.

If a person makes representations that he or she should not be surrendered, for consideration by the Minister in making his final determination whether to surrender the person, Australia gives the requesting country an opportunity to respond to those representations.

Such communications are considered to be confidential unless they have been produced in extradition litigation. All extradition cases challenging a determination that a person should be surrendered to a
requesting country involve consideration of responses by the requesting country to representations made by the person sought.

Statistics on court records are not available.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 44 Extradition

Paragraph 18

18. States Parties shall seek to conclude bilateral and multilateral agreements or arrangements to carry out or to enhance the effectiveness of extradition.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia has 38 bilateral extradition treaties in force, and 2 treaties not yet in force.

Australia continues to negotiate extradition treaties in accordance with Australian Government priorities.

In addition to the fact that some countries require a treaty as a basis for extradition, Australia recognises that bilateral treaties can be of considerable assistance in resolving issues arising in extradition practice.

Australia’s international cooperation measures have been assessed as part of other reviews such as the OECD review of implementation of the Convention on Combating Bribery of Foreign Public Officials in International Business Transactions.

In July 2011, the Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011 was introduced into the Australian Parliament. The Bill contains proposed amendments to streamline and modernise the extradition process. The introduction of this Bill followed an extensive public consultation process on the effectiveness of Australia’s extradition regime.

The Attorney-General’s Department is also currently reviewing Australia’s model treaties on extradition, mutual assistance and international transfer of prisoners. The aim of the review is to ensure that the models reflect current government policy and international best practice.

(b) Observations on the implementation of the article

In response to the expert’s query, Australia mentioned that among the Commonwealth countries, the London scheme (2002) that governs the extradition of a person from the Commonwealth country in which the person is found, to another Commonwealth country, in which the person is accused of an offence. Australia is a party to this scheme.

Article 45 Transfer of sentenced persons

States Parties may consider entering into bilateral or multilateral agreements or arrangements on the transfer to their territory of persons sentenced to imprisonment or
other forms of deprivation of liberty for offences established in accordance with this Convention in order that they may complete their sentences there.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia’s International Transfer of Prisoners (ITP) Scheme allows Australians imprisoned overseas, and foreign nationals imprisoned in Australia, to apply to serve out the remainder of their sentence in their home country. Australia is able to undertake prisoner transfers with over 60 jurisdictions through the Council of Europe Convention on the Transfer of Sentenced Persons. Australia can also undertake prisoner transfers under the following bilateral treaties.

- Agreement between the Government of Australia and the Government of the Kingdom of Thailand on the Transfer of Offenders and Co-operation in the Enforcement of Penal Sentences
- Agreement between the Government of Australia and the Government of Hong Kong Special Administrative Region of the People’s Republic of China concerning Transfer of Sentenced Persons
- Agreement between the Government of Australia and the Government of the Kingdom of Cambodia concerning transfer of sentenced persons

A treaty between Australia and China on the transfer of prisoners has been signed by the Australian Government, but has not yet entered into force.

Australia also has an arrangement with the United States of America on the transfer of prisoners sentenced by Military Commissions.

International Transfer of Prisoners Act 1997
Part 2 - Transfers Generally
Section 10 - When may a prisoner (other than a Tribunal prisoner) be transferred?
A prisoner (other than a Tribunal prisoner) may be transferred between Australia and a transfer country under this Act if:
(a) the prisoner is eligible for transfer from or to Australia (as the case requires); and
(b) Australia and the transfer country have agreed to the transfer of the prisoner on terms agreed under this Act; and
(c) the prisoner or the prisoner’s representative has consented in writing to transfer on those terms; and
(d) appropriate Ministerial consent in writing has been given to transfer on those terms; and
(e) the relevant conditions for transfer of the prisoner are satisfied; and
(f) the transfer of the prisoner is not likely to prevent the surrender of the prisoner to any extradition country known by the Attorney-General to have requested the extradition of the prisoner or to have expressed interest in extraditing the prisoner or that, in the opinion of the Attorney-General, is reasonably likely to request extradition.

11. When may a Tribunal prisoner be transferred?
A Tribunal prisoner may be transferred to Australia under this Act if:
(a) Australia and the Tribunal have agreed to the transfer of the prisoner on terms agreed under this Act; and
(b) unless the Attorney-General determines that it is not necessary in the prisoner’s case—the prisoner or prisoner’s representative has consented to transfer on those terms; and
(c) appropriate Ministerial consent in writing has been given to transfer on those terms; and
(d) the relevant conditions for transfer to Australia of Tribunal prisoners are satisfied.
12 Eligibility for transfer from Australia of prisoners (other than Tribunal prisoners)
A prisoner (other than a Tribunal prisoner) is eligible for transfer from Australia to a transfer country under this Act if the prisoner:
(a) is a national of the transfer country; or
(b) has community ties with the transfer country.

Note: Community ties with a transfer country is defined in subsection 4(4).

13 Eligibility for transfer to Australia of prisoners (other than Tribunal prisoners)
(1) A prisoner (other than a Tribunal prisoner) is eligible for transfer to Australia from a transfer country under this Act if the prisoner:
(a) is an Australian citizen; or
(b) is permitted to travel to, enter and remain in Australia indefinitely pursuant to the *Migration Act 1958* and has community ties with a State or a Territory.

Note: Community ties with a State or Territory is defined in subsection 4(5).

(2) If a request is made for the transfer of a prisoner (other than a Tribunal prisoner) to Australia, the Attorney-General must consult with the Immigration Minister about whether the prisoner:
(a) is eligible under subsection (1) for a transfer to Australia; or
(b) is likely to be eligible under subsection (1) for a transfer to Australia at a future time specified by the Attorney-General for the purposes of the consultation.

14 Transfer conditions—transfer from Australia
(1) The conditions for transfer from Australia of a prisoner (other than a mentally impaired prisoner) are satisfied if:
(a) neither the sentence of imprisonment imposed by the Australian court nor the conviction on which it is based is subject to appeal; and
(b) subject to subsection (3), the acts or omissions constituting the offence on account of which the prisoner is serving the sentence in Australia would, if the acts or omissions had occurred in the transfer country, have constituted an offence in the transfer country; and
(c) if the sentence of imprisonment is determinate—on the day of receipt of the request for transfer at least 6 months of the prisoner’s sentence remains to be served (whether or not the prisoner has been released on parole), or a shorter period remains to be served and the Attorney-General has determined that, in the circumstances, transfer for a shorter period is acceptable.

(2) The conditions for transfer from Australia of a mentally impaired prisoner are satisfied if:
(a) neither the sentence of imprisonment imposed by the Australian court nor the acquittal or finding of unfitness to stand trial on which it is based is subject to appeal; and
(b) subject to subsection (3), the acts or omissions constituting the offence:
   (i) in respect of which the prisoner was charged but acquitted on the ground of mental impairment or found unfit to stand trial; and
   (ii) on account of which the prisoner is serving the sentence in Australia;
   would, if the acts or omissions had occurred in the transfer country, have constituted an offence in the transfer country; and
(c) if the sentence of imprisonment is determinate—on the day of receipt of the request for transfer at least 6 months of the prisoner’s sentence remains to be served (whether or not any review affecting the duration of the sentence is pending), or a shorter period remains to be served and the Attorney-General has determined that, in the circumstances of the case, transfer for a shorter period is acceptable.

(3) The Attorney-General may determine that the requirements of subsection (1)(b) or (2)(b) need not be satisfied in a particular prisoner’s case.

15 Transfer conditions—transfer to Australia
(1) The conditions for transfer to Australia of a prisoner (other than a mentally impaired prisoner or Tribunal prisoner) are satisfied if:

(a) neither the sentence of imprisonment imposed by the transfer country’s court or tribunal nor the conviction on which it is based is subject to appeal under the law of the transfer country; and

(b) subject to subsection (3), the acts or omissions constituting the offence on account of which the prisoner is serving the sentence in the transfer country would, if the acts or omissions had occurred in Australia, have constituted an offence in Australia; and

(c) if the sentence of imprisonment is determinate on the day of receipt of the request for transfer at least 6 months of the prisoner’s sentence remains to be served (whether or not the prisoner has been released on parole), or a shorter period remains to be served and the Attorney-General has determined that, in the circumstances, transfer for a shorter period is acceptable.

(2) The conditions for transfer to Australia of a mentally impaired prisoner are satisfied if:

(a) neither the sentence of imprisonment imposed by the transfer country’s court or tribunal nor the acquittal or finding of unfitness to stand trial on which it is based is subject to appeal under the law of the transfer country; and

(b) subject to subsection (3), the acts or omissions constituting the offence:

(i) in respect of which the prisoner was charged but acquitted on the ground of mental impairment or found unfit to stand trial, and

(ii) on account of which the prisoner is serving the sentence in the transfer country;

would, if the acts or omissions had occurred in Australia, have constituted an offence in Australia; and

(c) if the sentence of imprisonment is determinate on the day of receipt of the request for transfer at least 6 months of the prisoner’s sentence remains to be served (whether or not any review affecting the duration of the sentence is pending), or a shorter period remains to be served and the Attorney-General has determined that, in the circumstances, transfer for a shorter period is acceptable.

(3) The Attorney-General may determine that the requirements of subsection (1)(b) or (2)(b) need not be satisfied in a particular prisoner’s case.

(4) The conditions for transfer to Australia of a Tribunal prisoner are satisfied if:

(a) neither the sentence of imprisonment imposed by the Tribunal nor the conviction on which it is based is subject to appeal under the Statute of the Tribunal; and

(b) if the sentence of imprisonment is determinate on the day of receipt of the request for transfer at least 6 months of the prisoner’s sentence remains to be served (whether or not the prisoner has been released on parole), or a shorter period remains to be served and the Attorney-General has determined that, in the circumstances, transfer for a shorter period is acceptable.

The International Transfer of Prisoners Act 1997 (the ITP Act) provides the domestic legal framework for Australia’s ITP Scheme. The Australian Government also has a publicly available Statement of Policy that provides information on policies that guide the Australian Minister’s assessment of applications for transfer of prisoners to or from Australia.

As of 21 July 2011, there have been 81 successful transfers under Australia’s ITP Scheme:

- 17 prisoners have transferred to Australia, and
- 64 prisoners have transferred from Australia.

Australia has 4 international transfer of prisoners treaty with: Vietnam, Cambodia, Thailand, Hongkong China SAR. The treaty signed with China has not yet been in force.

Australia also provided an explanatory note on the International Transfer of Prisoners Scheme.
While no formal review has been undertaken to assess the effectiveness of Australia’s ITP Scheme, Australia continues to review and update its practices to ensure ITP matters are dealt with as efficiently as possible. No assistance would be required to undertake a formal review.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance

Paragraph 1

1. States Parties shall afford one another the widest measure of mutual legal assistance in investigations, prosecutions and judicial proceedings in relation to the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The 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 Convention.

While the Mutual Assistance Act allows Australia to make requests to and receive requests from all countries, the Act allows for regulations to be made to facilitate mutual assistance requests in accordance with treaty arrangements. Australia has implemented the Mutual Assistance in Criminal Matters (Convention against Corruption) Regulations 2005 to facilitate Australia’s ability to make and receive mutual assistance requests to and from States Parties to the United Nations Convention against Corruption in respect of the offences covered by the Convention. The Regulations apply the Act to a foreign country that is a State Party to the Convention, subject to the Convention by modifying the application of the Act subject to the limitations, conditions, exceptions or qualifications that are necessary to give effect to mutual assistance obligations under the Convention.

The Mutual Assistance in Criminal Matters Act 1987 enables Australia to consider mutual legal assistance requests from any country.

In 2010-2011 Australia received 427 mutual assistance requests from foreign countries and made 203 mutual assistance requests to foreign countries. Of the 427 requests received, 18 sought assistance in relation to offences covered by the Convention. Eleven of these 18 requests were made under the Convention or with specific reference to the Convention. Of the 203 mutual legal assistance requests made by Australia, two sought assistance in relation to offences covered by the Convention. These two requests were not made under the Convention nor with specific reference to the Convention.

Australia has mutual legal assistance treaties with the following countries: Argentina, Austria, Canada, China, Ecuador, Finland, France, Greece, Hongkong SAR China, Hungary, Indonesia, India, Israel, Italy, Korea, Luxembourg, Malaysia, Mexico, Monaco, Netherlands, Philippines, Portugal, Spain, Sweden, Switzerland, Turkey, United Arab Emirates, United States of America.

Australia also provided a MLA request template for information of the reviewers.

(b) Observations on the implementation of the article
At the country visit, the reviewers heard explanations on the mutual legal assistance procedure and were provided with statistics.

The AGD’s MLA Unit is responsible for handling both incoming and outgoing MLA requests. The Unit is composed of (i) the Americas, South East Asia and other team, and (ii) the United Kingdom, Pacific and Other Team. Similarly to extradition requests management, MLA requests are managed by a casework database of high quality.

Dual criminality is a discretionary ground for refusing a request for mutual legal assistance. Assistance can only be provided under the grounds of a serious offense (over 12 months of potential prison penalty). Other civil and administrative assistance can be provided, but under other regimes. The Attorney-General can take into consideration all the circumstances of the case, including the Convention in making a decision whether or not to grant a request for assistance.

The MLA process highly depends on whether or not coercive powers need to be used, i.e. search and seizure requests, production of documents, etc. The use of coercive powers must be authorized by the Minister of Justice or the Attorney-General. This procedure does take time, but efforts are always made to speed things along and minimize delay. Sometimes the matters can be expedited, especially when funds are in an account and may be dissipated.

In the year 2010-2011, Australia received 427 requests, and sent out 203 requests. Approximately 5% of incoming requests are related to corruption matters.

**Incoming requests relating to corruption, bribery or extortion**

*Table 1* provides an overview of the number of mutual assistance requests received by the Central Authority relating to corruption, bribery or extortion. The table is divided according to calendar year. Of the 23 requests received in 2011, 18 related to corruption offences and 14 were made under UNCAC.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>2001</td>
<td>1</td>
</tr>
<tr>
<td>2002</td>
<td>1</td>
</tr>
<tr>
<td>2003</td>
<td>0</td>
</tr>
<tr>
<td>2004</td>
<td>1</td>
</tr>
<tr>
<td>2005</td>
<td>0</td>
</tr>
<tr>
<td>2006</td>
<td>4</td>
</tr>
<tr>
<td>2007</td>
<td>4</td>
</tr>
<tr>
<td>2008</td>
<td>2</td>
</tr>
<tr>
<td>2009</td>
<td>2</td>
</tr>
<tr>
<td>2010</td>
<td>8</td>
</tr>
<tr>
<td>2011</td>
<td>23</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>46</strong></td>
</tr>
</tbody>
</table>

**Incoming requests relating to corruption, bribery or extortion by type of assistance**

*Table 2* provides information about the type of assistance requested in the incoming requests relating to corruption, bribery or extortion for the period 2001-2011. Please note that in some instances, more than one type of assistance may have been requested.

<table>
<thead>
<tr>
<th>Type of assistance</th>
<th>Number of requests</th>
</tr>
</thead>
</table>

Page 225 of 293
Outgoing requests relating to corruption, bribery or extortion

Table 3 provides an overview of the number of mutual assistance requests sent by the Central Authority relating to corruption, bribery or extortion. The table is divided by calendar year. None of the outgoing requests were made under UNCAC.

<table>
<thead>
<tr>
<th>Year</th>
<th>Number of requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003</td>
<td>1</td>
</tr>
<tr>
<td>2004</td>
<td>1</td>
</tr>
<tr>
<td>2005</td>
<td>0</td>
</tr>
<tr>
<td>2006</td>
<td>2</td>
</tr>
<tr>
<td>2007</td>
<td>4</td>
</tr>
<tr>
<td>2008</td>
<td>4</td>
</tr>
<tr>
<td>2009</td>
<td>1</td>
</tr>
<tr>
<td>2010</td>
<td>7</td>
</tr>
<tr>
<td>2011</td>
<td>7</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>27</strong></td>
</tr>
</tbody>
</table>

Outgoing requests relating to corruption, bribery or extortion by type of assistance

Table 4 provides information about the type of assistance requested in the outgoing requests relating to corruption, bribery or extortion for the period 2001-2011. Please note that in some instances, more than one type of assistance may have been requested.

<table>
<thead>
<tr>
<th>Type of assistance</th>
<th>Number of requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>Request for bank records</td>
<td>11</td>
</tr>
<tr>
<td>Request for government records</td>
<td>8</td>
</tr>
<tr>
<td>Request for witness interview/statement</td>
<td>7</td>
</tr>
<tr>
<td>Request for business records</td>
<td>2</td>
</tr>
<tr>
<td>Request to make enquiries</td>
<td>2</td>
</tr>
<tr>
<td>Witness statement</td>
<td>2</td>
</tr>
<tr>
<td>Other</td>
<td>1</td>
</tr>
<tr>
<td>Request for internet records</td>
<td>1</td>
</tr>
<tr>
<td>Search and seizure (s.15)</td>
<td>1</td>
</tr>
</tbody>
</table>
Number of mutual assistance requests that Australia has refused 2003 – 2011

Table 5 shows the number of requests that Australia has refused by financial year, commencing with 2003.

<table>
<thead>
<tr>
<th>Fiscal Year</th>
<th>Requests</th>
</tr>
</thead>
<tbody>
<tr>
<td>2003-2004</td>
<td>1</td>
</tr>
<tr>
<td>2004-2005</td>
<td>0</td>
</tr>
<tr>
<td>2006-2007</td>
<td>0</td>
</tr>
<tr>
<td>2007-2008</td>
<td>0</td>
</tr>
<tr>
<td>2008-2009</td>
<td>0</td>
</tr>
<tr>
<td>2009-2010</td>
<td>1</td>
</tr>
<tr>
<td>2010-2011</td>
<td>0</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>2</strong></td>
</tr>
</tbody>
</table>

Only the Attorney General can consider requests related to terrorism and security issues. Other matters can be considered by the Minister of Justice.

Australia has never refused a request related to the Convention.

(c) Successes and good practices

The reviewers were of the view that the electronic MLA database is a good practice that shall be shared with other States Parties.

Article 46 Mutual legal assistance

Paragraph 2

2. Mutual legal assistance shall be afforded to the fullest extent possible under relevant laws, treaties, agreements and arrangements of the requested State Party with respect to investigations, prosecutions and judicial proceedings in relation to the offences for which a legal person may be held liable in accordance with article 26 of this Convention in the requesting State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The Mutual Assistance in Criminal Matters Act 1987 provides the legal framework for Australia to request and provide international assistance in criminal matters including taking evidence, production of documents, executing search warrants, providing material from Australian investigations, and locating, restraining and forfeiting proceeds of crime.

As noted above, Australia can consider mutual legal assistance requests from any country. Australia also has 29 bilateral treaties which streamline Australia’s mutual assistance relationship with foreign countries.

In 2010-2011 Australia made two requests for mutual legal assistance seeking assistance in relation to offences covered by the Convention. These requests sought witness statements, internet records, immigration records and government records. In relation to the first request, the foreign country was unable to provide assistance as it was not able to locate the records sought. The second request is still under consideration by the foreign country.
In 2010-2011 Australia received 18 requests for mutual legal assistance from foreign countries seeking assistance in relation to offences covered by the Convention. These requests sought company records, bank records, witness statements, material lawfully obtained by Australian law enforcement agencies and the location, restraint and forfeiture of proceeds of crime.

In response to these matters Australia provided material seized pursuant to search warrants, witness statements, material lawfully obtained in Australian law enforcement agencies and undertook extensive enquiries to locate the proceeds of crime.

Australia did not refuse any requests for assistance in 2010-2011.

(b) Observations on the implementation of the article

In response to the experts’ query, Australia stated that it has not encountered any problems receiving international cooperation under the UNCAC as a result of foreign data protection laws.

There is no example of mutual assistance request from a Party that has established the non criminal liability of legal persons for the foreign bribery offences.

Article 46 Mutual legal assistance

Paragraph 3 (a to i)

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

   (a) Taking evidence or statements from persons;
   (b) Effecting service of judicial documents;
   (c) Executing searches and seizures, and freezing;
   (d) Examining objects and sites;
   (e) Providing information, evidentiary items and expert evaluations;
   (f) Providing originals or certified copies of relevant documents and records, including government, bank, financial, corporate or business records;
   (g) Identifying or tracing proceeds of crime, property, instrumentalities or other things for evidentiary purposes;
   (h) Facilitating the voluntary appearance of persons in the requesting State Party;
   (i) Any other type of assistance that is not contrary to the domestic law of the requested State Party;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Subparagraph a:
Part II of the Mutual Assistance in Criminal Matters Act 1987 regulates Australia’s ability to request or provide assistance in relation to taking evidence and producing documents or other articles. Taking evidence from witnesses in an Australian Court can only be done where a proceeding has commenced in the requesting country.

A proceeding is defined at section 3 of the Mutual Assistance in Criminal Matters Act 1987 and includes a proceeding before a judicial officer or a jury for the purpose of gathering evidential material that may lead to the laying of a criminal charge or assessing evidential material in support of the laying of a criminal charge.
Australian authorities can obtain voluntary witness statements in response to a mutual assistance request.

Subparagraph b

Australia does provide mutual legal assistance for the purpose of effecting service of judicial documents.

While the *Mutual Assistance in Criminal Matters Act 1987* does not specifically regulate the service of judicial documents, section 6 provides that the Act does not prevent the provision or obtaining of international assistance in criminal matters other than assistance of a kind that may be provided or obtained under the Act.

Subparagraph c

Parts III and VIIA of the *Mutual Assistance in Criminal Matters Act 1987* regulates Australia’s ability to request or provide assistance for the issue and execution of search warrants to seize evidential material.

Part VI of the *Mutual Assistance in Criminal Matters Act 1987* relates to proceeds of crime matters. Subdivisions A and B of Division 2 of Part VI provide for the enforcement of foreign pecuniary, forfeiture and restraining orders relating to foreign criminal proceedings, and Subdivision F of Division 2 of Part VI provides for the requesting of search warrants to obtain proceeds or instruments of the offence relating to a foreign serious offence.

Subparagraph d

Part VIIA of the *Mutual Assistance in Criminal Matters Act 1987* relates to search and seizure, which includes the examination of objects and sites.

Subparagraph e

Part IV of the *Mutual Assistance in Criminal Matters Act 1987* provides that Australia may authorise the taking of evidence or production of documents or other articles, and the transmission of evidence, documents or other articles to a requesting country. This includes information, evidentiary items and expert evaluations.

Subparagraph f

Under section 15 of the *Mutual Assistance in Criminal Matters Act 1987* the Attorney-General may authorise a police officer to apply to a Magistrate for a search warrant in respect of evidential material sought by a foreign country. ‘Evidential material’, as provided in section 3 of the *Mutual Assistance in Criminal Matters Act 1987*, means a thing that is relevant to a proceeding or investigation, including such a thing in electronic form. This includes relevant documents and records, including government, bank, financial, corporate or business.

Subparagraph g

Part VI of the *Mutual Assistance in Criminal Matters Act 1987* contains provisions facilitating assistance in relation to proceeds of crime. These provisions relate to enforcing and registering foreign orders, issuing restraining orders relating to foreign criminal proceedings, issuing production orders, monitoring orders, notices to financial institutions and issuing search warrants relating to foreign serious offences.

The types of assistance Australia can provide to other countries in tracing and recovering the proceeds of crime under the Act include:
• production orders in respect of “property-tracking documents”, being documents relevant to identifying/locating property of any person who has been convicted of or charged with an offence, or who is suspected of having committed a serious offence, and documents relevant to identifying/locating the proceeds or instruments of crime – such orders may be directed to banks, real estate agents, solicitors, relatives or associates of a suspect etc.
• search warrants to seize the proceeds or instruments of a foreign serious offence, or to search for and seize property-tracking documents in relation to a foreign serious offence
• monitoring orders to obtain information about transactions conducted through an account with a financial institution in Australia which is reasonably suspected of being relevant to a foreign criminal investigation or proceeding

Subparagraph h
Division 2 of Part IV of the Mutual Assistance in Criminal Matters Act 1987 facilitates the voluntary appearance of prisoners and other persons at a hearing in the requesting country. The hearing must be held in connection with a proceeding relating to a criminal matter. Please refer to the response at 46(3)(a) for the definition of ‘proceeding’.

Subparagraph i
Section 6 of the Mutual Assistance in Criminal Matters Act 1987 provides that the Act does not prevent the provision or obtaining of other kinds of international assistance in criminal matters not covered by the Act.

With regard to examples and statistics, Australia stated the following:

Subparagraph a
Australia regularly seeks and provides assistance to take evidence before a court or obtain voluntary witness statements.

In 2010-2011 Australia made two requests relating to offences covered by the Convention. One of the requests made by Australia sought voluntary witness statements. The foreign country is still considering this request for assistance.

In 2010-2011 Australia did not receive any requests under the Convention for this type of assistance.

Subparagraph b
Australia regularly receives requests from foreign countries requesting the service of judicial documents.

In 2010-2011 Australia received 213 requests from foreign countries for the service of judicial documents for a range of offences including those covered by the Convention. Australia effected service of these documents either via personal service of the document to the intended recipient or sending of the document to the intended recipient via the postal system depending on the requirements specified by the requesting country.

In 2010-2011 Australia did not make any requests under the Convention or relating to offences covered by the Convention for the service of documents.

Subparagraph c
- Search and seizure
Australia regularly seeks assistance from, and provides assistance to, foreign countries in the form of executing searches and seizures. This form of assistance is regularly sought in relation to business records, bank records and internet records.
In 2010-2011 Australia made two requests relating to offences covered by the Convention. Both requests sought assistance in the form of search and seizure.

In 2010-2011 Australia received three requests relating to offences covered by the Convention seeking this type of assistance. Australia has provided assistance in response to one request and is currently actioning the other two requests.

- Freezing of Assets
  In 2010-2011 Australia did not make any requests under the Convention or relating to offences covered by the Convention seeking the registration of a restraining order.

In 2010-2011 Australia received 11 requests under the Convention to identify, trace and restrain assets of specified individuals. In response to these requests Australian authorities undertook extensive enquiries to identify whether the individuals held any assets in Australia. To date no assets have been identified. Seven of the requests are completed and Australian authorities are continuing enquiries in relation to the remaining four requests.

Australia received one request relating to offences covered by the Convention seeking assets of specified individuals to be restrained. In response to this request Australian authorities undertook extensive enquiries to identify whether the individuals held any assets in Australia. No assets were identified and the matter is complete.

Subparagraph d
As noted in the response to Article 46(3)(c), Australia regularly seeks assistance from, and provides assistance to, foreign countries in the form of executing searches and seizures. These searches and seizures are often required in order to obtain access for the examination of objects and sites.

In 2010-2011 Australia made two requests relating to offences covered by the Convention. Both requests sought records which were required to be seized before they were able to be provided in response to our requests. In one matter, the assistance sought was ultimately unable to be provided as the records were not able to be located. The other request is still being considered by the foreign country.

In 2010-2011 Australia received three requests relating to offences covered by the Convention seeking the seizure of records. Australia has provided assistance in response to one request and is currently actioning the other two requests.

Subparagraph e
Australia regularly receives requests for the provision of information, evidentiary items and expert evaluations (although requests seeking the latter form of assistance are less frequent). The responses in above relation to Article 46(a)-(d) cover requests for information, evidentiary items and expert evaluations (namely, the taking of evidence and search and seizure).

Subparagraph f
In 2010-2011 Australia made two requests relating to offences covered by the Convention that sought this type of assistance. In one matter, the assistance sought was ultimately unable to be provided as the records were not able to be located. The other request is still being considered by the foreign country.

In 2010-2011 Australia received 18 requests relating to offences covered by the Convention. Five of these requests sought the provision of original or certified copies of government or business records. Australian authorities have provided assistance in response to one request and are currently considering the other four requests.

Subparagraph g
Australia regularly seeks assistance from, and provides assistance to, foreign countries to locate and trace proceeds or crime including property.

In 2010-2011 Australia did not make any requests under the Convention, or relating to offences covered by the Convention, for this type of assistance.

In 2010-2011 Australia received 11 requests under the Convention to identify, trace and restrain assets of specified individuals. In response to these requests Australian authorities conducted extensive enquiries to identify whether the individuals held any assets in Australia. To date no assets have been identified. Seven of the requests are completed and Australian authorities are continuing enquiries in relation to the remaining four requests.

Australia received one request relating to offences covered by the Convention seeking assistance to identify and trace assets of specified individuals. In response to this request Australian authorities conducted extensive enquiries to identify whether the individuals held any assets in Australia. No assets were identified and the matter is now complete.

Subparagraph h
Australia has previously facilitated requests seeking this type of assistance.

In 2010-2011 Australia did not make or receive any requests under the Convention or for offences covered by the Convention for this type of assistance.

Subparagraph i
Australia can consider any requests for mutual legal assistance insofar as providing the assistance sought in the request is not contrary to Australia’s domestic law.

Australia regularly provides other kinds of international assistance not covered by the Mutual Assistance in Criminal Matters Act 1987 but that are not contrary to domestic law. These types of assistance include the service of judicial documents, obtaining voluntary witness statements and arranging for voluntary witnesses to give evidence via video link.

(b) Observations on the implementation of the article

Under Australian law, information on personal tax cannot be provided for mutual legal assistance purposes. Australia cannot obtain and/or provide certain types on the basis of another country request, including real-time telecommunications interception, DNA sweeps, and tax records.

It is possible to provide mutual legal assistance for an offence that is not regulated as a crime in Australia. Dual criminality is a discretionary ground for refusal of a request; and to date no refusal has been made due to the absence of dual criminality.

Urgent matters can be responded during 48 hours.

Under Australian law, an individual against whom there are no pending charges cannot be compelled to give evidence because such compulsion would be in violation of the right to remain silent. This was questioned by one reviewing country, whether the other reviewing country was firmly of the opinion that Australia is in compliance with article 46 of the Convention. The former argued that suspects should be summoned to appear at the court to provide assistance to requesting countries. During the review, Australia explained that while it cannot compel a suspect to give evidence before a court, in response to a mutual legal assistance request it would work with the requesting country to fulfill the request in other ways, including asking an Australian Federal Police officer would approach the suspect to advise him or her of the charge referred to in the request and ask whether he or she wished to make a voluntary statement or participate in an interview. If the suspect wished to make a statement, a signed written statement would be forwarded to the requesting country. If the suspect
declined, the requesting country would be advised that the suspect had been approached by police and informed of the nature of the charge but did not wish to make a statement in relation to the matter. If requested, the AFP officer who approached the person could provide a formal statement outlining the steps they took and what the person said to them.

Australia makes every effort to obtain evidence sought for the investigation and prosecution of a person in a requesting country and has never refused a request seeking evidence for the investigation or prosecution of an UNCAC related offence. Other investigative mechanisms that may be available to Australia to progress a foreign country’s investigation in the absence of being able to compel a suspect include:

- search and seizure (including bank and business records, evidence from a person’s residence)
- taking voluntary statements from, or compelling, other witnesses who may be able to give evidence of the offence
- providing information held by Australian authorities about a suspect (such as immigration records and criminal records), and
- providing evidence of the foreign offence which has already been obtained in a related Australian investigation.

Amendments to Australia’s mutual assistance laws which will enter into force shortly provide further mechanisms to assist a foreign investigation where appropriate, for example compelling a suspect to undergo a forensic procedure, and seeking evidence via a surveillance device on behalf of the foreign country.

Thus, Australia was invited to 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.

**Article 46 Mutual legal assistance**

**Paragraph 3 (j and k)**

3. Mutual legal assistance to be afforded in accordance with this article may be requested for any of the following purposes:

- (j) Identifying, freezing and tracing proceeds of crime in accordance with the provisions of chapter V of this Convention;
- (k) The recovery of assets, in accordance with the provisions of chapter V of this Convention.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provisions under review.

**Subparagraph j**

Part VI of the *Mutual Assistance in Criminal Matters Act 1987* contains provisions facilitating assistance in relation to proceeds of crime. These provisions relate to enforcing and registering foreign orders (including pecuniary, forfeiture and restraining orders), issuing production orders, monitoring orders, notices to financial institutions and issuing search warrants relating to foreign serious offences.

The applicable measures under the *Mutual Assistance in Criminal Matters Act 1987* are outlined in greater detail under Article 46(3)(g).

**Subparagraph k**

Part VI of the *Mutual Assistance in Criminal Matters Act 1987* facilitates cooperation between Australia and other countries in tracing, restraint and confiscation of proceeds of crime. The types of
assistance Australia can provide to other countries in tracing and recovering the proceeds of crime under the Act include:

- **production orders** in respect of “property-tracking documents”, being documents relevant to identifying/locating property of any person who has been convicted of or charged with an offence, or who is suspected of having committed a serious offence, and documents relevant to identifying/locating the proceeds or instruments of crime – such orders may be directed to banks, real estate agents, solicitors, relatives or associates of a suspect etc.
- **search warrants** to seize the proceeds or instruments of a foreign serious offence, or to search for and seize property-tracking documents in relation to a foreign serious offence
- **monitoring orders** to obtain information about transactions conducted through an account with a financial institution in Australia which is reasonably suspected of being relevant to a foreign criminal investigation or proceeding
- **registration of foreign restraining and confiscation orders.**

Australia supports sharing of confiscated assets with other countries. The *Mutual Assistance in Criminal Matters Act 1987* and the *Proceeds of Crime Act 2002* allow for confiscated assets to be repatriated to a foreign country with the approval of the Attorney-General or Minister of Justice. Assets may be shared in accordance with the provisions of the *Proceeds of Crime Act 2002* on one of the following bases:

- where the Minister considers sharing of assets is appropriate under the “equitable sharing program”
- where the Minister approves sharing of assets to satisfy Australia’s obligations in respect of a foreign confiscation order registered in Australia under Australia’s mutual assistance or proceeds of crime legislation.

The equitable sharing program is an arrangement under which Australia shares with a foreign country a proportion of any proceeds of any unlawful activity recovered under a federal law if, in the Minister’s opinion, the foreign country has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the unlawful activity.

As examples of implementation, Australia indicated that it regularly seeks assistance from, and provides assistance to, foreign countries in the form of identifying, freezing and tracing proceeds of crime.

In 2010-2011 Australia did not make any requests under the Convention or relating to offences covered by the Convention for this form of assistance.

In 2010-2011 Australia received 11 requests under the Convention to locate the assets of specified individuals. In response to these requests Australian authorities conducted extensive enquiries to identify if the individuals held any assets in Australia. To date no assets have been identified. Seven of the requests are completed and Australian authorities are completing inquiries in relation to the remaining four requests.

Australia received one request relating to offences covered by the Convention seeking assistance to identify and trace assets of specified individuals. In response to this request Australian authorities conducted extensive enquiries to identify if the individuals held any assets in Australia. No assets were identified and the matter is now complete.

(b) **Observations on the implementation of the article**

Australia informed the reviewers that the MLA Bill foresees the following actions: enforcement of non-conviction based orders from any country, streamline authorisation process for the use of investigative tools, grounds for refusal being extended to other cases such as death penalty.
Article 46 Mutual legal assistance

Paragraph 4

4. Without prejudice to domestic law, the competent authorities of a State Party may, without prior request, transmit information relating to criminal matters to a competent authority in another State Party where they believe that such information could assist the authority in undertaking or successfully concluding inquiries and criminal proceedings or could result in a request formulated by the latter State Party pursuant to this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Information relating to criminal matters can be transmitted, without the involvement of formal Government-to-Government requests, on a police-to-police or agency to agency basis. Police-to-police assistance does not include providing information that must be obtained by the exercise of coercive powers, such as material obtained by search warrant. Such assistance must be sought through a formal mutual assistance request.

Australia can provide the following types of assistance on a police to police basis:

- taking voluntary witness statements
- conducting voluntary witness interviews
- taking voluntary witness testimony via a video link facility
- hosting foreign police who are undertaking investigations in Australia
- sharing intelligence
- conducting optical surveillance without a warrant
- conducting crime scene analysis where material is not obtained under an Australian warrant
- taking fingerprints
- obtaining criminal records, or
- obtaining publicly available material

The Australian Federal Police (AFP) can facilitate police-to-police assistance either directly or via Interpol. The AFP also maintains an extensive international network where officers are posted in Australian overseas missions. These officers provide a conduit for Australian and overseas law enforcement agencies to exchange information and progress investigations.

The AFP has also entered into memoranda of understanding (MOUs) with its counterparts in a large number of foreign countries. These MOUs facilitate cooperation between the policing agencies.

Most Australian non-police investigative agencies (including the Australian Taxation Office and the Australian Securities and Investments Commission) also have liaison and information sharing arrangements with their counterparts in foreign countries. The information sought through agency-to-agency assistance often does not require the exercise of coercive powers and does not require a mutual assistance request to be made.

Furthermore, with regard to examples of implementation, Australia indicated that wherever possible, the Australian Central Authority for mutual assistance in criminal matters encourages assistance to be sought and provided through police-to-police (or other informal) channels as it can be faster and more
flexible than the formal mutual legal assistance process. Informal assistance can also complement a formal mutual assistance request. For example, Australian police can make advance preparations or provide non-coercive assistance at the same time as a mutual assistance request for material required under a search warrant is being processed.

(b) Observations on the implementation of the article

AFP reported that numerous MOUs have been signed by the AFP.

Article 46 Mutual legal assistance

Paragraph 5

5. The transmission of information pursuant to paragraph 4 of this article shall be without prejudice to inquiries and criminal proceedings in the State of the competent authorities providing the information. The competent authorities receiving the information shall comply with a request that said information remain confidential, even temporarily, or with restrictions on its use. However, this shall not prevent the receiving State Party from disclosing in its proceedings information that is exculpatory to an accused person. In such a case, the receiving State Party shall notify the transmitting State Party prior to the disclosure and, if so requested, consult with the transmitting State Party. If, in an exceptional case, advance notice is not possible, the receiving State Party shall inform the transmitting State Party of the disclosure without delay.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Section 43B of the Mutual Assistance in Criminal Matters Act 1987 restricts the use of material obtained as a result of a request made by Australia. Material is not to be intentionally used for any other purpose without the approval of the Attorney-General. In practice, Australia seeks the consent of the foreign country before seeking the Attorney-General’s approval to use the material for another purpose.

In relation to requests made to Australia by foreign countries, section 43C of the Mutual Assistance in Criminal Matters Act 1987 prohibits any person who, because of their employment, has knowledge of the contents of a mutual legal assistance request, the fact that a request has been made or the fact that a request has been granted or refused from disclosing this information except if it is necessary to do so in the performance of his or her duties or if the Attorney-General approves the disclosure.

In addition, many of Australia’s bilateral mutual legal assistance treaties include provisions that the requested party shall not disclose the contents of a mutual assistance request unless authorised by the requesting party.

Australia would comply with any request to keep information confidential to the extent it is not inconsistent with Australian law. If upholding confidentiality would be inconsistent with Australian law, Australian authorities would consult with the foreign country.

There have been no relevant examples.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance
Paragraph 8

8. States Parties shall not decline to render mutual legal assistance pursuant to this article on the ground of bank secrecy.

(a) Summary of information relevant to reviewing the implementation of the article

Australia indicated that bank secrecy is not a specified mandatory or discretionary ground for refusing a request for mutual legal assistance under section 8 the Mutual Assistance in Criminal Matters Act 1987.

Australia is also a party to bilateral mutual legal assistance treaties that include provisions which specify that bank secrecy is not a ground for refusing assistance. For example, Australia’s bilateral mutual legal assistance treaty with Malaysia states that ‘assistance shall not be refused solely on the ground of secrecy of banks and similar financial institutions or that the offence is also considered to involve fiscal matters.’

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance

Subparagraph 9 (a)

9. (a) A requested State Party, in responding to a request for assistance pursuant to this article in the absence of dual criminality, shall take into account the purposes of this Convention, as set forth in article 1:

(a) Summary of information relevant to reviewing the implementation of the article

Under Section 8(2)(a) of the Mutual Assistance in Criminal Matters Act 1987, dual criminality is a discretionary ground for refusing a request for mutual legal assistance.

It would be open to the Attorney-General, as decision maker, to take into account the purposes of the Convention in making a decision whether or not to grant the request for assistance.

As a party to the UNCAC, Australia has criminalised all of the mandatory offences contained within the Convention.

Australia has developed a strong legislative regime criminalising corruption. Australia’s corruption related offences are dealt with in federal legislation and the legislation of each State and Territory. Corruption related offences that are dealt with at the federal level include:

- domestic bribery and foreign bribery offences are contained in the Criminal Code Act 1995
- dealing in proceeds of crime is an offence under the Criminal Code Act 1995
- obstruction of justice is criminalised in the Crimes Act 1914
- offences for improperly dealing with public money are covered by the Financial Management and Accountability Act 1997 and the Commonwealth Authorities and Companies Act 1997, and
- breach of duties as a director of a company is dealt with by the Corporations Act 2001.
No request for mutual legal assistance relating to conduct covered by the Convention has been refused by Australia due to the absence of dual criminality

(b) Observations on the implementation of the article

Section 8(2) of the Mutual Assistance in Criminal Matters Act 1987 was provided at the request of the reviewers.

(2) A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney-General:
   (a) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Australia, would not have constituted an offence against Australian law; or
   (b) the request relates to the prosecution or punishment of a person in respect of an act or omission that occurred, or is alleged to have occurred, outside the foreign country and a similar act or omission occurring outside Australia in similar circumstances would not have constituted an offence against Australian law; or
   (c) the request relates to the prosecution or punishment of a person in respect of an act or omission where, if it had occurred in Australia at the same time and had constituted an offence against Australian law, the person responsible could no longer be prosecuted by reason of lapse of time or any other reason; or
   (d) the provision of the assistance could prejudice an investigation or proceeding in relation to a criminal matter in Australia; or
   (e) the provision of the assistance would, or would be likely to, prejudice the safety of any person (whether in or outside Australia); or
   (f) the provision of the assistance would impose an excessive burden on the resources of the Commonwealth or of a State or Territory; or
   (g) it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted.

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance

Subparagraph 9 (b)

States Parties may decline to render assistance pursuant to this article on the ground of absence of dual criminality. However, a requested State Party shall, where consistent with the basic concepts of its legal system, render assistance that does not involve coercive action. Such assistance may be refused when requests involve matters of a de minimis nature or matters for which the cooperation or assistance sought is available under other provisions of this Convention;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The Mutual Assistance in Criminal Matters Act 1987 regulates the provision of assistance to a foreign country where the exercise of coercive powers is necessary. Section 6 provides that the Act does not prevent the provision or obtaining of international assistance in criminal matters other than assistance of a kind that may be provided or obtained under the Act.

Under section 8(2)(a) of the Mutual Assistance in Criminal Matters Act 1987, dual criminality is a discretionary ground for refusing a request for mutual legal assistance.
Therefore Australia can render assistance that does not involve coercive powers outside of the formal mutual assistance regime.

Australia does not work to a formal definition of ‘de minimis’ for the purpose of mutual assistance. However mutual assistance can only be provided for ‘serious offences’ being an offence for which the maximum penalty is imprisonment for not less than 12 months.

Under Section 8(2)(a) of the Mutual Assistance in Criminal Matters Act 1987, dual criminality is a discretionary ground for refusing a request for mutual legal assistance.

The following assistance does not require the exercise of coercive powers and Australian law enforcement could provide the following types of assistance on a police to police basis, including in the absence of dual criminality:

- taking voluntary witness statements
- conducting voluntary witness interviews
- taking voluntary witness testimony via a video link facility
- hosting foreign police who are undertaking investigations in Australia
- sharing intelligence
- conducting optical surveillance without a warrant
- conducting crime scene analysis where material is not obtained under an Australian warrant
- taking fingerprints
- obtaining criminal records, or
- obtaining publicly available material.

In 2010-2011 Australia did not refuse or have any requests for assistance refused due to the absence of dual criminality.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance

Subparagraph 9 (e)

9. (c) Each State Party may consider adopting such measures as may be necessary to enable it to provide a wider scope of assistance pursuant to this article in the absence of dual criminality.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Under the Mutual Assistance in Criminal Matters Act 1987, dual criminality is a discretionary ground for refusal. In circumstances where dual criminality is not established, it would be open to the Attorney-General, as decision maker, to grant assistance where s/he considers it is appropriate to do so.

In assessing dual criminality Australia adopts a conduct-based approach.
Australia could also provide assistance outside of the formal mutual assistance regime where the assistance did not involve coercive action (please see the response to 46(9)(b) above).

As noted above, under the *Mutual Assistance in Criminal Matters Act 1987*, dual criminality is a discretionary ground of refusal.

**(b) Observations on the implementation of the article**

The reviewers were satisfied with the answer provided

**Article 46 Mutual legal assistance**

**Paragraph 10**

10. A person who is being detained or is serving a sentence in the territory of one State Party whose presence in another State Party is requested for purposes of identification, testimony or otherwise providing assistance in obtaining evidence for investigations, prosecutions or judicial proceedings in relation to offences covered by this Convention may be transferred if the following conditions are met:
   (a) The person freely gives his or her informed consent;
   (b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

**(a) Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

**Subparagraph a**

Part IV of the *Mutual Assistance in Criminal Matters Act 1987* provides for arrangements to be made for persons, including prisoners, to give evidence or assist investigations in a foreign country.

Section 26 of the Act provides for arrangements to be made for a prisoner to be transferred to another country to give evidence in criminal proceedings in that country. Section 27 of the Act provides for arrangements to be made for a prisoner to be transferred to another country to give assistance in relation to a criminal investigation in that country.

Subparagraph 26(1)(d)(i) requires the Attorney-General to be satisfied that the prisoner has consented to giving evidence in the requesting foreign country. Subparagraph 27(1)(d)(i) requires the Attorney-General to be satisfied that the prisoner has consented to being removed to the requesting foreign country for the purpose of giving assistance in relation to an investigation.

**Subparagraph b**

Part IV of the *Mutual Assistance in Criminal Matters Act 1987* provides for arrangements to be made for detained persons to give evidence or assist investigations in a foreign country.

Section 26 of the Act provides for arrangements to be made for a prisoner to be transferred to another country to give evidence in criminal proceedings in that country. Section 27 of the Act provides for arrangements to be made for a prisoner to be transferred to another country to give assistance in relation to a criminal investigation in that country.

Subparagraphs 26(2)(d)(ii) and 27(2)(d)(ii) provide that a person who is detained or serving a sentence may give evidence or assist investigations in a foreign country if the Attorney-General is satisfied that
the foreign country has given adequate (whether or not unqualified) undertakings in respect of matters under subsections 26(3) or 27(3), respectively.

In 2010-2011 Australia did not make or receive any requests under Article 46(10).

Australia has made and received mutual assistance requests for the transfer of prisoners from and to foreign countries to give evidence at hearings or assist in relation to investigations. These requests were actioned pursuant to Part IV of the Mutual Assistance in Criminal Matters Act 1987.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided

Article 46 Mutual legal assistance

Paragraph 11

11. For the purposes of paragraph 10 of this article:

(a) The State Party to which the person is transferred shall have the authority and obligation to keep the person transferred in custody, unless otherwise requested or authorized by the State Party from which the person was transferred;

(b) The State Party to which the person is transferred shall without delay implement its obligation to return the person to the custody of the State Party from which the person was transferred as agreed beforehand, or as otherwise agreed, by the competent authorities of both States Parties;

(c) The State Party to which the person is transferred shall not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person;

(d) The person transferred shall receive credit for service of the sentence being served in the State from which he or she was transferred for time spent in the custody of the State Party to which he or she was transferred.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Subparagraph a

Part IV of the Mutual Assistance in Criminal Matters Act 1987 provides for arrangements to be made for detained persons to give evidence or assist investigations in a foreign country.

Subsection 16(1) of the Act provides for requests by Australia for the transfer of a foreign prisoner to Australia to attend a hearing in connection with a proceeding relating to a criminal matter. Subsection 16(2) provides for requests by Australia for the transfer of a foreign prisoner to Australia to assist in relation to an investigation.

Section 18 of the Act provides that a prisoner transferred to Australia for the purposes of giving evidence pursuant to section 16 shall, if requested by the foreign country, be kept in such custody as directed by the Attorney-General while the person is in Australia or travelling to or from Australia pursuant to the request.

Subparagraph b

Part IV of the Mutual Assistance in Criminal Matters Act 1987 provides for arrangements to be made for detained persons to give evidence or assist investigations.
As stated above, subsection 16 (1) of the Act provides for requests by Australia for the transfer of certain persons (i.e. prisoners) to Australia to attend a hearing in connection with a proceeding. Subsection 16(2) provides for requests by Australia for the transfer of certain persons (i.e. prisoners) to Australia to assist in relation to an investigation.

Subsection 16(3) provides that if a request is made under subsection (1) and (2) the Attorney-General may make arrangements with an appropriate authority of the foreign country for the purposes of:

(a) the removal of the person to Australia
(b) the custody of the person while in Australia
(c) *the return of the person to the foreign country*, and
(d) other relevant matters.

**Subparagraph c**

See response to Article 46(11)(b) above.

Australia would not require the requested country to initiate extradition proceedings for the return of a person who has been transferred to Australia for such a purpose.

**Subparagraph d**

Part IV of the *Mutual Assistance in Criminal Matters Act 1987* provides for arrangements to be made for detained persons to give evidence or assist investigations in a foreign country.

Section 26 of the Act provides for arrangements to be made for a prisoner to be transferred to another country to give evidence in criminal proceedings in that country. Section 27 of the Act provides for arrangements to be made for a prisoner to be transferred to another country to give assistance in relation to a criminal investigation in that country.

Section 28 of the *Mutual Assistance in Criminal Matters Act 1987* provides that where a prisoner transferred to a foreign country pursuant to a request under section 26 or 27, the prisoner shall, while in custody in connection with the request (including custody outside Australia), be deemed to be continuing to serve the term of imprisonment imposed in Australia.

Furthermore, Australia provided examples of implementation. In 2010-2011 Australia did not make or receive any requests under Article 46(10).

However, Australia has otherwise made mutual assistance requests for the transfer of prisoners from foreign countries to Australia to give evidence at hearings or assist in relation to investigations. These requests were actioned pursuant to Part IV of the *Mutual Assistance in Criminal Matters Act 1987* and did not require the State Party from which the person was transferred to initiate extradition proceedings for the return of the person.

Australia has received mutual assistance requests for the transfer of prisoners from Australia to foreign countries to give evidence at hearings or assist in relation to investigations. These requests were actioned pursuant to Part IV of the *Mutual Assistance in Criminal Matters Act 1987* and the transferred prisoners have been deemed to be continuing to serve their term of imprisonment whilst in custody in the requesting foreign country.

(b) **Observations on the implementation of the article**

The reviewers were satisfied with the answer provided.

**Article 46 Mutual legal assistance**

**Paragraph 12**
12. Unless the State Party from which a person is to be transferred in accordance with paragraphs 10 and 11 of this article so agrees, that person, whatever his or her nationality, shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in the territory of the State to which that person is transferred in respect of acts, omissions or convictions prior to his or her departure from the territory of the State from which he or she was transferred.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Part IV of the Mutual Assistance in Criminal Matters Act 1987 provides for arrangements to be made for detained persons to give evidence or assist investigations in a foreign country.

As stated above, subsection 16(1) of the Act provides for requests by Australia for the transfer of a foreign prisoner to Australia to attend a hearing in connection with a proceeding relating to a criminal matter. Subsection 16(2) provides for requests by Australia for the transfer of a foreign prisoner to Australia to assist in relation to an investigation.

Section 19 provides that:

(1) Where a person is in Australia:

(a) pursuant to a request under section 16; or

(b) to give evidence in a proceeding, or to give assistance in relation to an investigation, pursuant to a request made by or on behalf of the Attorney-General (not being a request under section 16) for international assistance in a criminal matter;

the person, subject to subsection (2), shall not:

(c) be detained, prosecuted or punished in Australia for any offence that is alleged to have been committed, or that was committed, before the person’s departure from the foreign country pursuant to the request;

(d) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the person’s departure from the foreign country pursuant to the request, being a civil suit to which the person could not be subjected if the person were not in Australia;

(e) be required to give evidence in any proceeding in Australia other than the proceeding to which the request relates (if any).

(f) be required, in the proceeding to which the request relates (if any), to answer any question that the person would not be required to answer in a proceeding in the foreign country relating to a criminal matter; or

(g) be required, in the proceeding to which the request relates (if any), to produce any document or article that the person would not be required to produce in a proceeding in the foreign country relating to a criminal matter.

Mutual Assistance in Criminal Matters Act 1987

Section 16 - Requests for removal of certain persons to Australia

(1) Where:

(a) a proceeding relating to a criminal matter has commenced in Australia; and

(b) the Attorney-General is of the opinion that a person who is in a foreign country:

(i) is a foreign prisoner;

(ii) is capable of giving evidence relevant to the proceeding; and
(iii) has given his or her consent to being removed to Australia for the purpose of giving evidence in the proceeding; Australia may request the foreign country to authorise the attendance of the person at a hearing in connection with the proceeding.

(2) Where:

(a) an investigation relating to a criminal matter has commenced in Australia; and
(b) the Attorney-General is of the opinion that a person who is in a foreign country:
   (i) is a foreign prisoner;
   (ii) is capable of giving assistance in relation to the investigation; and
   (iii) has given his or her consent to being removed to Australia for the purposes of giving assistance in relation to the investigation;

Australia may request the foreign country to authorise the removal of the person to Australia for the purpose of giving assistance in relation to the investigation.

(3) If a request is made under subsection (1) or (2), the Attorney-General may make arrangements with an appropriate authority of the foreign country for the purposes of:

(a) the removal of the person to Australia;
(b) the custody of the person while in Australia;
(c) the return of the person to the foreign country; and
(d) other relevant matters.

Section 19 - Immunities

(1) Where a person is in Australia:

(a) pursuant to a request under section 16; or

(b) to give evidence in a proceeding, or to give assistance in relation to an investigation, pursuant to a request made by or on behalf of the Attorney-General (not being a request under section 16) for international assistance in a criminal matter;

the person, subject to subsection (2), shall not:

(c) be detained, prosecuted or punished in Australia for any offence that is alleged to have been committed, or that was committed, before the person’s departure from the foreign country pursuant to the request;

(d) be subjected to any civil suit in respect of any act or omission of the person that is alleged to have occurred, or that occurred, before the person’s departure from the foreign country pursuant to the request, being a civil suit to which the person could not be subjected if the person were not in Australia;

(e) be required to give evidence in any proceeding in Australia other than the proceeding to which the request relates (if any).

(f) be required, in the proceeding to which the request relates (if any), to answer any question that the person would not be required to answer in a proceeding in the foreign country relating to a criminal matter; or

(g) be required, in the proceeding to which the request relates (if any), to produce any document or article that the person would not be required to produce in a proceeding in the foreign country relating to a criminal matter.

(1A) A duly authorised foreign law immunity certificate is admissible in proceedings as prima facie evidence of the matters stated in the certificate.

(2) Subsection (1) ceases to apply to a person if:

(a) the person has left Australia; or

(b) the person has had the opportunity of leaving Australia and has remained in Australia otherwise than for:

   (i) the purpose to which the request relates;
   (ii) the purpose of giving evidence in a proceeding in Australia certified by the Attorney-General, in writing, to be a proceeding in which it is desirable that the person give evidence; or
(iii) the purpose of giving assistance in relation to an investigation in Australia certified by the Attorney-General, in writing, to be an investigation in relation to which it is desirable that the person give assistance.

(2A) Paragraph (1)(f) or (g) does not apply in a case where its application would be inconsistent with a provision of a mutual assistance treaty between Australia and the foreign country concerned.

(3) A certificate given by the Attorney-General for the purposes of subparagraph (2)(b)(ii) or (iii) has effect from the day specified in the certificate (which may be a day before the day on which the certificate is given).

(4) This section binds the Crown in right of the Commonwealth, of each of the States and of Norfolk Island.

Australia has not made any requests under Article 46(10).

However, Australia has otherwise made mutual assistance requests for the transfer of prisoners from foreign countries to Australia to give evidence at hearings or assist in relation to investigations. These requests were actioned pursuant to Part IV of the Mutual Assistance in Criminal Matters Act 1987.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance

Paragraph 13

13. Each State Party shall designate a central authority that shall have the responsibility and power to receive requests for mutual legal assistance and either to execute them or to transmit them to the competent authorities for execution. Where a State Party has a special region or territory with a separate system of mutual legal assistance, it may designate a distinct central authority that shall have the same function for that region or territory. Central authorities shall ensure the speedy and proper execution or transmission of the requests received. Where the central authority transmits the request to a competent Authority for execution, it shall encourage the speedy and proper execution of the request by the competent authority. The Secretary-General of the United Nations shall be notified of the central authority designated for this purpose at the time each State Party deposits its instrument of ratification, acceptance or approval of or accession to this Convention. Requests for mutual legal assistance and any communication related thereto shall be transmitted to the central authorities designated by the States Parties. This requirement shall be without prejudice to the right of a State Party to require that such requests and communications be addressed to it through diplomatic channels and, in urgent circumstances, where the States Parties agree, through the International Criminal Police Organization, if possible.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Sections 10 and 11 of the Mutual Assistance in Criminal Matters Act 1987 require requests by Australia for international assistance in criminal matters to be made by the Attorney-General, and requests by a foreign country to be made to the Attorney-General, or a person authorised by the Attorney-General.
The Australian Government Attorney-General’s Department is Australia’s Central Authority for mutual assistance in criminal matters.

The Australian Government Attorney-General’s Department is listed as the Australian Central Authority for mutual assistance in the United Nations Office of Drugs and Crime (UNDOC) Directory of Competent National Authorities and is also identified as such in Australia’s 29 bilateral mutual legal assistance treaties.

Mutual Assistance in Criminal Matters Act 1987
Section 10 - Request by Australia
(1) A request for international assistance in a criminal matter that Australia is authorised to make under this Act may be made only by the Attorney-General.

(2) Subsection (1) does not prevent the Attorney-General on behalf of Australia from requesting international assistance in a criminal matter other than assistance of a kind that may be requested under this Act.

Section 11 - Request by foreign country
(1) A request by a foreign country for international assistance in a criminal matter may be made to the Attorney-General or a person authorised by the Attorney-General, in writing, to receive requests by foreign countries under this Act.

(2) A request must be in writing and must include or be accompanied by the following information:
   (a) the name of the authority concerned with the criminal matter to which the request relates;
   (b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;
   (c) a description of the purpose of the request and of the nature of the assistance being sought;
   (d) any information that may assist in giving effect to the request.

However, a failure to comply with this subsection is not a ground for refusing the request.

(3) Where a request by a foreign country is made to a person authorised under subsection (1), the request shall be taken, for the purposes of this Act, to have been made to the Attorney-General.

(4) If a foreign country makes a request to a court in Australia for international assistance in a criminal matter:
   (a) the court must refer the request to the Attorney-General; and
   (b) the request is then taken, for the purposes of this Act, to have been made to the Attorney-General.

The Australian Central Authority ensures the speedy and proper transmission and execution of incoming mutual legal assistance requests. The Australian Central Authority is able to receive mutual assistance requests via regular post, fax, email, or via diplomatic or Interpol channels. These different methods of transmission allow a foreign country to determine the most appropriate channel depending on the urgency of the request.

The Attorney-General’s Department website provides detailed information about how to contact the Australian Central Authority, information about how the Australian Central Authority can assist foreign countries in providing mutual assistance, links to Australian domestic mutual assistance legislation and information about Australia’s bilateral mutual legal assistance treaties and multilateral agreements.

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Where the Attorney-General’s Department transmits foreign requests to the Australian Federal Police or the Commonwealth Director of Public Prosecutions for execution, it encourages expeditious and thorough execution of the request by the competent authority. Departmental case officers remain responsible for requests through to completion and follow up regularly with the competent authority about the execution of each request and provide regular updates to the foreign country.

Australia generally sends mutual legal assistance requests directly to the relevant foreign Central Authority or via diplomatic channels. In making mutual assistance requests, Australia provides an indication of the urgency of the request. Australia’s Central Authority liaises with the foreign Central Authority about the progress of the request. Once the request has been sent, Australia will liaise with the foreign country to respond to any queries that may arise in executing the request or seek updates within a reasonable time period.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance

Paragraph 14

14. Requests shall be made in writing or, where possible, by any means capable of producing a written record, in a language acceptable to the requested State Party, under conditions allowing that State Party to establish authenticity. The Secretary-General of the United Nations shall be notified of the language or languages acceptable to each State Party at the time it deposits its instrument of ratification, acceptance or approval of or accession to this Convention. In urgent circumstances and where agreed by the States Parties, requests may be made orally but shall be confirmed in writing forthwith.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Section 11 of the Mutual Assistance in Criminal Matters Act 1987 requires that requests by foreign countries to Australia be made in writing.

Australia is able to receive urgent requests via fax or email.

Australia is able to consider and make preliminary enquires in response to requests that have been made orally.

Mutual Assistance in Criminal Matters Act 1987

Section 11 - Request by foreign country

(1) A request by a foreign country for international assistance in a criminal matter may be made to the Attorney-General or a person authorised by the Attorney-General, in writing, to receive requests by foreign countries under this Act.

(2) A request must be in writing and must include or be accompanied by the following information:

(a) the name of the authority concerned with the criminal matter to which the request relates;

(b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

(c) a description of the purpose of the request and of the nature of the assistance being sought;
(d) any information that may assist in giving effect to the request. However, a failure to comply with this subsection is not a ground for refusing the request.

(3) Where a request by a foreign country is made to a person authorised under subsection (1), the request shall be taken, for the purposes of this Act, to have been made to the Attorney-General.

(4) If a foreign country makes a request to a court in Australia for international assistance in a criminal matter:
   (a) the court must refer the request to the Attorney-General; and
   (c) the request is then taken, for the purposes of this Act, to have been made to the Attorney-General.

Mutual legal assistance requests made by Australia are always in written English and, if required, accompanied by a translation of the request in the requested country’s official language.

Australia has not notified the Secretary-General of such information.

(b) Observations on the implementation of the article

The reviewers invited Australia to inform the Secretary-General of relevant information.

Article 46 Mutual legal assistance

Paragraph 15

15. A request for mutual legal assistance shall contain:
   (a) The identity of the authority making the request;
   (b) The subject matter and nature of the investigation, prosecution or judicial proceeding to which the request relates and the name and functions of the authority conducting the investigation, prosecution or judicial proceeding;
   (c) A summary of the relevant facts, except in relation to requests for the purpose of service of judicial documents;
   (d) A description of the assistance sought and details of any particular procedure that the requesting State Party wishes to be followed;
   (e) Where possible, the identity, location and nationality of any person concerned; and
   (f) The purpose for which the evidence, information or action is sought.

Paragraph 16

16. The requested State Party may request additional information when it appears necessary for the execution of the request in accordance with its domestic law or when it can facilitate such execution.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Paragraph 15

A template, at Attachment E, that is used by the Australian Central Authority for mutual assistance requests, which sets out all the information to be provided to a foreign country. The attached template does not contain any confidential information.
Subsection 11(2) of the *Mutual Assistance in Criminal Matters Act 1987* states that a mutual legal assistance request from a foreign country must be in writing and must include or be accompanied by the following information:

- the name of the authority concerned with the criminal matter to which the request relates
- a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts
- a description of the purpose of the request and the nature of the assistance sought, and
- any information that may assist in giving effect to the request.

However failure to provide the above information is not a ground for refusing the request.

In circumstances where the required information is not provided, the Australian Central Authority would contact the relevant foreign central authority directly to request the information or alternatively request this information through diplomatic channels noting that it is required to further progress and execute the mutual legal assistance request.

**Paragraph 16**
The Australian Central Authority regularly receives mutual legal assistance requests from foreign countries which do not include all the necessary information required to progress or execute the request. The information that is often omitted includes copies of offence provisions of the foreign country’s domestic law, personal details needed to locate witnesses, and information to indicate whether a proceeding (as defined in section 3 of the *Mutual Assistance in Criminal Matters Act 1987*) has commenced in the foreign country. Sometimes the foreign country does not provide sufficient facts to enable Australian authorities to undertake a dual criminality assessment.

As indicated above, in circumstances where the required information is not provided, the Australian Central Authority contacts the relevant foreign central authority directly to request the information or alternatively requests this information through diplomatic channels noting that it is required to further progress and execute the mutual legal assistance request.

If a foreign country contacts the Australian Central Authority seeking further information to progress Australia’s request, the Australian Central Authority will liaise with the requesting law enforcement or prosecutorial agency and respond in an expeditious manner.

**Observations on the implementation of the article**

The reviewers were satisfied with the answer provided.

**Article 46 Mutual legal assistance**

**Paragraph 17**

17. A request shall be executed in accordance with the domestic law of the requested State Party and, to the extent not contrary to the domestic law of the requested State Party and where possible, in accordance with the procedures specified in the request.

**Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Australia indicated that Australia does, to extent not contrary to Australian law, execute mutual assistance requests in accordance with the procedures specified in the request.
A mere suspect (as opposed to a person who is the subject of criminal proceedings) cannot be compelled to give evidence under Australian law.

When requests for this type of assistance are received by Australia the Central Authority will consult with the foreign country to discuss what alternative assistance might be provided such as obtaining a voluntary witness statement from the suspect. Australia will consult with the foreign country about the form of the statement, any cautions the suspect needs to be advised of before obtaining the statement and whether approaching the suspect will prejudice the foreign country’s investigation.

Australia has, to the extent not contrary to Australian law, also executed requests to ensure that the evidence obtained will comply with the evidentiary requirements of the requesting country, and particularly common law jurisdictions.

(b) Observations on the implementation of the article

One reviewing country reiterated its view regarding taking evidence of suspects, as stated and answered under article 46 paragraph 3.

Article 46 Mutual legal assistance

Paragraph 18

18. Wherever possible and consistent with fundamental principles of domestic law, when an individual is in the territory of a State Party and has to be heard as a witness or expert by the judicial authorities of another State Party, the first State Party may, at the request of the other, permit the hearing to take place by video conference if it is not possible or desirable for the individual in question to appear in person in the territory of the requesting State Party. States Parties may agree that the hearing shall be conducted by a judicial authority of the requesting State Party and attended by a judicial authority of the requested State Party.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Subsection 12(1) of the Mutual Assistance in Criminal Matters Act 1987 provides that Australia may request a foreign country to arrange for a person in that country to give evidence or produce a document or other article. Subsection 12(3) provides that when making a request under subsection (1), Australia may also request that an opportunity be given for the person giving evidence, or producing the document or other article, to be examined or cross-examined, through a video link, from Australia by:

(a) any party to the proceeding or that party’s legal representative; or
(b) any person being investigated or that person’s legal representative.

Subsection 13(1) of the Mutual Assistance in Criminal Matters Act 1987 provides that the Attorney-General may, for the purposes of a proceeding in relation to a criminal matter in the requesting country or another foreign country, authorise the taking of evidence or the production of documents or other articles and the transmission of the evidence, documents or articles to the requesting country.

Subsection 13(2) provides that where the Attorney-General authorises the taking of evidence or the production of documents or other articles under subsection (1):

(a) in the case of the taking of evidence—a Magistrate may take the evidence on oath of each witness appearing before the Magistrate to give evidence in relation to the matter, and a Magistrate who takes any such evidence shall:
(i) cause the evidence to be put in writing and certify that the evidence was taken by the Magistrate; and

(ii) cause the writing so certified to be sent to the Attorney-General; or

(b) in the case of the production of documents or other articles—a Magistrate may, subject to subsection (6), require the production of the documents or other articles and, where the documents or other articles are produced, the Magistrate shall send the documents, or copies of the documents certified by the Magistrate to be true copies, or the other articles, to the Attorney-General.

Subsection 13(4A) provides that if the requesting country so requests, the Magistrate conducting a proceeding under subsection (2) may permit:

(a) any person to whom the proceeding in the requesting country relates or that person’s legal representative; or

(b) the legal representative of the relevant authority of the requesting country;

to examine or cross-examine, through a video link, from the requesting country any person giving evidence or producing a document or other article, at the proceeding.

Australian law does not preclude a person voluntarily giving evidence in a foreign proceeding via video link from a commercial video link facility.

**Mutual Assistance in Criminal Matters Act 1987**

Section 12 - Requests by Australia

(1) Australia may request the appropriate authority of a foreign country:

(a) to arrange for:

    (i) evidence to be taken in the foreign country in accordance with the law of that country; or

    (ii) a document or other article in the foreign country to be produced in accordance with the law of that country;

for the purposes of a proceeding or investigation relating to a criminal matter in Australia; and

(b) to arrange for the evidence, document or other article to be sent to Australia.

(2) To remove any doubt, it is stated that:

(a) any evidence may be taken; or

(b) any document or other article may be obtained;

in the foreign country even though, under Australian law:

(c) the evidence could not have been taken; or

(d) the document or other article could not have been obtained;

by using in the circumstances processes similar to those used in the foreign country.

(3) When making a request under subsection (1), Australia may also request that an opportunity be given for the person giving evidence, or producing the document or other article, to be examined or cross-examined, through a video link, from Australia by:

(a) any party to the proceeding or that party’s legal representative; or

(b) any person being investigated or that person’s legal representative.

Section 13 - Requests by foreign countries for the taking of evidence or the production of documents

(1) Where a request is made by a foreign country (requesting country) that:

(a) evidence be taken in Australia; or
(b) documents or other articles in Australia be produced; for the purposes of a proceeding in relation to a criminal matter in the requesting country or another foreign country, the Attorney-General may, in his or her discretion, by writing in accordance with the approved form, authorise the taking of the evidence or the production of the documents or other articles, and the transmission of the evidence, documents or other articles to the requesting country.

(2) Where the Attorney-General authorises the taking of evidence or the production of documents or other articles under subsection (1):

(a) in the case of the taking of evidence—a Magistrate may take the evidence on oath of each witness appearing before the Magistrate to give evidence in relation to the matter, and a Magistrate who takes any such evidence shall:

(i) cause the evidence to be put in writing and certify that the evidence was taken by the Magistrate; and

(ii) cause the writing so certified to be sent to the Attorney-General; or

(b) in the case of the production of documents or other articles—a Magistrate may, subject to subsection (6), require the production of the documents or other articles and, where the documents or other articles are produced, the Magistrate shall send the documents, or copies of the documents certified by the Magistrate to be true copies, or the other articles, to the Attorney-General.

(3) The evidence of such a witness may be taken in the presence or absence of the person to whom the proceeding in the requesting country relates or of his or her legal representative (if any).

(4) The Magistrate conducting a proceeding under subsection (2) may permit:

(a) the person to whom the proceeding in the requesting country relates;

(b) any other person giving evidence or producing documents or other articles at the proceeding before the Magistrate; and

(c) the relevant authority of the requesting country;

to have legal representation at the proceeding before the Magistrate.

(4A) If the requesting country has so requested, the Magistrate conducting a proceeding under subsection (2) may permit:

(a) any person to whom the proceeding in the requesting country relates or that person’s legal representative; or

(b) the legal representative of the relevant authority of the requesting country;

to examine or cross-examine, through a video link, from the requesting country any person giving evidence or producing a document or other article, at the proceeding.

(5) The certificate by the Magistrate under subsection (2) shall state whether, when the evidence was taken or the documents or other articles were produced, any of the following persons were present:

(a) the person to whom the proceeding in the requesting country relates or his or her legal representative (if any);

(b) any other person giving evidence or producing documents or other articles or his or her legal representative (if any).

(6) Subject to subsections (7) and (8), the laws of each State or Territory with respect to the compelling of persons to attend before a Magistrate, and to give evidence, answer questions and produce documents or other articles, upon the hearing of a charge against a person for an offence against the law of that State or Territory apply, so far as they are capable of application, with respect to the compelling of persons to attend before a Magistrate, and to give evidence, answer questions and produce documents or other articles, for the purposes of this section.

(7) For the purposes of this section, the person to whom the proceeding in the requesting country relates is competent but not compellable to give evidence.
(8) For the purposes of this section, a person who is required to give evidence, or produce documents or other articles, for the purposes of a proceeding in relation to a criminal matter in the requesting country or another foreign country, is not compellable to answer a question, or produce a document or article, that the person is not compellable to answer or produce, as the case may be, in the proceeding in that country.

(9) A duly authenticated foreign law immunity certificate is admissible in proceedings under this section as prima facie evidence of the matters stated in the certificate.

(10) Subsection (8) does not apply in a case where its application would be inconsistent with a provision of a mutual assistance treaty between Australia and the requesting country concerned.

Australia regularly seeks assistance from, and provides assistance to, foreign countries in the form of taking evidence via video link. This form of assistance is usually sought when the person whose evidence is sought is unable or unwilling to travel to the foreign country to give evidence.

Australia has on many occasions successfully assisted foreign countries in locating witnesses and facilitating their giving evidence via video link from commercial video link facilities.

In 2010-2011 Australia did not make any requests for this type of assistance under the Convention or relating to offences covered by the Convention.

(b) Observations on the implementation of the article

In response to the experts’ query, at the country visit, Australia explained the role of the Magistrate in the process.

Article 46 Mutual legal assistance

Paragraph 19

19. The requesting State Party shall not transmit or use information or evidence furnished by the requested State Party for investigations, prosecutions or judicial proceedings other than those stated in the request without the prior consent of the requested State Party. Nothing in this paragraph shall prevent the requesting State Party from disclosing in its proceedings information or evidence that is exculpatory to an accused person. In the latter case, the requesting State Party shall notify the requested State Party prior to the disclosure and, if so requested, consult with the requested State Party. If, in an exceptional case, advance notice is not possible, the requesting State Party shall inform the requested State Party of the disclosure without delay.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Section 43B of the Mutual Assistance in Criminal Matters Act 1987 provides that any material received by Australia from a foreign country for the purposes of a proceeding or investigation is not to be used intentionally for any other purpose without the approval of the Attorney-General. The material is inadmissible in evidence in any proceeding in Australia other than the proceeding in respect of which it was obtained, unless the Attorney-General has approved its use for the purposes of that other proceeding.

In practice, Australia will always seek the consent of the foreign country prior to seeking the approval of the Attorney-General under section 43B.
Many of Australia’s 29 bilateral mutual legal assistance treaties currently in force include provisions prohibiting the use of evidence for a purpose different from that for which it was provided, without the consent of the requested Party.

**Mutual Assistance in Criminal Matters Act 1987**

**Section 43B - Restriction on use of information etc.**

(1) If, as a result of a request made by the Attorney-General under this Act, any material (whether it is evidence, a document, an article or a thing) has been sent to Australia by a foreign country for the purposes of a proceeding or investigation in relation to a criminal matter, the material is not to be used intentionally for any other purpose without the approval of the Attorney-General.

(2) The material is inadmissible in evidence in any proceeding other than the proceeding in respect of which it was obtained unless the Attorney-General has approved its use for the purposes of that other proceeding.

(3) Any information, document, article or thing obtained directly or indirectly from a person by making use of the material:
   (a) otherwise than for the purposes of the proceeding or investigation in respect of which it was obtained; and
   (b) without the approval of the Attorney-General;
   is inadmissible in evidence in any other proceeding and may not be used for the purposes of any other investigation.

(4) Any person who contravenes subsection (1) is guilty of an offence punishable, on conviction, by a term of imprisonment not exceeding 2 years.

Note: Subsection 4B(2) of the *Crimes Act* 1914 allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment.

(5) For the purposes of this section, disclosure of any material is taken to be a use of that material.

(b) **Observations on the implementation of the article**

All government documents are subject to Freedom of Information requests, but there are a number of exemptions to disclosure. Relevant requests are treated in confidence.

**Article 46 Mutual legal assistance**

**Paragraph 20**

20. The requesting State Party may require that the requested State Party keep confidential the fact and substance of the request, except to the extent necessary to execute the request. If the requested State Party cannot comply with the requirement of confidentiality, it shall promptly inform the requesting State Party.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Section 43C of the *Mutual Assistance in Criminal Matters Act* 1987 prohibits a person who, because of their employment, has knowledge of the contents of a mutual legal assistance request, the fact that a request has been made or the fact that a request has been granted or refused from disclosing this information except if it is necessary to do so in the performance of his or her duties or if the Attorney-General approves the disclosure.
In addition, many of Australia’s bilateral mutual legal assistance treaties include provisions protecting confidentiality of mutual assistance requests and the contents of requests.

Australia would comply with any request to keep information confidential to the extent possible under Australian law. If it were not possible to maintain confidentiality of a request in the circumstances of a particular case, Australian authorities would consult with the foreign country.

**Mutual Assistance in Criminal Matters Act 1987**

**Section 43C - Requests for international assistance not to be disclosed**

A person who, because of his or her office or employment, has knowledge of:

(a) the contents of a request for international assistance made by a foreign country to Australia under this Act; or
(b) the fact that such a request has been made; or
(c) the fact that such a request has been granted or refused;

must not intentionally disclose those contents or that fact except if:

(d) it is necessary to do so in the performance of his or her duties; or
(e) the Attorney-General has given his or her approval to the disclosure of those contents or that fact.

Penalty: Imprisonment for 2 years.

Note: Under subsection 4D(1) of the *Crimes Act 1914*, this penalty is the maximum penalty for any offence under this section. Subsection 4B(2) of that Act allows a court to impose an appropriate fine instead of, or in addition to, a term of imprisonment.

In practice, if Australian authorities consider that they cannot provide the requested assistance and comply with a foreign country’s confidentiality requirement Australian authorities will promptly inform the requesting country and liaise with that country to determine whether to proceed with the request.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

**Article 46 Mutual legal assistance**

21. Mutual legal assistance may be refused:

(a) If the request is not made in conformity with the provisions of this article;
(b) If the requested State Party considers that execution of the request is likely to prejudice its sovereignty, security, ordre public or other essential interests;
(c) If the authorities of the requested State Party would be prohibited by its domestic law from carrying out the action requested with regard to any similar offence, had it been subject to investigation, prosecution or judicial proceedings under their own jurisdiction;
(d) If it would be contrary to the legal system of the requested State Party relating to mutual legal assistance for the request to be granted.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Paragraph a
Non-conformance with the provisions of this article is not expressly a ground for refusing to grant the requested assistance.

As indicated above, subsection 11(2) of the *Mutual Assistance in Criminal Matters Act 1987* states that a mutual legal assistance request from a foreign country must be in writing and must include or be accompanied by the following information:

- the name of the authority concerned with the criminal matter to which the request relates
- a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts
- a description of the purpose of the request and the nature of the assistance sought, and
- any information that may assist in giving effect to the request.

However failure to provide the above information is not a ground for refusing the request.

In circumstances where the required information is not provided, the Australian Central Authority would contact the relevant foreign central authority directly to request the information or alternatively request this information through diplomatic channels noting that it is required to further progress and execute the mutual legal assistance request.

Subsection 8(1) of the *Mutual Assistance in Criminal Matters Act 1987* sets out the mandatory grounds for refusal of a mutual assistance request. Subsection 8(2) sets out the discretionary grounds for refusal of a mutual assistance request. Further details are outlined below.

**Paragraph b**

Paragraph 8(1)(e) of the *Mutual Assistance in Criminal Matters Act 1987* provides that a request for assistance shall be refused if the granting of the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory.

**Paragraph c**

Paragraph 8(2)(a) of the *Mutual Assistance in Criminal Matters Act 1987* provides that a request for assistance may be refused if the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Australia, would not have constituted an offence against Australian law.

Paragraph 8(2)(b) provides that a request for assistance may be refused if the request relates to the prosecution or punishment of a person in respect of an act or omission that occurred, or is alleged to have occurred, outside the foreign country and a similar act or omission occurring outside Australia in similar circumstances would not have constituted an offence against Australian law.

Paragraph 8(2)(c) provides that a request for assistance may be refused if the request relates to the prosecution or punishment of a person in respect to an act or omission where, if it had occurred in Australia at the same time and had constituted an offence against Australian law, the person responsible could no longer be prosecuted by reason of lapse of time or any other reason.

The assistance Australia is able to provide to other countries under its mutual assistance regime does not extend beyond the law enforcement tools and powers available to Australian law enforcement agencies (see the discussion of the circumstances in which arrangements may be made for evidence to be taken in Australia at the request of a foreign country in respect of Article 46(17)).

**Paragraph d**

Paragraph 8(2)(g) of the *Mutual Assistance in Criminal Matters Act 1987* provides that Australia may refuse a request for assistance if the Attorney-General considers it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted. This provision would allow refusal of a request for assistance if compliance with the request would be contrary to Australia’s legal system.
As indicated above, the assistance Australia is able to provide to other countries under its mutual assistance regime does not extend beyond the law enforcement tools and powers available to Australian law enforcement agencies (see the discussion of the circumstances in which arrangements may be made for evidence to be taken in Australia at the request of a foreign country in respect of Article 46(17)).

Mutual Assistance in Criminal Matters Act 1987
Section 8  Refusal of assistance

(1) A request by a foreign country for assistance under this Act shall be refused if, in the opinion of the Attorney-General:
   (a) the request relates to the prosecution or punishment of a person for an offence that is, or is by reason of the circumstances in which it is alleged to have been committed or was committed, a political offence; or
   (b) there are substantial grounds for believing that the request has been made with a view to prosecuting or punishing a person for a political offence; or
   (c) there are substantial grounds for believing that the request was made for the purpose of prosecuting, punishing or otherwise causing prejudice to a person on account of the person’s race, sex, religion, nationality or political opinions; or
   (d) the request relates to the prosecution or punishment of a person in respect of an act or omission that if it had occurred in Australia, would have constituted an offence under the military law of Australia but not also under the ordinary criminal law of Australia; or
   (e) the granting of the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory; or
   (f) the request relates to the prosecution of a person for an offence in a case where the person has been acquitted or pardoned by a competent tribunal or authority in the foreign country, or has undergone the punishment provided by the law of that country, in respect of that offence or of another offence constituted by the same act or omission as that offence.

(1A) A request by a foreign country for assistance under this Act must be refused if it relates to the prosecution or punishment of a person charged with, or convicted of, an offence in respect of which the death penalty may be imposed in the foreign country, unless the Attorney-General is of the opinion, having regard to the special circumstances of the case, that the assistance requested should be granted.

(1B) A request by a foreign country for assistance under this Act may be refused if the Attorney-General:
   (a) believes that the provision of the assistance may result in the death penalty being imposed on a person; and
   (b) after taking into consideration the interests of international criminal co-operation, is of the opinion that in the circumstances of the case the request should not be granted.

(2) A request by a foreign country for assistance under this Act may be refused if, in the opinion of the Attorney-General:
   (a) the request relates to the prosecution or punishment of a person in respect of an act or omission that, if it had occurred in Australia, would not have constituted an offence against Australian law; or
   (b) the request relates to the prosecution or punishment of a person in respect of an act or omission that occurred, or is alleged to have occurred, outside the foreign country and a similar act or omission occurring outside Australia in similar circumstances would not have constituted an offence against Australian law; or
   (c) the request relates to the prosecution or punishment of a person in respect of an act or omission where, if it had occurred in Australia at the same time and had constituted an offence against
Australian law, the person responsible could no longer be prosecuted by reason of lapse of time or any other reason; or

(d) the provision of the assistance could prejudice an investigation or proceeding in relation to a criminal matter in Australia; or

e) the provision of the assistance would, or would be likely to, prejudice the safety of any person (whether in or outside Australia); or

(f) the provision of the assistance would impose an excessive burden on the resources of the Commonwealth or of a State or Territory; or

(g) it is appropriate, in all the circumstances of the case, that the assistance requested should not be granted.

Section 11 - Request by foreign country

(1) A request by a foreign country for international assistance in a criminal matter may be made to the Attorney-General or a person authorised by the Attorney-General, in writing, to receive requests by foreign countries under this Act.

(2) A request must be in writing and must include or be accompanied by the following information:

(a) the name of the authority concerned with the criminal matter to which the request relates;

(b) a description of the nature of the criminal matter and a statement setting out a summary of the relevant facts and laws;

(c) a description of the purpose of the request and of the nature of the assistance being sought;

(d) any information that may assist in giving effect to the request.

However, a failure to comply with this subsection is not a ground for refusing the request.

(3) Where a request by a foreign country is made to a person authorised under subsection (1), the request shall be taken, for the purposes of this Act, to have been made to the Attorney-General.

(4) If a foreign country makes a request to a court in Australia for international assistance in a criminal matter:

(a) the court must refer the request to the Attorney-General; and

(b) the request is then taken, for the purposes of this Act, to have been made to the Attorney-General.

The following statistic and examples were provided.

Subparagraph a
In 2010-2011 Australia did not refuse a mutual legal assistance request on the basis of non-conformance with the provisions of this Article.

In 2010-2011 Australia did not make any requests under the Convention and therefore did not have a request refused on the basis of non-conformance with the provisions of this Article.

Sub paragraph b
In 2010-2011 Australia did not refuse a mutual legal assistance request on the basis that the provision of assistance would prejudice the sovereignty, security or national interest of Australia or the essential interests of an Australian State or Territory.

In 2010-2011 Australia did not have a request refused on the basis that the provision of assistance would prejudice the sovereignty, security or national interest of the requested country or the essential interests of the requested country.
Sub paragraph c and d
No relevant examples. However, if it was appropriate, Australia would consult a foreign country prior refusal of assistance on this basis.

(b) Observations on the implementation of the article

In response to the experts’ query, Australia stated that it has not encountered any problems receiving international cooperation under the UNCAC as a result of foreign data-protection laws.

Article 46 Mutual legal assistance

Paragraph 22

22. States Parties may not refuse a request for mutual legal assistance on the sole ground that the offence is also considered to involve fiscal matters.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Section 8 of the Mutual Assistance in Criminal Matters Act 1987 sets out mandatory and discretionary grounds for refusal of a request. That an offence involves a fiscal matter is not a ground for refusal under the Act.

Australia has not refused to provide assistance in response to a mutual legal assistance request involving offences covered by the Convention on the basis that the offences involve fiscal matters.

While the Attorney-General has the discretion to decline to execute a request where he/she considers it appropriate, in all the circumstances of the case, that the assistance requested should not be granted (paragraph 8(2)(g) of the Mutual Assistance in Criminal Matters Act 1987), it is not Australia’s policy to refuse mutual legal assistance requests on this ground.

The Mutual Assistance in Criminal Matters Act 1987 does not require Australia to provide a foreign country with reasons for refusing to provide assistance in response to a mutual legal assistance request.

Some of Australia’s 29 bilateral mutual legal assistance treaties include provisions which require that the requested country provide the requesting country with notice of an intention to refuse a request and the reasons for intended refusal. Final notice is also required to be provided to the foreign country that assistance has been refused.

For example, Article 4(4) of the bilateral mutual legal assistance treaty between Australia and China states that ‘before refusing to grant a request for assistance or postponing its execution, the Requested Party shall consider whether the assistance may be granted subject to conditions as it deems necessary.’ Article 4(5) of that treaty further states that ‘if the Requested Party refuses or postpones provision of assistance, it shall inform the Requesting Part of the reasons for the refusal or postponement.’

As previously stated, Australia has not refused to provide assistance in response to a mutual legal assistance request based on offences covered by the Convention.

In line with the obligations contained in the Convention and other bilateral or multilateral treaties to which Australia is a contracting party, and in the spirit of international cooperation, Australia would, where appropriate, provide a foreign country with the reasons for refusing to provide assistance.

(b) Observations on the implementation of the article
The reviewers were satisfied with the answer provided.

**Article 46 Mutual legal assistance**

**Paragraph 23**

23. Reasons shall be given for any refusal of mutual legal assistance.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

The *Mutual Assistance in Criminal Matters Act 1987* does not require Australia to provide a foreign country with reasons for refusing to provide assistance in response to a mutual legal assistance request.

Some of Australia’s 29 bilateral mutual legal assistance treaties include provisions which require that the requested country provide the requesting country with notice of an intention to refuse a request and the reasons for intended refusal. Final notice is also required to be provided to the foreign country that assistance has been refused.

For example, Article 4(4) of the bilateral mutual legal assistance treaty between Australia and China states that ‘before refusing to grant a request for assistance or postponing its execution, the Requested Party shall consider whether the assistance may be granted subject to conditions as it deems necessary.’ Article 4(5) of that treaty further states that ‘if the Requested Party refuses or postpones provision of assistance, it shall inform the Requesting Part of the reasons for the refusal or postponement.’

As previously stated, Australia has not refused to provide assistance in response to a mutual legal assistance request based on offences covered by the Convention.

In line with the obligations contained in the Convention and other bilateral or multilateral treaties to which Australia is a contracting party, and in the spirit of international cooperation, Australia would, where appropriate, provide a foreign country with the reasons for refusing to provide assistance.

(b) **Observations on the implementation of the article**

The reviewers were satisfied with the answer provided.

**Article 46 Mutual legal assistance**

**Paragraph 24**

24. The requested State Party shall execute the request for mutual legal assistance as soon as possible and shall take as full account as possible of any deadlines suggested by the requesting State Party and for which reasons are given, preferably in the request. The requesting State Party may make reasonable requests for information on the status and progress of measures taken by the requested State Party to satisfy its request. The requested State Party shall respond to reasonable requests by the requesting State Party on the status, and progress in its handling, of the request. The requesting State Party shall promptly inform the requested State Party when the assistance sought is no longer required.

(a) **Summary of information relevant to reviewing the implementation of the article**
Australia stated that it is in compliance with the provision under review.

Australia takes its obligations to execute mutual legal assistance requests in a timely manner seriously, and views the timely consideration and execution of requests as standard practice.

This obligation is also contained in many of Australia’s 29 bilateral mutual legal assistance treaties currently in force. Australia will execute the request for mutual legal assistance as soon as possible. In providing the assistance sought, Australia always considers the timeframes requested by the foreign country (for example, trial dates) and regularly provides updates on the status and progress of the execution of the request to foreign Central Authority counterparts.

Australia’s Central Authority for Mutual Assistance in Criminal Matters has recently undergone external review of its casework practices and has streamlined processes and implemented various efficiencies including improvements in knowledge management.

Australia regularly executes requests for mutual legal assistance well within the timeframe requested by the foreign country. Australia often receives acknowledgment from foreign Central Authority counterparts for executing requests in a timely manner and for keeping the foreign country aware of the progress of the matter prior to finalising the request.

The Australian Central Authority tracks all matters using a specially designed casework database. Some of the features of the database includes the ability for case officers to track each action taken on a matter and set reminders when next actions are due.

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The Australian Central Authority tracks all matters using a specially designed casework database. Some of the features of the database includes the ability for case officers to track each action taken on a matter and set reminders when next actions are due.

The Australian Central Authority responds to enquiries about the status and progress of mutual legal assistance requests in a timely manner. If requested, the Australian Central Authority can seek urgent updates from the Australian authorities responsible for executing the request in order to provide a comprehensive response to the foreign country.

Responses provided to the foreign country are detailed, explaining the action already taken or soon to be taken and the basis on which the action was taken (whether it be procedural or legislative). The Australian Central Authority always welcomes enquiries from foreign countries about the status of their requests for mutual legal assistance, and can accept enquiries via email, fax, post or via diplomatic channels.

The Australian Central Authority always advises the foreign country soon as it becomes apparent that the assistance sought in a mutual legal assistance request is no longer required. Reasons as to why the assistance is no longer required are also provided to the foreign country.

Once a mutual legal assistance request is received, the Australian Central Authority liaises with the foreign Central Authority about the progress of the request. It is Australia’s experience that the timeframe for completing a mutual assistance request varies depending on the sufficiency of information in the request, the type of assistance sought and the complexity of the issues raised. The timeframe can vary from a few days or weeks in very urgent or less complex cases to several months (or possibly longer) in cases which require the collection of extensive evidential material, or which involve tracing, restraint or confiscation of the proceeds of crime.)
The timeframe for completing mutual assistance requests will vary depending on the type of assistance requested, as well as mutual assistance laws and processes in the foreign country.

Timeframes can vary from a few weeks in very urgent or less complex cases, to several months or years in cases which require the collection of extensive evidential material. Once a request has been sent, the Australian Central Authority will liaise with the foreign country to seek updates within a reasonable time period (generally every 4-6 weeks).

(b) Observations on the implementation of the article

In response to the expert’s query, Australia stated that MLA requests are executed in the most timely manner possible. Urgent requests can be answered to within 48 hours. The case database allows Australia to monitor actions to be taken and to ensure that the answers are expeditious.

Article 46 Mutual legal assistance

Paragraph 25

25. Mutual legal assistance may be postponed by the requested State Party on the ground that it interferes with an ongoing investigation, prosecution or judicial proceeding.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Paragraph 8(2)(d) of the Mutual Assistance in Criminal Matters Act 1987 provides that a request for assistance may be refused if the provision of assistance would, or would be likely to, prejudice an investigation or proceeding in relation to a criminal matter in Australia.

The Australian Central Authority liaises with Australian law enforcement agencies when progressing mutual assistance requests. If an Australian agency has concerns that providing the assistance sought may prejudice an Australian criminal investigation or proceeding, the agency will immediately inform the Australian Central Authority.

The Australian Central Authority will then notify the foreign Central Authority. The Australian Central Authority will continue to liaise with the relevant Australian agencies about the Australian investigation, and if a stage is subsequently reached at which providing the requested assistance will no longer prejudice the Australian criminal investigation or proceeding, the foreign country will be advised and the Australian Central Authority will continue to progress the request. As indicated above, the Australian Central Authority tracks all active requests via its electronic casework database.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance

Paragraph 26

26. Before refusing a request pursuant to paragraph 21 of this article or postponing its execution pursuant to paragraph 25 of this article, the requested State Party shall consult with the requesting State Party to consider whether assistance may be granted.
subject to such terms and conditions as it deems necessary. If the requesting State Party accepts assistance subject to those conditions, it shall comply with the conditions.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The Mutual Assistance in Criminal Matters Act 1987 does not contain a provision that requires Australia to consult with a foreign country prior to refusing to provide assistance or postponing the provision of assistance.

Many of Australia’s 29 bilateral mutual legal assistance treaties currently in force contain provisions that oblige the contracting parties to consult prior to refusal or postponement of the execution of a request to determine whether the assistance can be granted subject to terms and conditions.

There are no relevant examples.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance

Paragraph 27

27. Without prejudice to the application of paragraph 12 of this article, a witness, expert or other person who, at the request of the requesting State Party, consents to give evidence in a proceeding or to assist in an investigation, prosecution or judicial proceeding in the territory of the requesting State Party shall not be prosecuted, detained, punished or subjected to any other restriction of his or her personal liberty in that territory in respect of acts, omissions or convictions prior to his or her departure from the territory of the requested State Party. Such safe conduct shall cease when the witness, expert or other person having had, for a period of fifteen consecutive days or for any period agreed upon by the States Parties from the date on which he or she has been officially informed that his or her presence is no longer required by the judicial authorities, an opportunity of leaving, has nevertheless remained voluntarily in the territory of the requesting State Party or, having left it, has returned of his or her own free will.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Paragraph 19(1)(c) of the Mutual Assistance in Criminal Matters Act 1987 provides that where a person from a foreign country is in Australia, at the request of Australia, to give evidence in a criminal proceeding or to give assistance in relation to a criminal investigation, the person shall not be detained, prosecuted or punished in Australia for any offence that is alleged to have been committed or that was committed, before the person’s departure from the foreign country pursuant to the request.

Subsection 19(2) of the Mutual Assistance in Criminal Matters Act 1987 provides that such safe conduct shall cease if the person has left Australia, or had the opportunity to leave Australia and has remained in Australia otherwise than for the purpose for which their presence was initially required.

There are no relevant examples.
(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 46 Mutual legal assistance

Paragraph 28

28. The ordinary costs of executing a request shall be borne by the requested State Party, unless otherwise agreed by the States Parties concerned. If expenses of a substantial or extraordinary nature are or will be required to fulfil the request, the States Parties shall consult to determine the terms and conditions under which the request will be executed, as well as the manner in which the costs shall be borne.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Generally Australia will bear the ordinary costs of executing requests. However, there are exceptions, for example:

- where the requesting country sought the transfer of a person to the foreign country to give evidence in a proceeding or to assist in an investigation, or
- where a bilateral treaty specifies that the responsibility for meeting costs of a particular nature lies with the requesting Party.

Paragraph 8(2)(f) of the Mutual Assistance in Criminal Matters Act 1987 provides that a request for assistance may be refused if, in the opinion of the Attorney-General, the provision of the assistance would impose an excessive burden on Australian resources.

Many of Australia’s 29 bilateral mutual legal assistance treaties currently in force provide that the requested Party shall pay the costs of executing a request.

Some bilateral treaties provide that the requested Party shall pay the costs of executing a request with the exception of particular costs such as costs associated with translations, expert fees, expenses incurred in the conveying of persons to give evidence or “exceptional expenses” incurred in fulfilling the request.

Article 20 of Australia’s bilateral mutual legal assistance treaty with Israel provides that the Requested State shall meet the cost of fulfilling the request for assistance except that Requesting State shall bear the expenses associated with conveying any person to or from the territory of the Requested State, the expenses associated with conveying custodial or escorting officers and, where required by the Requested State, exceptional expenses in fulfilling the request.

Article 6 of Australia’s bilateral mutual legal assistance treaty with the United States, provides that the Requested State shall pay all costs relating to the execution of the request, except for the fees of expert witnesses, the costs of translation and transcription and the allowances and expenses related to the travel of persons to the Requesting State for the purpose of giving evidence.

Article VII(3) of Australia’s bilateral mutual legal assistance agreement with Hong Kong states that if during the execution of the request it becomes apparent that expenses of an extraordinary nature are required to fulfil the request, then both parties are obliged to consult each other to determine the terms and conditions under which the execution of the request may continue.

Recently Australia agreed to pay extraordinary costs relating to the execution of one of Australia’s mutual assistance requests. The request sought a considerable number of bank account records, the production of which imposed an excessive burden on the requested country. The requested country
consulted with Australia about the cost and Australia agreed to pay for the costs over and above the ordinary costs of executing a request of its type.

(b) **Observations on the implementation of the article**

The reviewers were satisfied with the answer provided.

**Article 46 Mutual legal assistance**

**Subparagraph 29 (a)**

29. The requested State Party:

   (a) Shall provide to the requesting State Party copies of government records, documents or information in its possession that under its domestic law are available to the general public;

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Australia can provide copies of government records, documents or information that, under Australian domestic law, are available to the general public, in response to mutual assistance requests.

Australia regularly receives requests for government records, documents and information that are available to the general public. In these matters the Australian Central Authority refers the request to the Australian Federal Police who will make enquiries to locate the documents, retrieve the documents and then forward the documents to the Australian Central Authority for provision to the foreign country.

(b) **Observations on the implementation of the article**

The reviewers were satisfied with the answer provided.

**Article 46 Mutual legal assistance**

**Subparagraph 29 (b)**

29. The requested State Party:

   (b) May, at its discretion, provide to the requesting State Party in whole, in part or subject to such conditions as it deems appropriate, copies of any government records, documents or information in its possession that under its domestic law are not available to the general public.

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Any request for government records, documents or information not available to the general public would be considered subject to Australia’s domestic legislation governing disclosure of the relevant information.
Section 13 of the *Mutual Assistance in Criminal Matters Act 1987* empowers the Attorney-General to authorise the taking of evidence or the production of documents or other articles and the transmission of the documents, evidence or other articles to the requesting country.

Section 13A of the *Mutual Assistance in Criminal Matters Act 1987* empowers the Attorney-General to authorise the provision of material lawfully obtained by an Australian enforcement agency that is still in the possession of that enforcement agency to the requesting country.

Government records may, subject to domestic legislation, be obtainable through a search warrant issued under section 15 of the *Mutual Assistance in Criminal Matters Act 1987*.

Under Australian law tax records or social security records cannot be provided to foreign countries in response to mutual assistance requests.

**Mutual Assistance in Criminal Matters Act 1987**

**Section 15 - Requests by foreign countries for search and seizure—action by Attorney-General**

(1) Where:

(a) a proceeding or investigation relating to a criminal matter involving a serious offence has commenced in a foreign country;

(b) there are reasonable grounds to believe that evidential material relating to the investigation or proceeding is located in Australia; and

(c) the foreign country requests the Attorney-General to arrange for the evidential material to be obtained;

the Attorney-General may, in his or her discretion, authorise a police officer, in writing, to apply to a Magistrate of the State or Territory in which the evidential material is believed to be located for a search warrant in respect of the evidential material.

Note: Divisions 2 and 3 of Part VIIA make provision relating to applications for, and the issue and execution of, search warrants requested by foreign countries.

In 2010-2011 Australia did not receive any mutual legal assistance requests in relation to offences covered by the Convention seeking copies of government records, documents or information that under its domestic law are not available to the general public.

(b) **Observations on the implementation of the article**

The reviewers were satisfied with the answer provided.

**Article 46 Mutual legal assistance**

**Paragraph 30**

30. *States Parties shall consider, as may be necessary, the possibility of concluding bilateral or multilateral agreements or arrangements that would serve the purposes of, give practical effect to or enhance the provisions of this article.*

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

Australia has 29 bilateral mutual legal assistance treaties currently in force.

The Australian Government has conducted a comprehensive review of its mutual assistance law. The Extradition and Mutual Assistance in Criminal Matters Legislation Amendment Bill 2011, which is currently before the Australian Parliament, contains proposed amendments to the *Mutual Assistance in Criminal Matters Act 1987* to increase the range of law enforcement tools available to assist other countries with their criminal investigations and prosecutions and to streamline existing processes for providing certain forms of assistance to other countries.

The Australian Central Authority regularly evaluates its ability to promptly make and respond to mutual legal assistance requests. This evaluation includes internal reviews of processes and more recently, the contracting of external consultants to critically analyse and evaluate the Australian Central Authority’s processes for requesting and providing mutual legal assistance.

The Australian Central Authority also regularly hosts liaison meetings with Australian prosecutorial and law enforcement agencies involved in the making and execution of mutual legal assistance requests to assess current practices and discuss possible alternative methods for the speedy and efficient provision of mutual legal assistance. These agencies including the Office of the Commonwealth Director of Public Prosecutions, the Department of Foreign Affairs and Trade, the Australian Federal Police, the Australian Crime Commission and Australian State police agencies.

(b) Observations on the implementation of the article

At the request of the experts, Australia provided the proposed 2011 amendments to the *Mutual Assistance in Criminal Matters Act of 1987* with regard to law enforcement tools. The draft provisions are quoted below.

*Telecommunications (Interception and Access) Act 1979*

42 At the end of section 68

Add:

; and (l) if the Attorney-General has authorised the provision of the information to a foreign country under subsection 13A(1) of the *Mutual Assistance in Criminal Matters Act 1987*—to that foreign country, or to the Secretary of the Department for the purpose of providing the information to that foreign country.

43 After section 68

Insert:

68A. Communicating information obtained by Secretary

(1) The Secretary of the Department may, personally, or by a person authorised by him or her, communicate to another person (including a foreign country) lawfully intercepted information or interception warrant information if:

(a) the information was communicated to the Secretary under paragraph 68(l) for the purpose of providing the information to a foreign country; and

(b) the communication of the information is for purposes connected with providing the information to the foreign country.

(2) A person to whom lawfully intercepted information or interception warrant information has been communicated under subsection (1) or this subsection may communicate that information to another person (including a foreign country) for purposes connected with providing the information to the foreign country.

Division 2—Requests for use of surveillance devices

*Mutual Assistance in Criminal Matters Act 1987*

50 After Part IIIB

Insert:
Part IIIC—Assistance in relation to use of surveillance devices

15E Requests by Australia for surveillance devices

(1) This section applies if:

(a) an investigation in relation to an offence punishable by a maximum penalty of imprisonment for 3 years or more has commenced in Australia; and

(b) the use of a surveillance device (however described) is reasonably necessary for the purpose of obtaining information relevant to:

(i) the commission of the offence; or

(ii) the identity or location of the offenders.

(2) Australia may request an appropriate authority of a foreign country:

(a) to authorise the use of a surveillance device (however described), in accordance with the law of that country, to obtain the information referred to in paragraph (1)(b); and

(b) to arrange for any such information that has been obtained to be sent to Australia.

(3) Subsection (4) applies if:

(a) Australia makes a request under this section; and

(b) the foreign country obtains any information referred to in paragraph (1)(b) by means of a process authorised by the law of that country other than the use (as requested by Australia) of a surveillance device.

(4) The information obtained by the foreign country:

(a) is not inadmissible in evidence in a proceeding that relates to the investigation; or

(b) is not precluded from being used for the purposes of the investigation; on the ground alone that it was obtained otherwise than in accordance with the request.

15F Requests by foreign countries for surveillance devices

(1) The Attorney-General may, in his or her discretion, authorise an eligible law enforcement officer, in writing, to apply for a surveillance device warrant under section 14 of the Surveillance Devices Act 2004 if the Attorney-General is satisfied that:

(a) an investigation, or investigative proceeding, relating to a criminal matter involving an offence against the law of a foreign country (the requesting country) that is punishable by a maximum penalty of imprisonment for 3 years or more, imprisonment for life or the death penalty has commenced in the requesting country; and

(b) the requesting country requests the Attorney-General to arrange for the use of a surveillance device; and

(c) the requesting country has given appropriate undertakings in relation to:

(i) ensuring that the information obtained as a result of the use of the surveillance device will only be used for the purpose for which it is communicated to the requesting country; and

(ii) the destruction of a document or other thing containing information obtained as a result of the use of the surveillance device; and

(iii) any other matter the Attorney-General considers appropriate.

(2) In this section:

eligible law enforcement officer means a person referred to in paragraph (a) or (c) of the definition of law enforcement officer set out in subsection 6(1) of the Surveillance Devices Act 2004.

Surveillance Devices Act 2004

51 Subsection 6(1)

Insert:

investigative proceeding has the same meaning as in the Mutual Assistance in Criminal Matters Act 1987.

52 Subsection 6(1)

Insert:

mutual assistance application means an application for a surveillance device warrant made under a mutual assistance authorisation.

53 Subsection 6(1)

Insert:
mutual assistance authorisation means an authorisation under subsection 15F(1) of the Mutual Assistance in Criminal Matters Act 1987.

54 After subsection 14(3)
   Insert:
   (3A) A law enforcement officer (or another person on his or her behalf) may apply for the issue of a surveillance device warrant if he or she:
   (a) is authorised to do so under a mutual assistance authorisation; and
   (b) suspects on reasonable grounds that the use of a surveillance device is necessary, in the course of the investigation or investigative proceeding to which the authorisation relates, for the purpose of enabling evidence to be obtained of:
       (i) the commission of the offence to which the authorisation relates; or
       (ii) the identity or location of the persons suspected of committing the offence.

55 Subsection 14(4)
   Omit “(1) or (3)”, substitute “(1), (3) or (3A)”.

56 After paragraph 16(1)(b)
   Insert:
   (ba) in the case of a warrant sought in relation to a mutual assistance authorisation—that such an authorisation is in force and that there are reasonable grounds for the suspicion founding the application for the warrant; and

57 Paragraph 16(2)(a)
   After “relevant offence”, insert “or a mutual assistance authorisation”.

58 Paragraph 16(2)(e)
   Before “the likely”, insert “in the case of a warrant sought in relation to a relevant offence or a recovery order—”.

59 After paragraph 16(2)(e)
   Insert:
   (ea) in the case of a warrant sought in relation to a mutual assistance authorisation—the likely evidentiary or intelligence value of any evidence or information sought to be obtained, to the extent that this is possible to determine from information obtained from the foreign country to which the authorisation relates; and

60 After subparagraph 17(1)(b)(ii)
   Insert:
   (iiia) if the warrant relates to a mutual assistance authorisation—the offence or offences against the law of a foreign country to which the authorisation relates; and

61 Subsection 20(2)
   Omit “21(3)(a) and (b)”, substitute “, 21(3)(a) and (b) or 21(3A)(a) and (b)”.

62 After subsection 21(3)
   Insert:
   (3A) If:
   (a) a surveillance device warrant has been sought by or on behalf of a law enforcement officer as authorised under a mutual assistance authorisation; and
   (b) the chief officer of the law enforcement agency to which the law enforcement officer belongs or is seconded is satisfied that the use of a surveillance device is no longer required for the purpose of enabling evidence to be obtained of:
       (i) the commission of the offence against a law of a foreign country to which the authorisation relates; or
       (ii) the identity or location of the persons suspected of committing the offence;
   the chief officer must, in addition to revoking the warrant under section 20, take the steps necessary to ensure that use of the surveillance device authorised by the warrant is discontinued.

63 After paragraph 21(5)(b)
   Insert:
   or (c) if the warrant was issued in relation to a mutual assistance authorisation—of enabling evidence to be obtained of:
(i) the commission of the offence against a law of a foreign country to which the authorisation relates; or
(ii) the identity or location of the persons suspected of committing the offence;

64 Paragraph 45(4)(f)
Repeal the paragraph, substitute:
(f) the communication of information for the purpose of providing the information to a foreign country, or an appropriate authority of a foreign country, if:
(i) the provision of the information has been authorised under subsection 13A(1) of the Mutual Assistance in Criminal Matters Act 1987; or
(ii) the information was obtained under, or relates to, a surveillance device warrant issued in relation to a mutual assistance authorisation.

65 After paragraph 50(1)(a)
Insert:
(aa) the number of mutual assistance applications made by or on behalf of, and the number of warrants issued as a result of such applications to, law enforcement officers of the agency during that year; and

66 After paragraph 50(1)(e)
Insert:
(ea) the number of mutual assistance applications made by or on behalf of law enforcement officers of the agency that were refused during that year, and the reasons for refusal; and

67 After paragraph 50(1)(i)
Insert:
(ia) for each offence (the foreign offence) against a law of a foreign country in respect of which a warrant was issued as a result of a mutual assistance application made by or on behalf of law enforcement officers of the agency during the year—the offence (if any), under a law of the Commonwealth, or of a State or a Territory, that is of the same nature as, or a substantially similar nature to, the foreign offence; and

68 After subparagraph 53(2)(c)(iii)
Insert:
(iii) if the warrant was issued in relation to a mutual assistance authorisation—the offence against the law of the foreign country to which the authorisation relates; and

69 Application of amendments made by this Division
The amendments made by this Division apply in relation to a request by a foreign country that is under consideration on or after the commencement of this item, whether the request was made before or after that commencement.

Article 47 Transfer of criminal proceedings

States Parties shall consider the possibility of transferring to one another proceedings for the prosecution of an offence established in accordance with this Convention in cases where such transfer is considered to be in the interests of the proper administration of justice, in particular in cases where several jurisdictions are involved, with a view to concentrating the prosecution.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it does not consider transferring criminal proceedings.

It is currently Australian Government policy not to transfer criminal proceedings. In cases of concurrent jurisdiction, Australia is able to both extradite a person at the request of a foreign country and provide mutual legal assistance at the request of a foreign country.

(b) Observations on the implementation of the article
If parallel proceedings are ongoing, Australia can consult with the other jurisdiction(s) to determine which is the best jurisdiction to proceed.

**Article 48 Law enforcement cooperation**

**Subparagraph 1 (a)**

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

   (a) To enhance and, where necessary, to establish channels of communication between their competent authorities, agencies and services in order to facilitate the secure and rapid exchange of information concerning all aspects of the offences covered by this Convention, including, if the States Parties concerned deem it appropriate, links with other criminal activities;

(a) **Summary of information relevant to reviewing the implementation of the article**

Australia stated that it is in compliance with the provision under review.

The AFP’s international relationships are fundamental to success in the global crime environment. The AFP International Network supports efforts to disrupt crime at its source through investigative, intelligence and capacity building activities facilitated by intelligence-sharing agreements, joint operations and alliances forged through participation in multilateral and regional forums.

**International Liaison Officer Network**

The AFP's International Liaison Officer Network has offices in 29 countries to broker collaboration with international law enforcement agencies in order to drive investigations, and support bilateral or multilateral cooperation. The AFP International Liaison Officers are the Australian Government's law enforcement representatives overseas, and have well established channels of communication with local Law Enforcement Agencies, which are constantly developed and enhanced.

**International Visits**

During the 2010-11 financial year the International Network facilitated 37 inwards and 24 outwards visits of AFP and foreign law enforcement agency delegations to/from Australia. Engagement with these delegations is a key component in strengthening the relationships between the AFP and its international partner agencies, often resulting in the identification of capacity-building opportunities and leading to subsequent operational outcomes.

**Regional Forums**

The AFP regularly takes part in multilateral and regional forums aimed at enhancing police practice, cooperation, knowledge and professionalism. Recent examples include:

- **31st ASEAN Chiefs of Police Conference (ASEANAPOL) held in Laos in May 2011**: This is a forum that brings together police officers from 10 South-East Asian member nations to forge stronger regional cooperation in police work, to build lasting friendships, to enhance police professionalism and to promote the prevention of crime in the region.

- **Pacific Islands Police of Chiefs (PICP) Conference held in Brisbane, Queensland, in August 2010**: The AFP funded and facilitated this conference, at which 18 of the 21 member countries were represented. Through the PICP the AFP has immediate and influential access to the police executive of all its closest neighbours. Further, the AFP member attached to the PICP
Secretariat develops and implements law enforcement projects in the Pacific on behalf of the PICP.

- 79th Interpol General Assembly in Qatar in November 2010: This forum drives the future directions of international law enforcement, ensuring the focus remains thematic, contemporary and topical. It was attended by 650 senior law enforcement officials from 141 countries, which provided an ideal platform to enhance relationships and share Australia’s expertise in future planning and strategic processes.

- 7th annual heads of National Central Bureau Conference at Lyons in France in April 2011: This conference was attended by 252 officials from 147 member countries. The focus of this year’s meeting was facilitating international police information exchange.

- Australia and New Zealand Police Commissioners Forum, hosted for the first time by the AFP in Canberra in April 2011: At the conference development of a strategic agenda was proposed that would identify and progress priority areas of business for collectively improving policing.

- A colloquium to discuss information sharing with Europol in Canberra in June 2011: Representatives from all Australian state and territory police services, the Australian Crime Commission and Australian Customs and Border Protection Service attended. The colloquium resulted in an increased awareness of the assistance Europol could provide in identifying a criminal nexus to other operational targets.

- The official opening of Europol Headquarters in The Hague, 27-30 June 2011: High-level plenary sessions on counter-terrorism and organised crime were also attended, which provided an opportunity to gain significant operational insight into current transnational crime trends across Europe with potential future impacts on Australia.

**Capacity Building**

The AFP is also committed to working with our international partners to ensure security and stability in our region. Key outcomes within this area include providing assistance to the Pacific region and to other areas of national interest such as Papua New Guinea, Timor-Leste and Afghanistan to strengthen order and their rule of law, and by application, reduce corruption.

- The Australian Federal Police’s Law Enforcement Cooperation Program (LECP) plays a vital role in assisting foreign law enforcement agencies to deal with transnational crime. The LECP supports AFP efforts offshore through bilateral and multilateral projects aimed at:
  
  - strengthening the capability of foreign law enforcement agencies to gather information and evidence against illicit drug traffickers through modest education and training programs for the practitioner and through modest provisions of equipment;
  - developing a greater capacity to meet Australia’s international priorities by being able to more effectively gather international law enforcement intelligence to support AFP operations;
  - improving law enforcement infrastructure of foreign law enforcement agencies;
  - improving operational understanding dealing with international crime; and
  - fostering closer personal and institutional linkages.

- The AFP performs a lead role in assisting Pacific Islands Countries in managing, coordinating and enhancing law enforcement intelligence, collaboration and capacity building against transnational crime (including terrorism). This is undertaken through the AFP funded Pacific Transnational Crime Network (PTCN), which over the past 8 years has developed a series of fusion (multi-agency - Law enforcement, Customs, Immigration) Transnational Crime Units (TCU) networked across twelve Pacific Countries.
  
  - TCU’s are based in Papua New Guinea, Vanuatu, Fiji, Samoa, Tonga, Solomon
Islands and Micronesia. There are also four mini-TCUs in Palau, Commonwealth of Northern Mariana Islands, Marshall Islands and Kiribati;

- The TCUs are supported by the Pacific Transnational Coordination Centre (PTCCC) based in Samoa which is staffed by members seconded from various TCU for 6-9 month periods and full time AFP Advisor. The role of the PTCCC is to coordinate information through the network and disseminate inside and outside the network to other Pacific or international law enforcement agencies.

**Interpol and Europol**

The AFP’s Operations Coordination Centre (AOCC) Response Operations Team is the primary contact point for the Australian National Central Bureau of Interpol and Europol, and supports all Interpol/Europol enquiries to and from Australia.

- Interpol facilitates cross-border police co-operation, and supports and assists all organisations, authorities and services whose mission is to prevent or combat international crime. 28,990 Interpol communications were actioned by the bureau in 2009-10.

- Europol is an international policing organisation focusing on law enforcement intelligence collection, analysis and information sharing. Based in The Hague, Europol works with 41 member countries from around the world. Australia became a member of Europol in 2007 through the signing of an International Treaty which allows the Australian Federal Police, State and Territory Police, Customs and Border Protection and the Australian Crime Commission (collectively known as Competent Authorities) to exchange intelligence and interact with other Europol member countries.

**The International Deployment Group and Capacity Building**

Established in February 2004, the International Deployment Group (IDG) provides the Australian Government with a standing capacity to deploy Australian police domestically and internationally to contribute to stability and capacity development operations. Whilst the IDG’s charter is not to specifically address corruption issues, the IDG does provide capacity building and peacekeeping services to countries to enhance the rule of law. In doing this, especially in capacity building missions, the development of more professional police forces should allows them to be better positioned to cope with issues of corruption, and less likely to be instigators of corrupt activities.

- UN mission in Sudan: The UN Mission in Sudan (UNMIS) was established in 2005. The AFP contributes 10 police officers to the mission and has done so consistently since March 2006. AFP members contribute to the coordination of bilateral and multilateral assistance programs aimed at restructuring the Sudanese Police Service consistent with democratic policing. Members assist in educating Sudanese civilian police by developing, evaluating and conducting training in leading-practice policing techniques, processes and strategies.

- Cambodian Criminal Justice Assistance Program: In conjunction with AusAID, the AFP is currently engaged with Phase III of the Cambodian Criminal Justice Assistance Program, aimed at strengthening the strategic, executive and technical capacity of the Cambodia National Police (CNP). In 2010-2011 the program
  - established a national crime data collection and analysis system using a data collection computerised program and collection forms to gather accurate and credible crime statistics; and
  - implemented a community policing strategy via a pilot program focused on building a trusted relationship with local citizens to reduce crime and make Cambodian communities safer.

- Regional Assistance Mission to Solomon Islands (RAMSI): RAMSI is a multinational mission to which Australia, New Zealand and Pacific Islands Forum nations have contributed since the assistance mission commenced in July 2003. Since 2003 there have been a number of high profile arrests in relation to corrupt activities of senior government and public officers. Whilst this was not the main focus of the AFP's activities in Solomon Islands, this was an outcome of a strengthened police and legal system.
International Networking

- The AFP and UK Serious Organised Crime Agency (SOCA) engaged in a pilot project that enables SOCA and the AFP to employ each other’s international networks in certain locations. The arrangements serve to maximise the use of resources, improve capability and timeliness in responding to international inquiries and reduce associated costs.

- A Joint Transnational Crime Centre in Vietnam’s Ho Chi Minh City was opened with support from the AFP to enhance information and intelligence sharing in relation to transnational crime issues. Similar centres are also being established in Cambodia and Colombia.

In October 2010 the AFP was a major sponsor of the International Serious and Organised Crime Conference, hosted in Melbourne. The conference was a joint initiative by the AFP, Australian Institute of Criminology, Victoria Police, the Australian Crime Commission and CrimTrac. The conference focus was on cross-agency relationships, which are essential to mitigating the potential threat that serious and organised crime poses to national security. Conference participants engaged in planning sessions and workshops aimed at bringing together experts from law enforcement, intelligence, government and the private sector to share information and identify opportunities for cooperation.

Australia does have a database through which information can be shared. Access to this database is restricted to only Australian jurisdictions.

As examples of implementation, Australia provided the following information on the Operation Rune. Operation Rune is an ongoing investigation into bribery offences which has involved extensive international AFP-coordinated activity, including six search warrants executed by the AFP and 11 search warrants executed by United Kingdom and Spanish authorities. The AFP will continue investigations in Australia and internationally with law enforcement partners. The AFP’s international network has been crucial to the investigation in facilitating liaison and the exchange of information with international counterparts.

This operation has highlighted the complexity of international legal and factual matters in investigations of bribery of foreign public officials. As a result, the AFP engaged with Austrade and the Attorney-General’s Department in support of legislative review and educational initiatives to raise awareness of this issue in Australian companies operating overseas.

Furthermore, Australia also provided information on information exchanges for recent cases. The following operational outcomes are examples of those achieved through overseas activities supported by the International Network in the 2010-11 financial year:

- Operation Thaic, a joint AFP and Cambodian National Police Transnational Crime Team investigation, led to the first arrest of an outbound internal drug courier from Cambodia. Further joint investigations resulted in the arrest of another five people, including two Cambodia-based heroin suppliers who have previously supplied heroin to couriers importing drugs into Australia.

- A joint investigation by the AFP and Burmese Anti Narcotics Task Force disrupted drug manufacturing at its source through the seizure of over 600 000 pseudoephedrine tablets, over 90 000 ATS tablets and 6 kilograms of ephedrine powder. It was identified that the pseudoephedrine had been smuggled from India to clandestine laboratories in Burma for ultimate distribution in Australia.

- Operation Stair resulted in the arrest of four conspirators to import a total of 690 kilograms of cocaine from South America via Tonga. In support of this operation, a joint AFP and Peruvian parcel post investigation was launched which resulted in the arrest of 25 people in Peru and the seizure of 12.5 kilograms of cocaine, 1.65 litres of cocaine suspended in bottles of vegetable oil, 15 latex capsules containing cocaine, 9 books containing concealments of
cocaine, 12 book covers containing concealments of cocaine, 4 vehicles, 2 firearms and the equivalent of approximately A$60 000. Peruvian authorities also requested the assistance of AFP Bogota to make inquiries through the AFP liaison officer network in China; this close cooperation led to the arrest of five people for related offences.

- Operation Girawheen saw significant cooperation between the AFP and Nepalese partners result in the arrest and sentencing of an Australian citizen to a minimum of 15-months imprisonment for child sex tourism offences committed in Nepal.
- AFP assistance provided to a Fijian Police investigation into the theft of $1 million in minted Fijian currency enabled transnational inquiries in Australia, Singapore and Hong Kong. As a result, three males were arrested in relation to the theft and approximately $600 000 of the currency was recovered in Australia.

AFP Bangkok facilitated inquiries with Thai authorities on behalf of Victoria Police to locate and arrest two murder suspects. The AFP International Network provides this crucial role on behalf of state police to assist in overseas inquiries and to achieve multilateral cooperation for police operations.

(b) Observations on the implementation of the article

Information provided by another country, either through MLA or other channels, can give rise to investigations in Australia. First, there will be informal contact to see if there are any particular issues that might arise or obstacles.

The reviewers observed that most of the examples cited by the AFP appear to relate to drug cases. Australia noted that few corruption cases have been prosecuted in Australia, namely the Leyton Holdings and Securrency cases, but that there are ongoing cases, which cannot be disclosed for law enforcement reasons.

There have been challenges in receiving information from other countries at times. In fact, the volume of information is often high and its treatment can take a long time. In particular, in the foreign bribery context, it has proven very difficult to get information quickly.

At the request of the reviewers, Australia explained how the AFP works and interacts with local police authorities in investigating corruption offenses. The AFP interacts with local police mainly through the Crime Stopper Network.

Article 48 Law enforcement cooperation

Subparagraph 1 (b)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

   (b) To cooperate with other States Parties in conducting inquiries with respect to offences covered by this Convention concerning:

   (i) The identity, whereabouts and activities of persons suspected of involvement in such offences or the location of other persons concerned;
   (ii) The movement of proceeds of crime or property derived from the commission of such offences;
(iii) The movement of property, equipment or other instrumentalities used or intended for use in the commission of such offences;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

There are numerous provisions, legislation and measures that are utilised by the AFP in order to facilitate inquiries with Other State Parties, including the exchange of information that would include the identity, whereabouts and/or activities of persons involved in criminal offences. These include (but are not limited to) some of the following examples:

Mutual Assistance in Criminal Matters Act 1987
The object of the Mutual Assistance in Criminal Matters Act 1987 is:
(a) to regulate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country for any of the following:
   i. the taking of evidence, or the production of any document or other article, for the purposes of a proceeding in the foreign country;
   ii. the issue of a search warrant and the seizure of any thing relevant to a proceeding or investigation in the foreign country;
   iii. the forfeiture or confiscation of property in respect of a foreign serious offence;
   iv. the recovery of pecuniary penalties in respect of a foreign serious offence;
   v. the restraining of dealings in property that may be forfeited or confiscated, or that may be needed to satisfy pecuniary penalties imposed, because of the commission of a foreign serious offence; and
(b) to facilitate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country for the making of arrangements for a person who is in Australia to travel to the foreign country to give evidence in a proceeding or to give assistance in relation to an investigation; and
(c) to facilitate the obtaining by Australia of international assistance in criminal matters.

The Extradition Act 1988
The Extradition Act 1988 provides a statutory basis for the extradition of persons to/from Australia and extradition countries. It also facilitates the making of requests for extradition by Australia to other countries, and enables Australia to carry out its obligations under extradition treaties. Under the Extradition Act 1988, Australia can only make an extradition request if charges have been laid against the person in Australia and there is admissible evidence which can presented to an Australian court to prove the allegations. The AFP does not disclose whether it has received, or made, an extradition request prior to an arrest. This is to avoid giving the person who is subject of an extradition request an opportunity to flee the jurisdiction. The receipt or making of an extradition request is made public either at the time of the arrest, or during the subsequent extradition proceedings.

Interpol and Europol
The AFP’s Operations Coordination Centre (AOCC) Response Operations Team is the primary contact point for the Australian National Central Bureau of Interpol and Europol, and supports all Interpol/Europol enquiries to and from Australia.

- Interpol facilitates cross-border police co-operation, and supports and assists all organisations, authorities and services whose mission is to prevent or combat international crime. 28,990 Interpol communications were actioned by the bureau in 2009-10.
- Europol is an international policing organisation focusing on law enforcement intelligence collection, analysis and information sharing. Based in The Hague, Europol works with 41 member countries from around the world. Australia became a member of Europol in 2007.
through the signing of an International Treaty which allows the Australian Federal Police, State and Territory Police, Customs and Border Protection and the Australian Crime Commission (collectively known as Competent Authorities) to exchange intelligence and interact with other Europol member countries.

International Liaison Officer Network

The AFP's International Liaison Officer Network has offices in 29 countries to broker collaboration with international law enforcement agencies in order to drive investigations, and support bilateral or multilateral cooperation. The AFP International Liaison Officers are the Australian Government's law enforcement representatives overseas, and have well established channels of communication with local Law Enforcement Agencies, which are constantly developed and enhanced.

Bilateral Arrangements

The AFP has a number of bilateral or multilateral agreements with other law enforcement agencies, mainly in the form of Memorandum of Understanding, Letters of Exchange &/or Statement of Intent. These arrangements are designed to facilitate cooperation in a variety of specific areas. Some of these arrangements include (but are not limited to):

- Memorandum of understanding between the Korean National Police Agency and the Australian Federal Police on combating transnational crime and developing police cooperation
- Statement of Intent between the National Police Agency of Japan and the Australian Federal Police on combating transnational crime and developing police cooperation
- Australian Federal Police and Netherlands Police Agency memorandum of understanding on police cooperation
- Memorandum of Understanding between the Australian Federal Police and the Royal Papua New Guinea Constabulary in relation to cooperation on law enforcement issues and the exchange of information
- Memorandum of Understanding between the between the Royal Thai Police and the AFP on combating transnational crime and developing police cooperation
- Memorandum of Understanding between the Singapore Police Force and the Australian Federal Police on combating transnational crime and developing police cooperation
- Memorandum of Understanding between the Australian Federal Police and the Sri Lanka Police on combating transnational crime and developing police cooperation
- Australian Federal Police and Policia Nacional de Timor-Leste Memorandum of Understanding on combating transnational crime and developing police cooperation

This is a representative list of agreements that the AFP is party to. A more exhaustive list can be provided by the AFP upon request.

Australia referred to an example of implementation provided above.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 48 Law enforcement cooperation

Subparagraph 1 (c)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:
(c) To provide, where appropriate, necessary items or quantities of substances for analytical or investigative purposes;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The AFP have over 25 arrangements in place with other states’ police forces that enable operational planning and information sharing on a number of law enforcement issues, including provisions for supplying intelligence and information for specific criminal investigations, such as illicit drug offences. A full list of these agreements is available on request.

**AFP Forensic and Data Centres**

Forensic and Data Centres provides forensic science and technical intelligence services to the AFP and partner agencies. It also contributes to international capacity building and seeks to strengthen relationships with domestic and international counterparts and academia.

Forensic and Data Centres delivers:

- forensic science and specialist services (laboratory and field operations), including biological and chemical criminalistics, identification science, computer forensics and electronic evidence, disaster victim identification, ballistics and rapid field operations response capability,
- technical intelligence services provided by the Australian Bomb Data Centre, the Australian Chemical, Biological, Radiological and Nuclear Data Centre and the Australian Illicit Drug Data Centre, which was formally launched in February 2010 to provide technical drug intelligence and a national program for profiling illicit drugs,
- coordination and management of projects funded for a specific purpose,
- leadership through Australian participation in international forums including the provision of Australian heads of delegation in a range of scientific and technical environments - for example, the Technical Response Group of the Australia, United Kingdom, Canada and United States Quadrilateral partnership and participation in the associated chemical, biological and radiological terrorism exercise that was conducted in the United Kingdom in March 2011,
- Providing samples to the Special Testing and Research Laboratory of the US Drug Enforcement Administration (DEA) for chemical profiling analysis. The exchange of illicit drug samples enables the direct comparison of AFP profiling analysis results with DEA profiling results. This interaction ensures that both agencies can be confident in the effectiveness of their respective profiling programs.

**National Measurement Institute**

To chemically profile illicit drugs, the AFP utilises the significant scientific expertise of the National Measurement Institute, and while it remains the only routine drug profiling program within Australia, it networks with other similar initiatives in overseas jurisdictions to track and compare trends. Drugs profiled include heroin, cocaine and MDMA.

The AFP has been the recipient of requests from its law enforcement partners to undertake analysis of drugs seized by the requesting party. This is done through normal AFP procedures. The AFP will also provide information to partner agencies in relation to analysis results of drug seizures for comparison in multi-jurisdictional databases.
From 2004 to present additional samples from selected AFP seizures and have been collected and provide to the US DEA. The next exchange of AFP illicit drug samples is scheduled to occur in September 2011.

This successful arrangement has resulted in the US DEA sharing chemical profiling methodologies with the AFP as well as enabling the comparison of results for the samples submitted.

The AFP has entered into a specific arrangement with the Department of Customs and Border Security and other state and federal government bodies in relation to serious drug detections and investigations. This achieves a collaborative approach to evidence and intelligence sharing.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 48 Law enforcement cooperation

Subparagraph 1 (d)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

   (d) To exchange, where appropriate, information with other States Parties concerning specific means and methods used to commit offences covered by this Convention, including the use of false identities, forged, altered or false documents and other means of concealing activities;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Operational information, including specific methods of criminal activity, is able to be shared amongst Australia’s law enforcement partners through a variety of means. These include:

The AFP’s International Network

The AFP’s International Liaison Officer Network has offices in 29 countries to broker collaboration with international law enforcement agencies in order to drive investigations, and support bilateral or multilateral cooperation. The AFP International Liaison Officers are the Australian Government’s law enforcement representatives overseas, and have well established channels of communication with local Law Enforcement Agencies, which are constantly developed and enhanced.

Individual agreements between states

The AFP have over 25 arrangements in place with other states’ police forces that enable operational planning and information sharing on a number of law enforcement issues, including identify theft and document forgery. A full list of these agreements is available on request.

Mutual Assistance Requests

Formal government to government assistance in criminal investigations and prosecutions is provided for through the operation of the Commonwealth Mutual Assistance in Criminal Matters 1987 Act. Actions able to be undertaken include providing evidentiary material in support of investigations, and the taking of witness statements for foreign proceedings.
As examples of implementation, Australia indicated that the AFP has information sharing agreements in place with each state and territory police force in Australia, as well as federal and state law enforcement departments and agencies. A full list of these arrangements is available on request. Specific operational examples include:

- The AFP Identity Security Strike Teams (ISST) form a collaborative network to investigate identity crime offences, in partnership with other Commonwealth and State agencies and regional law enforcement bodies. ISSTs target the syndicated manufacture, distribution and use of fraudulent identity documents, as well as the compromise of personal information by organised crime groups. Following a joint-agency investigation, five suspects were charged and approximately 5000 credit cards, other identity cards and machinery were seized.
- In an investigation of a major international credit card syndicate, information was passed by Australian investigators to Spanish authorities, via the US Secret Service, in relation to telephone records and special projects material. This information related to the transfer/sale of payment card data via telecommunications services, which was then used to undertake fraudulent activity in Australia. 13 members of the Spanish syndicate were arrested, and 9 persons have been prosecuted in Australia in relation to this investigation to date.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 48 Law enforcement cooperation

Subparagraph 1 (e)

1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(e) To facilitate effective coordination between their competent authorities, agencies and services and to promote the exchange of personnel and other experts, including, subject to bilateral agreements or arrangements between the States Parties concerned, the posting of liaison officers;

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia has referred to the response under 48.a.

Furthermore, Australia has provided information on international networking.

International Networking

- The AFP and UK Serious Organised Crime Agency (SOCA) engaged in a pilot project that enables SOCA and the AFP to employ each other’s international networks in certain locations. The arrangements serve to maximise the use of resources, improve capability and timeliness in responding to international inquiries and reduce associated costs.

- A Joint Transnational Crime Centre in Vietnam’s Ho Chi Minh City was opened with support from the AFP to enhance information and intelligence sharing in relation to transnational crime issues. Similar centres are also being established in Cambodia and Colombia.
Information on police liaison offices are also provided.

The AFP Liaison Officer Network
The International Network has offices in 29 countries to broker collaboration with international law enforcement agencies to drive investigations and support bilateral or multilateral cooperation. These offices are as follows:

1. Europe and Africa
   - Beirut
   - Belgrade
   - Dubai
   - The Hague
   - London
   - Lyon (Interpol)
   - Pretoria

2. Asia
   - Bali
   - Bangkok
   - Beijing
   - Colombo
   - Guangzhou
   - Dili
   - Hanoi
   - Ho Chi Minh City
   - Hong Kong
   - Islamabad
   - Jakarta
   - Dhaka
   - Manila
   - Phnom Penh
   - Rangoon
   - Singapore

3. Americas
   - Bogota
   - Los Angeles (FBI)
   - New York (UN)
   - Washington DC

4. Pacific
   - Port Moresby
   - Port Vila
   - Suva
   - Pohnpei
   - Apia
   - Wellington

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 48 Law enforcement cooperation

Subparagraph 1 (f)
1. States Parties shall cooperate closely with one another, consistent with their respective domestic legal and administrative systems, to enhance the effectiveness of law enforcement action to combat the offences covered by this Convention. States Parties shall, in particular, take effective measures:

(f) To exchange information and coordinate administrative and other measures taken as appropriate for the purpose of early identification of the offences covered by this Convention.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

- The AFP has information sharing agreements in place with each state and territory police force in Australia, as well as federal and state law enforcement departments and agencies. A full list of these arrangements is available on request.

- Established in February 2004, the International Deployment Group (IDG) provides the Australian Government with a standing capacity to deploy Australian police domestically and internationally to contribute to stability and capacity development operations. Whilst the IDG’s charter is not to specifically address corruption issues, the IDG does provide capacity building and peacekeeping services to countries where the rule of law is not as strong as it should be. In doing this, especially in capacity building missions, the development of more professional police forces should allows them to be better positioned to cope with issues of corruption, and less likely to be instigators of corrupt activities.

UN mission in Sudan: The UN Mission in Sudan (UNMIS) was established in 2005. The AFP contributes 10 police officers to the mission and has done so consistently since March 2006. AFP members contribute to the coordination of bilateral and multilateral assistance programs aimed at restructuring the Sudanese Police Service consistent with democratic policing. Members assist in educating Sudanese civilian police by developing, evaluating and conducting training in leading-practice policing techniques, processes and strategies.

Cambodian Criminal Justice Assistance Program: In conjunction with AusAID, the AFP is currently engaged with Phase III of the Cambodian Criminal Justice Assistance Program, aimed at strengthening the strategic, executive and technical capacity of the Cambodia National Police (CNP). In 2010-2011 the program

- established a national crime data collection and analysis system using a data collection computerised program and collection forms to gather accurate and credible crime statistics; and

- implemented a community policing strategy via a pilot program focused on building a trusted relationship with local citizens to reduce crime and make Cambodian communities safer.

Regional Assistance Mission to Solomon Islands (RAMSI): RAMSI is a multinational mission to which Australia, New Zealand and Pacific Islands Forum nations have contributed since the assistance mission commenced in July 2003. Since 2003 there have been a number of high profile arrests in relation to corrupt activities of senior government and public officers. Whilst this was not the main focus of the AFP's activities in Solomon Islands, this was an outcome of a strengthened police and legal system.
• The AFP and UK Serious Organised Crime Agency (SOCA) engaged in a pilot project that enables SOCA and the AFP to employ each other’s international networks in certain locations. The arrangements serve to maximise the use of resources, improve capability and timeliness in responding to international inquiries and reduce associated costs.

• A Joint Transnational Crime Centre in Vietnam’s Ho Chi Minh City was opened with support from the AFP to enhance information and intelligence sharing in relation to transnational crime issues. Similar centres are also being established in Cambodia and Colombia.

In October 2010 the AFP was a major sponsor of the International Serious and Organised Crime Conference, hosted in Melbourne. The conference was a joint initiative by the AFP, Australian Institute of Criminology, Victoria Police, the Australian Crime Commission and Crimtrac. The conference focus was on cross-agency relationships, which are essential to mitigating the potential threat that serious and organised crime poses to national security. Conference participants engaged in planning sessions and workshops aimed at bringing together experts from law enforcement, intelligence, government and the private sector to share information and identify opportunities for cooperation.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

The reviewers observed that the AFP is invested with wide powers to combat serious offences, including corruption. The Telecommunications Interception Act (1979) and the Surveillance Devices Act (2004) provide enforcement and national security agencies with significant investigative tools, including the ability to obtain warrants, intercept communications, obtain access to stored communications, install and use surveillance devices, and obtain access to telecommunications data while still protecting the privacy of individuals. The AFP also has extensive powers to conduct undercover and controlled operations.

(c) Successes and good practices

The reviewers were of the view that the following successes shall be brought to the attention of other States Parties:
- The AFP’s impressive cooperation measures at both the domestic and international levels, and their experience and expertise in detecting and investigating corruption which could further assist foreign law enforcement counterparts.
- The existence of a comprehensive range of investigative tools for fighting corruption in Australia.

Article 48 Law enforcement cooperation

Paragraph 2

2. With a view to giving effect to this Convention, States Parties shall consider entering into bilateral or multilateral agreements or arrangements on direct cooperation between their law enforcement agencies and, where such agreements or arrangements already exist, amending them. In the absence of such agreements or arrangements between the States Parties concerned, the States Parties may consider this Convention to be the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention. Whenever appropriate, States Parties shall make full use of agreements or arrangements, including international or regional organizations, to enhance the cooperation between their law enforcement agencies.

(a) Summary of information relevant to reviewing the implementation of the article
Australia stated that it is in compliance with the provision under review.

Australia referred to response under 48.b.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 48 Law enforcement cooperation

Paragraph 3

3. States Parties shall endeavour to cooperate within their means to respond to offences covered by this Convention committed through the use of modern technology.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Australia indicated that it considers the Convention as the basis for mutual law enforcement cooperation in respect of the offences covered by this Convention.

Information sharing arrangements and processes are constantly internally reviewed for their effectiveness and efficiency. The results achieved from products obtained from joint information sharing bodies are best measured through operational outcomes. The successful investigation and prosecution of matters is the most obvious indicator of the success of such bodies.

Measuring the impact of IDG operations

In February 2007 the AFP contracted the University of Queensland to examine existing IDG performance assessment methodologies and develop an updated body of knowledge that includes an effective means of measuring the impact of IDG operations. The project, ‘Measuring the impact of the IDG’s contribution to peace operations and international capacity building’, was completed and delivered to the AFP in June 2011. The AFP will now commence a process of implementation of the framework across applicable AFP international policing missions.

The completed project has delivered a comprehensive framework that emphasises and builds upon local engagement as the core platform for establishing mission objectives and measurement of mission success. Although the framework allows for the use of quantitative data where this can be obtained consistently and reliably, the main focus of the project is measurement of progress in mission environments where reliable quantitative data is difficult or even impossible to source. The framework is built upon a qualitative process that provides a number of tools that reduce the subjectivity of previous qualitative methods sufficiently to measure progress against a well-established justifiable baseline. The University of Queensland has met the design brief from the AFP for a framework that is flexible enough to be applied to all types of AFP mission typologies and all stages of mission delivery.

Foundation theoretical work from the University of Queensland includes a number of papers that examine aspects of both the mission environments in which the AFP operates internationally, as well as aspects of measurement of performance in the international development context. A report to the AFP provides a detailed rationale for the framework, as well as critical review of a number of other performance measurement approaches that led the project team to decide on the approach used for the final framework developed. The project team has also written abridged and comprehensive
practitioner manuals that provide instructions for use of the framework. Field testing of the framework using AFP missions in Marshall Islands and Vanuatu was conducted during the 2010-11 financial year to ensure the framework could be applied in a practical context.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 49 Joint investigations

States Parties shall consider concluding bilateral or multilateral agreements or arrangements whereby, in relation to matters that are the subject of investigations, prosecutions or judicial proceedings in one or more States, the competent authorities concerned may establish joint investigative bodies. In the absence of such agreements or arrangements, joint investigations may be undertaken by agreement on a case-by-case basis. The States Parties involved shall ensure that the sovereignty of the State Party in whose territory such investigation is to take place is fully respected.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Bilateral Arrangements

The AFP has a number of bilateral or multilateral agreements with other law enforcement agencies, mainly in the form of Memorandum of Understanding, Letters of Exchange &/or Statement of Intent. These arrangements are designed to facilitate cooperation in a variety of specific areas. Some of these arrangements include (but are not limited to):

- Memorandum of understanding between the Korean National Police Agency and the Australian Federal Police on combating transnational crime and developing police co-operation
- Statement of Intent between the National Police Agency of Japan and the Australian Federal Police on combating transnational crime and developing police cooperation
- Australian Federal Police and Netherlands Police Agency memorandum of understanding on police cooperation
- Memorandum of Understanding between the Australian Federal Police and the Royal Papua New Guinea Constabulary in relation to cooperation on law enforcement issues and the exchange of information
- Memorandum of Understanding between the between the Royal Thai Police and the AFP on combating transnational crime and developing police cooperation
- Memorandum of Understanding between the Singapore Police Force and the Australian Federal Police on combating transnational crime and developing police cooperation
- Memorandum of Understanding between the Australian Federal Police and the Sri Lanka Police on combating transnational crime and developing police co-operation
- Australian Federal Police and Policía Nacional de Timor-Leste Memorandum of Understanding on combating transnational crime and developing police cooperation

This is a representative list of agreements that the AFP is party to. A more exhaustive list can be provided by the AFP upon request.

Asia/Pacific Group on Money Laundering

The purpose of the APG is to ensure the adoption, implementation and enforcement of internationally accepted anti-money laundering and counter terrorist financing standards as set out in the 40
Recommendations and Nine Special Recommendations of the Financial Action Task Force (FATF). The APG was formally established in February 1997.

The following operational outcomes are examples of those achieved through overseas activities supported by the International Network in the 2010-11 financial year:

- Operation Rune is an ongoing investigation into bribery offences which has involved extensive international AFP-coordinated activity, including six search warrants executed by the AFP and 11 search warrants executed by United Kingdom and Spanish authorities. The AFP will continue investigations in Australia and internationally with law enforcement partners. The AFP’s international network has been crucial to the investigation in facilitating liaison and the exchange of information with international counterparts.

- Operation Zanella, a money laundering investigation, resulted in the seizure of A$1 931 395, £300 000 and US$6500 during the 2010-11 financial year. This operation aims to deter and disrupt organised and high-volume money laundering activity through partnerships with the financial industry, the Australian public sector and international law enforcement agencies. The investigation spans many jurisdictions and has resulted in enhanced international relationships and produced significant crime-targeting efficiencies.

- Operation Goldfinger is a joint investigation with the Federal Bureau of Investigations (FBI) that has resulted in the restraint of approximately US$15.2 million in gold and silver bullion and cash in Perth in October 2010.

Examples of implementation have been provided. Information on joint investigations and joint investigative bodies are also provided.

Pacific Transnational Crime Network

The AFP performs a lead role in assisting Pacific Islands Countries in managing, coordinating and enhancing law enforcement intelligence, collaboration and capacity building against transnational crime (including terrorism). This is undertaken through the AFP funded Pacific Transnational Crime Network (PTCN), which over the past 8 years has developed a series of fusion (multi-agency - Law enforcement, Customs, Immigration) Transnational Crime Units (TCU) networked across twelve Pacific Countries.

- TCU’s are based in Papua New Guinea, Vanuatu, Fiji, Samoa, Tonga, Solomon Islands and Micronesia. There are also four mini-TCUs in Palau, Commonwealth of Northern Mariana Islands, Marshall Islands and Kiribati;

- The TCU’s are supported by the Pacific Transnational Coordination Centre (PTCCC) based in Samoa which is staffed by members seconded from various TCU for 6-9 month periods and full time AFP Advisor. The role of the PTCCC is to coordinate information through the network and disseminate inside and outside the network to other Pacific or international law enforcement agencies.

The Cambodian Transnational Crime Team

One program resulted in the Australian Joint Transnational Crime Centre being opened in Ho Chi Minh City and the establishment of the Cambodian Transnational Crime Team. This has enabled collaboration between Australia, Vietnam and Cambodia on transnational crimes such as illicit drug production and trafficking, money laundering and human trafficking and has enhanced intelligence sharing.

The effectiveness of measures adopted to provide for joint investigations and joint investigative bodies is assessed on an ongoing basis as a part of effective law enforcement.

(b) Observations on the implementation of the article

The reviewers observed that the AFP seems to be the only police agency in Australia that has law enforcement cooperation agreements with foreign authorities, as the response indicates that the AFP has a number of agreements with other countries’ law enforcement agencies. Australia confirmed this
and specified that exceptionally speaking, the NSW police has a liaison officer in Los Angeles. However this is an ad hoc deployment of state-level police overseas.

The AFP is not the sole federal law enforcement agency in Australia. Other agencies are: Australian Crime Commission, Customs, ACLEI, Department of Immigration and Citizenship. All of the states have law enforcement agencies as well.

In response to the reviewers’ query on the progress of Operations Rune and Zanella, Australia reported that there have been prosecutions. Currently eight foreign bribery investigations are ongoing. Operation Rune resulted in 8 individuals charged of bribery of foreign public officials. Trial scheduled for August 2012. Companies have been charged with 3 charges each, conspiracy to provide benefit to foreign public officials. Companies have entered guilty pleas to the charges and have been fined. Other operations are ongoing and cannot be commented on extensively.

Operation Zunella is ongoing money laundering -- $1.3 million AUS and other currencies seized as of late last year. Separate from confiscated assets team, which now has a litigation role. Important to have an internal AFP team to move forward with seizure and forfeiture litigation. This is an international operation as well, which provides opportunities for mentoring and guidance to other countries.

Article 50 Special investigative techniques

Paragraph 1

1. In order to combat corruption effectively, each State Party shall, to the extent permitted by the basic principles of its domestic legal system and in accordance with the conditions prescribed by its domestic law, take such measures as may be necessary, within its means, to allow for the appropriate use by its competent authorities of controlled delivery and, where it deems appropriate, other special investigative techniques, such as electronic or other forms of surveillance and undercover operations, within its territory, and to allow for the admissibility in court of evidence derived therefrom.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The AFP has a wide ambit of powers to combat serious offences, including corruption. These measures were already in existence and not adopted to comply with UNCAC. These powers include communications interception abilities which operate through a number of legislative arrangements, including:

- Crimes Act 1914;
- Surveillance Devices Act 2004;
- Telecommunications Interception Act 1979; and
- Telecommunications (Interception) and Listening Devices Amendment Act 1997

Telecommunications Interception and Surveillance

The Telecommunications Interception Act 1979 (TIA Act) and the Surveillance Devices Act 2004 (SDA Act) provide enforcement and national security agencies with significant investigative tools, including the ability to obtain warrants to intercept communications, obtain access to stored communications, install and use surveillance devices, and to obtain access to telecommunications data while still protecting the privacy of individuals. This includes the use of data surveillance devices, such as key logging devices or other computer-based surveillance, listening devices, optical
surveillance devices and tracking devices. This information can be shared with other police forces and agencies under certain guidelines. In addition to setting out the circumstances in which warrants may be obtained, the TIA and SDA Acts also contain significant reporting, oversight and accountability measures designed to ensure the proper use of lawful interception and stored communications access powers.

**Undercover Operations and Controlled Operations**

The AFP also has extensive powers for conducting undercover and controlled operations. These operate under the Commonwealth *Crimes Act 1914*, as well as respective state and territory legislation. Controlled operations are frequently carried out to combat a range of serious offences, including corruption investigations. The Commonwealth *Crimes Act 1914* allows for a variety of actions to be taken to uncover and gather evidence on illegal activity, including the delivery of substitutes for illicit substances, and tracing documents from creators to ultimate illicit customers. The performance of such operations is governed by a strict regulatory scheme and an AFP National Guideline.

AFP undercover operations operate under the following sections of the *Crimes Act 1914*:

- Part 1AB - Controlled Operations CA 1914;
- Part 1AC - Assumed Identities CA 1914; Part 1ACA - Witness Identity Protection for operatives CA 1914; and
- Respective State/Territory legislation as it applies to undercover operations.

Australia has provided examples of implementation. The following examples were already in existence and not adopted to comply with UNCAC. Although these activities were not performed in relation to Australia’s UNCAC responsibilities, they do fulfil Australia’s requirements in a holistic fashion.

**Project AXIOM**

The AFP operates Program Axiom, an undercover policing program. Axiom has a team of full and part-time covert personnel who provide high standards of evidence and intelligence collection. This is done across a range of investigative tasks and crime types, including high-tech crime, economic crime, money laundering, illicit drugs, counter terrorism, people smuggling and corruption.

**Australian New Zealand Policing Advisory Agency (ANZPAA)**

The creation of the ANZPAA provides strategic policy advice to the ANZPAA Board on cross-jurisdictional policing initiatives that help enhance community safety and security. Two of ANZPAA’s services include:

- Development and promotion of professional standards, through the Integrity Testing Practitioners Committee, and
- Promotion of best practice, development of strategies and policies, establishment of consistent standards to improve the operation and practice of undercover policing.

**International Working Group on Undercover Operations**

The AFP also has a current membership of the International Working Group (IWG) on Undercover Operations, with a current membership of over 25 law enforcement agencies, which emphasises the importance of relationships to forge and strengthen an international covert capacity.

Data on number of investigations, convictions and acquittals are not readily available due to the wide use of the powers in question for a variety of offences.

Information on recent cases in which controlled delivery or other special investigative techniques being used and admitted in court has been provided.
In recent years, the AFP has used telecommunications interception powers within several investigations involving corrupt officials or police. There are currently two, high profile matters before the court involving these powers. These matters cannot be discussed at this time, however, as communications intercepted under warrant are contained within the brief of evidence.

**Telecommunications Interception**
- In the 2009-2010 financial year a total of 3079 prosecutions were commenced in Australian courts, for which lawfully intercepted telecommunications were tendered as evidence. Of these, 82 cases involved bribery or corruption matters.
- Similarly, in the 2009-2010 financial year a total of 2198 successful convictions were obtained in Australian courts where lawfully intercepted telecommunications evidence was used/tendered. Of these, 70 cases involved bribery or corruption matters.

**Surveillance Devices**
- The following table outlines the number of arrests, prosecutions and convictions obtained in the last three financial years for investigations where surveillance devices were used.

<table>
<thead>
<tr>
<th>Agency</th>
<th>Arrests</th>
<th>Safe recovery</th>
<th>Prosecutions</th>
<th>Convictions</th>
</tr>
</thead>
<tbody>
<tr>
<td></td>
<td>07/08</td>
<td>08/09</td>
<td>09/10</td>
<td>07/08</td>
</tr>
<tr>
<td>Australian Crime Commission</td>
<td>33</td>
<td>8</td>
<td>49</td>
<td>-</td>
</tr>
<tr>
<td>Australian Federal Police</td>
<td>98</td>
<td>107</td>
<td>58</td>
<td>-</td>
</tr>
<tr>
<td>WA Corruption and Crime Commission</td>
<td>-</td>
<td>-</td>
<td>1</td>
<td>-</td>
</tr>
<tr>
<td>Total</td>
<td>131</td>
<td>115</td>
<td>108</td>
<td>-</td>
</tr>
</tbody>
</table>

**Controlled Operations and Assumed Identities**
- In the 2009-2010 financial year, 72 applications for a controlled operation were granted to the AFP;
- In the 2009-2010 financial year, 73 authorities for the acquisition and use of assumed identities were issued by authorising persons from the AFP;
- In the 2008-2009 financial year, 52 applications for a controlled operation were granted to the AFP;
- In the 2008-2009 financial year, 75 authorities for the acquisition and use of assumed identities were issued by authorising persons from the AFP;
- In the 2007-2008 financial year, 65 applications for a controlled operation were granted to the AFP;
- In the 2007-2008 financial year, 76 authorities for the acquisition and use of assumed identities were issued by authorising persons from the AFP;

The AFP has also communicated intercepted product to various police forces and integrity agencies within Australia where corrupt activity is detected within AFP interception operations. The AFP can lawfully communicate this information to the relevant agencies which have the appropriate jurisdiction.
and powers to investigate these matters.

(b) Observations on the implementation of the article

In response to the experts’ query on explanations of the “Program Axiom”, Australia reported that this is a robust undercover program that operates nationally and internationally. It allows for operations in other countries with the country’s consent (and vice versa).

Article 50 Special investigative techniques

Paragraph 2

2. For the purpose of investigating the offences covered by this Convention, States Parties are encouraged to conclude, when necessary, appropriate bilateral or multilateral agreements or arrangements for using such special investigative techniques in the context of cooperation at the international level. Such agreements or arrangements shall be concluded and implemented in full compliance with the principle of sovereign equality of States and shall be carried out strictly in accordance with the terms of those agreements or arrangements.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The AFP has a number of bilateral or multilateral agreements with other law enforcement agencies, mainly in the form of Memorandum of Understanding, Letters of Exchange &/or Statement of Intent. These arrangements are designed to facilitate cooperation in a variety of specific areas. Some of these arrangements include (but are not limited to):

- Memorandum of understanding between the Korean National Police Agency and the Australian Federal Police on combating transnational crime and developing police cooperation
- Statement of Intent between the National Police Agency of Japan and the Australian Federal Police on combating transnational crime and developing police cooperation
- Australian Federal Police and Netherlands Police Agency memorandum of understanding on police cooperation
- Memorandum of Understanding between the Australian Federal Police and the Royal Papua New Guinea Constabulary in relation to cooperation on law enforcement issues and the exchange of information
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- Memorandum of Understanding between the Singapore Police Force and the Australian Federal Police on combating transnational crime and developing police cooperation
- Memorandum of Understanding between the Australian Federal Police and the Sri Lanka Police on combating transnational crime and developing police co-operation
- Australian Federal Police and Policia Nacional de Timor-Leste Memorandum of Understanding on combating transnational crime and developing police cooperation
This is a representative list of agreements that the AFP is party to. A more exhaustive list can be provided by the AFP upon request.

For further information on Australia’s bilateral mutual assistance treaties please refer to Article 46.

Examples of implementation has been provided.

**Australian New Zealand Policing Advisory Agency (ANZPAA)**
The creation of the ANZPAA provides strategic policy advice to the ANZPAA Board on cross-jurisdictional policing initiatives that help enhance community safety and security. Two of ANZPAA’s services include:

- Development and promotion of professional standards, through the Integrity Testing Practitioners Committee, and
- Promotion of best practice, development of strategies and policies, establishment of consistent standards to improve the operation and practice of undercover policing.

**International Working Group on Undercover Operations**
The AFP also has a current membership of the International Working Group (IWG) on Undercover Operations, with a current membership of over 25 law enforcement agencies, which emphasises the importance of relationships to forge and strengthen an international covert capacity.

Regarding information on recent cases in which bilateral or multilateral agreements or arrangements have facilitated the use of special investigative techniques, Australia indicated that due to the nature of this evidence, releasing information on specific techniques and intelligence gained may jeopardise the integrity of future investigations.

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

**Article 50 Special investigative techniques**

**Paragraph 3**

3. In the absence of an agreement or arrangement as set forth in paragraph 2 of this article, decisions to use such special investigative techniques at the international level shall be made on a case-by-case basis and may, when necessary, take into consideration financial arrangements and understandings with respect to the exercise of jurisdiction by the States Parties concerned.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

Under Australia’s mutual assistance law, Australia may provide mutual assistance to any country in the absence of a bilateral or multilateral treaty.

The Mutual Assistance in Criminal Matters Act 1987

The object of the Mutual Assistance in Criminal Matters Act 1987 is:

(a) to regulate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country for any of the following:

i. the taking of evidence, or the production of any document or other article, for the purposes of a proceeding in the foreign country;

ii. the issue of a search warrant and the seizure of any thing relevant to a
proceeding or investigation in the foreign country;
iii. the forfeiture or confiscation of property in respect of a foreign serious offence;
iv. the recovery of pecuniary penalties in respect of a foreign serious offence;
v. the restraining of dealings in property that may be forfeited or confiscated, or that may be needed to satisfy pecuniary penalties imposed, because of the commission of a foreign serious offence; and
(b) to facilitate the provision by Australia of international assistance in criminal matters when a request is made by a foreign country for the making of arrangements for a person who is in Australia to travel to the foreign country to give evidence in a proceeding or to give assistance in relation to an investigation; and
(c) to facilitate the obtaining by Australia of international assistance in criminal matters.

AXIOM

Program Axiom is a user pays service in respect to supplier costs expended during undercover operations. All salary costs are absorbed by the AFP and not payable by the client. Program Axiom first seeks authorisation of the countries government to operate in each country and operates within the laws and legislation of each individual country.

Regarding information on recent cases in which bilateral or multilateral agreements or arrangements have facilitated the use of special investigative techniques, Australia indicated that due to the nature of this evidence, releasing information on specific techniques and intelligence gained may jeopardise the integrity of future investigations

(b) Observations on the implementation of the article

The reviewers were satisfied with the answer provided.

Article 50 Special investigative techniques

Paragraph 4

4. Decisions to use controlled delivery at the international level may, with the consent of the States Parties concerned, include methods such as intercepting and allowing the goods or funds to continue intact or be removed or replaced in whole or in part.

(a) Summary of information relevant to reviewing the implementation of the article

Australia stated that it is in compliance with the provision under review.

The AFP has extensive powers for conducting controlled operations. These operate under the Commonwealth Crimes Act 1914, as well as respective state and territory legislation.

Where controlled operations involve international boundaries, methods for intercepting and/or allowing goods or funds to continue intact are dependent on individual arrangements with each State. Examples include:

- China: A statement of intent exists between the Ministry of Public Security (MPS), China, and the Australian Federal Police on combating transnational crime and developing police cooperation. Within that statement, guidelines have been established to conduct coordinated operations, including procedures relating to:
the determination and preparation of coordinated operations;
- the preparation of coordinated investigation plans;
- contribution of resources; and
- management of the flow of information and security.

- Columbia: A Memorandum of Understanding (MoU) exists between the Republic of Colombia and Australia on law enforcement issues in combating transnational crime. This MoU outlines guidelines for the execution of joint operations, including the exchange of information to enable controlled deliveries to be undertaken within the boundaries of each State’s legislation, regulation and procedures.

- Indonesia: A Memorandum of Understanding (MoU) exists between the Australian Federal Police and the National Narcotics Board of the Republic of Indonesia, on combating illicit trafficking in narcotic drugs, psychotropic substances and their precursors. Within the MoU provisions are made to collaborate on the suppression of drug trafficking by conducting controlled delivery operations.

Where controlled operations involve illicit goods entering into Australia from overseas, the AFP is required to notify Customs as soon as practicable under section 15J of the *Crimes Act 1914*. This allows the goods exemption from detailed Customs scrutiny, with the AFP accepting total responsibility for compliance with Customs statutory requirements.

Examples of implementation have been provided.

AFP and MPS are currently, jointly, investigating a syndicate following the first successful controlled delivery of narcotics from China to Australia. The successful controlled delivery of narcotics from China to Australia is currently still in investigation phase therefore comment cannot be made. However the outcome in China was the arrest of several offenders who are before the court.

The effectiveness of special investigative techniques is assessed on an ongoing basis as a part of effective law enforcement. Additionally, formal processes under legislation require reporting to government on both outcomes of specific investigations and aggregated statistical reporting. These measures ensure that the tools used in special investigations are constantly reviewed for improvements and possible issues.

(b) **Observations on the implementation of the article**

The reviewers were satisfied with the answer provided. The reviewers reiterated their observation that there are a broad range of investigative tools at the disposal of law enforcement agencies, in particular the AFP, to allow the AFP to cooperate with foreign law enforcement authorities.