



UNODC

United Nations Office on Drugs and Crime

Draft Country Review Report of Australia

Review by Iceland and Pakistan of the implementation by
Australia of articles 5-14 and 51-59 of the United Nations
Convention against Corruption for the review cycle 2016-2021

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 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 Australia and the governmental experts from Iceland and Pakistan, by means of telephone conferences, e-mail exchanges and a country visit in Australia in accordance with the terms of reference and involving Messrs. Sveinn Helgason and Kjartan Olafsson for Iceland, and Mr. Asim Lodhi for Pakistan.

A country visit, agreed to by Australia, was conducted from 10 to 12 April 2018.¹

III. Executive summary

1. Introduction: overview of the legal and institutional framework of Australia in the context of implementation of the United Nations Convention against Corruption

Australia signed the Convention on 9 December 2003 and ratified it on 7 December 2005; it entered into force on 6 January 2006. The Australian legal system is dualist. Therefore, the Convention is not directly applicable.

Australia is a constitutional democracy. It has a federal system with three layers of government: Commonwealth (federal), States and Territories, and local level. The review of Australia was limited to the federal level.

The implementation by Australia of chapters III and IV of the Convention was reviewed in the second year of the first cycle, and the executive summary of that review was published on 15 May 2012 (CAC/COSP/IRG/I/2/1). Australia's anti-money-laundering and counter-terrorist

¹ The review takes into account only legislation and any other relevant measures, such as guidelines, statistics, examples, etc, in effect in Australia by the end of the last day of country visit.

financing (AML/CTF) framework was also assessed jointly by the FATF and the Asia-Pacific Group on Money Laundering (APG) in 2014-15.

Relevant institutions in the prevention of and fight against corruption include the Australian Commission for Law Enforcement Integrity (ACLEI), the Australian Criminal Intelligence Commission (formerly the Australian Crime Commission), the Commonwealth Ombudsman, the Australian Transaction Reports and Analysis Centre (AUSTRAC), and the Australian Federal Police (AFP).

The implementing legislation for chapters II and V includes, notably, the Criminal Code Act 1995 (Criminal Code); the Public Service Act 1999 (PSA), the Public Governance, Performance and Accountability Act 2013 (PGPAA), the Public Interest Disclosure Act 2013 (PIDA), the Anti-Money Laundering and Counter-Terrorism Financing Act 2006 (AML/CTF Act), and the Proceeds of Crime Act 2002 (POCA)

2. Chapter II: preventive measures

2.1. Observations on the implementation of the articles under review

Preventive anti-corruption policies and practices; preventive anti-corruption body or bodies (arts. 5 and 6)

Australia relies on a set of relevant legislative provisions, notably the PSA, the Parliamentary Service Act 1999, the Commonwealth Electoral Act 1918 (CEA), the PIDA, the PGPAA, the Freedom of Information Act (FOIA), the Corporations Act 2001 (CorpA), and legislative instruments like the Commonwealth Procurement Rules (CPR) to promote integrity, transparency and accountability in the public and private sectors and to prevent corruption.

Additionally, Australia has developed the Open Government National Action Plan for 2016-2018 (NAP) together with civil society. NAP includes 15 specific commitments aimed at improving Australia's anti-corruption regime, such as integrity in the public sector, public participation, access to government information and transparency and accountability in business. Each commitment identifies its objective, lead agency, timeframes and milestones.

Australia takes a multi-agency approach to implement and coordinate the above policies to effectively prevent and combat corruption. The Attorney-General's Department (AGD) oversees and coordinates the implementation of domestic anti-corruption policies and programmes across governmental departments and agencies and engages in international fora aimed at combatting corruption. Other key agencies are the AFP, the Australian Public Service Commission (APSC), the Australian Securities and Investments Commission (ASIC), the Australian National Audit Office (ANAO), the Office of the Australian Information Commissioner (OAIC), the Commonwealth Ombudsman, the Independent Parliamentary Expenses Authority, ACLEI and AUSTRAC. All these bodies and functions except AGD are statutory authorities or officeholders and have the necessary independence, resources, sufficient budget and specialized staff to carry out their work.

These agencies conduct activities to increase awareness regarding corruption and fraud within the public sector. AFP together with other agencies operate a Fraud and Anti-Corruption Centre to exchange information and intelligence regarding emerging threats and challenges regarding financial crimes including corruption. ACLEI systematically increases and disseminates knowledge about the prevention of corruption amongst agencies in their jurisdiction and amongst the members of the public.

Operations of the key anti-corruption legislation are periodically reviewed but the results are not always made publicly available.

Australia is part of various regional and international anti-corruption fora such as G20, APEC, OECD, FATF, the International Anti-Corruption Coordination Centre (IACCC), and the International Foreign Bribery Taskforce (IFBT), and supports efforts to tackle corruption and improve transparency and accountability in partner countries bilaterally through its development programmes.

Public sector; codes of conduct for public officials; measures relating to the judiciary and prosecution services (arts. 7, 8 and 11)

The APSC, established under PSA, is responsible for promotion of high standards of integrity, conduct, accountability, effectiveness and performance and regulates recruitment, hiring, retention, promotion and retirement of Australian Public Service (APS) employees.

Recruitment to APS is competitive and based, inter alia, on fairness and merit. Recruitment decisions can be appealed by unsuccessful applicants to the Merit Protection Commissioner (MPC). The MPC, the Fair Work Commission, the Federal Court or the Federal Circuit Court may review employment decisions.

The Constitution contains the qualification criteria for election (sections 16 and 34) and for disqualification (sections 44 and 45) of Members of Parliament and senators. Additional requirements for parliamentarians and candidates are provided in sections 163, 362 and 386 CEA.

The CEA further provides for an electoral funding and disclosure scheme that requires disclosure entities (candidates, political parties, donors etc.) to lodge financial returns with the Australian Electoral Commission (AEC). These returns are made public. Donations, loans, debts and gifts (as defined in subsection 287(1) CEA) must be disclosed. Details such as the date when received, the amount or value and the name and address of the donor must be disclosed for individual donations exceeding a specified threshold (currently AUD 13,800). Candidates may be eligible for public funding. The AEC reviews the financial returns and may refer violations, including lodging misleading or deceptive returns and failures to lodge accurate returns to the relevant authorities for criminal prosecution.

Each House of the Parliament has a scheme for continuous disclosure of interests of its members and their immediate family members. Separately, the Prime Minister's Statement of Ministerial Standards (SMS) also requires Ministers, Assistant Ministers and Parliamentary Secretaries to, inter alia, declare and register their interests and those of members of their immediate families and avoid conflicts of interests in their dealings with lobbyists. The declarations are publicly available.

All APS employees shall take reasonable steps to avoid real or apparent conflicts of interests and declare them if they arise (section 13(7) PSA). The declarations are kept and reviewed by agencies individually. APSC develops and makes available to all agencies training materials on conflicts of interest. In addition, the PGPAA requires all officials of state or parliamentary departments and other public and corporate bodies listed in section 10 of the Act to disclose material personal interests.

All APS employees are bound by the APS Code of Conduct (section 13 PSA). If necessary, they may seek advice on ethical issues from the Ethics Advisory Service. The PGPAA also imposes a set of general duties on relevant officials. SMS sets specific standards of integrity and propriety for Ministers, Assistant Ministers and Parliamentary Secretaries in their conduct of public business. Breaches of the APS Code of Conduct, including failure to declare conflicts of interest, may lead to sanctions ranging from a reprimand to termination of employment (section 15 PSA). PGPAA officials who do not discharge their general duties can also be subject to the PSA sanctions (section 32 PGPAA).

APS employees are obliged to report misconduct (section 14(f) APS Commissioner's Directions 2016). Misconduct can also be reported under PIDA. In addition, agency heads under ACLEI's jurisdiction are required to notify the Integrity Commissioner of information or allegations relating to corruption in their agencies (section 19 Law Enforcement Integrity Commissioner Act). Potential fraud and corruption may also be referred to the AFP for criminal investigation.

PIDA facilitates disclosure and investigation of wrongdoing and maladministration and regulates whistleblower protections in the public sector. Reporting persons are protected from civil, criminal or administrative liability (section 10 PIDA). Disclosing the identity of and taking reprisal action against reporting persons are offences (sections 20 and 19 PIDA respectively). External disclosures may be made exceptionally (section 26 PIDA). Disclosable conduct is defined broadly and includes corruption, fraud, and corrupt conduct (section 29 PIDA).

Appointments and removals from office of the federal judiciary are regulated by section 72 of the Constitution and guided by convention and practice.

There are no compulsory integrity trainings for federal court judges, but they are encouraged to attend internal and external training and judicial education programmes that may include sessions on judicial ethics and conduct. Complaints are primarily handled according to the Courts Legislation (Judicial Complaints Act) 2012 (JCA) and the Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012 (JMA). The JCA sets out internal procedures to consider, investigate and recommend actions in response to complaints. The JMA assists the Parliament in considering the removal of a judge under section 72 of the Constitution.

The Commonwealth Director of Public Prosecutions (CDPP) is regulated mainly by the Director of Public Prosecutions Act 1983, which states in sections 5 and 27 that PGPA and PSA fully apply to the Director and staff of the CDPP. Additionally, the Director and Associate Director must disclose any direct or indirect pecuniary interests (section 24 PSA). Further, the CDPP has developed a Values and Behaviours Statement as a guide for its staff and requires them to declare any financial assets and liabilities as part of the security clearance process.

Public procurement and management of public finances (art. 9)

Relevant Australian public entities conduct their own procurement and grant processes under the general framework set by the PGPA. The Act provides for issuance of the CPR by the Minister for Finance which serve as the basic rules set for all public procurements (subsection 105B (1)).

The CPR require that relevant entities report their procurement contracts at or above specified thresholds on AusTender - a centralised, public information system providing information on procurement plans, open tenders and awarded contracts.

The use of a standard contract template (Commonwealth Contracting Suite) is mandatory for procurements valued up to AUD 200,000 and encouraged for use up to AUD 1 million. For each procurement, responsible officials must maintain appropriate documentation for proper scrutiny (Part 7 CPR). Complaints may be made to the procuring entity, the Procurement Coordinator within the Department of Finance, the Commonwealth Ombudsman, and the Federal Court. The ANAO conducts audits on procurement activities and publishes the audit reports on its website and tables them in Parliament.

The annual federal budget is prepared by the Cabinet and adopted by the Parliament. The budget is presented under the framework set by the Charter of Budget Honesty Act 1998 which requires the Treasurer to publicly release periodic budget economic and fiscal outlook reports that are based on accounting standards and the Government Financial Statistics standards developed by the International Monetary Fund.

In addition to annual whole-of-government financial statements prepared by the Finance Minister, state or parliamentary departments and other public and corporate bodies listed in section 10 PGPA must prepare annual financial statements and submit them to the Auditor-General for audit (sections 42 and 48 PGPA). The Joint Committee of Public Accounts and Audit of the Parliament also examines the financial affairs of authorities and all reports of the Auditor-General.

Sections 490.1 and 490.2 of the Criminal Code establish offences for false dealing with accounting documents.

Public reporting; participation of society (arts. 10 and 13)

The FOIA gives every person a legally enforceable right to access an official document of Ministers or Government agencies, subject to specific exceptions and exemptions (including personal privacy, national security, trade secrets etc.) and establishes an Information Publication Scheme that requires public bodies to proactively publish a range of information. Requests may also incur charges. Responses to requests must be published with few exceptions. The FOIA sets specific deadlines to deal with requests and requires reasons to be provided if the request is denied.

The OAIC, established by the Australian Information Commissioner Act 2010, oversees the operation of the FOIA and issues guidelines on its operation. Ministers and agencies must have regard to the guidelines when applying the FOIA. The Information Commissioner may conduct investigations into actions of agencies taken and review decisions made under the FOIA. Under the Ombudsman Act 1976, the Commonwealth Ombudsman may also investigate complaints against actions taken by agencies under the FOIA.

Approaches to stakeholder engagement and public consultations vary across public bodies. Policy development generally requires genuine and timely consultation with businesses, community organizations and individuals. The NAP seeks to improve the approach in its commitment 5.2.

The AFP and State police services have telephone and internet services to report crime. The Crime Stoppers Australia project and the National Security Hotline provide for anonymous reporting of crime.

Private sector (art. 12)

The Australian regulatory and co-regulatory framework to prevent corruption in the private sector consists mainly of the Criminal Code, the CorpA, the Australian Securities and Investments Commission Act 2001 (ASICA), the AML/CTF Act, and relevant legislative instruments and regulatory guidance.

The AFP regularly engages with the private sector to, inter alia, educate on domestic and foreign corruption and bribery legislation and promote transparency in international business transactions.

The Department of Foreign Affairs and Trade and the Australian Trade and Investment Commission (AusTrade) conduct outreach activities to ensure that Australian businesses are aware of their obligations under anti-bribery laws. The Australian Stock Exchange (ASX) Corporate Governance Council's Corporate Governance Principles and Recommendations are linked to the ASX Listing Rules and encourage listed entities to adopt good governance practices.

Whistleblower protection in the private sector is provided in Part 9.4AAA CorpA, which covers reporting of breaches of the CorpA and the ASICA. The ASIC has established an Office of the Whistleblower, enhanced its internal process for dealing with whistleblower reports and developed targeted information to raise awareness among potential whistleblowers on available protections and ASIC's role.

ASIC maintains 31 legal registers (companies, business names, professional registers, etc) that contain information about over 4.8 million entities. Most registers are publicly available online. Accuracy of information in the registers is ensured by ongoing legal obligations to update information, including an annual review requirement, a late fee regime and prescribed offences under the Criminal Code (sections 137.1 and 137.2).

No general legislative restrictions on post-separation employment exist for public officials – agencies may adopt the appropriate policies, in line with the PSA and the APS Code of Conduct. The APSC provides guidance for agencies on conflicts of interest, including managing post-separation employment. The SMS also provides for some restrictions but it is unclear if and how they could be enforced.

Under the CorpA, relevant entities must keep written financial records that correctly record and explain their transactions, financial position and performance, and that enable accurate financial statements to be prepared and audited (Section 286). Section 292 CorpA requires all companies, other than small proprietary companies to prepare an annual report and make it public by lodging it with ASIC.

Many entities regulated under the CorpA are required to apply Australian Accounting Standards based on International Financial Reporting Standards. The financial records must be retained for seven years (section 286(2)) and failure to do so is a criminal offence (section 286(1) and 286 (2)). Section 490 CC criminalizes false dealing with accounting documents in the private sector.

The Income Tax Assessment Act 1997 expressly restricts deductibility of bribes to public officials (sections 26-52 and 26-53) and expenditure relating to illegal activities (section 26-54). However, minor facilitation payments may be deductible under section 26-52(4) and Australia continues to

periodically review its policies and approach on facilitation payments in order to effectively combat the phenomenon.

Measures to prevent money-laundering (art. 14)

Australia has a robust and mature regime for combating money laundering, although certain key areas – in particular the coverage of certain designated non-financial businesses and professions – remain unaddressed. The main legislative instruments for the prevention of and fight against money laundering are the AML/CTF Act, the Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument 2007 (No. 1) (AML/CTF Rules), the Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) AML/CTF Regulation 2018, the Financial Transaction Reports Act 1988 and Part 10.2 of the Criminal Code. The AML/CTF Act adopts a risk-based approach and establishes three levels of due diligence (standard, enhanced and simplified). A national money laundering threat assessment was carried out in 2011. This assessment is augmented by sectoral and product risk assessments, which commenced in 2016. Substantial changes to the AML/CTF Rules on beneficial ownership, politically exposed persons (PEPs) and customer due diligence were introduced in 2014.

Australia has adopted an all-crimes approach to money laundering. Money laundering is criminalised under Division 400 of the Criminal Code and covers dealing with proceeds and instruments of crime.

AUSTRAC is Australia's financial intelligence unit and AML/CTF regulator. Reporting entities under the AML/CTF Act include financial institutions, and the gambling, remittance, digital currency exchange and bullion dealing sectors that provide designated services listed in section 6 of the Act ('reporting entities'). This means that designated non-financial businesses and professions other than casinos and bullion dealers are not subject to AML/CTF obligations.

Verification of the identity of customers is provided for in sections 28-35 AML/CTF Act and Chapter 4 of the AML/CTF Rules. Ongoing customer due diligence is required by section 36 of the Act. Enhanced due diligence obligations are set out in Part 15.8-15.11 of the AML/CTF Rules. Procedures for the collection and verification of beneficial owner information are outlined in Part 2 of the AML/CTF Act and Part 4.12 of the AML/CTF Rules. Part 4.13 of the AML/CTF Rules provides for enhanced customer due diligence with regard to PEPs. Reporting entities have an obligation to make a suspicious matter report to AUSTRAC (section 41 AML/CTF Act). The major reporting entities – including the biggest domestic banks – have an informed understanding of their AML/CTF risks and obligations

In terms of national cooperation, AUSTRAC has 46 domestic partner agencies across law enforcement, national security, human services and revenue protection. In 2017, AUSTRAC launched the Fintel Alliance, a public-private partnership to share financial intelligence.

Mutual legal assistance, also in relation to money laundering, is regulated in the Mutual Assistance in Criminal Matters Act 1987 (the MACMA).

Provisions relating to the declaration or disclosure of cross border movement of currency and bearer negotiable instruments (BNI) are contained in Part 4 of the AML/CTF Act. In particular, the physical cross-border transportation of cash in the amount of AUD 10,000 or more must be reported (section 53 AML/CTF Act). There is no threshold value for the requirement to report cross-border movements of BNI but an individual must report the movement of a BNI when requested by a police or customs officer. Part 5 of the AML/CTF Act covers electronic funds transfers, Part 6 establishes a remittance sector register and Part 6A establishes a register for digital currency exchange businesses. Reporting entities providing a designated remittance service (section 6 AML/CTF Act) must enrol and register with AUSTRAC before providing remittance services to their customers. It is an offence for unregistered persons to provide remittance services, including hawalas.

Australia is a founding member both of the FATF and the APG, a FATF-style regional body. AUSTRAC is also a founding member of the Egmont Group of Financial Intelligence Units.

2.2. Successes and good practices

The review highlighted as good practices:

- *Australia actively participates in regional and international organizations and programmes that address anti-corruption (art. 5(4));*
- *Australia has created a dedicated website that contains information on the national budget and clearly presents budget information with detailed explanations and interactive tools (art. 9(2));*
- *The establishment of the Fintel Alliance, a public-private partnership to share financial intelligence (art. 14(1)(b));*
- *The wide range of assistance and training provided by Australia to neighbouring countries and international initiatives (art. 14(5)).*

2.3. Challenges in implementation

It is recommended that Australia:

- *Continue its efforts under the Open Government Partnership in order to develop and maintain effective and coordinated measures to prevent corruption (article 5(1));*
- *Consider lowering or eliminating entirely the minimum threshold at which political parties and other disclosure entities must report donations, and endeavour to publish more timely financial returns of parties, candidates and other disclosure entities (article 7(3));*
- *Consider introducing detailed regulation on gifts for public officials within APS and Cabinet and establishing a register of gifts; and consider taking specific measures to systematically review and verify the declarations of interests made by public officials (article 8(5));*
- *Continue its measures to enhance transparency of beneficial ownership of companies and director identification (article 12(2)(c));*
- *Strengthen legislative or administrative measures to prevent conflicts of interest by introducing appropriate restrictions and effective compliance mechanisms to regulate professional activities and employment of former public officials in the private sector (article 12(2)(e))*
- *Continue to fully implement article 12(4);*
- *Amend the AML/CTF Act to ensure that designated non-financial businesses and professions beyond casinos and bullion dealers, such as real estate agents, accountants and lawyers, are subject to AML/CTF obligations in line with FATF standards (art. 14(1)(a) and 52(1));*
- *Ensure that information on the beneficial owners of legal persons and legal arrangements is maintained and accessible to competent authorities in a timely manner (art. 14(1)(a) and 52(1));*
- *Introduce a threshold value for the requirement to report cross-border movements of bearer negotiable instruments (art. 14(2)).*

3. Chapter V: asset recovery

3.1. Observations on the implementation of the articles under review

General provision; special cooperation; bilateral and multilateral agreements and arrangements (arts. 51, 56 and 59)

Australia has a comprehensive legislative and policy framework on asset recovery. The POCA, the MACMA, and the AML/CTF Act provide a legal basis for identifying, restraining, forfeiting, and returning assets derived from the commission of an offence. A Confiscated Assets Fund has been established under the POCA (Part 4-3). In the framework of the G20, Australia has published a Step-by-Step Guide for Asset Recovery.

The sharing of information held by AUSTRAC with foreign countries is governed by sections 132-133C AML/CTF Act. AUSTRAC cooperates with other FIUs through the Egmont Group. AUSTRAC can and

does, share information pro-actively, without a prior request. AUSTRAC has 92 MoUs with counterpart international FIUs for the exchange of financial intelligence and of regulatory and compliance information.

Prevention and detection of transfers of proceeds of crime; financial intelligence unit (arts. 52 and 58)

Provisions governing the identity of customers and beneficial owners are contained in sections 28-35 AML/CTF Act and Chapter 4 of the AML/CTF Rules. There is no register of beneficial owners.

PEPs are defined in Part 1.2 of the AML/CTF Rules and includes domestic PEPs. Under Part 4.13 of the AML/CTF Rules, PEPs are subject to special measures and enhanced due diligence. However, Part 4.14 sets out certain exemptions relating to the identification of beneficial owners and PEPs. Reporting entities can consult information in links communicated in AUSTRAC Guidance and through existing commercial databases to identify PEPs and individuals on United Nations sanctions lists.

Records of customer identification procedures must be kept for the life of the customer relationship and for seven years after the reporting entity ceases to provide designated services to the customer (section 113 AML/CTF Act). Banks that have no physical presence and that are not affiliated with a regulated financial group (“shell banks”) are defined in section 15 AML/CTF Act. Section 95 AML/CTF Act prohibits financial institutions from entering into a correspondent banking relationship with a shell bank, or with another financial institution that has a correspondent banking relationship with a shell bank. Nonetheless, FATF has rated Australia non-compliant with FATF Recommendation 13 due to the lack of information reporting entities are required to gather and verify in the context of a correspondent banking relationship.

Every Commonwealth parliamentarian is required to maintain a public register of interests, including domestic and foreign accounts, assets, gifts and any source of income. Under the APS Code of Conduct, all APS employees shall declare any potential conflicts of interest and update this declaration when circumstances change. The declaration does not include assets. There are no requirements for public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship.

AUSTRAC is an administrative FIU in the portfolio of the Department of Home Affairs. The obligation to report suspicious transactions to AUSTRAC is established in Part 3.2 AML/CTF Act.

Measures for direct recovery of property; mechanisms for recovery of property through international cooperation in confiscation; international cooperation for purposes of confiscation (arts. 53, 54 and 55)

As a matter of common law and subject to relevant jurisdictional and procedural requirements, foreign States may initiate civil action in Australian civil courts to establish title to or ownership of property or seek compensation or damages.

Part VI.2.A of the MACMA deals with the “Enforcement of foreign orders”. The Attorney-General can authorise a domestic proceeds of crime authority to register a foreign forfeiture order in a court with proceeds jurisdiction upon receiving a request from a foreign country (sections 34 and 34A MACMA). It then has effect, and may be enforced, as if it were a forfeiture order made by the court under the POCA (section 34B MACMA). Both conviction based and non-conviction based orders may be registered. A foreign freezing or seizure order may be registered and enforced under sections 34 and 34E MACMA. Where a foreign country has not provided a restraining order to Australia, the MACMA makes provision for the Attorney-General to apply for a domestic interim restraining order if requested to do so by the foreign country (section 34J). However, Australia will require a foreign restraining order to be sent to Australia and registered within a prescribed time after the interim order was made. The applicable standard of proof is reasonable suspicion that the criminal proceedings or confiscation proceedings are about to commence in a foreign country.

With regard to the application of the provisions implementing art. 54 to a concrete case under art. 55, section 34 MACMA provides that the Attorney General enjoys discretion whether or not to take any

measures. The content of requests for mutual legal assistance for the purpose of confiscation is determined by MACMA.

To provide assistance for the purposes of confiscation Australia does not require a treaty. However, Australia has concluded bilateral treaties, which included a framework for recovery of property and the confiscation of assets.

Section 8 MACMA outlines the grounds for refusal of assistance, which do not include the *de minimis* value of the property. Australian authorities would not discontinue provisional measures without first giving the requesting state an opportunity to outline why the measures should be continued.

The rights of bona fide third parties are protected under section 34L MACMA.

Pro-active measures without request may be taken under sections 18 or 19 POCA. A restraining order must have been in force for at least 6 months, before the property can be forfeited. The POCA provides for non-conviction based forfeiture. Section 47 enables action to be taken where a court is satisfied that a person has committed a serious offence, including corruption. Section 49 of the POCA enables the forfeiture (in rem) of property suspected of being the proceeds of indictable offences or foreign indictable offences, including corruption. The POCA also contains mechanisms to ensure that legitimate owners of property can have their interest in property recognised, including exclusion orders and compensation orders (sections 29 et seq. and 73 et seq.).

Return and disposal of assets (art. 57)

Australia cannot return confiscated property in direct application of the Convention. Pursuant to the POCA, once a domestic forfeiture order is made by a court, the property is liquidated and credited to the Confiscated Assets Account (section 296). Australia can share with a foreign country a proportion of any proceeds recovered if the foreign country has made a significant contribution to the recovery or to the investigation or prosecution of the unlawful activity (so-called “equitable sharing program”, section 296(4)(c) POCA). Moreover, under section 70 POCA, the Minister may direct that the property be alternatively disposed of. This section can be used to return property to the country of origin. However, this mechanism is discretionary.

Section 34B(3) MACMA provides for a complementary process to the POCA where a property that has been dealt with pursuant to a foreign forfeiture order may be disposed of, or otherwise dealt with, in accordance with any direction of the Attorney-General.

The rights of bona fide third parties and the rights of legitimate owners are protected through the use of exclusion orders (section 34L MACMA). Cooperation requests are, in principle, executed free of charge. Australia will not reclaim expenses incurred for investigations, prosecutions or judicial proceedings. Where costs are incurred in the administration of the confiscated assets, Australia may choose to reclaim them.

Australia does not make cooperation for purposes of return and disposal of assets conditional on the existence of a treaty. However, Australia has concluded bilateral treaties which included a framework for dealing with the return and disposal of assets. Australia can also conclude agreements on a case-by-case basis for the final disposal of confiscated property.

3.2. Successes and good practices

- Australian authorities may act on information provided by foreign law enforcement to commence domestic proceedings against property in Australia that is the proceeds of a foreign indictable offence (art. 54(2)(b)).

3.3. Challenges in implementation

It is recommended that Australia:

- Review the application of the exemptions relating to the identification of beneficial owners and PEPs in Part 4.14 of the AML/CTF Rules at appropriate intervals, in order to ensure that they do not create loopholes for the AML/CTF regime (art. 52(1));

- *Continue to implement the FATF recommendation with regard to correspondent banking relationships with shell banks (art. 52(4));*
- *Ensure that obligations under article 55(1) and (2) of UNCAC are considered by the Attorney-General as part of the exercise of his or her discretion under section 34 of the MACMA;*
- *Consider including a reference in the legislation to the specific mechanisms and mandatory requirements of article 57 and monitor the application thereof in all asset recovery cases (art. 57(3)(a) and (b)).*

IV. Implementation of the Convention

A. Ratification of the Convention

The United Nations Convention against Corruption (UNCAC) was signed by Australia on 9 December 2003 and ratified by Parliament on 7 December 2005.

The Convention and Australia's legal system

The power to enter into treaties is an aspect of the Commonwealth's executive power under section 61 of the *Australian Constitution* (the Constitution).

The Australian legal system is dualist. Parliament must enact domestic laws reflecting the terms of any international treaty before treaty obligations have effect.

The key legislative power to implement treaties in Australian domestic law is granted in subsection 51(xxix) of the 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 relate to matters covered in whole or in part by State or Territory legislation.

In accordance with revised treaty-making arrangements adopted in 1996, all proposed treaty actions are required to be tabled in the Australian Parliament for 15-20 joint sitting days before binding treaty action is taken, to facilitate public consultation and scrutiny by the Joint Standing Committee on Treaties (JSCOT). The UNCAC was tabled in the Australian Parliament on 7 December 2004. JSCOT recommended on 17 August 2005 that binding treaty action be taken (JSCOT Report 66 of 2005).

The Australian Government's policy is that action to bring a treaty into force will not be taken until any necessary implementing legislation has been passed by the Commonwealth or the States and Territories. Any new Australian legislation to implement a treaty must be in force on or before the date that a treaty enters into force in Australia.

Accordingly, UNCAC was ratified by Australia on 7 December 2005 and entered into force on 6 January 2006 (in accordance with Article 68 of the Convention). UNCAC is implemented by a broad range of Commonwealth legislation, including the *Criminal Code Act 1995* (the Criminal Code) and the *Crimes Act 1914* (Crimes Act), 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

Australia's System of Government

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

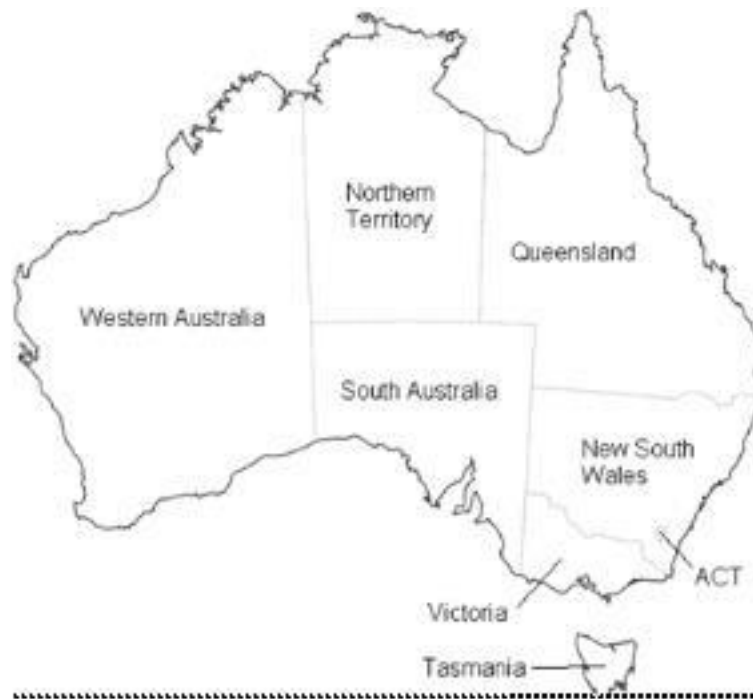
Australia is a constitutional democracy based on the Westminster system, a system which provides checks and balances to guard against corruption. Ministers are constitutionally responsible for government departments and are answerable to Parliament for any abuses of power.

The doctrine of the separation of powers is a key principle underpinning the Constitution. Under the Constitution, the legislative, executive and judicial powers of the Commonwealth are divided between the Parliament, executive government and judicature, 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. While under the Westminster system of responsible government, there is not a complete separation of the legislative and executive branches, the separation of powers between the judicial branch and the executive and legislative branches is a strict one.

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 by a strict separation of judicial power as described above.

Together, these constitutional safeguards form a strong basis for preventing and addressing corruption in Australia.

Map of Australia with the States and internal Territories identified:



States and Territories

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, consisting of the federal Parliament, executive government (known as the Australian Government or Commonwealth Government), and judiciary.

The founders of the Australian Constitution intended that the Australian Parliament would have the power to legislate on specific areas of concern common to the whole of Australia. The powers of the Australian Parliament are, therefore, limited to certain subject matters.

States and Territories have the power to make their own laws on most topics. The Commonwealth generally shares the power to make laws with the States and Territories on a number of topics, such as those enumerated in section 51 of the Constitution. However, in the event of an inconsistency between a law of a State and a law of the Commonwealth, section 109 of the Constitution provides that the latter prevails to the extent of the inconsistency. State governments also have their own constitutions, as well as their own legislatures, executives and judiciaries.

Territories are polities that have been surrendered to the Commonwealth by a State or otherwise placed under the authority of the Commonwealth under section 122 of the Constitution. Territories can be administered by the Australian Government, or they can be granted self-government. Self-government allows a Territory to govern its internal affairs in a similar manner to a State. Australia has two self-governing internal territories (the Australian Capital Territory and the Northern Territory). All other Territories are administered by the Australian Government.

Criminal Law

The Constitution does not give the Australian Parliament a specific power 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.

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.

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.

C. Implementation of selected articles

II. Preventive measures

Article 5. Preventive anti-corruption policies and practices

Paragraph 1 of article 5

1. Each State Party shall, in accordance with the fundamental principles of its legal system, develop and implement or maintain effective, coordinated anti-corruption policies that promote the participation of society and reflect the principles of the rule of law, proper management of public affairs and public property, integrity, transparency and accountability.

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

System of Government

The Australian system of government provides safeguards against corrupt behaviour. As a representative democracy, parliamentarians in Australia are elected by, and accountable to, the people of Australia. Furthermore, the separation of powers and the rule of law provide the foundation for Australia's system of government and provide checks against corruption and abuse of power.

Under the rule of law, everyone - including citizens and the government - is bound by and entitled to the benefit of laws. The Australian Government advances the rule of law by ensuring that laws are clear, predictable, accessible, made in consultation with the community, and publicly adjudicated by an independent judicial system.

Australia's independent and impartial judicial system protects against corruption. Judicial officers act independently of the Parliament and the executive. Constitutional guarantees of tenure and remuneration assist in securing judicial independence and impartiality.

The Governor-General is the Queen's representative in Australia and is appointed by the Queen on the advice of the Prime Minister. The Governor-General's powers and role derive from the Constitution.

The Governor-General performs important constitutional, ceremonial and community duties. For example, the Governor-General:

- dissolves the Parliament and issues writs for new elections
- commissions the Prime Minister and appoints other Ministers after elections
- assents in the Queen's name to legislation that has passed both Houses of Parliament
- acts on the advice of Ministers through the Executive Council to make regulations and proclamations under existing laws and appoint Federal Judges, Australian Ambassadors, High Commissioners to foreign countries and other senior Government officials
- issues Letters Patent to establish Royal Commissions, and
- authorises other executive decisions by Ministers.

Apart from a few exceptional cases (such as the appointment of a Prime Minister), the Governor-General acts on the advice of ministers in the executive government. More information about the Governor-General can be found at: <https://www.gg.gov.au/>.

The Governor-General has the power to remove judges for proved misbehaviour or incapacity (but only provided that such a course of action has been requested by both Houses of Parliament in the same session). Complaints against federal judges can be handled by federal courts, Federal Parliament, and Parliamentary Commissions.

Australia has a free and open media, an active civil society and an independent legal profession. Each plays an important role in protecting against corruption by enabling scrutiny of both the public and private sectors.

Open Government Partnership

The Australian Government finalized its membership to the Open Government Partnership (OGP) when it released its first Open Government National Action Plan 2016-2018 (first NAP) at the OGP Summit in Paris on 7 December 2016. The first NAP includes 15 ambitious commitments, including improving access to data and increasing transparency in the public sector. There are a number of commitments that will further Australia's anti-corruption regime and efforts over the next two years, including improving whistleblower protections, consulting publicly on foreign bribery law reforms and a possible Deferred Prosecution Agreement (DPA) scheme in Australia and reviewing the jurisdiction of our key anti-corruption bodies: the Australian Commission for Law Enforcement Integrity and the Fraud and Anti-Corruption (FAC) Centre.

Legislative Provisions

Public Service Act 1999 and Parliamentary Service Act 1999

The *Public Service Act 1999* (PSA) establishes an apolitical public service that is efficient and effective in serving the Government, the Parliament and the Australian public. The Act provides a legal framework for the effective and fair employment, management and leadership of Australian Public Service (APS) employees, defines the powers, functions and responsibilities of agency heads, the APS Commissioner and the Merit Protection Commissioner, and establishes the rights and obligations of APS employees. Sections 10, 10A and 13 of the Act respectively enshrine the APS Values, Employment Principles and Code of Conduct for APS employees in legislation.

In addition to the PSA, the *Parliamentary Service Act 1999* covers the public service staff supporting the Parliament. While most of the provisions of this act are similar to the PSA (and the staff may transfer from one service to the other), this is an important distinction as it provides for a parliamentary service independent from the executive branch of government. Sections 10, 10A and 13 of the Act respectively enshrine in legislation the Parliamentary Service Values, Employment Principles and Code of Conduct for the parliamentary service employees.

Public Governance, Performance and Accountability Act 2013

The *Public Governance, Performance and Accountability Act 2013* (PGPA Act) establishes a comprehensive and coherent system of governance and accountability for the proper use of public resources. It also establishes positive duties on the accountable authorities of Commonwealth entities and all officials in relation to this objective. The Act establishes a planning and reporting framework for public and parliamentary accountability. The Act applies to all Commonwealth corporate and non-corporate entities, and has special provisions applicable to Commonwealth companies.

Public Interest Disclosure Act 2013

The *Public Interest Disclosure Act 2013* (PID Act) commenced in January 2014. The legislation's purpose is to facilitate disclosure and investigation of wrongdoing and maladministration in the Commonwealth public sector and to protect 'whistleblowers' from reprisal action.

Under the PID Act, internal disclosures can be made by a current or former public official to any supervisor, an Authorised Officer in an agency, the Commonwealth Ombudsman or the Inspector-General of Intelligence and Security. External disclosures can be made in a narrow range of circumstances and usually only after an internal disclosure has been made. Disclosable conduct is defined broadly and includes illegal conduct, corruption, maladministration, abuses of public trust, fraud, serious misconduct and corrupt conduct, deception relating to scientific research, wastage of public money, and conduct that contravenes a law.

Secrecy provisions protect the identity of disclosers. Disclosers are protected from civil, criminal or administrative liability as a result of making a public interest disclosure. It is an offence to take reprisal action against a discloser. A discloser can also seek civil remedies for reprisal action against them (including compensation, injunction and reinstatement to their position). These protections apply from when the discloser makes a valid public interest disclosure.

Public officials include APS and non-APS employees, contracted service providers and their staff members, as well as agency heads, directors of Commonwealth companies, members of the Australian Defence Force and the Australian Federal Police (AFP), statutory officeholders, and individuals exercising statutory powers.

Law Enforcement Integrity Commissioner Act 2006

The *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) establishes the Australian Commission for Law Enforcement Integrity (ACLEI), led by an independent statutory officer, the Integrity Commissioner. ACLEI is an anti-corruption agency with full law enforcement and administrative inquiry powers, whose role is to detect, investigate and prevent serious corruption and systemic corruption in Commonwealth law enforcement agencies prescribed under the LEIC Act or *Law Enforcement Integrity Commissioner Regulations 2017* (LEIC Regulations), such as key law enforcement and border agencies that are at risk of criminal infiltration. Aside from investigating corruption issues, ACLEI has a specific corruption prevention function, which involves analysing and disseminating corruption trends and vulnerabilities and convening a Corruption Prevention Community of Practice, a network of integrity professionals.

Crimes Legislation

Under Australia's federal system of government, the Commonwealth, States and Territories have different areas of responsibility. Criminal law enforcement is primarily a matter for the States and Territories, with each managing their own criminal justice system and related programmes, including policing, administration of the courts and prison systems.

The primary repository of Commonwealth criminal law is the Criminal Code. Chapter 4 of the Criminal Code contains offences relating to bribery of foreign public officials. Chapter 7 is entitled "The Proper Administration of Government" and contains theft and other property offences, offences in relation to fraudulent conduct, unwarranted demands to or by a Commonwealth public official, domestic bribery and forgery of Commonwealth documents. Chapter 10 of the Criminal Code deals with national infrastructure and contains offences relating to money laundering, postal, telecommunications, computer crime and financial information.

The Australian Government keeps its legislative framework under constant review, and is exploring possible reform options to improve the effectiveness of the offence in addressing foreign bribery, and to remove unnecessary barriers to successful prosecution. On 4 April 2017, the Minister for Justice, the Honourable Michael Keenan MP, released a public consultation paper on proposed reforms to Australia's foreign bribery regime.

The Crimes Act contains offences relating to the administration of justice, as well as offences by public officers and offences relating to the disclosure of official secrets. The *Mutual Assistance in Criminal Matters Act 1987* (MACMA) provides the mechanism by which Australia can assist foreign countries in relation to criminal matters.

Corporations Act 2001

Part 9.4AAA of the *Corporations Act 2001* (the Corporations Act) affords corporate and financial sector whistleblowers immunity from civil and criminal penalties. The Office of the Whistleblower within corporate regulator, the Australian Securities and Investments Commission (ASIC), monitors the handling of all whistleblower reports, manages staff development and training and handles the relationship with whistleblowers on more complex matters.

The Corporations Act deals with breaches of duties by company directors and other offences by company officers and employees. It also creates a scheme for the appointment and independence of company auditors.

Anti-Money Laundering and Counter-Terrorism Financing Act 2006

The *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) establishes a regime to detect, deter and disrupt money laundering, terrorism financing and other serious crimes such as corruption. It imposes obligations on regulated businesses, including obligations to identify customers or beneficial owners that may be politically exposed persons (PEPs) and to conduct enhanced customer due diligence for higher-risk domestic PEPs and all foreign PEPs. These due diligence obligations include taking reasonable measures to establish the customer or beneficial owner's source of wealth and source of funds. The AML/CTF Act also provides for regulated businesses to submit specified financial transaction and suspicious matter reports to Australia's anti-money-laundering and counter-terrorism financing regulator and financial intelligence unit, Australian Transaction Reports and Analysis Centre (AUSTRAC). These reports are used to generate actionable financial intelligence and are disseminated to law enforcement, intelligence, revenue and regulatory agencies.

Further information is provided below in response to subsequent articles.

Proceeds of Crime Act 2002

The *Proceeds of Crime Act 2002* (POC Act) provides a scheme to trace, restrain and confiscate the proceeds and benefits gained from Commonwealth indictable offences, foreign indictable offences and certain offences against State and Territory law.

Unexplained wealth provisions were inserted into POC Act in February 2010 as part of a suite of reforms to more effectively prevent, investigate and prosecute organised crime activity. Under these laws, if a court is satisfied that there are 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.

Crimes (Superannuation Benefits) Act 1989

The *Crimes (Superannuation Benefits) Act 1989* establishes the means by which the Australian Government can repatriate superannuation, on the order of a Court, where a public official has been convicted of a corruption offence.

Fair Work (Registered Organisations) Amendment Act 2016

The *Fair Work (Registered Organisations) Amendment Act 2016* establishes the Registered Organisations Commission. A registered organisation is, generally speaking, an association of employers, an association of employees, or an enterprise association. The Commission's role as an independent statutory body is to increase the level of financial transparency and accountability in registered organisations. It achieves this by using its investigation and information-gathering powers to monitor and regulate registered organisations whilst also providing education and advice on compliance. The *Fair Work (Registered Organisations) Amendment Act 2016* also amended the *Fair Work (Registered Organisations) Act 2009* to strengthen financial accounting and

disclosure obligations for registered organisations, and to increase civil penalties and introduce criminal penalties for serious breaches of officers' duties.

Fair Work Amendment (Corrupting Benefits) Bill 2017

In response to the Final Report of the Royal Commission into Trade Union Governance and Corruption (December 2015), the Fair Work Amendment (Corrupting Benefits) Bill 2017 has been introduced to the Commonwealth Parliament for debate.² This Bill aims to promote better governance of organisations registered by the Fair Work Commission under the *Fair Work (Registered Organisations) Act 2009*. Under the Bill, several new offences are proposed that relate to the giving, receiving and soliciting of corrupting benefits in relation to registered organisations. The Bill also proposes disclosure requirements for certain financial benefits received by bargaining representatives.

Policies

APS Values and Employment Principles³

The principles of good public administration are embodied in the APS Values and Employment Principles. Good public administration is a protection not only against inefficiency and poor performance but also against fraud, corruption, inequity, inability to conduct business confidently and infringement of human rights. All APS employees, including APS agency heads, are required to uphold the APS Values and Employment Principles, as set out in sections 10 and 10A of the PSA. Additionally, agency heads are required to promote and uphold the APS Values and Employment Principles.

APS Code of Conduct

All APS employees, including agency heads, are bound by section 13 of the PSA, which sets out the APS Code of Conduct. A breach of the Code of Conduct can result in sanctions, ranging from a reprimand to termination of employment. Among other things, the APS Commissioner is responsible for:

- promoting the APS Values, the APS Employment Principles and the Code of Conduct,
- upholding high standards of integrity and conduct in the APS,
- evaluating the extent to which agencies incorporate and uphold the APS Values and the APS Employment Principles
- evaluating the adequacy of systems and procedures in agencies for ensuring compliance of the Code of Conduct, and
- investigating alleged breaches of the Code of Conduct by agency heads.

The Ethics Advisory Service is available to all APS employees seeking advice on ethical issues in the workplace.

The Commonwealth Fraud Control Framework

The Commonwealth Fraud Control Framework (CFCF) outlines the Australian Government's requirements for fraud control. It is comprised of three key documents:

- The Fraud Rule – this legislative instrument (section of the *Public Governance, Performance and Accountability Rule 2014*) sets out the key principles of fraud control for all Commonwealth entities. Under the Fraud Rule, all entities are required to conduct risk assessments to identify fraud risks and are required to have appropriate measures in place to address these risks.

² This Bill was passed by the Australian Parliament on 10 August 2017. It is now known as the *Fair Work Amendment (Corrupting Benefits) Act 2017*.

³ The APS Values and Employment Principles are legal obligations enshrined in the PSA.

- The Fraud Policy – binds non-corporate Commonwealth entities and sets out key procedural requirements for fraud training, investigation, response and reporting.
- The Fraud Guidance – this provides better practice advice on fraud control arrangements.

The CFCF is principles-based and allows the core elements of fraud control (risk assessments, fraud control plans, prevention, detection and investigations) to be managed in a way which best responds to the risk profiles of individual entities. Under the CFCF, each entity is responsible for its own fraud control arrangements, including investigating and responding to fraud incidents that are not handled by law enforcement agencies.

The CFCF sets out the national minimum standards to help entities combat fraud against the Commonwealth, including requiring each entity to:

- conduct thorough regular fraud risk assessments
- develop and implement processes and systems to effectively prevent, detect and investigate fraud
- apply appropriate criminal, civil, administrative or disciplinary action to remedy the harm from fraud and deter future fraud
- recover the proceeds of fraudulent activity
- record and report incidents of actual or suspected fraud, and
- provide fraud awareness training for all officials and specialised training of officials involved in fraud control activities.

Oversight is provided by audit committees within entities, annual reporting and reporting of significant non-compliance under the PGPA Act. Independent audits conducted by the Australian National Audit Office (ANAO) may include an assessment of how entities meet their fraud responsibilities.

Lobbying Code of Conduct and Register of Lobbyists

The Lobbying Code of Conduct (LCC) and Register of Lobbyists (RL) ensure that contact between lobbyists and Australian Government representatives is conducted in accordance with public expectations of transparency, integrity, and honesty. The LCC underpins the RL and sets out the requirements for contacts between third-party lobbyists and Government representatives. It also indicates what will be publicly available on the RL and outlines the conditions for successful registration of lobbyists.

The LCC contains a number of sections designed to uphold the integrity of the RL. These include principles of engagement with Government representatives which prohibit lobbyists from engaging in conduct that is corrupt, dishonest or illegal. The LCC also places prohibitions on lobbying activities for former government representatives and executive members of political parties. Responsibility for the LCC lies with the Secretary of the Department of the Prime Minister and Cabinet, who has power to include or remove lobbyists from the RL and is responsible for investigating reported breaches of the LCC.

The Commonwealth Risk Management Policy

The Commonwealth Risk Management Policy, established under the PGPA Act framework, requires the accountable authority of a Commonwealth entity to establish and maintain appropriate systems and internal controls for the oversight and management of risk. The policy binds all non-corporate Commonwealth entities and sets out the elements for an appropriate risk management framework under the PGPA Act.

Commonwealth Procurement Rules

The Commonwealth Procurement Rules (CPRs) represent the government policy framework under which entities govern and undertake their own procurement and combine both Australia's international obligations and good practice. The CPRs enable entities to design processes that are robust, transparent and instil confidence in government procurement. Entities subject to the CPRs are required to report their procurement contracts on

AusTender, the Australian Government's procurement information system. AusTender provides a centralised, public point of contact for notification of Australian Government business opportunities, annual procurement plans and contracts awarded to ensure transparency and public accountability in government procurement.

Commonwealth Grants Rules and Guidelines

The Commonwealth Grants Rules and Guidelines (CGRGs) establish the Australian Government's grants policy framework. The CGRGs contain mandatory requirements and explain better practice principles of grants administration. Entities can determine their own specific grants administration practices in accordance with the CGRGs. The CGRGs apply to all non-corporate Commonwealth entities subject to the PGPA Act, and extend to grants administration performed by ministers, accountable authorities, officials and third parties who undertake grants administration on behalf of the Commonwealth.

Australian Government Investigations Standards

The Australian Government Investigations Standards (AGIS) provide the minimum standard for agencies conducting investigations relating to fraud and other matters in the programmes and legislation they administer. The AGIS are designed to allow entities to apply them to their own operations and to maintain a minimum quality standard within investigations. Under the Commonwealth Fraud Control Policy, the AGIS is mandatory for all fraud investigations conducted by non-corporate Commonwealth entities.

Examples of implementation, including related court or other cases

The Australian Public Service Commission (APSC) conducts an annual survey of all APS employees and prepares and reports on the results of that in the annual State of the Service Report. The survey covers a range of aspects of APS employment, including performance management, workplace relations, human resources management, talent management, diversity, and the APS employment framework. The 2015-2016 State of the Service Report can be found at: <https://www.apsc.gov.au/state-service/state-service-report-2015-16>. Further, APS agencies complete an annual survey, reporting on a number of issues, including Code of Conduct investigations. The data shows low levels of misconduct and perceived corruption.

As noted above, ACLEI is an anti-corruption agency with full law enforcement and administrative inquiry powers whose role is to detect, investigate and prevent corruption in Commonwealth law enforcement agencies prescribed under the LEIC Act and LEIC Regulations (that is, key law enforcement and border agencies that are at risk of criminal infiltration). Since ACLEI was established in 2006, it has conducted 217 investigations across 319 corruption issues, and concluded 24 investigation reports for provision to the Minister for Justice. Arising from these investigations, 44 prosecutions have been commenced, resulting in 30 criminal convictions concerning 13 public officials and 17 co-conspirators. Six prosecutions were finalised in other ways (such as a court diversionary process), and eight prosecutions remain in progress (as at August 2017). Various civil proceedings have also resulted in the confiscation of the proceeds of crime.

Lessons learned from ACLEI investigations have also informed corruption prevention measures - such as the development of online integrity training for staff and creation of integrity units and reporting hotlines.⁴ ACLEI publishes its investigation reports, which often include corruption prevention observations, on the ACLEI website, at www.aclei.gov.au/reports/investigation-reports.

In regard to the legislative process, the participation of society is promoted in a number of ways. Stakeholder consultation is an important aspect of policy development and involves not only genuine and timely consultation with affected businesses, community organisations and individuals, but also whole-of-government consultation to avoid creating cumulative or overlapping regulatory burdens. These principles are reflected in the *Australian Government Guide to Regulation*. In addition to comprehensive stakeholder engagement, society plays a

⁴ For more information, see [ACLEI Investigation Report: Operation Volker—An investigation into alleged false document production by a staff member of the Department of Agriculture and Water Resources](#) (2018).

fundamental role in the legislative review process through a range of parliamentary committees, which among other important functions, open the legislative process to the public and trigger debate on issues of significance.

Parliamentary Committees

A range of committees exist within both Houses of Parliament (the Senate and House of Representatives) to examine legislation and government administration. Committees endeavour to seek evidence from a wide range of witnesses through both written submissions and by oral evidence. Committee inquiries are usually advertised in the national press, reaching the people and organisations most likely to make submissions. The committee conducting the inquiry will also seek submissions from government and non-government agencies known to have an interest in the matter under inquiry. Persons or organisations with a specialist knowledge or interest may be specifically invited to make submissions.

The committee will prepare a report that is formally presented to the Senate. Reports frequently recommend changes to policies, legislation and administrative practices based on the evidence gathered throughout the inquiry. Governments give careful consideration to reports, must provide a response to each recommendation within 3 months (according to Senate Standing Order 46) and frequently act on committee recommendations. Committees provide an opportunity for organisations and individuals to participate in policy making and to have their views placed on the public record and considered as part of the decision-making process. Committees provide a formal channel of communication between Parliament and the public, and this encourages greater community participation in the parliamentary process. The Committee consideration process can also facilitate media attention being drawn to important aspects of legislation.

Stakeholder Consultation

There have been a number of recent legislative amendments that demonstrate the Government's engagement with relevant stakeholders on corruption-related initiatives. Different agencies may take different approaches to stakeholder engagement, and there may be some legislative initiatives where it is not appropriate (or necessary) to consult publicly. There is work underway under commitment 5.2 of Australia's first Open Government National Action Plan to enhance public participation in policy and service delivery outcomes (see [5.2 - Enhancing public participation in government decision making | Open Government Partnership Australia \(pmc.gov.au\)](#) for more information).

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

On 7 December 2017, the Senate referred the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 20 April 2018. As part of the legislative process prior to the Bill's introduction, the then Minister for Justice released two public discussion papers on a proposed deferred prosecution agreement (DPA) scheme and one discussion paper on possible reform of laws applying to the bribery of foreign public officials. These were published on the website of the Attorney-General's Department (AGD). A range of consultations on foreign bribery and the proposed DPA scheme were undertaken, including engagement with non-government stakeholders through the Government Business Anti-Corruption Roundtable held on 31 March 2017 and a further consultation event held on 27 April 2017. Since the Bill's introduction to the Australian Parliament on 6 December 2017, it has been considered by the Senate Standing Committee for the Scrutiny of Bills, and referred to the Senate Legal and Constitutional Affairs Committee for inquiry and report by 20 April 2018. The inquiry is currently accepting submissions from the public, which will be analysed by the committee and inform their recommendations.

Anti-Money Laundering and Counter-Terrorism Financing Amendment Bill 2017

In December 2013, the Australian Government commenced the review of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act). On 29 April 2016, the then Minister for Justice, the Honourable Michael Keenan MP, released the Report on the Statutory Review of the AML/CTF Act and Associated Rules and Regulations. The report considered findings of the Financial Action Task Force's (FATF) mutual evaluation of Australia's AML/CTF regime and involved extensive consultation with industry, government and the general public. An overarching recommendation arising from the review was that any reforms to the AML/CTF Act and Rules that have a regulatory impact should be co-designed by Government and industry. A number of public consultations via written submission and a series of roundtable and industry-specific meetings on the content of proposed legislative reforms were undertaken in the context of developing the first phase of draft legislation that was introduced on 17 August 2017 and passed Parliament on 7 December 2017 (now the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017*). These reforms regulated the digital currency exchange sector, expanded AUSTRAC's enforcement powers and enhanced the reporting regime for the cross-border movement of value.

Open Government National Action Plan

Australia's first NAP was developed collaboratively through consultation and collaboration between government, non-government organisations, the public and the private sectors. The Government undertook a number of consultation activities, including:

- public meetings and awareness-raising activities on social media, government websites, and teleconferences to lift public awareness of Australia's membership of the Open Government Partnership
- a formal consultation process to seek suggestions on potential commitments for the first NAP
- an Interim Working Group comprising equal government and non-government representation, to inform the drafting of the first NAP, and
- release of the first NAP online for public consultation.

A number of legislative amendments were undertaken (and are ongoing) as part of the first NAP, and these involve various forms of public consultation—for example, the Government formulated the whistleblower protection reforms in the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 following extensive public consultation and with the advice of the Whistleblower Expert Advisory Panel (made up of academia and industry experts).

(b) Observations on the implementation of the article

Australia relies on a set of relevant legislative provisions, legislative instruments and policies to promote integrity, transparency and accountability in the public and private sectors and to prevent corruption. The relevant legislative provisions, among others, include the PSA, the *Parliamentary Service Act 1999*, the *Commonwealth Electoral Act 1918* (CEA), the PIDA, the PGPAA, the *Freedom of Information Act 1982* (FOIA), the *Corporations Act 2001* (CorpA), and legislative instruments like the Commonwealth Procurement Rules (CPR).

Additionally, Australia has developed the first NAP together with civil society. The first NAP includes 15 specific commitments aimed at improving Australia's anti-corruption regime, such as integrity in the public sector, public participation, access to government information and transparency and accountability in business. Each commitment identifies its objective, lead agency, timeframes and milestones. The implementation of these commitments has already resulted in a number of legislative amendments, such as the 2017 Bill on whistleblower protection reforms.

The reviewers note that the system of government in Australia with the division of responsibility between the States, Territories and federal governments and its proven doctrine of separation of powers between different branches of the federal government informs Australia's multifaceted approach to corruption prevention. In this

regard, the reviewers welcome the authorities' efforts under the Open Government Partnership described above and believe that it provides Australia with an additional platform to develop new and strengthen the existing measures to prevent and fight corruption and engage a wider range of stakeholders along the way.

Therefore, it is recommended that Australia continue its efforts under the Open Government Partnership in order to develop and maintain effective and coordinated measures to prevent corruption.

Paragraph 2 of article 5

2. Each State Party shall endeavour to establish and promote effective practices aimed at the prevention of corruption.

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

The APSC monitors and reports on levels of misconduct within APS agencies, including on the level of perceived corruption in the APS. For further information, please refer to the guidance material on preventing and identifying corruption in [APS Values and Code of Conduct in Practice](#) and [Managing Integrity Risks in the Workplace](#). These materials assist APS members in remaining informed on how to uphold their obligations under the PSA.

The PGPA Act (noted previously) establishes a comprehensive financial framework for all Commonwealth entities, having regard to their respective risk profiles. Key anti-corruption features include establishing independent audit committees for each entity and a requirement to assess entity fraud risk at least every two years.

A specific corruption prevention function was added formally to ACLEI's role, by an amendment in November 2012 of the LEIC Act, in respect of agencies in ACLEI's jurisdiction.

The Department of Foreign Affairs and Trade (DFAT) seeks to ensure that Australian businesses are aware of their obligations under Australian anti-bribery laws and conducts outreach activities to the private sector about these laws. These activities outline the Australian Government's zero-tolerance approach to foreign bribery and corruption, encourage Australian businesses to contact DFAT missions abroad for any assistance, and highlight the importance of effective internal compliance systems and a culture of compliance.

DFAT's outreach activities target a broad audience, including industry, Small and Medium Enterprises (SMEs), legal and accounting professionals, financial institutions and Commonwealth, State and Territory governments. Outreach is conducted in a variety of formats, including DFAT-hosted events, in partnership with non-government or private sector organisations, individual briefings, and as conference speakers. DFAT's network of overseas posts also engages with the local Australian business communities and chambers of commerce on the issue of corruption.

Assessing the effectiveness of measures

Under the PGPA Fraud Rule, all entities must conduct a fraud risk assessment at least every two years. Agencies with particularly high exposure to corruption risk also conduct reviews of their integrity frameworks—two recent examples being the Australian Taxation Office and the Department of Agriculture and Water Resources. These examples show how various entities respond to the risk of corruption in their own contexts.

As part of its corruption prevention function, ACLEI advises agencies within the Integrity Commissioner's jurisdiction of particular corruption vulnerabilities and suggests mitigation strategies. While much of that work is confidential (so as not to publish information about weaknesses that could be exploited), some is published, such as: <https://www.aclei.gov.au/reports/project-reports>.

In 2017, a Senate Select Committee took evidence about the effectiveness of the anti-corruption framework. Public submissions, and the report, can be found at: https://www.aph.gov.au/select_integritycommission.

Similarly, a Senate Select Committee also inquired into the effectiveness of whistleblowing arrangements for private sector entities:

https://www.aph.gov.au/Parliamentary_Business/Committees/Joint/Corporations_and_Financial_Services/WhistleblowerProtections.

The Government also commissions reports into the effectiveness of particular measures—for a recent example see, for instance: <https://pmc.gov.au/government/legislation-review/statutory-review-public-interest-disclosure-act-2013>.

The public consultations conducted (in 2016, and again this year) as part of the Open Government Partnership provide an opportunity for citizens to contribute views about changes in risk, or potential gaps in the integrity framework. It is noted that Griffith University and Transparency International (Australia) are presently undertaking an independent review of the health of Australia's anti-corruption framework (a second 'National Integrity System Assessment'). The Australian Government is assisting the evaluation process wherever appropriate.

Examples of implementation, including related court or other cases

Case study – Operation Heritage/Marca: a joint investigation of alleged corrupt conduct among officers of the Australian Customs and Border Protection Service at Sydney International Airport

In 2007, two former Australian Customs and Border Protection officers began abusing their position to import steroids through Sydney International Airport. Emboldened by the success of their scheme, the corrupt operation soon expanded to include more officers and the importation of the precursor drug pseudoephedrine.

The officers used their inside knowledge to defeat the surveillance and control systems at the airport. They also exploited their privileged access to the secure border environment and to law enforcement databases, and manipulated rosters and job placements to improve their chances of facilitating larger drug importations. In these ways, the officers enabled drug couriers to bypass screening by other customs officers. The corrupt officers also provided advice to the couriers on how to avoid detection and provided them with pre-stamped incoming passenger cards to this end.

The corrupt conduct was ultimately exposed by Operation Heritage/Marca, which found that the criminal conspiracy grew out of a combination of circumstances, including an organisational integrity culture that was naive to changes in the risk environment. The Operation also found the department was over-confident in the effectiveness of its newly established anti-corruption measures and paid little attention to systemic vulnerabilities that were then extant or emerging.

A better understanding of corruption pressure at the border was a catalyst for the formation of the Australian Border Force in 2014.

Please also refer to the guidance material on preventing and identifying corruption in the [APS Values and Code of Conduct in Practice](#) and [Managing Integrity Risks in the Workplace](#). These materials assist APS members in remaining informed on how to uphold their obligations under the PSA.

(b) Observations on the implementation of the article

Australia has provided several examples of how different authorities have established and promoted corruption prevention activities. The APS Commissioner, ACLEI, and DFAT systematically conduct awareness-raising of the risk of corruption and how to respond and report and other activities in their respective areas of responsibility.

In addition, the PGPA Act requires Commonwealth entities to establish appropriate financial frameworks based on their risk profiles and assess fraud risks regularly. Stakeholders outside the public sector may also contribute to evaluating national anti-corruption frameworks via the OGP.

Paragraph 3 of article 5

3. Each State Party shall endeavour to periodically evaluate relevant legal instruments and administrative measures with a view to determining their adequacy to prevent and fight corruption.

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

Legislation

In addition to regular review by responsible agencies, a number of Australia's most critical corruption-prevention agencies are established under or governed by acts which require independent review and reporting on the legislative scheme and functions and powers of the relevant agency. These provisions ensure that the central pillars of Australia's anti-corruption framework are consistently reviewed and remain fit-for-purpose.

Legislative instruments

The main components of regulatory regimes are contained in an Act of Parliament, with detail often set out in delegated legislation (in the form of legislative instruments). Part 4 of Chapter 3 of the *Legislation Act 2003* provides that legislative instruments (subordinate legislation which is delegated by the Parliament to be made by the executive) will be automatically repealed ('sunset') after a fixed period of time unless further legislative action is taken to extend the operation of that legislative instrument (subject to some exceptions). The overarching regulatory regime to which an instrument relates is retained notwithstanding the sunseting of a legislative instrument because the sunseting mechanism applies to delegated legislation only (and not to Acts of the Parliament).

The purpose of the sunseting framework, as set out in section 49 of the *Legislation Act 2003*, is to ensure that legislative instruments are kept up to date and only remain in force for so long as they are needed. If it is not appropriate for an instrument to sunset without replacement, government agencies should conduct a review to determine if the instrument can be remade in substantially the same form, or with amendment. Instruments that cover a broad area of regulation with many stakeholders may attract debate on the merits of the instrument. Such debate can ensure that a particular instrument meets community expectations. Further, exemptions from sunseting may be available in the limited circumstances where exposure to the sunseting mechanism could cause commercial uncertainty, undermine an inter-government agreement or have other unintended consequences. As instruments only become subject to automatic repeal every 10 years under Australia's sunseting mechanism (under the *Legislation Act 2003*), there is no evidence that the mechanism has generated constant debate.

Government agencies must actively ensure that legislative instruments that continue to be needed do not inadvertently lapse. To help ministers and government agencies keep track of the scheduled sunseting dates of the instruments that they administer, the Attorney-General is required to table in Parliament twice a year a list of legislative instruments sunseting in the next 18 months. In addition, the sunseting date of each instrument is recorded on an easily accessible electronic register of federal legislation (namely, the Federal Register of Legislation). In addition, Australia's sunseting framework contains a number of contingency mechanisms to ensure that the operation of the sunseting framework does not impose an unreasonable burden on government agencies or result in unintended consequences. In particular, there is some scope to alter the sunseting date of an instrument by up to 5 years in certain circumstances, and to prescribe exemptions from the sunseting framework where appropriate.

The Government has also committed, through the first NAP, to review the jurisdiction and capabilities of the ACLEI and the Australian Federal Police (AFP)-led Fraud and Anti-Corruption Centre (FAC) Centre. The latest review was conducted in late 2016. The next review is scheduled to commence in 2018 under Australia's second National Action Plan 2018-2020.

Independent statutory/legislative reviews

In the case of independent reviews, a reviewer may invite submissions from organisations likely to have views on the terms of reference, or alternatively, advertise for public submissions. The Terms of Reference may stipulate that the review should be informed by public submissions. During the independent review of the *Proceeds of Crime Act 2002* (POC Act) undertaken by Tom Sherman AO, submissions were sought from a wide range of agencies, including civil society organisations, legal aid commissions, law societies, civil liberties organisations and peak bodies for the banking and finance sectors. Interviews were also held with a number of key organisations, details of which were included in the report. Mr Sherman notes in his report that the submissions and interviews greatly assisted in identifying the relevant issues. The agencies involved in work under the POC Act identified a large number of issues directed towards increasing the effectiveness of the Act. These suggestions fed directly into the recommendations of the report. The report and its attachments can be accessed at: http://pandora.nla.gov.au/pan/33012/20071102-1423/www.nationalsecurity.gov.au/www/agd/agd.nsf/Page/Publications_Proceedsofcrimereview-October2006.html.

Independent reviews commissioned by the Australian Government are complemented by ongoing parliamentary oversight. The Parliamentary Joint Committee (PJC) on the ACLEI initiated a review into ACLEI's jurisdiction on 6 March 2014. The Committee tabled its report on 5 May 2016, making three recommendations. The Government is considering those recommendations.

Previous government reviews of the LEIC Act have led to extensions in ACLEI's jurisdiction, such as including the AUSTRAC, the Department of Immigration and Border Protection (DIBP) (now the Department of Home Affairs), and prescribed aspects of the Department of Agriculture and Water Resources.

AML/CTF Act

Under section 251 of the AML/CTF Act, the Minister is required to cause a review of the operation of the Act within 7 years of its commencement. In December 2013, the government commenced the review of the AML/CTF Act. The findings of the review are set out in the Report on the Statutory Review of the Anti-Money Laundering and Counter Terrorism Financing Act 2006 and Associated Rules and Regulations (<https://www.homeaffairs.gov.au/help-and-support/how-to-engage-us/consultations/statutory-review-of-the-anti-money-laundering-and-counter-terrorism-financing-act-2006>). This report was tabled in Parliament by the Minister for Justice on 29 April 2016. The report contains 84 recommendations to strengthen, simplify and streamline Australia's already robust Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) regime and enhance Australia's capability to detect, deter and disrupt money laundering, terrorism financing and other serious crimes such as corruption.

The review report also takes into account the findings of the 2015 mutual evaluation of Australia's AML/CTF regime by the FATF (<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>). Australia was one of the first countries in the world to be assessed against the FATF's new methodology. Australia's mutual evaluation report highlights a number of areas of strength in Australia's AML/CTF regime, particularly in relation to risk understanding, coordination, financial intelligence and international cooperation. The report also identifies areas where Australia's regime can be strengthened and Australia is reporting back on those areas on a yearly basis to the FATF. These two reports serve as the basis for Australia's future AML/CTF reform agenda.

Further information on how Australia is implementing the recommendations of these reports is available here:

[https://www.homeaffairs.gov.au/help-and-support/how-to-engage-us/consultations/australias-anti-money-laundering-and-counter-terrorism-financing-\(aml-ctf\)-regime](https://www.homeaffairs.gov.au/help-and-support/how-to-engage-us/consultations/australias-anti-money-laundering-and-counter-terrorism-financing-(aml-ctf)-regime).

LEIC Act

The Australian Government keeps under regular review the adequacy of the Integrity Commissioner's jurisdiction under the LEIC Act (and subordinate legislation under that Act). The Government has further committed, through the first NAP, to review the jurisdiction and capabilities of the FAC Centre.

Independent reviews commissioned by the Australian Government are complemented by ongoing parliamentary oversight. The PJC on the ACLEI initiated a review into ACLEI's jurisdiction on 6 March 2014. The Committee tabled its report on 5 May 2016, making three recommendations. The Government is considering those recommendations.

Previous government reviews of the LEIC Act have led to extensions in ACLEI's jurisdiction, such as including the AUSTRAC, the Department of Immigration and Border Protection (DIBP) (now the Department of Home Affairs), and prescribed aspects of the Department of Agriculture and Water Resources.

Australian Crime Commission Act 2002

Section 61A of the *Australian Crime Commission Act 2002* (ACC Act) requires the relevant Minister to cause an independent review of the ACC Act to be undertaken every 5 years. The purpose of this provision, inserted on 20 February 2010, is to ensure that the legislation that governs the Australian Criminal Intelligence Commission (ACIC) remains appropriate and effective.

The final report of the first independent review was provided to the (then) Minister for Justice on 3 November 2015. The report made 37 recommendations about a range of issues associated with the ACC Act and the operation of the (then) Australian Crime Commission. The report is classified and not publicly available.

PID Act

An independent review of the PID Act was undertaken by Mr Philip Moss AM in the first half of 2016. The review wrote to over 250 stakeholders inviting written submissions. The review's Terms of Reference required the review to be informed by public submissions. The review received forty-six submissions. In addition to written submissions, the review released an online survey aimed at those who had considered using the PID Act to report a concern. The review received 56 responses to the survey which captured a range of individual experiences. The review also undertook a range of public consultation exercises to discuss views and sought comments on its draft report from key stakeholders. The challenges identified by individuals during this process formed the basis of the review's assessment and informed the review's recommendations. The report, including an outline of the review's methodology, can be viewed at:

<https://pmc.gov.au/sites/default/files/publications/pid-act-2013-review-report.pdf>.

The review report was tabled in the Commonwealth Parliament on 20 October 2016. The Review made 33 recommendations to: strengthen the PID Act's role in promoting a culture in the public sector that encourages the reporting of wrongdoing; better focus the PID Act towards more serious wrongdoing or misconduct; and simplify the way the PID Act interacts with other investigatory and accountability mechanisms.

The Government is considering the recommendations of the Moss Review report. Such consideration will take account of any recommendations of the PJC on Corporations and Financial Services in its inquiry on 'whistleblower protections in the corporate, public and not-for profit sectors', which was reported on 14 September 2017.

The observations made in the Moss Review about the experience of whistleblowers under the PID Act need to be read together with the observations made in the Moss Review that most agencies reported that the bulk of disclosures related to personal employment-related grievances. A main recommendation in the Moss Review is to exclude from the Act conduct solely related to personal employment-related grievances unless considered to be systemic. The Review considered complaints of that kind are better dealt with through other existing frameworks for addressing employment-related grievances.

The Commonwealth Ombudsman publishes data on the PID Act each year in the Commonwealth Ombudsman's Annual Report, which is published on the Ombudsman's website. The 2016-17 Annual Report includes the following data:

- A total of 684 public interest disclosures (PIDs) (up from 612 in 2015-16) were made across federal government agencies (with 57 of 176 agencies receiving one or more disclosure).

- Of the 684 PIDs reported, 28% concerned conduct that could amount to a contravention of an Australian law; 30% concerned conduct that may result in disciplinary action; 23% maladministration; 4% wastage of resources; 1% conduct for purposes of corruption; 5% abuse of public trust; and some other areas.
- Of 684 PIDs reported, covering 809 instances of possible wrongdoing, agencies decided not to investigate 106 instances (main grounds that information did not concern serious conduct (25%) or the information has already been investigated (34%)).

In the reporting period, 21 agencies completed 365 investigations. 105 investigations were finalized with at least one finding of disclosable conduct.

Parliamentary Business Resources Act 2017 and Independent Parliamentary Expenses Authority Act 2017

The *Parliamentary Business Resources Act 2017* (PBR Act) established the new parliamentary work expenses framework, with effect from 1 January 2018. It is a principles-based framework to cover parliamentarians' work expenses, requiring parliamentarians only claim expenses and allowances that were incurred for the dominant purpose of their parliamentary business and provide value-for-money for the Commonwealth. Under s 56(1) of the PBR Act (passed in May 2017), an independent review of that Act must be conducted every three years. The Minister responsible for the Act is responsible for ensuring a report on this periodic review is tabled in each House of Parliament, thereby making the report open to debate and scrutiny by Parliament and the public.

The *Independent Parliamentary Expenses Authority Act 2017* (IPEA Act) established the Independent Parliamentary Expenses Authority (IPEA) to administer, monitor, and provide advice on parliamentary travel resources as well as audit and report on all parliamentary work resources (including travel). Under s 62(2) of the IPEA Act, the Minister is also required to cause an independent review of that Act three years after the Act commences. The purpose of the review is to ensure the IPEA is meeting its objectives of improving the accountability and transparency of MP work expenses. Again, the Minister is required to table a report of this review in Parliament. It is open for the reviewers to recommend that another review be conducted sometime after any legislative amendments in response to the first review come into effect. IPEA has introduced a range of audit and assurance activities coupled with new education initiatives to improve accountability and transparency. The effectiveness of these measures is expected to be considered in the review.

POC Act

Under section 327 of the POC Act, the Minister was required to cause an independent review of the operation of the POC Act within 3 years of its commencement. In 2006, an independent review of the POC Act was undertaken by Tom Sherman AO. This review identified a number of options to improve the effectiveness of the POC Act.

In April 2009, the Standing Committee of Attorneys-General agreed to a set of resolutions to provide a national response to combat organised crime. In June 2009, the Crimes Legislation Amendment (Serious and Organised Crime) Bill 2009 was introduced, including unexplained wealth provisions. An amended version of the Bill was passed in 2010.

In August 2009, a PJC recommended the Government examine an integrated model of criminal asset recovery where investigation and litigation are undertaken within one agency. A subsequent AGD review undertaken in 2010 explored various options to achieve the recommended approach by the PJC. The preferred option was the creation of a multi-agency taskforce. The Criminal Assets Confiscation Taskforce was created in 2011.

(b) Observations on the implementation of the article

Overall it should be noted that regular reviews of the relevant legal instruments and administrative measures against corruption have been conducted with a view to determining their adequacy to prevent and fight corruption. However, the results are not always made publicly available. It is also noted that independent

reviews of key corruption prevention legislation have involved submissions from key stakeholders, including civil society.

Paragraph 4 of article 5

4. States Parties shall, as appropriate and in accordance with the fundamental principles of their legal system, collaborate with each other and with relevant international and regional organizations in promoting and developing the measures referred to in this article. That collaboration may include participation in international programmes and projects aimed at the prevention of corruption.

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

Australia is engaged in a range of international anti-corruption fora. These include the G20 Anti-Corruption Working Group, APEC Anti-Corruption and Transparency Working Group and the OECD Working Group on Bribery.

Australia is also a founding member of the FATF, a member and permanent co-chair of the Asia/Pacific Group (APG) on Money Laundering and is a founding member of the International Anti-Corruption Academy. Australia hosts the APG Secretariat in the offices of the AFP.

Australia is a founding member of the Egmont Group of Financial Intelligence Units and chairs the Egmont Group's Information Exchange Working Group. Australia is an observer member of the Middle East & North Africa Financial Action Task Force (MENAFATF) and the Eastern and Southern African Anti-money Laundering Group (ESSAMLG).

AUSTRAC has an extensive international network of ties which enables AUSTRAC to facilitate the exchange of financial, regulatory and other intelligence between Australian agencies and overseas counterparts. As of June 2017, AUSTRAC has in place a total of 87 Memorandums of Understanding (MOUs) for the exchange of financial intelligence with international counterparts and two MOUs in place for the exchange of regulatory information. A list of all MOUs is available on the AUSTRAC website: <http://www.austrac.gov.au/about-us/international-engagement/exchange-instruments-list>.

Twice a year, the Australasian Public Service Commissioners' Conference is held. The conferences are attended by representatives of the Public Services of the Commonwealth and all States of Australia, and New Zealand. Papua New Guinea (PNG) and Singapore attend as observers. The purpose of these conferences is to discuss contemporary opportunities and challenges in public administration and how each jurisdiction is addressing them.

Australia is also a founding member of the Asset Recovery Interagency Network Asia Pacific (ARIN-AP), which is a network of professionals (investigators and litigators) that aims to exchange information on individuals, companies and assets at the international level with the intention of facilitating the pursuit and recovery of proceeds of unlawful activity. Australia is also a founding member of the International Anti-Corruption Coordination Centre (IACCC) hosted by the National Crime Agency in London. The IACCC brings together specialist law enforcement officers from multiple agencies around the world to tackle allegations of grand corruption. Grand corruption increases poverty and inequality, undermines good business and threatens the integrity of financial markets. It can include acts of corruption by PEPs that may involve vast quantities of assets and threaten political stability and sustainable development. Members include:

- AFP
- National Crime Agency (United Kingdom)
- United States Federal Bureau of Investigation (FBI)
- Royal Canadian Mounted Police (RCMP)

- New Zealand's Serious Fraud Office
- New Zealand Police, and

Corrupt Practices Investigation Bureau of the Republic of Singapore.

Furthermore, the AFP is a founding member of the International Foreign Bribery Taskforce (IFBT), which incorporates the law enforcement expertise of the FBI, RCMP and the National Crime Agency to synchronise efforts specifically aimed at tackling foreign bribery.

Australia's development programme works with partner countries to support their efforts to tackle corruption and improve transparency and accountability through bilateral development cooperation, supporting leading international institutions and programmes, and safeguarding project funds from fraud.

Examples of implementation, including related court or other cases

Australia supports:

- The ratification and implementation of the UNCAC, through support to the United Nations Office on Drugs and Crime (UNODC) and the United Nations Development Programme's regional anti-corruption programmes.
- Transparent and accountable systems of governance, through support to Transparency International's Asia Pacific work.
- The development of anti-corruption research, training and workshops, which aim to identify and propose informed solutions to help reduce the impact of corruption through partnership with the U4 Anti-Corruption Resource Centre.
- The recovery of the proceeds of corruption through support to the World Bank-UNODC Stolen Assets Recovery Initiative.
- A range of bilateral law and justice capacity-building programmes in the Pacific and Southeast Asia which regularly respond to partner country requests to prevent corruption through improvements to the transparency and accountability of law and justice institutions.

In May 2017, the AFP hosted an IFBT workshop to discuss contemporary challenges faced in the foreign bribery landscape across jurisdictions. Actions out of this meeting have included a greater focus on the use of social media to disseminate information about foreign bribery and to convey success stories about prosecutions, and also the establishment of a secure platform across IFBT members to share sensitive information pertaining to foreign bribery in real-time.

(b) Observations on the implementation of the article

Australia actively participates in relevant international and regional organizations and initiatives in promoting and developing measures aimed at the prevention of corruption, including through its development programmes.

Australia is part of various regional and international anti-corruption fora such as G20, APEC, OECD, FATF, the International Anti-Corruption Coordination Centre (IACCC), and the International Foreign Bribery Taskforce (IFBT), and supports efforts to tackle corruption and improve transparency and accountability in partner countries bilaterally through its development programmes.

(c) Successes and good practices

Australia actively participates in regional and international organizations and programmes that address anti-corruption.

Article 6. Preventive anti-corruption body or bodies

Paragraph 1 of article 6

1. Each State Party shall, in accordance with the fundamental principles of its legal system, ensure the existence of a body or bodies, as appropriate, that prevent corruption by such means as:

(a) Implementing the policies referred to in article 5 of this Convention and, where appropriate, overseeing and coordinating the implementation of those policies;

(b) Increasing and disseminating knowledge about the prevention of corruption.

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

The Australian Government opposes corruption in all its forms. The Australian Government takes a robust and multi-agency approach to combating corruption, which vests specialised functions and responsibilities in a number of agencies. The Australian Government's approach to preventing corruption is based on the principle that no single body should be solely responsible for anti-corruption and that the heads of each entity must also take responsibility for the integrity of their staff and the programmes they administer. Within the framework, a number of specialised agencies have a role in assuring integrity in the system.

Accordingly, a number of agencies have oversight functions, including the AGD, which oversees criminal legislation and corruption policy, and the Commonwealth Ombudsman's Office, which handles complaints about Australian Government agencies and carries out specialised oversight tasks. Other agencies with detection and investigation functions include the AFP, which investigates serious and complex crimes against Commonwealth laws, including fraud and corruption, and ACLEI, which detects, investigates and prevents corrupt conduct in prescribed Commonwealth Government law enforcement agencies. Commonwealth agencies with an anti-corruption role include:

- AGD
- ACLEI
- AFP
- APSC
- The Merit Protection Commissioner
- Commonwealth Director of Public Prosecutions (CDPP)
- AUSTRAC
- ACIC
- Auditor-General for Australia and the ANAO
- The Commonwealth Ombudsman
- ASIC
- The Office of the Australian Information Commissioner (OAIC)
- IPEA
- The Inspector-General of Intelligence and Security

- The Independent National Security Legislation Monitor

Australia sees this distribution of responsibility as a great strength in our approach to preventing corruption, as it creates a strong system of checks and balances. For example, 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.

The Government is of the view that the current multi-faceted approach to combating corruption is effective. However, the Government acknowledges that the multi-faceted nature of the national integrity framework may make it more difficult to identify the most appropriate agency for particular matters. To this end, the Government is exploring ways to make the integrity framework more accessible and raising awareness of the measures being taken to combat corruption, including through the Open Government Partnership platform.

Decentralisation of the responsibility for anti-corruption prevention, detection, investigation and resolution does not diminish the oversight of agencies or particular anti-corruption measures or policies. Each ‘part’ of the system is overseen by and accountable to a particular body or entity, for example:

- Corrupt conduct by staff members of prescribed Commonwealth law enforcement agencies is investigated by the ACLEI
- ACLEI is overseen by the PJC on the ACLEI
- intelligence agencies are overseen by the Inspector-General of Intelligence and Security
- APS agencies are subject to the PSA and directions issued under that Act by the Australian Public Service Commissioner. The Commonwealth Ombudsman and the ANAO have oversight of administrative actions, and staff members engaging in criminal conduct may be investigated by the AFP, and
- relevant politicians are overseen by Parliamentary Committees, Houses of Parliament (who can issue a censure motion/remove them), IPEA, and the AFP as relevant.

AGD

The AGD plays a core coordination role in the implementation of anti-corruption policies and programmes across governmental departments and agencies. The department is the lead agency responsible for the Commonwealth’s domestic and international anti-corruption policy, and a range of related topics, including foreign bribery, Commonwealth fraud control and the Protective Security Policy Framework. The department facilitates Australia’s active engagement in international fora aimed at combating corruption and foreign bribery. The department is also Australia’s central authority for extradition and mutual legal assistance requests, and works with partner countries to investigate, prosecute and recover the proceeds of crime in transnational corruption cases (along with the AFP). The department coordinates domestic policy on anti-corruption and works closely with other agencies on initiatives to combat corruption. As a result of machinery of government changes in late 2017, policy responsibility for some areas closely related to anti-corruption policy, for example, anti-money laundering and counter-terrorism financing, have moved to the newly established Department of Home Affairs.

Australia has a strong legislative regime criminalising corrupt behaviour. Australia’s corruption offences cover a very broad range of crimes, including bribery, embezzlement, abuse of office 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
- obstruction of justice is criminalised in the Crimes Act
- dealing in proceeds of crime is an offence under the Criminal Code, and
- breach of duties as a director of a company is dealt with by the Corporations Act.

Responsibility for investigating corruption-related offences is similarly allocated between State and Territory police forces, the AFP and specialised bodies such as the ACIC (formerly the Australian Crime Commission), ACLEI and ASIC.

AFP

The AFP has primary law enforcement responsibility for investigating serious or complex fraud and corruption against the Commonwealth.

The AFP is established under the *Australian Federal Police Act 1979* as an independent statutory agency. The AFP Commissioner is the accountable authority for the purposes of the PGPA Act. The Commissioner of the AFP is appointed by the Governor-General by commission for a period of up to seven years, and is eligible for re-appointment. The AFP established the FAC Centre under the Crime Programme in February 2013 to enhance the Commonwealth's response to serious and complex Commonwealth fraud and corruption, including foreign bribery and identity crime.

Participating agencies now include:

- AFP
- AGD
- Australian Border Force
- Australian Competition and Consumer Commission
- Australian Crime Intelligence Commission
- Australian Taxation Office (ATO)
- ASIC
- AUSTRAC
- CDPP
- DFAT
- Department of Agriculture and Water Resources (DAWR)
- Department of Social Services (DSS)
- Department of Human Services (DHS)
- Clean Energy Regulator (CER)
- Department of Education (DET)
- National Disability Insurance Agency (NDIA)
- Department of Defence (DoD)

The FAC Centre is focused on the following objectives:

- Strengthening whole of government efforts and collaboration to respond to fraud against the Commonwealth, bribery of foreign public officials, and corruption by Australian Government employees.
- Collective response to instances of serious and complex fraud and corruption and building investigative capabilities.
- Protecting the finance of Australia.

The FAC Centre identifies opportunities and initiatives for policy, regulatory and legislative reform. The multi-agency approach supports a holistic understanding of the operating environment which enables the FAC Centre agencies to better anticipate emerging challenges and to share these across Government agencies.

The vulnerabilities and learnings identified by the FAC Centre are often applicable to the broader Commonwealth. The FAC Centre can produce and disseminate intelligence and information reports outlining these key findings arising from referrals. The FAC Centre convenes bilateral and multilateral meetings to discuss the findings and identify opportunities for action or reform.

The AFP also feeds into key intelligence assessments and products produced by the ACIC, such as the Serious Financial Crime Risk Assessment.

The FAC Centre also conducts standardised quality assurance reviews on key investigations for member agencies with key lessons learnt shared.

APSC

The APSC is a statutory agency established under the PSA with functions, including: strengthening the professionalism of the APS, facilitating continuous improvement in workforce management in the APS, upholding high standards of integrity and conduct in the APS, and monitoring, reviewing, and reporting on APS capabilities within and between agencies to promote high standards of accountability, effectiveness, and performance. The Commissioner is appointed for up to five years on a full-time basis by the Governor-General, and the Commissioner's remuneration is determined by the independent Remuneration Tribunal (for more information on the Remuneration Tribunal, see answer to article 7(1) below). The Commissioner is also protected under section 47 of the PSA from removal except on certain limited grounds.

The APSC is responsible for promoting high standards of integrity and conduct in the APS. The PSA 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 PSA, 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.

The APS Commissioner can 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.

The APS Commissioner and Merit Protection Commissioner were established under the PSA. The PSA defines the powers, functions and responsibilities of agency heads, the APS Commissioner and the Merit Protection Commissioner. Under sections 41 and 50 of the Act, the APS Commissioner and the Merit Protection Commissioner can respectively 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. Investigations of misconduct within APS agencies from time to time reveal evidence of criminal behaviour. In such cases, it is open to the head of the investigating agency to refer that evidence to the relevant police authority for consideration.

The APSC has published guidance in relation to handling particular reports of criminal acts. It notes that should an investigator in the course of an investigation under the PID Act suspect that the disclosure includes an offence against a law of the Commonwealth that may be punishable by imprisonment for a period of at least two years, the investigator must notify a member of an Australian police force of that suspected offence. It also notes that agencies have obligations relating to receiving and dealing with reports of suspected breaches of the criminal law under the Australian Government's Protective Security Policy Framework.

ACLEI

ACLEI is established under the LEIC Act. ACLEI assists the Integrity Commissioner to provide independent assurance to government about the integrity of prescribed law enforcement agencies and their staff, by detecting and investigating corruption issues. ACLEI also collects intelligence about corruption in relevant agencies, and has a role in preventing corruption. Agencies subject to the Integrity Commissioner's jurisdiction are the ACIC, the AFP, AUSTRAC, DIBP (now the Department of Home Affairs), and prescribed aspects of the Department of Agriculture and Water Resources.

The Integrity Commissioner is an independent office established under the LEIC Act. The LEIC Act established this new independent office, supported by a statutory agency, ACLEI. 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 has powers similar to that of a Royal Commission. This includes the power to conduct public or private coercive 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 (although noting there are legislative protections available to preclude compelled evidence that is self-incriminatory being used against a person in matters that would see the imposition of a penalty). ACLEI investigators can access other powers commonly 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.

The agencies within ACLEI's jurisdiction reflect the central role that they play in Commonwealth law enforcement and the particularly high corruption risk environments in which they operate. The Integrity Commissioner prioritises 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 (including policing, anti-money laundering, visa and biosecurity compliance systems, anti-drug law enforcement programmes and international cargo clearance programmes).

ACLEI also assists agencies by disseminating information or intelligence about corruption vulnerabilities or compromise of people or systems. ACLEI convenes a Corruption Prevention Community of Practice (open to agencies under the Integrity Commissioner's jurisdiction) to strengthen professional practice and networking. ACLEI also hosts a corruption prevention website for practitioners, with case studies and key insights (<http://www.aclei.gov.au>).

AUSTRAC

AUSTRAC is Australia's combined Financial Intelligence Unit (FIU) and specialist AML/CTF regulator. AUSTRAC identifies threats to, and criminal abuse of, the financial system, and acts to protect Australia's economy. AUSTRAC also works in partnership with industry and government agencies in Australia and overseas to help keep Australia safe from financial and other serious crime, and to build and maintain trust in Australia's financial system as part of the global community.

Section 209 of the AML/CTF Act continues the existence of AUSTRAC, which was established under the *Financial Transaction Reports Act 1988* (FTR Act). AUSTRAC is a member of the AFP-hosted FAC Centre and contributes financial intelligence on allegations of this nature. AUSTRAC has a permanent staff member located within the FAC Centre. The AUSTRAC member within the FAC Centre conducts detailed financial analysis in the evaluation of all corruption matters and provides actionable financial intelligence.

ACIC

The ACIC was formed to strengthen Australia's response to crime and provide our law enforcement and protection agencies with accurate information and intelligence to respond to immediate threats. The agency, through its investigative, research and information delivery services, also works with law enforcement partners to improve the ability to stop criminals exploiting emerging opportunities and perceived gaps in law enforcement information.

The ACIC commenced operations on 1 July 2016 as a result of the merger of CrimTrac and the Australian Crime Commission. It was established under section 7 of the ACC Act. The ACIC's mission is to make Australia

safer through improved national ability to discover, understand and respond to current and emerging crime threats and criminal justice issues, including the ability to connect police and law enforcement to essential policing knowledge and information. In support of this role, the ACIC has a statutory duty to maintain a national database of criminal information and intelligence and to facilitate national access by law enforcement agencies to policing information. Additionally, ACIC examiners are able to access (in appropriate cases) coercive powers to question individuals and require the production of documents and things to support investigations and intelligence operations in relation to serious and organised crime, expressly including such activity where it involves bribery and corruption of government officials.

CDPP

The CDPP is responsible for prosecution of offences against Commonwealth law through an effective, efficient, ethical, high quality, and independent criminal prosecution service for Australia in accordance with the Prosecution Policy of the Commonwealth. The CDPP is an independent prosecution service established under section 5 of the *Director of Public Prosecutions Act 1983* (CDPP Act). The Office of the CDPP is under the control of the Director, who is appointed for a term of up to five years. The CDPP is within the Attorney-General's portfolio, but operates largely independently of the Attorney-General and the political process.

The CDPP receives referrals from over 50 Commonwealth investigative agencies and also State and Territory police and has offices in every State and Territory in Australia. It operates under a national practice group model, consisting of specialised branches of lawyers, each led by a Deputy Director. The Commercial, Financial and Corruption practice group handles referrals from agencies including the AFP, ACLEI, the ACIC and the ASIC, relating to domestic and foreign bribery, breaches of the Corporations law, money-laundering and other serious financial crimes.

Auditor-General for Australia and the ANAO

The Auditor-General has a broad range of auditing responsibilities, as set out in the *Auditor-General Act 1997* (the A-G Act). These responsibilities include:

- auditing the financial statements of Commonwealth entities, companies and their subsidiaries
- auditing annual performance statements of Commonwealth entities on request in accordance with the PGPA Act
- conducting performance audits, assurance reviews, or audits of the performance measures of Commonwealth entities, companies, and their subsidiaries
- providing other audit services as required by other legislation or allowed under section 20 of the A-G Act; and
- reporting directly to the Parliament on any matter or to a Minister on any important matter.

The Auditor-General has discretion in the performance or exercise of their functions or powers. In particular, the Auditor-General is not subject to direction in relation to whether or not a particular audit is to be conducted, the way in which a particular audit is to be conducted, or the priority to be given to any particular matter. In the exercise of their functions or powers, the Auditor-General must, however, have regard to the audit priorities of the Parliament, as determined by the Joint Committee of Public Accounts and Audit.

In delivering against this mandate, the Auditor-General is assisted by the ANAO. The purpose of the ANAO is to improve public sector performance and support accountability and transparency in the Australian Government sector through independent reporting to the Parliament, the executive and the public. The ANAO has full and free access at all reasonable times to documents or other property, and authority to examine, make copies of or take extracts from documents. The ANAO's work is governed by the A-G Act and the auditing standards (<https://www.anao.gov.au/about/legislation-and-standards>) established by the Auditor-General. These currently incorporate the standards made by the Auditing and Assurance Standards Board as applied by the auditing profession in Australia.

The Commonwealth Ombudsman

The Commonwealth Ombudsman plays an important role, along with the courts and administrative tribunals, in examining government administrative action. The Office of the Commonwealth Ombudsman was established by the *Ombudsman Act 1976* (Ombudsman Act) as part of a comprehensive reform of Australian administrative law in the 1970s. The Ombudsman is impartial and independent. The Ombudsman is 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. 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. 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.

The third role is to inspect the records of agencies such as the AFP 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 AFP and its members
- *Postal Industry Ombudsman* - handling complaints about Australia Post and private postal operators registered with the Postal Industry Ombudsman scheme
- *Overseas Students Ombudsman* - handling complaints from international students about private education providers in Australia, and
- *VET Student Loans Ombudsman* - handling complaints from VET FEE-HELP or VET Student Loans students about their education provider in Australia.

ASIC

ASIC is Australia's corporate, markets and financial services regulator. ASIC contributes to Australia's economic reputation and wellbeing by ensuring that Australia's financial markets are fair, orderly and transparent, promoting investor and financial consumer trust and confidence, and providing efficient and accessible registration. ASIC is an independent Commonwealth Government body set up under and administering the *Australian Securities and Investments Commission Act 2001* (ASIC Act). Section 261 of the ASIC Act continues the existence of ASIC.

ASIC is part of the executive branch of Government, being part of the portfolio of the Australian Treasury. The Minister may give ASIC written direction as to policies it should pursue and priorities it should follow in performing or exercising any of its functions or powers under the Corporations Act (section 12 ASIC Act). However, before the Minister can issue a direction, the Minister must provide notice of the proposed direction

to the ASIC Chairperson. The Chairperson is then to be given adequate opportunity to discuss with the Minister the need for the proposed direction. Where the Minister does issue a direction, they are required to:

- publish a copy of the direction in the Government Gazette within 21 days of it being made; and
- table the direction in both Houses of Parliament within 15 sitting days of the direction being published in the Gazette (section 12(5) ASIC Act).

Therefore, in the event that the Minister issues a direction to ASIC, that direction is made publicly available and is brought to the attention of the Commonwealth Parliament.

The Minister is prevented from giving a direction under section 12 of the ASIC Act with reference to a particular case (subsection 12(3), ASIC Act). The Minister can only direct ASIC to investigate a matter when the Minister considers it is in the public interest to do so (section 14, ASIC Act).

AIC

The Australian Institute of Criminology (AIC) hosts an annual data collection for the Fraud against the Commonwealth program of research, which collects data on fraud, corruption and collusion occurring by Australian public servants and members of the public against Commonwealth entities.

IPEA

IPEA was established in April 2017 to administer, monitor, and provide advice on parliamentary travel resources as well as audit and report on all parliamentary work resources (including travel), with the aim of improving transparency and minimising misuse of parliamentary travel expenses and work expenses generally. IPEA works with parliamentarians and their staff to raise awareness and understanding of the Parliamentary work expenses framework. Under a new framework which took effect on 1 January 2018, parliamentarians are required to demonstrate that they used their work expenses for the dominant purpose of parliamentary business (and not personal or commercial interests) and also that they have ensured work expenses that are claimed provide value for money.

IPEA was established to perform the following functions:

- providing advice to parliamentarians and their staff, as well as former parliamentarians, in regards to their travel expenses and use of travel allowances
- monitoring, reporting on and auditing parliamentary travel and MP work expenditure matters
- processing claims and paying or providing travel expenses, allowances and other resources in compliance with legislation
- giving rulings that determine whether the legislation was complied with by a parliamentarian, which may result in the parliamentarian being required to repay the money claimed; and
- recovering overpayments and non-compliant payments.

These functions are conferred on the IPEA through section 12 of the IPEA Act. IPEA has a publicly available protocol on how it handles allegations of misuse by parliamentarians and a publicly available table on its escalation process.

Joint Committee of Public Accounts and Audit

At the first session of each Parliament, a joint committee of members of the Parliament - the Joint Committee of Public Accounts and Audit - is appointed under section 5 of the *Public Accounts and Audit Committee Act 1951*. The duties of the Committee under section 8 of the Act broadly include:

- the examination of the financial affairs of authorities of the Commonwealth

- the examination of all reports of the Auditor-General
- reporting to both Houses of the Parliament with comments relating to statements
- accounts and reports
- reporting to both Houses of the Parliament any alteration that the Committee thinks desirable; and
- inquiry into any question connected with public accounts which is referred to the Committee.

Additionally, the Joint Committee has a range of duties under section 8 that relates to the Audit Office. These include:

- the ability to consider the operations and resources of the Audit Office
- reporting to both House of the Parliament on the performance of the Audit Office; and
- consideration of draft estimates for the Audit Offices.

States

Most state jurisdictions in Australia have a dedicated independent anti-corruption body established under state legislation. These bodies receive complaints, take on investigations and inform the public sector and community about the risks and impacts of corruption.

- Western Australia - section 8 of the *Corruption, Crime and Misconduct Act 2003* (WA) establishes the Corruption and Crime Commission.
- Victoria - section 12 of the *Independent Broad-Based Anti-Corruption Commission Act 2011* (Vic) establishes the Independent Broad-Based Anti-Corruption Commission.
- South Australia - section 7 of the *Independent Commissioner Against Corruption Act 2012* (SA) establishes the Independent Commissioner Against Corruption.
- New South Wales - section 4 of the *Independent Commission Against Corruption Act 1988* (NSW) establishes the Independent Commission Against Corruption.
- Queensland - section 7 of the *Crime and Corruption Commission Act 2001* (Qld) establishes the Crime and Corruption Commission.
- Tasmania - section 7 of the *Integrity Commission Act 2009* (Tas) establishes the Integrity Commission.
- Northern Territory - has recently announced that it will establish an Anti-Corruption, Integrity and Misconduct Commission by mid-2018.

Australian Capital Territory (ACT) - the ACT Legislative Assembly has formed a committee to consider the establishment of an independent integrity commission for the ACT.

Australia regularly reviews this framework and undertakes reforms to strengthen the approach where gaps are found. An advantage of this system is that responsibility for corruption prevention, detection, investigation and resolution is spread among many agencies with particular expertise, rather than centralised in the one agency. This ensures that anti-corruption approaches are mainstreamed across agencies, which each understand they have anti-corruption responsibilities, rather than outsourced to one agency. This approach also recognises that tailored approaches to managing and mitigating corruption and fraud risks are effective, depending on the agency, its type of work, its operating environment and risk profile. Although the current system is effective, the authorities always look at how the current approach to combating corruption could be strengthened. Examples of reforms include the commitments Australia made under the OGP National Action Plan 2016-18, reforms to sharing information on fraud and corruption in the public sector that are contained in the Crimes Legislation Amendment (Powers, Offences and Other Measures) Bill 2017 (currently before Parliament), and the recent establishment of the IPEA (which commenced as an independent statutory authority ‘watchdog’ on 1 July 2017 to provide advice and rulings on parliamentarians’ work expenses).

The Australian Parliament's Senate Select Committee on a National Integrity Commission recently undertook an inquiry into the adequacy of the Australian Government's legislative, institutional and policy framework for addressing corruption and misconduct. The Committee tabled its report on 13 September 2017. The Committee (majority) report did not recommend that a national integrity commission be established to investigate integrity and corruption matters relating to members of parliament and Australian Government public officials. Recommendation 2 of the Committee's report is that the Commonwealth Government gives careful consideration to establishing a Commonwealth agency with broad scope and jurisdiction to address integrity and corruption matters. The Government is considering its response to the Committee's recommendations.

Examples of implementation, including related court or other cases

ACLEI

ACLEI assists agencies by disseminating information or intelligence about corruption vulnerabilities or compromise of people or systems. ACLEI convenes a Corruption Prevention Community of Practice (open to agencies under the Integrity Commissioner's jurisdiction) to strengthen professional practice and networking. ACLEI also hosts a corruption prevention website for practitioners, with case studies and key insights (www.aclei.gov.au). ACLEI's corruption prevention strategy can also be found at: https://www.aclei.gov.au/sites/default/files/aclei_corruption_prevention_strategy_-_june_2018.pdf?acsf_files_redirect.

AUSTRAC

As of June 2017, AUSTRAC has 46 domestic partner agencies across law enforcement, national security, revenue protection and corruption. Officers in these partner agencies have direct online access to query AUSTRAC's financial intelligence database. In the 2016-17 financial year, 2.7 million searches were conducted of the AUSTRAC database by officers across Australia. This is equivalent to over 7,000 searches each day.

Over the past 12 months to April 2018, AUSTRAC has engaged in 22 international exchanges relating to investigations or inquiries associated with bribery or corruption. A breakdown by exchange type is:

- 11 requests for information from other FIUs
- 5 requests for information to other FIUs on behalf of domestic partner agencies
- 2 incoming spontaneous disseminations from other FIUs
- 4 outgoing spontaneous disseminations to other FIUs.

(b) Observations on the implementation of the article

It is noted that a number of Australian agencies play a core preventative role at the federal level. Thus, Australia takes a multi-agency approach to implement and coordinate the above policies to effectively prevent and combat corruption. In addition to the APSC's and ACLEI's preventive mandates in relation to the federal public service and prescribed Commonwealth law enforcement agencies, respectively, each federal agency remains responsible for preventive activities in relation to its own staff, including through awareness-raising activities.

AGD oversees and coordinates the implementation of domestic anti-corruption policies and programmes across governmental departments and agencies and engages in international fora aimed at combating corruption.

Other key agencies are the AFP, the Australian Public Service Commission (APSC), the Australian Securities and Investments Commission (ASIC), the Australian National Audit Office (ANAO), the Office of the Australian Information Commissioner (OAIC), the Commonwealth Ombudsman, the Independent Parliamentary Expenses Authority, ACLEI and AUSTRAC.

These agencies conduct activities to increase awareness regarding corruption and fraud within the public sector. AFP, together with other agencies, operates a Fraud and Anti-Corruption Centre to exchange information and intelligence regarding emerging threats and challenges regarding financial crimes, including corruption.

During the country visit, Australia clarified that ACLEI systematically increased and disseminated knowledge about the prevention of corruption not only amongst agencies in their jurisdiction but also amongst the members of the public. Regarding ACLEI's prosecution (44) and conviction (30) rates vis-à-vis the total number of investigations it has conducted (217), Australia explained that these rates were not the only measure of success as a result of ACLEI's investigations. These figures do not take into account ACLEI's efforts to disrupt and prevent corruption, and the referral of matters to other agencies for other investigation. ACLEI's work takes in a broad spectrum of matters, including intelligence probes, instances where initial allegations are found to be lacking in substance, issues where an administrative or employment action is a more appropriate action, and matters of serious criminality. The convictions recorded against evidence adduced by ACLEI investigations have led to the disruption of some significant criminal enterprises involved in corruption-enabled border crime, and in that regard, ACLEI is playing an important detection and deterrence role in Australia's anti-corruption framework.

Paragraph 2 of article 6

2. Each State Party shall grant the body or bodies referred to in paragraph 1 of this article the necessary independence, in accordance with the fundamental principles of its legal system, to enable the body or bodies to carry out its or their functions effectively and free from any undue influence. The necessary material resources and specialized staff, as well as the training that such staff may require to carry out their functions, should be provided.

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

The Australian Government takes an active and preventative approach to combating corruption in all its forms. A range of bodies and government initiatives are designed to promote accountability and transparency. This strategy addresses corruption in both the private and public sectors. The following information is in addition to the independence mechanisms specified in response to paragraph 1 of article 6.

AUSTRAC

AUSTRAC is Australia's combined AML/CTF regulator and financial intelligence unit (FIU). It was first established under the FTR Act, and continues to operate pursuant to section 209 of the [AML/CTF Act](#).

The Minister (section 214 of the AML/CTF Act) appoints the AUSTRAC CEO. Section 228 (Directions by Minister) of the AML/CTF Act also allows the Minister to give the AUSTRAC CEO a written direction about policies the AUSTRAC CEO should pursue, or priorities the AUSTRAC CEO should follow, in performing any of the AUSTRAC CEO's functions. The Minister must not give a direction about a particular case. The Minister must cause a copy of each direction to be tabled in each House of the Parliament within 15 sitting days of that House after giving the direction.

Section 212(1) of the AML/CTF Act sets out the functions of the AUSTRAC CEO. Under section 229 of the AML/CTF Act, the AUSTRAC CEO may, in writing, make Anti-Money Laundering and Counter-Terrorism Financing (AML/CTF) Rules. The AML/CTF Rules (which are binding legislative instruments) set out specific requirements under the AML/CTF Act. AUSTRAC develops the AML/CTF Rules in consultation with the Department of Home Affairs, other relevant government/partner agencies, industry and other stakeholders.

The AML/CTF Rules are subject to scrutiny by the Australian Parliament and can be disallowed by the Australian Parliament.

As at 30 June 2017, AUSTRAC has 318 staff. The FATF, in its 2015 mutual evaluation of Australia, considered that AUSTRAC was an independent body and that Australia met the global standard for FIU independence (Paragraphs a3.28 to a3.30 of the Australian mutual evaluation report: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>).

AUSTRAC makes substantial training available to its staff. As part of the Fintel Alliance (see Australia's response to Subparagraph 1 (b) of article 14 below for further information on the Fintel Alliance), AUSTRAC developed an innovative world-first Financial Intelligence Analyst Course (FIAC) with input from law enforcement partner agencies, industry, academia, and its United States counterpart, the Financial Crimes Enforcement Network. The course includes specialist financial intelligence tradecraft modules, alongside subject matter topics which were developed, co-designed and presented by external industry, academia and partner agencies, alongside AUSTRAC subject matter experts. AUSTRAC and partner agency intelligence practitioners have attended the pilot course. FIAC is intended to build high-quality analyst skills, capability and tradecraft to prevent, detect and disrupt financial crime. It includes financial intelligence tradecraft, to transform intelligence analysts into financial intelligence analysts.

AUSTRAC also delivered a new Intelligence Induction programme, providing a baseline of intelligence processes and practices to new-starters in AUSTRAC's Intelligence capability. AUSTRAC also has a Studies Assistance Scheme that supports employees to access external professional development opportunities that lead to a qualification recognised under the Australian Qualifications Framework.

ACLEI

As at 30 June 2017, ACLEI has 50 staff, as well as resources to procure specialist services such as physical and technical surveillance. ACLEI's own investigators are typically highly experienced investigators and intelligence analysts drawn from other law enforcement and integrity agencies.

The Commissioner is appointed by the Governor-General and cannot be removed arbitrarily, may not hold office for more than seven years, can commence investigations on his or her own initiative, and can make public statements and release reports publicly. The Integrity Commissioner can only be removed during his or her term by a decision (for cause) of the Governor-General (section 183 LEIC Act). In addition to this, the PJC on the ACLEI reports to both Houses of Parliament on matters relating to ACLEI. The Committee monitors and reviews the performance of the Integrity Commissioner's functions, and examines each annual report and any special reports produced by the Integrity Commissioner.

The Integrity Commissioner may also publish material independently and may cause a Special Report (including on the functioning of ACLEI) to the Parliament (subsection 204(1) LEIC Act).

IPEA

IPEA is an independent statutory authority that currently consists of four members appointed by the Governor-General and the President of the Remuneration Tribunal. The members of the authority are assisted by a Chief Executive Officer (CEO) who has responsibility for managing IPEA, including its staff. The IPEA Act provides that IPEA has an oversight role in relation to the work expenses of parliamentarians and their staff. This legislative basis ensures a high degree of independence, which protects IPEA from political influence. The staff are engaged as public servants under the PSA, which requires that public servants be impartial, accountable and ethical. If public servants do not meet these expectations, they may be investigated for breach of the APS Code of Conduct, with sanctions including termination of employment. IPEA is very supportive of its staff and responsive to staff training needs. It has a staff study assistance scheme and encourages staff to attend training opportunities both inside and outside of government.

ACIC

The ACIC is an independent statutory authority established under section 7 of the *Australian Crime Commission Act 2002*. The ACIC's strategic direction and priorities are largely determined by the ACIC's Board, comprising police commissioners from all jurisdictions and heads of certain Commonwealth agencies. The Board is responsible for approving the use of the ACIC's special coercive powers and for determining special operations and special investigations. The responsible Commonwealth Minister has a limited power to give the ACIC's Board directions and guidelines for the performance of its functions, and any directions or guidelines given must be published. The Minister does not have the ability to set ACIC work priorities. The coercive powers of the agency may only be exercised by an appointed examiner. ACIC examiners must be satisfied it is reasonable in all the circumstances to use coercive powers. Examiners are not subject to direction by the Minister, the Board, or the CEO of the agency.

ASIC

ASIC has effective independence in performing its functions and exercising its powers under the corporations legislation. The current structure is not susceptible to political interference. The Minister has a power to issue directions; this is highly circumscribed and rarely used, but it ensures there is balance between transparency and accountability.

Minister's written directions

The Minister may give ASIC written direction as to policies it should pursue and priorities it should follow in performing or exercising any of its functions or powers under the corporations legislation (section 12 ASIC Act 2001). However, before the Minister can issue a direction, the Minister must provide notice of the proposed direction to the ASIC Chairperson. The Chairperson is then to be given adequate opportunity to discuss with the Minister the need for the proposed direction. In the event that the Minister issues a direction to ASIC, that direction is made publicly available and is brought to the attention of the Commonwealth Parliament.

The Minister is prevented from giving a direction under section 12 of the ASIC Act with reference to a particular case (section 12(3) ASIC Act). However, the Minister can direct ASIC to investigate certain specified particular matters when the Minister considers it is in the public interest to do so (section 14 ASIC Act). The Minister can direct ASIC to undertake an investigation, but the conduct of that investigation and any decisions made following that investigation (for example, whether to commence proceedings or whether to conclude the investigation) are matters entirely for ASIC. Section 12 of the Corporations Act would prevent the Minister from issuing any direction in respect of a particular case other than a direction to investigate in accordance with section 14.

ASIC is not aware of any instances where the Minister has given a direction to ASIC under either section 12 or section 14 of the ASIC Act. ASIC is aware of one instance where the Minister issued a direction to ASIC (operating then as the Australian Securities Commission) under the *Australian Securities Commission Act 1989*. The direction was issued by the Minister in 1992 and was given as a consequence of the Minister's concerns that the cooperation and collaboration between the Australian Securities Commission (ASC) and the CDPP did not meet Government expectations. The direction was that the ASC and the CDPP develop and implement a policy for the discharge of their powers, having regard to certain guidelines. These guidelines focused on collaboration and cooperation between the agencies and the development of dispute resolution mechanisms in the event of disputes between the ASC and the CDPP.

Consultation with the Minister

ASIC is generally not required to consult with or obtain approval from the Minister in relation to particular matters of regulatory policy.

One example where the Minister must approve ASIC policy is in relation to the making of Market Integrity Rules (MIRs). With the consent of the Minister, ASIC may make MIRs that deal with licensed markets, the

activities and conduct of persons in relation to licensed markets and financial products traded on these markets (section 798G(1) and (3) Corporations Act). The process that ASIC must follow to obtain Ministerial consent is set out in the Corporations Act (see section 798G).

In addition, although Ministerial consent is generally required, ASIC is given powers to make rules without Ministerial consent in emergency situations (section 798G(4)). The MIRs, when made, are legislative instruments and subject to parliamentary scrutiny, and possible disallowance by Parliament.

Further, the power to impose, vary or revoke the conditions on an Australian Financial Services Licence held by an Authorised Deposit-taking Institution, such as a bank, is reserved to the Minister (section 914A(5) Corporations Act). ASIC provides advice to the Minister about this function. As a matter of practice, a copy of this advice is provided to the Treasury.

ASIC does not consult with the Minister or other external authorities in relation to decision-making about day-to-day technical matters. These issues are for ASIC to decide based on ASIC's own decision-making processes.

Statutory protections

The ASIC Act provides that ASIC, its members (that is, the Commissioners) and its staff are protected from legal liability in relation to an act done or omitted in good faith in performance or purported performance of any function, or in exercise or purported exercise of any power, under the corporations legislation or a prescribed law (section 246 ASIC Act).

ASIC Commissioners are appointed under a transparent procedure that is set out in legislation. ASIC's Commissioners are appointed by the Governor-General of the Commonwealth of Australia (section 9(2) ASIC Act). Criteria for removal of ASIC Commissioners are set out in the ASIC Act. The engagement of an ASIC Commissioner can only be terminated by the Governor-General (section 111(1) ASIC Act).

Material resources

In 2016-2017, ASIC received approximately \$342 million in appropriation revenue from government, including \$27 million from the Enforcement Special Account. ASIC received approximately \$7 million of own-source revenue. The Enforcement Special Account was set up as a contingency fund to give ASIC independence in the large investigations it pursues, the costs of which could not otherwise be absorbed without significantly prejudicing its general enforcement role. Enforcement Special Account expenditure may vary significantly from year-to-year.

In 2016, the Government committed an additional \$127.3 million in funding over the next four years to implement recommendations from the ASIC Capability Review and the Financial System Inquiry. Of this amount, \$121.3 million has been allocated to ASIC:

- \$61.1 million will enable ASIC to increase its data analytics capabilities, including updating its data management system and increasing its surveillance capabilities
- \$57 million will enable ASIC to increase its enforcement and surveillance activities with a focus on financial advice, responsible lending, life insurance and breach reporting
- \$3.2 million will enable ASIC to facilitate the accelerated implementation of key Financial System Inquiry recommendations.

Total operating expenditure was \$392 million in 2016-17.

Staff and training

In 2016-2017 ASIC had 1640 full-time equivalents. In 2016-2017 ASIC delivered 217 learning initiatives (including educational courses) covering regulatory practice, data analysis, legal practice, enforcement, accounting and auditing and professional technical learning. All ASIC staff are required to complete mandatory online training modules for training and refresher training. Training is relied upon in order for staff to gain an understanding of the various ASIC and Government policies that cover fraud, general security awareness, valuing and handling information. The bi-annual declaration of interest is also administered as part of ASIC's compliance framework, requiring all staff to provide details of their interests and dealings with them.

Specifically, ASIC employees are made aware of their responsibilities through the following mandatory courses:

- Fraud Awareness Training Module - this module assists staff to gain an understanding of fraud, fraud against the Commonwealth and ASIC's policies on fraud. There is a specific section in this module that covers conflicts of interest, bribery and corruption.
- General Security Awareness - this module outlines the security responsibilities of employees at ASIC.
- Valuing and Handling Awareness - this module outlines how ASIC classifies, manages and protects information in ASIC.
- Declaration of Interest - the module focuses on conflicts of interests and declarations of conflicts of interest.

All training is supported by appropriate policy consistent with Protective Security Policy Framework requirements.

ASIC's learning frameworks are a key component of its approach to building capability. The frameworks are implemented through Professional Networks and Communities of Practice. ASIC uses its Learning Management System to monitor the capability development of team members. ASIC's Legal Coaching Programme includes the capabilities from the Legal Framework, which form the basis of the coaching plans for lawyers.

ASIC's professional networks and communities of practice drive development, including on-the-job learning and information sharing. ASIC has Learning Champions who facilitate and promote learning in their individual teams, forming an important part of the organisation's learning strategy.

ASIC also expanded its induction programs in 2016-17 by developing a Regulatory Practice induction, designed for team members who are new to ASIC's regulatory work. The program covers the context for financial services regulation, ASIC's key regulatory risks and developing regulatory professionalism and confidence.

(b) Observations on the implementation of the article

Overall, Australia lays out a convincing case for the implementation of this article. All relevant bodies and functions except AGD are statutory authorities or officeholders and have the necessary resources, sufficient budget and specialized staff to carry out their mandates. Legal and policy measures have also been introduced to safeguard their independence.

Paragraph 3 of article 6

3. Each State Party shall inform the Secretary-General of the United Nations of the name and address of the authority or authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

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

Australia has notified the Secretary-General of the United Nations that Australian Commission for Law Enforcement Integrity is the prevention authority for the purposes of this provision.

Information on Australian authorities under UNCAC is available at: <https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=AUS>.

(b) Observations on the implementation of the article

Australia has informed the Secretary-General of the United Nations of the name and address of the authorities that may assist other States Parties in developing and implementing specific measures for the prevention of corruption.

Article 7. Public sector

Paragraph 1 of article 7

1. Each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, endeavour to adopt, maintain and strengthen systems for the recruitment, hiring, retention, promotion and retirement of civil servants and, where appropriate, other non-elected public officials:

- (a) That are based on principles of efficiency, transparency and objective criteria such as merit, equity and aptitude;*
- (b) That include adequate procedures for the selection and training of individuals for public positions considered especially vulnerable to corruption and the rotation, where appropriate, of such individuals to other positions;*
- (c) That promote adequate remuneration and equitable pay scales, taking into account the level of economic development of the State Party;*
- (d) That promote education and training programmes to enable them to meet the requirements for the correct, honourable and proper performance of public functions and that provide them with specialized and appropriate training to enhance their awareness of the risks of corruption inherent in the performance of their functions. Such programmes may make reference to codes or standards of conduct in applicable areas.*

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

Recruitment in the public service

The recruitment, hiring, retention, promotion and retirement of Australian public servants is regulated by the PSA. Generally, vacancies in the APS are published on the APS Jobs website. Currently, the vacancies published on APS Jobs are those which are mandated by legislation: permanent positions, temporary positions and non-ongoing positions in excess of 18 months. The APSC is redeveloping APS Jobs so that any job opportunity in the APS, not just those mandated by legislation, can be found on the new APS Jobs website.

Under the PSA, the APSC has responsibilities to:

- develop, promote, review and evaluate APS employment policies and practices
- facilitate continuous improvement in people management throughout the APS
- contribute to learning and development and career management
- contribute to and foster leadership in the APS
- provide advice and assistance on public service matters to entities, and promote high standards of integrity and conduct in the APS.

Decisions to engage or promote employees in the APS must be made on merit. The PSA states that a decision is based on merit when:

- all eligible members of the community were given a reasonable opportunity to apply
- a competitive selection process is used to assess the relative suitability of applicants
- the assessment is based on the work-related qualities of the applicants and the job, and the assessment focuses on the relative capacity of the candidates to achieve outcomes related to the duties of the job.

The Australian Public Service Commissioner's Directions 2016 additionally require that:

- information about the selection process be readily available to applicants
- the selection process be applied fairly in relation to each applicant, and the selection process be appropriately documented.

At the request of an agency head, the Merit Protection Commissioner (a statutory office holder who conducts independent reviews of employment actions and merit-based decisions) may convene an independent selection advisory committee to conduct the selection process. More information on the role of the independent selection advisory committee is available at: <https://www.mpc.gov.au/employer-services>

Independent selection advisory committees are not mandatory. Agencies must ask for the Merit Protection Commissioner to establish a committee. The committee operates independently of the agency and in accordance with binding instructions issued by the Merit Protection Commissioner. It makes non-binding recommendations to the agency head but agencies generally accept their recommendations; promotions made on the basis of such recommendations are not subject to further administrative review.

The committees are useful for large or sensitive processes where it is important that stakeholders view the process as independent and impartial. The involvement of the Merit Protection Commissioner in a selection exercise provides employees with assurance that merit is being applied appropriately in staff selection decisions.

Promotions to APS 2-6 levels may be reviewed by the Merit Protection Commissioner on application by an unsuccessful applicant. Recruitment decisions relating to Executive Level 1 and Executive Level 2 positions may be reviewed by the head of the agency in the first instance, with a subsequent review by the Merit Protection Commissioner. The Merit Protection Commissioner may recommend a course of action to the agency head, who must deal with that recommendation. Where a selection process is conducted in relation to a vacancy in the Senior Executive Service (SES), there is a further requirement that the APS Commissioner, or a representative of the Commissioner, is fully involved in the process and certifies that the principle of merit was upheld in the process before an applicant can be engaged or promoted. The APSC has a policy regarding who

may be a representative of the Commissioner on an SES selection process. The policy aims to maintain the independence of the representative from the rest of the selection committee.

Ongoing APS employees may only have their employment terminated on grounds listed in section 29 of the PSA. Procedures for terminating the employment of non-SES employees are generally found in the enterprise agreements of each APS agency. For SES employees, there is a requirement that the Commissioner be satisfied that termination of the SES employee's employment is in the public interest before such termination can occur.

In addition to these protections, all APS employees may seek judicial review of employment decisions by justices of the Federal Court or judges of the Federal Circuit Court under the *Administrative Decisions (Judicial Review) Act 1977*. All APS employees who have their employment terminated and who meet the criteria set out under the *Fair Work Act 2009* may also seek review of the decision to terminate their employment.

Remuneration arrangements

The Remuneration Tribunal is an independent statutory authority established under the *Remuneration Tribunal Act 1973* responsible for determining the remuneration arrangements for Federal parliamentarians, judicial and non-judicial officers of Federal Courts and Tribunals, Secretaries of Departments and holders of various public offices. The Tribunal consists of three part-time members appointed by the Governor-General. The Tribunal sits regularly throughout the year.

The remuneration for approximately 98% of APS employees is set through enterprise bargaining agreements. These are negotiated at the agency level between the employer, employees and their bargaining representatives. Most enterprise agreements are 3 years in duration.

The remuneration arrangements for SES employees, other than Agency Heads, are the responsibility of the agency head. These are usually individual arrangements supported by internal remuneration policy.

The Australian Government Employment Bargaining Framework (published and administered by the APSC) sets out Australian Government policy as it applies to workplace relations arrangements in Australian Government employment. It provides a framework for the management of workplace relations in Australian Government employment consistent with both the broader principles of Australian Government workplace relations policy and legislative requirements.

Performance-based salary progression

Arrangements for performance-based salary progression are outlined in enterprise agreements. With few exceptions, the eligibility criteria to progress include a time at level requirement and a minimum of satisfactory performance. Progression, again with only a few exceptions, is limited to the top of the salary span for the employee's classification.

Review of adequacy of remuneration arrangements

As part of the annual State of the Service Report, APS employees are asked through the employee census about their perceptions of their monetary and non-monetary conditions of service. This provides a general test of employees' views on their terms and conditions, including remuneration.

Agency heads are responsible for training their employees. New APS employees will usually undergo induction training covering the general requirements of being an APS employee. This training includes Code of Conduct training together with any agency-specific training. Existing APS employees undergo additional training as required to fulfil the needs of their position.

Further, the APSC provides training on Conduct and Values issued to APS employees generally as part of its public training suite; training is also made available to employees on particular relevant topics such as fraud awareness.

Examples of implementation, including related court or other cases

In the year ending 30 June 2016, 108 promotion reviews were finalised by the APSC, covering 920 promotion decisions. Many of the reviews related to bulk recruitment actions, where multiple candidates were promoted in one action. Twenty-three of the 920 promotion decisions were varied after review. This equates to a rate of 2.5%.

The Remuneration Tribunal's decisions and annual reports on its activities are publicly available on its website: <http://www.remtribunal.gov.au/>.

The APSC also publishes an annual report on the remuneration paid across the APS. It is available on its website: <http://www.apsc.gov.au/>.

The APSC makes the State of Service report available to the public on its website. A link to the 2015-2016 State of the Service Report is available at <http://www.apsc.gov.au/>.

(b) Observations on the implementation of the article

The PSA regulates recruitment, hiring, retention, promotion and retirement of APS employees. Under the Act, the APS Commissioner is responsible for promotion of high standards of integrity, conduct, accountability, effectiveness and performance among the APS employees. The *Parliamentary Service Act 1999* regulates similar issues with respect to parliamentary staff. The requirements of article 7(1) regarding other categories of public officials such as agency heads and staff of the Australian Electoral Commission are addressed in relevant legislation.

Recruitment to the APS is competitive and based, *inter alia*, on fairness and merit. Agencies may outsource the recruitment process to independent selection advisory committees established by the Merit Protection Commissioner (MPC) in order to ensure transparency, efficiency, speed and fairness of the process.

Recruitment decisions can be appealed by unsuccessful applicants to the MPC or agency heads. The MPC, the Fair Work Commission, the Federal Court or the Federal Circuit Court may review employment decisions.

During the country visit, the authorities explained that candidates with criminal or disciplinary records, including for corrupt acts, are not precluded from working in the APS provided that the record is declared by the candidate during the recruitment process. Special recruitment and hiring guidelines for high-risk sectors exist (e.g. Protective Security Policy Framework).

It was also clarified that the yearly performance appraisal of parliamentary staff requires the staff to undergo specific corruption-related trainings.

Paragraph 2 of article 7

2. Each State Party shall also consider adopting appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to prescribe criteria concerning candidature for and election to public office.

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

The Constitution provides foundational principles for election of Members of Parliament. Further details are regulated by the *Commonwealth Electoral Act 1918* (the Electoral Act).

Several of the grounds for disqualification of Members of Parliament and candidates for election in sections 44 and 45 of the Constitution are directed partly at ensuring that Members of Parliament do not have conflicts of interests.

Under section 44, a person cannot be elected or sit as a Member of the House of Representatives or a Senator if he or she is subject to grounds of disqualification, including:

- foreign citizenship, being under sentence or subject to be sentenced for an offence which is punishable by imprisonment for one year or longer, being an undischarged bankrupt or insolvent, holding an office of profit of the Crown, having a direct or indirect pecuniary interest in an agreement with the Commonwealth public service.

Under section 45, a Member of the House of Representatives or a Senator becomes disqualified if he or she:

- takes the benefit, whether by assignment, composition, or otherwise, of any law relating to bankrupt or insolvent debtors, or
- directly or indirectly takes or agrees to take any fee or honorarium for services rendered to the Commonwealth, or for services rendered in the Parliament to any person or State.

Requirements for the registration of members' and senators' pecuniary and other interests were put in place by formal resolutions of each House some years ago—House of Representatives (1984) and Senate (1994). Each House has a scheme for the registration of interests of their members, as well as that of their spouses (or partners) and any dependent children. The registration systems provide for continuous disclosure of interests where a conflict of interest with a member's or senator's public duties could foreseeably arise or be seen to arise.

The resolutions of the Houses contain detailed lists of specific matters which are required to be disclosed, including shareholdings, trusts, real estate, financial instruments, non-household assets over \$7,500, gifts and memberships, in addition to the final expansive category of 'any other interests where a conflict of interest with a Member's (Senator's) public duties could foreseeably arise or be seen to arise'. Initial statements are made at the commencement of each term of office by every member and senator, and any alteration of interests must be notified on the respective Register of Interests of Members or Senators within a specified period of the alteration.

The Registers of Interests of Members and Senators are overseen by the House of Representatives Committee of Privileges and Members' Interests and the Senate Standing Committee on Senators' Interests, respectively. Failure to comply with the schemes may be treated as a serious contempt and subject to inquiry by the relevant oversight committee. A member or senator who seeks or obtains any benefits in return for exercising his or her duties may be dealt with for contempt.

Under the respective standing orders, the relevant oversight committee shall consider specific complaints about registering or declaring interests. Such complaints are rare. However, currently, the House of Representatives Committee of Privileges and Members' Interests is considering a complaint about the conduct of someone when he was a member of the House (although he is now a former member), and the committee is yet to conclude its consideration of the complaint. No matters have been followed up by the Senate in recent times. However, the scrutiny provided by a publicly available register means that omissions and errors are usually corrected promptly when brought to public attention (e.g. by the media).

Since July 2017, a total of eight senators and three members have resigned or been disqualified by the High Court (sitting as the Court of Disputed Returns) as they have not met a constitutional qualification which denies eligibility to be chosen or to sit in the Australian Parliament if the person holds allegiance to a foreign power (Constitution section 44(i)). These have generally been cases where the parliamentarians have inherited dual citizenship through a parent or grandparent who has migrated to Australia. The Court has ruled that dual citizenship does constitute allegiance, obedience or adherence to a foreign power in the absence of any action to renounce the foreign citizenship. The Court acknowledged that the foreign citizenship was a matter of law as applied by the other country. In the case of two of the members, they renounced their allegiance to the foreign power and won their seats in subsequent by-elections. The Senate system is more complex, and the court ordered a recount of the original ballot papers, which meant that the senators have since left the Parliament and been replaced by other candidates. The current provision in the Electoral Act requires candidates to make a declaration when they nominate that they meet the constitutional qualifications, and this is accepted and difficult

to challenge before voting (see below). In at least several cases, the senators who were later disqualified claimed that they were unaware that they held dual citizenship. In late 2017, each House passed a resolution requiring every member and senator to provide a statement, to the Registrar of Members' or Senators' Interests, as appropriate, in relation to the citizenship of themselves and their spouses, parents and grandparents.

Electoral Act

The Electoral Act sets out detailed requirements for representation in the Parliament, the nomination of candidates, and the voting process, which regulates candidature for and election to public office.

In addition to the constraints set out in the Constitution outlined above, section 163 of the Electoral Act (consistent with section 34 of the Constitution) provides that, in order to be eligible to become a Member of the House of Representatives, a person must:

- have reached the age of 18 years;
- be an Australian citizen; and
- be an elector, or qualified to become an elector, who is entitled to vote in a House of Representatives election.

Under section 386 of the Electoral Act, a person is incapable of being chosen or sitting as a Member if he or she has been convicted of bribery, undue influence or interference with political liberty, or has been found by the Court of Disputed Returns (the High Court of Australia) to have committed or attempted to commit bribery or undue influence when a candidate.

Section 362 of the Electoral Act provides for the election of a candidate to be declared void in the event of a candidate being found to have attempted or committed bribery or undue influence.

Examples of decisions of the High Court, sitting as the Court of Disputed Returns, concerning the possible disqualification of a candidate or a Member of Parliament due to the operation of section 44 of the Constitution are outlined below.

High Court of Australia Cases

In 2017, the High Court sitting as the Court of Disputed Returns, decided the matter of *Re Culleton [No 2]* [2017] HCA 4, which was referred to it from the Senate under sections 376 and 377 of the Electoral Act. The question was referred to the Court due to concerns that a senator (Senator Culleton) may not have been eligible to be elected to the Senate and was not eligible to remain as a senator. A question arose whether Senator Culleton may have, at the time of nomination as a candidate, been "convicted and... under sentence, or subject to be sentenced, for any offence punishable under the law of the Commonwealth or of a State by imprisonment for one year or longer" contrary to paragraph 44(ii) of the Constitution. The Court held that, despite the subsequent annulment of the conviction, at the time of the nomination as a candidate, the senator's election was contrary to paragraph 44(ii) and therefore invalid. The Court ordered a special recount of Senate ballot papers in the state in which he was elected (Western Australia).

Also, in 2017, the High Court decided the matter of *Re Day (No 2)* [2017] HCA 14, a referral to it from the Senate under sections 376 and 377 of the Electoral Act. The question was referred to the Court due to concerns that a senator (Senator Day) may not have been eligible to be elected to the Senate and was not eligible to remain a Senator. A question arose whether Senator Day may have, at the time of nomination as a candidate and while sitting as a Senator, had a "direct or indirect pecuniary interest in any agreement with the Public Service of the Commonwealth", contrary to paragraph 44(v) of the Constitution. On 5 April 2017, the High Court, sitting as the Court of Disputed Returns, ruled that the Senator's election was contrary to paragraph 44(v) and therefore invalid. The Court ordered a special recount of Senate ballots in the state in which he was elected (South Australia).

The most recent judicial consideration of paragraph 44(iv) disqualification (holding an office of profit from the Crown) was in *Re Lambie* [2018] HCA 6; 263 CLR 601. In *Re Lambie*, the High Court considered whether

Senator Steven Martin, who following a special count was chosen to fill a vacancy left by Senator Jacqui Lambie, was capable of being chosen or sitting as a senator at the time of his candidacy. The Court found that Senator Martin, who at the time of his candidacy held the offices of Mayor and Councillor of Devonport City Council, was not incapable of being chosen or of sitting as a senator by reason of section 44(iv). The Court relevantly held Mr Martin's council offices did not constitute offices of profit to which officeholders are appointed by the executive government, nor did his continued holding of those offices turn on the will of the executive government of the Commonwealth or of a state.

There are two other leading cases on section 44(iv); *Sykes v Cleary* [1992] HCA 60;(1992) 176 CLR 77, and *Free v Kelly and the Australian Electoral Commission* [1996] HCA 42. Mr Cleary was disqualified by the High Court because he was, at the time of his nomination, a Victorian State school teacher on leave without pay. Ms Kelly was disqualified by the High Court because she was, at the time of her nomination, a serving member of the Australian Defence Force who was regarded by the Court to be 'wholly employed' by the Commonwealth. Both of these occupations are then clearly to be regarded as "offices of profit under the Crown", and by implication, all Federal and State public servants and serving members of the Australian Defence Force would be disqualified from standing for election. This appears to apply even if the person is "unattached", or on leave without pay, and not currently in receipt of remuneration.

(b) Observations on the implementation of the article

The Australian Constitution establishes foundational qualifications for the election and disqualification of Members of the House of Representatives and senators. Sections 44 and 45 of the Constitution provide for the disqualification of candidates or members of parliament if, inter alia, they commit certain offences or have specified conflicts of interests.

Additional requirements for parliamentarians and candidates are provided in sections 163, 362 and 386 of the Electoral Act.

Paragraph 3 of article 7

3. Each State Party shall also consider taking appropriate legislative and administrative measures, consistent with the objectives of this Convention and in accordance with the fundamental principles of its domestic law, to enhance transparency in the funding of candidatures for elected public office and, where applicable, the funding of political parties.

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

Electoral Act

The Electoral Act establishes the Commonwealth funding and disclosure scheme. The scheme was introduced to increase overall transparency and inform the public about the financial dealings of political parties, candidates and others involved in the electoral process. The scheme requires candidates, registered political parties, their state branches, local branches/sub-party units and their associated entities, donors and other participants (such as 'political campaigners' and 'third parties' as defined in subsection 287(1) of the Electoral Act) in the electoral process to lodge annual or election period financial disclosure returns with the Australian Electoral Commission (AEC). The disclosure returns are then made available for public inspection.

Donations

Part XX of the Electoral Act refers to a donation as a "gift". Subsection 287(1) defines a "gift" to mean any disposition of property made by a person to another person, otherwise than by will, being a disposition made without consideration in money or money's worth or with inadequate consideration, and includes the provision

of a service (other than volunteer labour) for no consideration or for inadequate consideration. This definition specifically excludes payments of public funding and annual subscriptions paid to a political party, to a state branch of a political party or to a division of a state branch of a political party by a person in respect of the person's membership of the party, branch or division. Subsection 304(5) of the Act also excludes from the disclosure requirements gifts that a candidate receives where the gift was made in a private capacity to the candidate for their personal use and would not be used for a purpose related to an election.

Disclosure of certain information (e.g. details of gifts and donations) is subject to a minimum threshold below which disclosure is not required. The financial disclosure scheme was amended with effect from 8 December 2005 to increase the threshold to 'more than \$10 000'. This amount is indexed with effect from 1 July each year based on increases in the consumer price index. The disclosure threshold amount that will apply from 1 July 2017 to 30 June 2018 is more than \$13,500. This threshold also applies to disclosures made by candidates, Senate groups and donors to candidates at the 2 July 2016 federal election. There is no cap on the amount that a donor is able to give to a candidate or political party.

The Electoral Act has two types of disclosures - annual disclosure requirements and election disclosure requirements.

Annual Disclosures

For annual disclosure returns, registered political parties and their state or territory branches, associated entities and political campaigners are required to lodge an annual return with the AEC. Returns lodged with the AEC for each financial year must show:

- the total value of receipts
- details of amounts received that are more than the disclosure threshold
- the total value of payments
- the total value of debts as at 30 June
- details of debts outstanding as at 30 June that total more than the disclosure threshold, and details of any discretionary benefits received from the Commonwealth, or from a state or territory.

The details to be disclosed for amounts received that are more than the disclosure threshold are:

- full name and address details of the person or organisation from whom the amount was received
- the sum of amounts received from that person or organisation, and whether the receipt is a 'donation' or 'other receipt'.

The details to be disclosed for debts outstanding as at 30 June that total more than the disclosure threshold are:

- full name and address details of the person or organisation that the debt is owed to
the amount that is owed, and whether the debt is to a financial institution or non-financial institution.

Annual returns for third parties for each financial year must include:

- total electoral expenditure incurred above the disclosure threshold;
- details of gifts received for political expenditure of more than the disclosure threshold wholly or partly used to incur the political expenditure disclosed in the return; and
- a signed statement of compliance with the foreign donations restrictions.

Annual returns for donors to political parties and political campaigners for each financial year must disclose details of donations:

- including gifts-in-kind, made to registered political parties or political campaigners totalling more than the disclosure threshold, and

- above disclosure threshold received by the donor and used (wholly or partly) to make the donations disclosed in the return.

Election Disclosure Returns

For election disclosure returns, candidates, unendorsed Senate groups and Senate groups endorsed by more than one registered political party must disclose donations and electoral expenditure incurred. Returns to the AEC must show:

- the total value of donations received
- the total number of donors
- all individual donations received above the disclosure threshold (personal gifts such as Christmas and birthday presents need not be disclosed)
- the details of donations including
 - the date on which each donation was received
 - the amount or value of each donation
 - the name and address of the donor
- electoral expenditure (mainly advertising, printing and direct mail costs) incurred between the issue of the writ and polling day, and
- details of any discretionary benefits received from the Commonwealth, a State or Territory during the 12-month period before polling day.

People or organisations making donations to candidates in excess of the disclosure threshold must also lodge a donor return.

Funding

The Electoral Act also provides for public funding of election activities. A candidate or Senate group is eligible for election funding if they obtain at least 4% of the formal first preference vote in the division or the State or Territory they contested. The amount to be paid is calculated by multiplying the number of votes obtained by the current election funding rate. This rate is indexed every six months on 1 January and 1 July to increases in the Consumer Price Index. The rate of public funding for the 2 July 2016 Federal election was \$2.63 per first preference vote. For the 2016 Federal election, a total of \$62,778,275 was paid to candidates and their endorsing political parties.

As soon as practicable, 20 days after polling day, all candidates and Senate groups eligible for election funding will be paid an amount of \$10,080.

For entitlements greater than this amount, eligible candidates and Senate groups need to submit a claim setting out their electoral expenditure.

Registered political parties, candidates and Senate groups will be entitled to receive the lesser of:

- the amount of claimed expenditure; or
- the amount calculated by multiplying the number of votes by the current election funding rate.

Claims for election funding can be made from 20 days after polling day up to six months following polling day. Political parties and candidates are required to retain all records associated with a claim for election funding for a period of five years after polling day.

Compliance

The primary objective of the Commonwealth disclosure scheme is to achieve full and accurate disclosure of political expenditure and donations. Disclosure information is publicly accessible at <http://periodicdisclosures.aec.gov.au/Default.aspx>. The AEC, which is responsible for the administration of

the Electoral Act, conducts compliance reviews of those with disclosure obligations based on a risk matrix model. The AEC manages any matters that arise, which may trigger an obligation to declare or amend a return, directly with the person concerned. The majority of matters that are brought to the attention of the AEC reveal no breach of the disclosure obligations. The AEC accepts amendments to returns at any time to enable organisations and donors with reporting obligations to achieve full disclosure.

There are currently 81 registered political parties who can contest Federal elections. There are also 184 associated entities who have disclosure obligations. For the 2016 calendar year, the AEC completed 22 compliance reviews (which resulted in 14 material amendments to disclosure returns).

Since the 2016 federal election, the AEC has referred three matters to the relevant authorities for prosecution action. While there are criminal offences that apply for failing to lodge accurate returns within the specified timeframe, it is very rare for prosecution legal action to be taken against donors or registered political parties who fail to comply with the reporting obligations. The nature of the scheme itself supports such an approach as the actual disclosure of the reports is only made available to the public several months after an election or the end of the disclosure period. In addition, all of the registered political parties rely on reporting of donations and political expenditure by their individual party units. For the larger political parties, this can involve many hundreds of party units which are administered by volunteers. Accordingly, the need to amend a return occurs often, and in most reporting periods, there are several hundred amendments which are disclosed to the AEC and then made available to the public. It is only where there has been some attempt to deliberately or recklessly provide information to the AEC that is misleading or deceptive that a matter will be considered for possible prosecution. As at 13 February 2018, there are 2 such criminal investigations underway.

(b) Observations on the implementation of the article

The Electoral Act provides for an electoral funding and disclosure scheme that requires disclosure entities (candidates, political parties, donors etc.) to lodge financial returns with the Australian Electoral Commission (AEC). These returns are made public. Donations, loans, debts and gifts (as defined in subsection 287(1) of the Electoral Act) must be disclosed. Details such as the date when received, the amount or value and the name and address of the donor must be disclosed for individual donations exceeding a specified threshold (currently AUD 13,800). Candidates may be eligible for public funding. The AEC reviews the financial returns and may refer violations, including lodging misleading or deceptive returns and failures to lodge accurate returns to the relevant authorities for criminal prosecution.

During the country visit, the authorities explained that the disclosure scheme is designed to prevent candidates from reporting political donations as gifts. As there are separate reporting obligations on both a donor and a candidate, it is unlikely that this would give rise to a loophole as both parties would need to have collaborated in a fraud.

It was also explained that Australia proposes to include a commitment in its Open Government National Action Plan 2018-2020 to investigate options for enhancing the timeliness and the accessibility of relevant information about the electoral funding and disclosure scheme.

In regard to the risks of such frauds, the reviewers note that the disclosure threshold for donors is the same as for candidates. Furthermore, political contributions and gifts are not deductible from assessable income under section 26-22 of the *Income Tax Assessment Act 1997* (ITAA 1997) except where the deduction of up to \$1500 is claimed by an individual in their personal capacity (and not as a business), and the contribution or gift is valued at \$2 or more. This, coupled with the high disclosure threshold above, may limit incentives for both donors and candidates to declare gifts that may be in fact donations.

Therefore, it is recommended that Australia consider lowering or eliminating entirely the minimum threshold at which political parties and other disclosure entities must report donations, and endeavour to publish more timely financial returns of parties, candidates and other disclosure entities.

Paragraph 4 of article 7

4. Each State Party shall, in accordance with the fundamental principles of its domestic law, endeavour to adopt, maintain and strengthen systems that promote transparency and prevent conflicts of interest.

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

In addition to the below information, please see responses to articles 8(2), 8(5), 10, and 13. The Australian Government requires SES employees to make an annual declaration of conflicts of interest. These declarations are kept on individual agency registers. As noted above, all APS employees, including SES employees, are required to declare any conflict of interest to their agency as they arise. Failure to do so may result in the employee being subject to a Code of Conduct determination.

Sanctions for breaches of the Code of Conduct include:

- reprimand
- fine
- reduction in salary
- re-assignment of duties
- reduction in classification, and
- termination of employment.

The APSC develops and makes available to all agencies training materials that promote transparency and address conflicts of interest. Data from agencies shows that in 2015-2016, 52 Code of Conduct investigations were finalised in relation to suspected conflicts of interest.

To further promote transparency and prevent conflicts of interests, the Australian Government:

- has established IPEA, outlined in response to paragraph 1 of article 6, to administer parliamentarians' travel expenses and provide advice to parliamentarians and their staff on travel, and audit parliamentarians' use of travel and other work expenses; and
- reports on parliamentary travel and work expenses on a quarterly rather than half-yearly basis with the intention of moving to monthly reporting in 2020.

Examples of implementation, including related court or other cases

Case Study - Operation Karoola: An investigation into conflicts of interest of a biosecurity officer

This joint investigation by ACLEI, AFP and the then Department of Agriculture established that a former long-standing officer of the Department created a private consultancy firm to provide services to businesses that had dealings with the Department in relation to quarantine and biosecurity regulation. The former officer then recruited clients during interactions with food importers while performing official duties. The company traded for almost 5 years, generating \$190,000 in gross revenue.

At no point did the former officer seek permission from the Department for secondary employment, or otherwise declare a financial interest in the company he had established, despite the general duty to avoid conflicts of interest which applies to all public officials.

Following the investigation, in April 2016 the officer was charged and convicted with abuse of public office under section 142.2(1) of the *Criminal Code Act 1995* (Cth) and one count of using a forged document with the intention that it be accepted as genuine by a Commonwealth public official under section 145.1(1) of the Criminal Code and sentenced to 12 months' imprisonment with conditional release subject to a 2 year good behaviour bond.

The then Integrity Commissioner published his investigation report, making findings that the officer had engaged in corrupt conduct. ACLEI provided the Department with an assessment of corruption risks and vulnerabilities in practices and procedures that were identified through Operation Karoola and related investigations to inform its review of the integrity framework.

(Source: [ACLEI Investigation Report – Operation Karoola](#))

LCC and RL

The LCC and RL ensure that the contact between lobbyists and Australian Government representatives is conducted in accordance with public expectations of transparency, integrity, and honesty. The LCC underpins the RL and sets out the requirements for the contact between third-party lobbyists and Government representatives. It also indicates what will be publicly available on the RL and outlines the conditions for successful registration of lobbyists. The LCC contains a number of sections designed to uphold the integrity of the RL. These include principles of engagement with Government representatives which prohibit lobbyists from engaging in conduct that is corrupt, dishonest or illegal. The LCC also places prohibitions on lobbying activities for former government representatives and executive members of political parties. The responsibility of the LCC lies with the Secretary of the Department of the Prime Minister and Cabinet, who has power to include or remove lobbyists from the RL and is responsible for investigating reported breaches of the LCC.

Statement of Ministerial Standards

Ministers are entrusted with the conduct of public business and must act in a manner that is consistent with the highest standards of integrity and propriety. They are required to act in accordance with the law, their oath of office and their obligations to the Parliament. In addition to those requirements, it is vital that Ministers conduct themselves in a manner that will ensure public confidence in them and in the government. The expected standards for that conduct are set out in the *Statement of Ministerial Standards (September 2015)*, available at www.pmc.gov.au <<http://www.pmc.gov.au>>.

The Standards include requirements for Ministers to declare and register their personal interests and to have regard to the pecuniary and other private interests of members of their immediate families, to the extent known to them. Ministers are also to ensure their dealings with lobbyists are conducted consistent with the LCC so that they do not give rise to a conflict between public duty and private interest. Ministers are required to withdraw from any professional practice or the day-to-day management of any business. They may not receive any significant income other than as provided for by the Standards, or from personal exertion other than as a Minister and Member of Parliament.

Section 7 of the Ministerial Standards deals with Implementation arrangements, as set out below:

- 7.1 Ministers must accept that it is for the Prime Minister to decide whether and when a Minister should stand aside if that Minister becomes the subject of an official investigation of alleged illegal or improper conduct.
- 7.2 Ministers will be required to stand aside if charged with any criminal offence⁵, or if the Prime Minister regards their conduct as constituting a prima facie breach of these Standards. Ministers will be required to resign if convicted of a criminal offence and may be required to resign if the Prime Minister is satisfied that they have breached or failed to comply with these Standards in a substantive and material manner. Where an allegation involving improper conduct of a significant kind, including a breach of these Standards, is made against a Minister (including the Prime Minister), the Prime Minister may refer the matter to an appropriate independent authority for investigation and/or advice.
- 7.3 The Prime Minister may seek advice from the Secretary of the Department of the Prime Minister and Cabinet on any of the matters within these Standards, at any time. In providing such advice, the Secretary of the Department of the Prime Minister and Cabinet may, as required, seek professional advice.
- 7.4 Advice received by the Prime Minister from the Secretary of the Department of the Prime Minister and Cabinet may be made public by the Prime Minister, subject to proper considerations of privacy.

(b) Observations on the implementation of the article

All APS employees are required to take reasonable steps to avoid real or apparent conflicts of interests and declare them if they arise (section 13(7) PSA). Senior executive service officials are required to declare conflicts of interests annually. The declarations are kept and reviewed by agencies individually.

The APS Commissioner develops and makes available to all APS agencies training materials on conflicts of interest. In addition, section 29 of the PGPA Act requires all officials of state or parliamentary departments and other Commonwealth entities listed in section 10 of the Act to disclose material personal interests that relate to the affairs of the entity.

Other related transparency measures are provided in the Statement of Ministerial Standards (for ministers) and the Lobbying Code of Conduct (for dealings of Government representatives with lobbyists).

Article 8. Codes of conduct for public officials

Paragraphs 1,2 and 3 of article 8

1. In order to fight corruption, each State Party shall promote, inter alia, integrity, honesty and responsibility among its public officials, in accordance with the fundamental principles of its legal system.

2. In particular, each State Party shall endeavour to apply, within its own institutional and legal systems, codes or standards of conduct for the correct, honourable and proper performance of public functions.

⁵ Criminal offence does not include an infringement notice such as an “on the spot” fine.

3. For the purposes of implementing the provisions of this article, each State Party shall, where appropriate and in accordance with the fundamental principles of its legal system, take note of the relevant initiatives of regional, interregional and multilateral organizations, such as the International Code of Conduct for Public Officials contained in the annex to General Assembly resolution 51/59 of 12 December 1996.

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

The purpose of the APSC is to create a high-performing APS that delivers quality outcomes for the Government, for business and for the community. The APSC's statutory responsibilities are detailed in the PSA and include to:

- develop, promote, review and evaluate APS employment policies and practices
- facilitate continuous improvement in people management throughout the APS
- contribute to learning and development and career management
- contribute to and foster leadership in the APS
- provide advice and assistance on public service matters to entities, and
- promote high standards of integrity and conduct in the APS.

APS Code of Conduct, APS Values and Employment Principles

For further information, refer to the above response to paragraph 1 of article 5.

Section 15 of the PSA deals with breaches of the Code of Conduct by APS employees. That section provides that agency heads may impose the following sanctions on an APS employee who is found to have breached the Code of Conduct:

- termination of employment
- reduction in classification
- re-assignment of duties
- reduction in salary
- deductions from salary, and
- reprimand.

In a workforce of approximately 150,000 employees, in 2015-2016, agencies finalised 717 Code of Conduct investigations into misconduct. A failure to behave in accordance with the APS Values and Employment Principle or to uphold the integrity and good reputation of the employee's agency and the APS, are the most common alleged breaches.

Sanctions for breaches of the Code of Conduct range from a reprimand to termination of employment. In 2015-2016, the most common sanction imposed was a reprimand. The second most common sanction was a reduction in salary. Agency heads terminated the employment of 87 employees. The 2015-2016 data is consistent with previous years.

The APS Code of Conduct generally aligns with the key elements of the International Code of Conduct for Public Officials.

General Duties of officials under the PGPA Act

Officials are required to exercise their powers and perform their functions under the PGPA Act and rules in accordance with certain standards of behaviour. The PGPA Act does this through imposing a set of general duties on officials:

- duty of care and diligence (section 25 <<http://www.finance.gov.au/resource-management/pgpa-act/25>>)
- duty to act honestly, in good faith and for a proper purpose (section 26 <<http://www.finance.gov.au/resource-management/pgpa-act/26>>)
- duty in relation to use of position (section 27 <<http://www.finance.gov.au/resource-management/pgpa-act/27>>)
- duty in relation to use of information (section 28 <<http://www.finance.gov.au/resource-management/pgpa-act/28>>), and
- duty to disclose material personal interests (section 29 <<http://www.finance.gov.au/resource-management/pgpa-act/29>>).

To meet these duties, officials need to consider and, where relevant, comply with:

- the finance law, which includes the PGPA Act and rules and instruments made under the PGPA Act, as well as Appropriation Acts
- the systems of risk management and internal control in their entity established by their accountable authority (including any delegations or authorisations), and
- any other duties contained in other Commonwealth laws; under an employment contract or employment frameworks; or any principles or rules of common law or equity (section 31 of the PGPA Act).

Officials who do not discharge their general duties can be subject to employment sanctions, including termination of employment (for staff) or termination of appointment (for board members or office holders).

Additional disclosure requirements

Under section 29 of the PGPA Act, an official of a Commonwealth entity who has a material personal interest that relates to the affairs of the entity must disclose details of the interest. A Commonwealth entity includes a department of state, a parliamentary department, a listed entity and a body corporate established by a law of the Commonwealth.

Sections 41 and 46F of the ACC Act deal with interest disclosures in the ACIC. They require disclosures by ACIC examiners to be made to the CEO of the Commission and disclosures by the CEO to be made to the chair of the board.

Section 24 of the CDPP Act requires the Director (and the associate director if appointed) to give written notice to the Attorney-General of all direct or indirect pecuniary interests that he or she has or acquires in any business whether in Australia or elsewhere or in any body corporate carrying on any such business. Subsection 24(3) of the CDPP Act provides that the obligations under this section apply in addition to the obligation to disclose interests under section 29 of the PGPA Act.

Under section 40L of the *Australian Federal Police Act 1979*, the Commissioner of the Australian Federal Police may give an AFP employee a written direction to produce a statement of that person's financial interest.

Statement of Ministerial Standards

Refer to comments made at paragraph 1 of article 8 of the Convention.

The Commonwealth Fraud Control Framework

Refer to comments made at paragraph 1 of article 5 of the Convention.

Examples of implementation, including related court or other cases:

The APSC develops and makes available to all agencies training and guidance materials about the APS framework: the APS Values and Code of Conduct in Practice at <http://www.apsc.gov.au/publications-and-media/current-publications/values-and-conduct>, and Handling Misconduct at <http://www.apsc.gov.au/publications-and-media/current-publications/handling-misconduct-a-human-resource-managers-guide-2015>.

For more information on the role of the APSC, see paragraph 1 of article 5.

Further information on the Code of Conduct is provided above in response to article 5(1). Further information on the PBR Act is provided above in response to article 5(3).

(b) Observations on the implementation of the article

All APS employees are bound by the APS Code of Conduct as provided in section 13 of the PSA. They are also to uphold the APS Values and Employment Principles found in sections 10 and 10A of the same Act. If necessary, they may seek advice on ethical issues from the Ethics Advisory Service.

The PGPA Act also imposes a set of general duties on relevant officials. The Statement of Ministerial Standards sets specific standards of integrity and propriety for Ministers, Assistant Ministers and Parliamentary Secretaries in their conduct of public business.

Paragraph 4 of article 8

4. Each State Party shall also consider, in accordance with the fundamental principles of its domestic law, establishing measures and systems to facilitate the reporting by public officials of acts of corruption to appropriate authorities, when such acts come to their notice in the performance of their functions.

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

Public sector whistleblower protections are enshrined in the *Public Interest Disclosure Act 2013*, as referenced under article 5(1) above. These offer protections (such as protection from reprisal) for public officials who report corruption (among other issues), and so in that sense, they facilitate the reporting by public officials of acts of corruption as required by the article.

Handling misconduct in PSA agencies

Section 14(f) of the Australian Public Service Commissioner's Directions 2016 requires APS employees, having regard to their duties and responsibilities, to report and address misconduct and other unacceptable behaviour by public servants in a 'fair, timely and effective way'. The APS Commissioner is able to investigate allegations of misconduct made against Agency Heads.

The APSC provides guidance to employees in its publications, 'APS Values and Code of Conduct in Practice' and 'Handling Misconduct', about the obligation to report unacceptable behaviour and avenues to make reports. In most cases, it will be appropriate for an APS employee to bring suspected misconduct to the attention of their

direct supervisor in the first instance. If this is not possible, for example, if the suspected misconduct involves the direct supervisor, the APS employee should seek guidance from their Human Resources area.

Reporting fraud incidents

Under paragraph (d) of section 10 of the *Public Governance, Performance and Accountability Rule 2014*, officials, clients or members of the public must be provided with an appropriate channel to report fraud confidentially.

Resource Management Guide No. 201 Preventing, detecting and dealing with fraud provides better practice guidance for entities to implement the Fraud Rule and Fraud Policy and sets out the government's expectations for fraud control arrangements within all Commonwealth entities. In Part 9, it states that entities should have in place a formal system for securely storing, recording, analysing and monitoring all instances or allegations of fraud or attempted fraud within the entity and any subsequent investigations and outcomes. Part 9 also states that entities should establish policies and procedures to encourage and support reporting of suspected fraud through proper channels. This should include consideration of appropriate management of risks of adverse consequences to those making such reports.

The AFP has the primary law enforcement responsibility for investigating serious or complex fraud against the Commonwealth. The Commonwealth Fraud Control Policy requires all instances of potential serious or complex fraud offences to be referred to the AFP except:

- where entities
 - have the capacity and the appropriate skills and resources needed to investigate potential criminal matters, and
 - meet requirements of the AGIS for gathering evidence and the CDPP in preparing briefs of evidence, or
 - where legislation sets out specific alternative arrangements.

Reporting law enforcement corruption

In addition to the above measures and obligations, each head of an agency in ACLEI's jurisdiction is required to notify the Integrity Commissioner of information or allegations relating to corruption in his or her agency (mandatory reporting, section 19 LEIC Act). In addition, members of the public or a third party agency can refer a corruption issue (relating to a LEIC Act agency) to the Integrity Commissioner for assessment. The Integrity Commissioner decides independently how each notification or referral of a corruption issue is dealt with.

ACLEI

Since the LEIC Act commenced in December 2006, more than 1000 notifications and referrals have been assessed. Following initial assessment, approximately one third are investigated by ACLEI, another third dealt with as an internal investigation, and another third not warranting further treatment under the LEIC Act framework. ACLEI investigations (to July 2017) have resulted in 30 convictions (including 13 public officials). Another eight prosecutions (including four public officials) are in progress.

(b) Observations on the implementation of the article

APS employees are obliged to report misconduct pursuant to the *APS Commissioner's Directions 2016* (section 14(f)). Misconduct can also be reported under the PID Act. In addition, agency heads under ACLEI's jurisdiction are required to notify the Integrity Commissioner of information or allegations relating to corruption in their agencies (section 19, LEIC Act). Potential fraud and corruption may also be referred to the AFP for criminal investigation.

The PID Act facilitates disclosure and investigation of wrongdoing and maladministration and regulates whistleblower protections in the public sector. Reporting persons are protected from civil, criminal or administrative liability for making public interest disclosures (section 10 PID Act). Disclosing or using identifying information regarding reporting persons for unlawful purposes and without consent as well as taking a reprisal or threatening to take a reprisal against them are offences (sections 20 and 19 of the PID Act respectively). Reports may be made external to government under specific circumstances (section 26 PID Act). Disclosable conduct is defined broadly and includes corruption, fraud, and corrupt conduct (section 29 PID Act).

Furthermore, the APS Commissioner issues guidance and directions on available avenues to make reports by APS employees and how to handle the reports.

Paragraph 5 of article 8

5. Each State Party shall endeavour, where appropriate and in accordance with the fundamental principles of its domestic law, to establish measures and systems requiring public officials to make declarations to appropriate authorities regarding, inter alia, their outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials.

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

APS Employees

All APS employees, including SES employees, are bound by the APS Values and Code of Conduct. The Code of Conduct requires employees to take reasonable steps to avoid any conflict of interest, real or apparent, in connection with their employment. It is accepted that the appearance of a conflict can be just as damaging to public confidence in public administration as a conflict which gives rise to a concern based on objective facts.

Where a perceived risk of conflict arises, the Code of Conduct requires employees to disclose details of any material personal interest of the employee in connection with their employment. This obligation is equivalent to the general duty of officials to disclose interests under section 29 of the PGPA Act.

It may be possible to make arrangements to avoid the conflict. For example, duties can be reassigned, or the employee can stand aside from relevant decisions. Disclosures and strategies to manage them should be recorded appropriately.

Agency heads and Senior Executive Service employees are subject to a specific regime that requires them to submit, at least annually, a written declaration of their own and their immediate family's financial and other material personal interests.

Where there is credible evidence that a personal interest has compromised the decision made by an employee, that situation should be handled as suspected misconduct.

The APSC publishes on its website guidance material on how to manage outside activities, employment, investments, assets and substantial gifts or benefits from which a conflict of interest may result with respect to their functions as public officials. All SES employees must make an annual declaration of conflict of interest. These declarations are kept on individual agency registers.

Agency heads investigate allegations of APS employees failing to make declarations and/or properly manage conflicts of interest. Failure to do so may result in the employee being subject to a Code of Conduct determination. See paragraphs 2 and 3 of article 8 for sanctions for breaches. In 2015-2016, agencies reported that they had completed 52 investigations into alleged conflicts of interest.

Additionally, Australia's Protective Security Policy Framework (PSPF) requires all agencies (non-corporate Commonwealth entities under the PGPA Act) to have policies and procedures to assess and manage the ongoing suitability for employment of their personnel. The PSPF acknowledges that public confidence in the integrity of personnel is vital to the proper operation of government: confidence may be jeopardised if the community perceives a conflict of interest and personnel need to be aware that their private interests, both financial and personal, could conflict with their official duties. The PSPF states that, ultimately, it is the agency head's responsibility to determine what actions are taken where there is a conflict. While it is best to avoid a conflict, it is not always practical.

The PSPF requires that all agencies are to establish processes that deliver effective personnel security outcomes and withstand scrutiny; this should include:

- an agency conflict of interest policy to guide personnel on what could be perceived as a conflict of interest and when and how to report a conflict
- a conflict of interest declaration in pre-employment checks for all personnel, including contractors (mandatory for SES officers, and based on an agency's risk assessment for other personnel)
- reviewing changes to conflicts of interest annually through performance management conversations (mandatory for SES officers, and based on an agency's risk assessment for other personnel), and
- periodically requiring updated conflict of interest declarations from personnel—agencies should determine the frequency of periodic checks based on the risks related to the agency, specific work area and, if appropriate, the specific role.

For security clearance holders, the PSPF requires that agencies determine there is no conflict of interest between the clearance subject's obligation to protect security classified resources and the clearance subject's connection to a foreign person, group or government.

(b) Observations on the implementation of the article

The reviewers note from the response provided under article 7(2) that each House of the Parliament has a scheme for continuous disclosure of interests of its members and their immediate family members. Separately, the Statement of Ministerial Standards also requires Ministers, Assistant Ministers and Parliamentary Secretaries to declare and register their interests and those of members of their immediate families. The declarations are also made public.

All APS employees shall declare conflicts of interests if they arise. The declarations are kept and reviewed by agencies individually. In addition, the PGPA Act requires all officials of Commonwealth entities, including parliamentary departments and other entities described in section 10 of the PGPA Act to disclose material personal interests.

However, it is noted that there are no detailed restrictions on acceptance of gifts by public officials within the APS and Cabinet. Also, there are no established mechanisms to systematically review and verify the declarations of interests.

Therefore, **it is recommended that Australia consider introducing detailed regulation on gifts for public officials within APS and Cabinet and establishing a register of gifts; and consider taking specific measures to systematically review and verify the declarations of interests made by public officials.**

Paragraph 6 of article 8

6. Each State Party shall consider taking, in accordance with the fundamental principles of its domestic law, disciplinary or other measures against public officials who violate the codes or standards established in accordance with this article.

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

Section 15 of the PSA deals with breaches of the Code of Conduct by APS employees. For more information, see responses to articles 8(2) and 8(3).

As noted above, section 14(f) of the Australian Public Service Commissioner's Directions 2016 states that there is an obligation for APS employees to report misconduct. Suspected misconduct about an agency head may be reported to the APSC. The Commissioner may conduct an investigation under section 41A of the PSA. All other suspected misconduct can be reported to the agency head. Misconduct can also be reported under the PID Act.

Potential fraud may also be referred to the AFP for criminal investigation. The Commonwealth Ombudsman oversees the AFP. The AFP also falls under ACLEI's jurisdiction by virtue of the LEIC Act. The Integrity Commissioner's mandate is to detect, investigate and prevent law enforcement-related corruption issues, giving priority to serious corruption and systemic corruption. Matters amounting to criminal conduct are referred to the relevant prosecuting authority.

Integrity Testing

Part IABA of the Crimes Act establishes a framework for designated agencies (AFP, the ACIC, and DIBP, now the Department of Home Affairs) to conduct a covert investigation using controlled or simulated situations designed to test the integrity of their staff members. ACLEI can also conduct integrity tests in respect of these agencies. Operations can only be authorised if there is a reasonable suspicion that a staff member has committed, is committing, or is likely to commit an offence punishable on conviction of 12 months or more.

(b) Observations on the implementation of the article

As noted elsewhere in the report, breaches of the APS Code of Conduct, including failure to declare conflicts of interest, may lead to sanctions ranging from a reprimand to termination of employment (section 15, PSA). Similarly, the PGPA Act refers to the PSA sanctions as potential consequences if relevant officials do not discharge their general duties under the PGPA Act (section 32 PGPA Act).

Article 9. Public procurement and management of public finances

Paragraph 1 of article 9

1. Each State Party shall, in accordance with the fundamental principles of its legal system, take the necessary steps to establish appropriate systems of procurement, based on transparency, competition and objective criteria in decision-making, that are effective, inter alia, in preventing corruption. Such systems, which may take into account appropriate threshold values in their application, shall address, inter alia:

(a) The public distribution of information relating to procurement procedures and contracts, including information on invitations to tender and relevant or pertinent information on the award of contracts, allowing potential tenderers sufficient time to prepare and submit their tenders;

- (b) The establishment, in advance, of conditions for participation, including selection and award criteria and tendering rules, and their publication;*
- (c) The use of objective and predetermined criteria for public procurement decisions, in order to facilitate the subsequent verification of the correct application of the rules or procedures;*
- (d) An effective system of domestic review, including an effective system of appeal, to ensure legal recourse and remedies in the event that the rules or procedures established pursuant to this paragraph are not followed;*
- (e) Where appropriate, measures to regulate matters regarding personnel responsible for procurement, such as declaration of interest in particular public procurements, screening procedures and training requirements.*

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

The Australian Government operates a devolved procurement framework in which Commonwealth entities are responsible for undertaking their own procurement and grant processes in order to meet their business needs.

Legislation

Section 15 PGPA Act

- 1) The accountable authority of a Commonwealth entity must govern the entity in a way that:
 - a) promotes the proper use and management of public resources for which the authority is responsible; and
 - b) promotes the achievement of the purposes of the entity; and
 - c) promotes the financial sustainability of the entity.
- 2) In making decisions for the purposes of subsection (1), the accountable authority must take into account the effect of those decisions on public resources generally.

Section 16 PGPA Act

The accountable authority of a Commonwealth entity must establish and maintain:

- (a) an appropriate system of risk oversight and management for the entity; and
- (b) an appropriate system of internal control for the entity;
- (c) including by implementing measures directed at ensuring officials of the entity comply with the finance law.

CPRs

The CPRs are issued by the Minister for Finance under subsection 105B(1) of the PGPA Act. The CPRs are the basic rule set for all Commonwealth procurements and govern the way in which entities undertake their own processes. The CPRs are the core of the procurement framework, which also includes:

- web-based guidance, developed by the Department of Finance to assist entities to implement the procurement framework, and
- Resource Management Guides, which advise of key changes and developments in the procurement framework, and
- templates, such as the Commonwealth Contracting Suite, which simplify and streamline processes, creating uniformity across Commonwealth contracts to reduce the burden on businesses when contracting with the Commonwealth.

Section 15 of the PGPA Act outlines an accountable authority's duties to govern a Commonwealth entity. It states at subsection (1) that 'the accountable authority of a Commonwealth entity must govern the entity in a way that: (a) promotes the proper use and management of public resources for which the authority is responsible, (b) promotes the achievement of the purposes of the entity, and (c) promotes the financial sustainability of the entity. In making decisions for the purposes of subsection (1), the accountable authority must also take into account the effect of those decisions on public resources generally. Section 8 of the PGPA Act describes 'proper', when used in relation to the use or management of public resources as meaning efficient, effective, economical and ethical. This is reflected in the CPRs, which give further guidance to the meaning of these terms.

Transparency

The Australian Government is committed to ensuring accountability and transparency in its procurement activities. Section 7 of the CPRs states that transparency involves relevant entities taking steps to enable appropriate scrutiny of their procurement activity. Paragraph 7.2 of the CPRs provides that Officials must maintain for each procurement a level of documentation commensurate with the scale, scope and risk of the procurement. Documentation should provide accurate and concise information on:

- the requirement for the procurement
- the process that was followed
- how value for money was considered and achieved
- relevant approvals, and
- relevant decisions and the basis of those decisions.

The ANAO further supports transparency in Commonwealth procurement by conducting a number of audits on procurement activities each year. These reports are published on its website and tabled in Parliament.

Value for Money

Achieving value for money is the core rule of the CPRs. Officials responsible for a procurement must be satisfied, after reasonable enquires, that the procurement achieves a value for money outcome. Paragraphs 4.4 and 4.5 of the CPRs state that procurements should:

- encourage competition and be non-discriminatory
- use public resources in an efficient, effective, economical and ethical manner that is not inconsistent with the policies of the Commonwealth
- facilitate accountable and transparent decision making
- encourage appropriate engagement with risk, and
- be commensurate with the scale and scope of the business requirement.

When conducting a procurement, an official must consider the relevant financial and non-financial costs and benefits of each submission, including, but not limited to:

- the quality of the goods and services
- fitness for purpose of the proposal
- the potential supplier's relevant experience and performance history
- flexibility of the proposal (including innovation and adaptability over the lifecycle of the procurement)

- environmental sustainability of the proposed goods and services (such as energy efficiency and environmental impact) and
- whole-of-life costs.

Competition

Competition is a key element of the Australian Government's procurement framework. Effective competition requires non-discrimination and the use of competitive procurement processes. Paragraph 5.4 of the CPRs states that all potential suppliers to government must be treated equitably based on their commercial, legal, technical and financial abilities and not be discriminated against due to their size, degree of foreign affiliation or ownership, location, or the origin of their goods and services. To ensure that SMEs can engage in fair competition for Australian Government business, officials should apply procurement practices that do not unfairly discriminate against SMEs and provide appropriate opportunities for SMEs to compete (paragraph 5.5 of the CPRs refers).

AusTender

AusTender, the Australian Government's procurement information system, is a centralised web-based facility that publishes a range of information, including relevant entities' planned procurements, open tenders and contracts awarded. Relevant entities must use AusTender to publish open tenders and, to the extent practicable, to make relevant request documentation available.

Relevant entities must report contracts and amendments on AusTender within 42 days of entering into (or amending) a contract if they are valued at or above the reporting threshold. The reporting thresholds (including Goods and Services Tax (GST)) are:

- \$10,000 for non-corporate Commonwealth entities, and
- for prescribed corporate Commonwealth entities:
 - \$400,000 for procurements other than procurement of construction services, or
 - \$7.5 million for procurement of construction services.

Feedback and Complaints

Following the rejection of a submission or the award of a contract, officials must promptly inform affected tenderers of the decision. Debriefings must be made available, on request, to unsuccessful tenderers outlining the reasons the submission was unsuccessful. Debriefings must also be made available, on request, to the successful supplier(s).

If a complaint about procurement is received, relevant entities must apply timely, equitable and non-discriminatory complaint-handling procedures, including providing acknowledgement soon after the complaint has been received. Relevant entities should aim to manage the complaint process internally, when possible, through communication and conciliation.

Suppliers can also make complaints to the Procurement Coordinator within the Department of Finance, the Commonwealth Ombudsman, and the Federal Court.

Ethical

The PGPA Act requires officials to exercise their powers and perform their functions with certain standards of behaviour, including duties to:

- act with care and diligence

- act honestly, in good faith and for a proper purpose
- not improperly use their position
- not improperly use information, and
- to disclose material personal interests.

Officials breaching these duties can be subject to employment sanctions, including termination of employment. A range of offences may also apply depending on the nature of the misconduct. When the misconduct has been serious enough, officials have been investigated and prosecuted.

The Commonwealth Procurement Framework, and the Australian Government more broadly, promote the proper use and management of public resources. This includes the requirement that officials must act ethically throughout a procurement, including the tender process, where ‘ethically’ relates to honesty, integrity, probity, diligence, fairness and consistency (section 6 of the CPRs). Section 6 of the CPRs also provides that officials undertaking procurement must act ethically throughout the procurement. Ethical behaviour includes complying with all directions, including relevant entity requirements, in relation to gifts or hospitality, the Australian Privacy Principles of the *Privacy Act 1988* and the security provisions of the Crimes Act.

Relevant entities must not seek to benefit from supplier practices that may be dishonest, unethical or unsafe. This includes not entering into contracts with tenderers who have had a judicial decision against them (not including decisions under appeal) relating to employee entitlements and who have not satisfied any resulting order. Officials should seek declarations from all tenderers confirming that they have no such unsettled orders against them.

Risk management

Relevant entities must establish processes for the identification, analysis, allocation and treatment of risk when conducting a procurement. The effort directed to risk assessment and management should be commensurate with the scale, scope and risk of the procurement. Relevant entities should consider risks and their potential impact when making decisions relating to value for money assessments, approvals of proposals to spend relevant money and the terms of the contract.

Standard Contract Template

The Commonwealth Contracting Suite (CCS) streamlines and simplifies procurement processes. It was designed to be consistent with the *Treasury Legislation Amendment (Small Business and Unfair Contract Terms) Act 2015*, and creates uniformity across Commonwealth contracts to reduce the burden on business contracting with the Commonwealth Government.

The CCS is mandatory for most procurements valued up to \$200,000 and encouraged for use up to \$1 million. CCS Commonwealth Contract Terms require that:

- The supplier must comply with, and ensure its officers, employees, agents and subcontractors comply with the laws from time to time in force in any jurisdiction in which any part of the Contract is performed.
- The supplier must take all reasonable steps to prevent and detect fraud in relation to the performance of this Contract. The supplier acknowledges the occurrence of fraud will constitute a breach of this Contract.
 - Fraud is defined as dishonestly obtaining a benefit from the Commonwealth or causing a loss to the Commonwealth by deception or other means.

Another initiative aimed at creating uniformity across Commonwealth contracts is *ClauseBank*, which is a suite of standard pre-drafted terms which can be used by procuring entities, when appropriate, in Commonwealth contracts which are not subject to the CCS.

In relation to reducing fraud risk, a number of clauses include requirements such as:

- standards for record keeping and retention
- broad rights for the Customer or its nominee to access the Supplier's (and any subcontractors) premises, personnel, computer systems, documents and other records, for any purpose associated with the Contract or any review of Supplier or the Customer performance under the Contract, and
- requiring Suppliers to develop, implement, and maintain a Fraud Control Plan that is consistent with the Commonwealth Fraud Control Framework 2017.

Domestic Review

The Government Procurement (Judicial Review) Bill 2017 was introduced into the Australian Parliament on 25 May 2017. This Bill will vest the Federal Circuit Court of Australia with jurisdiction (concurrently with the Federal Court of Australia) to grant an injunction and/or order payment of compensation in relation to a contravention of the relevant CPR, so far as those rules relate to a covered procurement. The debate and passage of this Bill is expected to take place during 2018 (subject to parliamentary processes).

Procurement Coordinator

The Procurement Coordinator assists the business community in matters relating to procurement activities conducted by the Australian Government. The roles and responsibilities of the Procurement Coordinator are:

- providing external parties with an understanding of the Commonwealth procurement framework
- handling of certain complaints
- monitoring issues related to Australian Government procurement, and
- reporting to the Minister for Finance on procurement matters where necessary.

Since the role of the Procurement Coordinator was established in 2009, the Procurement Coordinator has received on average under five complaints per year.

SME Engagement

The Department of Finance has a number of initiatives designed to simplify the Government/supplier relationship by minimising the burden for businesses contracting with the Commonwealth, particularly small businesses. This includes:

- the Selling to Government website (sellingtogov.finance.gov.au), which provides information and support to participate in the Commonwealth procurement market
- a number of payment policies aimed at facilitating timely payment to suppliers, assisting with cash flow and reducing the cost to business in supplying to the Commonwealth, and mandatory use of the CCS for most procurements valued under \$200,000.

Examples of implementation, including related court or other cases:

In addition to the information provided above, the following points may be of interest.

AusTender

AusTender is freely available to the public and provides email notification of new publicly available business opportunities and planned procurements for registered users who have specified particular areas of interest. AusTender is free to use and can also be accessed using mobile and tablet devices. In 2017-18, a total of 73,458 procurement contracts were published on AusTender with a value of \$71.1 billion.

SMEs are well represented in Commonwealth procurement. Analysis conducted on AusTender data estimate that SMEs represented 18.2% by value of contracts (\$12.9 billion of \$71.1 billion), and 52.7% of the number of contracts (38,739 of 73,458) awarded in 2017-18. Of the 10,663 unique businesses who contracted with the Government last financial year, 85 per cent were estimated to be SMEs.

(b) Observations on the implementation of the article

Public procurement in Australia is decentralized and public entities conduct their own procurement and grant processes individually under the general framework set by the PGPA Act. The Act provides for issuance of the CPRs by the Minister for Finance which serve as the basic rules set for all public procurements (subsection 105B(1)).

Procuring entities report their procurement contracts at or above specified thresholds on AusTender - a centralised, public information system providing information on procurement plans, open tenders and awarded contracts.

The use of a standard contract template (Commonwealth Contracting Suite) is mandatory for procurements valued up to AUD 200,000 and encouraged for use up to AUD 1 million. For each procurement, responsible officials must maintain appropriate documentation for proper scrutiny (Section 7 CPRs).

The Procurement Coordinator within the Department of Finance assists potential bidders in matters relating to procurement activities conducted by the Government.

Furthermore, appropriate appeal mechanisms are provided. Complaints may be made to the procuring entity, the Procurement Coordinator, the Commonwealth Ombudsman, and the Federal Court. The ANAO conducts audits on procurement activities and publishes the audit reports on its website and tables them in Parliament.

Paragraph 2 of article 9

2. Each State Party shall, in accordance with the fundamental principles of its legal system, take appropriate measures to promote transparency and accountability in the management of public finances. Such measures shall encompass, inter alia:

- (a) Procedures for the adoption of the national budget;*
- (b) Timely reporting on revenue and expenditure;*
- (c) A system of accounting and auditing standards and related oversight;*
- (d) Effective and efficient systems of risk management and internal control; and*
- (e) Where appropriate, corrective action in the case of failure to comply with the requirements established in this paragraph.*

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

Integrity of Commonwealth Revenue

Section 81 of the Constitution provides for one consolidated revenue fund, formed from all revenues or money raised or received by the Executive Government of the Commonwealth. It provides that all appropriations from the consolidated revenue fund must be for the purposes of the Commonwealth.

Section 83 of the Constitution provides that no money shall be drawn from the Treasury of the Commonwealth except under an appropriation made by law. The 'Treasury' of the Commonwealth mentioned in section 83, equates to the consolidated revenue fund referred to in section 81. Together, sections 81 and 83 provide that there must be an appropriation, made by law, for the purposes of the Commonwealth, before money may be drawn from the consolidated revenue fund.

The Budget Process

The federal government develops its own annual federal budget and each State and the two mainland Territories prepare their own annual budgets.

The annual federal budget (the Budget) process typically commences in September or October each year when the Cabinet agrees the timing and operational rules for the Budget process. From February to April, the Expenditure Review Committee of Cabinet develops the budget against the background of the government's political, social and economic priorities. At the end of this process, a budget cabinet meeting is held where the Cabinet provides a final consideration and approval of the budget.

Charter of Budget Honesty Act 1998

The *Charter of Budget Honesty Act 1998* (the Charter Act) provides a framework for the conduct of government fiscal policy. The purpose of the Charter Act is to improve fiscal policy outcomes. The Charter Act provides for this by requiring the fiscal strategy to be based on principles of sound fiscal management and by facilitating public scrutiny of fiscal policy and performance.

Under the Charter Act, the Treasurer has responsibility for the public release and tabling of the following regular reports:

- A budget economic and fiscal outlook report with each budget - this provides information to allow the assessment of the Government's fiscal performance against the fiscal strategy set out in its current fiscal strategy statement.
- A Mid-Year Economic and Fiscal Outlook (MYEFO) report by the end of January in each year or within 6 months after the last budget, whichever is later - this provides updated information to allow the assessment of the Government's fiscal performance against the fiscal strategy set out in its current fiscal strategy statement.
- A Final Budget Outcome (FBO) report within 3 months of the end of each financial year - this report encompasses fiscal outcomes for the financial year, largely from entities audited financial statements and is based on external reporting standards. The financial statements provide actual outcomes rather than estimates.

Under the Charter Act, the Government is required to base the budget economic and fiscal outlook report on external reporting standards. The relevant accounting standards applied in the Budget, the MYEFO and the FBO is the Australian Bureau of Statistics' Government Financial Statistics standards, except where the Australian Accounting Standards provide a better conceptual basis for presenting information.

The Government Financial Statistics standards are an internationally recognised statistical framework, prepared by the International Monetary Fund (IMF), that allows consistency and comparability across IMF member countries. The Australian Bureau of Statistics prepares the Government Financial Statistics based on the international standards.

In line with requirements of the Charter Act and the PGPA Act, all Commonwealth entities are required to keep their estimates and actuals reporting up-to-date in both their internal systems and the Central Budget Management System (CBMS) to ensure that all public reporting is accurate and consistent. Estimates within CBMS are updated during the preparation of the annual Budget and MYEFO to incorporate new Government decisions, changes in program-specific or whole-of-government parameters (such as the Consumer Price Index or currency exchange rates variations), or Machinery of Government changes.

Annual Forecasts

Annual forecasts are published at the portfolio and entity level (Portfolio Budget Statements) and General Government Sector level (Budget Paper 1 and MYEFO). These documents provide estimated General Government Sector aggregates and more detailed estimates for each entity. The Portfolio Budget Statements are prepared by each portfolio entity at each Budget and if required are updated after the MYEFO.

The Budget Papers support the Budget-related decisions of government, providing the fiscal outlook for the Australian economy and include major new initiatives of the government. A high-level summary of information generally contained in each of the Budget Papers is below.

- Budget Paper No. 1 - Budget Strategy and Outlook, provides an overview of the economic and fiscal outlook, summarises the Government's fiscal strategy, and outlines key Budget priorities.
- Budget Paper No. 2 - Budget Measures, provides comprehensive information on all government decisions that involve changes to its revenue, expense and investing activities since the last MYEFO.
- Budget Paper No. 3 - Federal Financial Relations, includes information on revenue provision and payments (GST and specific purpose payments), as well as an overview of fiscal developments in the states and territories.
- Budget Paper No. 4 - Agency Resourcing, shows, for each entity, estimated expenses for each special appropriation act, estimated balances and flows for all special accounts, estimated resourcing by type of appropriation, and estimated average staffing levels in the public sector.
- The FBO - The financial statements in the FBO are similar to the statements in the budget but provide actual outcomes rather than estimates.

Parliamentary Budget Office

The role of the Parliamentary Budget Office is to inform the Parliament by providing independent and non-partisan analysis of the budget cycle, fiscal policy and the financial implications of proposals.

Audits and Reports

Section 42 of the PGPA Act provides that Commonwealth entities must prepare annual financial statements and give the statements to the Auditor-General. Section 48 of the PGPA Act requires the Commonwealth to prepare the whole of government Consolidated Financial Statements, which must also be provided to the Auditor-General. The annual financial statements must:

- comply with the accounting standards and any other requirements prescribed by the rules, and
- present fairly the entity's financial position, financial performance and cash flows.

Joint Committee of Public Accounts and Audit

The response to article 6(1) above provides further information.

Parliamentary expenses, fraud control and independent auditing

The response to article 5(1) above provides further information.

State and Territory Budgets

The Federal and State Budgets are completely independent of one another, with the Federal Government having sole responsibility for the Federal Budget, and the relevant State and Territory Governments having sole

responsibility for their respective Budgets. The Federal Budget is generally delivered on the second Tuesday in May each year. Whereas, the State and Territory governments will normally deliver their Budget following the delivery of the Federal Budget, this is not mandated and is not always the case.

States and Territories have no control over the allocation of funding through the Federal Budget but can receive funding through the Federal Budget. The Australian Government provides funding to States and Territories through general revenue assistance and payments for specific purposes (including National Partnership Agreements (NPAs)).

- General revenue assistance is provided to the States and Territories without conditions, to spend according to their own budget priorities. The main form of general revenue assistance is the Goods and Services Tax entitlement. Other general revenue assistance includes payments in relation to municipal services in the Australian Capital Territory and royalties.
- NPAs (or similar) exist where funding and conditions of funding are agreed between the Federal and State and Territory governments. The Council of Australian Governments (COAG) has agreed on a framework for federal financial relations, which is given effect through the Intergovernmental Agreement on Federal Financial Relations (IGA FFR). NPAs, which set out the terms and conditions for payments to States and Territories, are negotiated by relevant jurisdictions in line with the IGA FFR. COAG is chaired by the Prime Minister with each State and Territory represented by their First Minister. Through conditionality, NPAs can influence but not dictate State and Territory budget planning.
- Federal payments to the States and Territories under NPAs (or similar) are generally for specific purposes in policy areas for which the States and Territories have primary responsibility. These payments cover most areas of State, Territory and Local Government activity, including health, education, skills and workforce development, community services, housing, Indigenous affairs, infrastructure and environment.

State and Territory governments also have ability to raise some revenue independently from any funding received from the Federal government.

(b) Observations on the implementation of the article

The annual federal budget is prepared by the Cabinet and adopted by the Parliament. The budget is presented under the framework set by the Charter Act, which requires the Treasurer to publicly release periodic budget economic and fiscal outlook reports that are based on accounting standards and the Government Financial Statistics standards developed by the International Monetary Fund.

In addition to annual whole-of-government financial statements prepared by the Minister of Finance, Commonwealth entities must prepare annual financial statements and submit them to the Auditor-General for audit (sections 42 and 48 PGPAA). The Joint Committee of Public Accounts and Audit of the Parliament also examines the financial affairs of authorities and all reports of the Auditor-General.

The reviewers also note that Australia publishes detailed information about the federal budget on a dedicated website. Information on the website is presented in a clear and accessible language for different types of audience (individuals, families and business) and interactive tools to calculate benefits or taxes are available. This should be highlighted as a good practice.

(c) Successes and good practices

Australia has created a dedicated website that contains information on the national budget and clearly presents budget information with detailed explanations and interactive tools.

Paragraph 3 of article 9

3. Each State Party shall take such civil and administrative measures as may be necessary, in accordance with the fundamental principles of its domestic law, to preserve the integrity of accounting books, records, financial statements or other documents related to public expenditure and revenue and to prevent the falsification of such documents.

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

Section 490.1 of the Criminal Code provides an offence for false dealing with accounting documents. Under that section, a person commits an offence if the person makes, alters, destroys or conceals an accounting document; or fails to make or alter an accounting document that the person is under a duty, under a law of the Commonwealth, a State or Territory or at common law, to make or alter. The maximum applicable penalty for breach of this provision is 10 years imprisonment or 10,000 penalty units (\$2.1 million) for an individual, or 100,000 penalty units (\$21 million) for a legal person.

Section 490.2 of the Criminal Code provides an offence for reckless false dealing with accounting documents. While, under section 490.1, intention is an element, under section 490.2, it is sufficient for a person to be reckless. The maximum applicable penalty for breach of this provision is 5 years imprisonment or 5,000 penalty units (\$1,050,000) for an individual, or 50,000 penalty units (\$10.5 million) for a legal person.

(b) Observations on the implementation of the article

Australia has criminalized acts that violate the integrity of financial documentation related to public expenditure and revenue (sections 490.1 and 490.2, CC).

Article 10. Public reporting

Subparagraph (a) of article 10

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

(a) Adopting procedures or regulations allowing members of the general public to obtain, where appropriate, information on the organization, functioning and decision-making processes of its public administration and, with due regard for the protection of privacy and personal data, on decisions and legal acts that concern members of the public;

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

Under section 11 of the *Freedom of Information Act 1982* (FOI Act), every person has a legally enforceable right to obtain access to:

- a document of an agency, other than an exempt document, or

- an official document of a Minister, other than an exempt document.

The objects of the FOI Act are provided in section 3. They are:

- to give the Australian community access to information held by the Commonwealth government by requiring agencies to publish information and providing for a right of access to documents
- to promote Australia's representative democracy by contributing towards increasing public participation in government processes, and increasing scrutiny, discussion, comment and review of the government's activities, and
- to increase recognition that information held by the government is to be managed for public purposes and is a national resource.

Further information in relation to the PID Act is provided above in response to articles 5(1) and 5(3).

The FOI Act requires agencies and ministers to publish information that they have released under the Act. This publication is known as a 'disclosure log' (<https://www.oaic.gov.au/about-us/access-our-information/foi-disclosure-log/>). These reforms, together with the information publication scheme, aim to transform the freedom of information framework from one that responds to individual requests for access to documents to one that also requires agencies and ministers to take a proactive approach to publishing information. This will build a stronger foundation for greater openness and transparency in government. Disclosure logs are published on agencies' and ministers' websites.

Under section 47 of the PGPA Act, the Minister for Finance must publish financial reports every month. They are available to the public online at:

<https://www.finance.gov.au/publications/commonwealth-monthly-financial-statements/>.

Under section 46 of the PGPA Act, the accountable authority of a Commonwealth entity must give an annual report to the entity's responsible Minister, for presentation to the Parliament, on the entity's activities during the period. A Commonwealth entity's annual report must include the entity's annual performance statements and annual financial statements, in accordance with the *Public Governance, Performance and Accountability Rule 2014*. As the annual reports are presented to the Parliament, they are generally made publicly available.

Information and Data Sets

A wide range of current and historical publications are available at budget.gov.au.

Since 2014 the Australian Government has published a number of datasets related to the Budget, Monthly and Annual Financial Statements, and the Commonwealth's governance structures in a machine-readable format as part of the National Innovation and Science Agenda. This information is available at <https://data.gov.au/>.

The types of datasets that have been made accessible are described below.

Budget Data

Comprising the:

- Twenty-two Portfolio Budget Statements which includes the Parliamentary Departments and a consolidated table for all Budgeted Expenses by Outcomes for agencies who receive an appropriation which is accessible in a machine-readable format.
- Selected tables from annual Budget Paper No.1 Budget Strategy and Outlook and Budget Paper No. 4 Agency Resourcing (including in a machine-readable format).

Whole of Australian Government Annual Financial Statements

The Whole of Australian Government Annual Financial Statements (the Consolidated Financial Statements (CFS)), includes the audited consolidated results for all Australian Government controlled entities as well as disaggregated information on the General Government Sector (GGS), public non-financial corporations and public financial corporations.

Each government entity prepares annual audited financial statements, which form the basis of the CFS. The CFS received an unqualified audit opinion in 2017-18.

Monthly Financial Statements

The dataset provides both current statements and a historical series of a collection of published Australian Government general government sector monthly financial statements from 2005-06, including:

- Income Statement
- Balance Sheet
- Cash Flow Statement
- Taxation revenue heads statement
- Expenses by function statement

As a member of the IMF Special Data Dissemination Standard countries, the Australian Government also release the monthly Central Government Operations (CGO) data on a monthly basis. The CGO data is a reformat of the Australian Government general government sector monthly financial statements published by Finance on the Finance website. The CGO data is published by the Australian Bureau of Statistics on the ABS website (<http://www.abs.gov.au/ausstats/abs@.nsf/mf/1344.0>).

The Charter Act requires that the Budget be based on external reporting standards. These standards are applied consistently across all reports, including the Budget, mid-year Budget update and actual reporting. Each year the Government publishes Consolidated Financial Statements, which include the whole-of-government annual financial statements, audited by the Auditor-General.

The external standards that are applied are:

- the Australian Bureau of Statistics' accrual Government Finance Statistics (GFS), which are based on the IMF accrual GFS framework, and
- Australian Accounting Standards, which include International Financial Reporting Standards (IFRS) as adopted in Australia.

In addition, the Australian Government also publishes a centralised publication of Australian Government contracts awarded on the AusTender website, which is available at <https://www.tenders.gov.au/>.

Media and FOI

Since 1 July 2017, the Department of Finance (Finance) has received 42 Finance-specific media requests regarding Government contracts or Budget information.

Finance does not hold whole of Government information regarding freedom of information requests for access to government financial records. Since 1 July 2017, Finance has received the following FOI requests specific to Finance's work:

- one FOI request relating to government contracts,
- eleven FOI requests regarding departmental expenditure, and
- four FOI requests seeking further information regarding public expenditure or costs of termination in relation to publicly available Parliamentarians' Expenditure reports (that were published by Finance until the July to December 2016 reporting period. Since then, Parliamentarians' Expenditure reports have been published by the Independent Parliamentary Expenses Authority).

(b) Observations on the implementation of the article

The FOI Act gives every person a legally enforceable right to access an official document of Ministers or Government agencies. The Act also contains specific exceptions and exemptions to this right, including for reasons related to personal privacy, national security, trade secrets, etc. and establishes an Information Publication Scheme that requires public bodies to proactively publish a range of information. The FOI Act sets specific deadlines to deal with requests and requires reasons to be provided if the request is denied. Requests made under the FOI Act may also incur charges. Responses to requests must be published with few exceptions.

The Office of Australian Information Commissioner, established by the *Australian Information Commissioner Act 2010*, oversees the operation of the FOI Act and issues guidelines on its operation. Ministers and agencies must have regard to the guidelines when applying the Act. The Information Commissioner may conduct investigations into actions of agencies taken and review decisions made under the Act. Under the *Ombudsman Act 1976*, the Commonwealth Ombudsman may also investigate complaints against actions taken by agencies in response to FOI requests.

During the country visit, Australia explained that each agency normally has a designated officer or unit which potential requestors may consult on how a FOI request should be made. Requests are free of charge, but processing fees may apply if a request takes longer than five hours to process. The current rates are AUD 15 per hour for retrieval of information and AUD 20 per hour for making a decision on the request. If the requested information is personal information about the requestor, no fees would be charged.

It was also clarified that the authorities receive around 40 000 FOI requests yearly, and over 90 percent of them are granted.

Subparagraph (b) of article 10

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

...

(b) Simplifying administrative procedures, where appropriate, in order to facilitate public access to the competent decision-making authorities; and

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

Refer to comments made at article 10(a) of the Convention.

(b) Observations on the implementation of the article

The FOI Act gives every person a legally enforceable right to access an official document of ministers or Government agencies, subject to specific exceptions and exemptions (including personal privacy, national security, trade secrets etc.) and establishes an information publication scheme that requires public bodies to proactively publish a range of information..

Subparagraph (c) of article 10

Taking into account the need to combat corruption, each State Party shall, in accordance with the fundamental principles of its domestic law, take such measures as may be necessary to enhance transparency in its public administration, including with regard to its organization, functioning and decision-making processes, where appropriate. Such measures may include, inter alia:

...

(c) Publishing information, which may include periodic reports on the risks of corruption in its public administration.

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

Refer to the 'Audits and Reports' section in response to article 9(2) and in response to article 10(a) above.

IPEA publishes regular public reports on the use of parliamentary work expenses by Parliamentarians and their offices. This reporting provides the community with a high degree of transparency with regard to the use of these resources.

(b) Observations on the implementation of the article

It is noted that Australia periodically conducts statutory reviews of key anti-corruption legislation and publishes, where appropriate, the results of such reviews as mentioned under article 5(3) above.

Article 11. Measures relating to the judiciary and prosecution services

Paragraph 1 of article 11

1. Bearing in mind the independence of the judiciary and its crucial role in combating corruption, each State Party shall, in accordance with the fundamental principles of its legal system and without prejudice to judicial independence, take measures to strengthen integrity and to prevent opportunities for corruption among members of the judiciary. Such measures may include rules with respect to the conduct of members of the judiciary.

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

Constitutional and Legal Framework

The Australian system of government is based on the separation of powers between the Parliament, the Executive and the judiciary, and in particular, a strict separation of judicial power.

Judicial independence is provided for under the Constitution and ensures that disputes are resolved by judges who are impartial and are not subject to improper control or pressure. Chapter III of the Constitution vests judicial power in 'the High Court of Australia and such other federal courts that the Parliament creates, and in such other courts as it invests with federal jurisdiction'. The federal judiciary comprises the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia. There are two important attributes of constitutional independence: the security of tenure and financial security.

Under section 72 of the Constitution, judges of the High Court and of other courts created by the Parliament:

- shall be appointed by the Governor-General in Council
- shall not be removed except by the Governor-General in Council, on an address from both Houses of the Parliament in the same session, praying for such removal on the ground of proved misbehaviour or incapacity
- shall receive such remuneration as the Parliament may fix; but the remuneration shall not be diminished during their continuance in office, and
- shall be appointed for a term expiring upon attaining the age of 70.

Codes of Conduct

The Australasian Institute of Judicial Administration (AIJA) has published a Guide to Judicial Conduct (the AIJA Guide). It contains objectives and principles intended to guide the conduct of judicial officers in their private life and in the discharge of their judicial functions. The AIJA Guide is intended to apply to members of the Australian judiciary at all levels and across all jurisdictions (see page 1 of the AIJA Guide). The AIJA Guide provides the following three basic principles against which judicial conduct should be measured: impartiality, judicial independence, and integrity and personal behaviour. The AIJA Guide also covers a vast variety of matters ranging from conflicts of interest, membership of other bodies, commercial activities, to grounds for disqualification.

The AIJA Guide includes guidance on participation in non-judicial activities and conduct, in particular in relation to engagement in public and community organisations, public fundraising, acting as executors or trustees, the acceptance of gifts and the use of the judicial title. For example, the AIJA Guide distinguishes between accepting gifts in a personal capacity and accepting gifts in a non-personal capacity which are small and unobjectionable, such as being gifted a book for making a speech.

The AIJA Guide is consistent with international standards, including the United Nations Office of the High Commissioner for Human Rights Basic Principles on the Independence of the Judiciary and the Bangalore Principles on Judicial Conduct. The AIJA Guide was most recently revised in 2017.

Complaint Processes & Disciplinary Mechanisms

The Australian Government is committed to a clear, accountable and effective system for handling complaints against federal judicial officers, which respects the constitutional separation of powers. There are primarily two legislative mechanisms that operate within the Australian system:

- The *Courts Legislation Amendment (Judicial Complaints) Act 2012* (the Judicial Complaints Act) provides a legislative basis to support the Chief Justices of the Federal Court and the Family Court and the Chief Judge of the Federal Circuit Court to manage complaints about judicial officers that are referred to them.
- The *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (the Judicial Misbehaviour Act) provides a framework to assist the Parliament when considering the removal of a judge from office under section 72(ii) of the Constitution.

The seriousness and nature of complaints about judicial officers may vary and together these two Acts provide a range of options in relation to the way complaints about judicial conduct may be handled.

Complaints about the conduct of federal judicial officers are handled almost exclusively through internal complaints processes that operate within each of the federal courts.

Judicial Complaints Act

Under the Judicial Complaints Act, the Chief Justice or Chief Judge of the relevant court is empowered to consider, investigate and otherwise handle complaints that are referred to them. The Judicial Complaints Act also outlines the measures that a head of jurisdiction may take in relation to a judicial officer, should they believe

it is reasonably necessary in order to maintain public confidence in the court. These measures include temporarily restricting the judicial officer to non-sitting duties.

The relevant Chief Justice or Chief Judge has the power to establish a Conduct Committee to assist with the investigation of a complaint and make recommendations about any action that may be taken in response to the complaint. This may occur when a head of jurisdiction believes that a complaint warrants further inquiry or they see value in receiving independent advice.

While the Chief Justice or Chief Judge has the power to handle a complaint about the conduct of a judicial officer, they do not have the power to review a decision made by another judicial officer. This outcome can only be achieved through the appeals process. The appeals process is a fundamental part of Australia's legal system as it affords people the right to challenge decisions which affect their legal rights.

Australia is well-served by its judiciary, and allegations about judicial conduct that warrant the consideration of the removal of a judge from office are extremely rare.

Parliamentary Consideration

Serious complaints about the conduct of a judicial officer that may warrant consideration of removal are examined by the Parliament pursuant to the process provided for in section 72(ii) of the Constitution. Section 72(ii) provides that Justices of the High Court and of other courts created by the Parliament shall not be removed from office, except by the Governor-General in Council, on an address from both Houses of Parliament in the same session, praying for removal on the grounds of proved misbehaviour or incapacity.

The Judicial Misbehaviour Act provides a standard mechanism to assist the Parliament in its consideration of the removal from office of a judicial officer under the Constitution in the event of a serious complaint.

Disciplinary Measures

The complaint procedure detailed above does not provide a mechanism for disciplining a judge. However, it offers a process by which complaints by a member of the public about judicial conduct can be brought to the attention of the Chief Justice or Chief Judge of the relevant court.

Transparency in the Federal Judicial Appointments Process

The transparency of the appointment process is guaranteed by section 72 of the Constitution. Section 72 provides that judicial appointments are made by the Governor-General on the advice of the Executive Council. Judicial appointments are made on merit. As the First Law Officer of the Commonwealth, the Attorney-General is responsible for making recommendations to the Government about candidates suitable for appointment.

Consistent with long-standing conventions, each government determines its own process for judicial appointments to the federal courts. The Government's Cabinet Handbook sets out various practices and procedures for the consideration of judicial appointments, including ensuring that any real or perceived conflict of interest with the proposed appointee has been considered and addressed, and that a Private Interest Disclosure is completed and signed by candidates.

The Attorney-General has regard to a broad range of factors when making recommendations for judicial appointments. These factors include the expertise and background of candidates. The federal courts' enabling legislation also prescribes criteria which the Attorney General must consider. For example, section 22 of the *Family Law Act 1975* (Cth) (Family Law Act) provides that in order to be appointed as a judge, a person must have been a judge of a federal or state court or have been enrolled as a legal practitioner for at least five years and must, "by reason of training, experience and personality, [be a person] suitable to deal with matters of family law." The Attorney-General consults with relevant people, such as heads of the relevant courts, to identify suitable candidate(s) before making a recommendation to the Government, and ultimately, to the Governor-General. For example, section 6 of the *High Court of Australia Act 1979* (Cth) (High Court Act) provides that the Attorney-General must consult State Attorneys-General in relation to the appointment of

justices before an appointment is made. This consultative process ensures transparency and avoids bias in the judicial appointment process.

Proposed judicial appointments that come before the Governor-General are proposed on the advice of the Attorney-General and following Cabinet approval.

Asset Declarations & Standards for Determining Conflicts of Interest

In preparing documentation for federal judicial appointments, the AGD undertakes a media search and bankruptcy search on the candidate. Conflicts of interest are assessed during the appointment process.

Candidates for judicial appointment are required to complete a private interest disclosure form. In the form, they provide information on whether:

- a) they have any disclosable criminal convictions
- b) they have been the respondent or defendant in any civil or criminal court action
- c) they or any of their partners have been declared bankrupt
- d) they or any of their partners have been responsible for any businesses that have gone into receivership
- e) they or any of their partners have been the subject of a court order in connection with monies owing to another party
- f) they have been summonsed or charged by the Australian Tax Office in relation to outstanding tax debts
- g) they have been the subject of a complaint to a professional body
- h) they have ever been dismissed from employment because of a discipline or misconduct issue
- i) they or their immediate family have any financial interest in or are engaged by a company that might have dealings with or an interest in the decisions of the office to which they would be appointed (if the answer is yes, the candidate is required to include a statement as to how this conflict of interest would be managed), and
- j) they are registered on the Australian Lobbyists Register.

The form also provides space for the judicial officer to provide any other information relevant to their suitability for the proposed appointment.

The AGD briefs the Attorney-General on the outcome of the searches and the private interest disclosure form. The Attorney-General subsequently advises the Prime Minister and Cabinet of the relevant suitability matters. These matters guide Cabinet's consideration of the suitability of the candidate for appointment to a federal court.

Induction

There is no particular requirement for federal judges to undertake a programme of induction upon appointment. However, in addition to specific programmes prepared for new appointees by the individual courts, judges are encouraged to attend external training courses shortly after their appointment.

There are various external entities which facilitate ongoing training and education. These entities include the National Judicial College of Australia (NJCA), which was established in May 2002. It is funded by contributions from the Commonwealth and from some State and Territory governments. NJCA will generally contact the newly appointed judge and invite them to participate in the National Judicial Orientation Programme run by experienced judges and judicial education professionals to assist with the transition into judicial office, which includes sessions on integrity and conflicts of interest, and other courses (such as judgment writing). In addition, the AJJA holds regular conferences, seminars, workshops and orations on topics relating to judicial and court administration. The events are on topical issues of interest to judicial officers and court administrators.

Some of the federal courts also put in place mentoring programmes so that new judges have an experienced judge to mentor them.

Training

The Chief Justice or Chief Judge of each federal court is responsible for ensuring the effective, orderly and expeditious discharge of the business of their court. This responsibility includes an obligation to ensure arrangements are in place to provide judges with appropriate access to judicial education and is provided for in the enabling legislation of the federal courts (see section 15 of the *Federal Court of Australia Act 1976* (Cth) (Federal Court Act), section 21B and subparagraph 21(1A)(b)(iii) of the Family Law Act and section 12 of the *Federal Circuit Court of Australia Act 1999* (Cth) (Federal Circuit Court Act)).

Each of the federal courts has a Judicial Education Committee, which is responsible for developing, implementing and overseeing ongoing judicial education in the relevant court. These committees ensure that the courts' internal judicial education programs align with national standards for judicial development, including the 'Standard for Judicial Professional Development in Australia,' developed by NJCA. Judicial officers are encouraged to attend external training conducted by AIJA and NJCA, which often relates to relevant areas of practice. The external training must be approved by the Chief Justice or Chief Judge and often relates to relevant areas of practice.

The Federal Court of Australia also runs a three-year education curriculum, which includes components on integrity and conflicts of interest.

The federal courts also support judicial officers' attendance at conferences and other judicial education events, by providing conference leave and financial assistance. Through attendance at these events and their membership of relevant bodies, judicial officers contribute to the development of the law and legal education both in Australia and internationally. This includes by addressing academic institutions, professional associations and community-based organisations and liaising with international delegations and judicial colleagues.

Performance Management

The performance of judicial officers must be considered in the context of the legal framework and the separation of powers. In discharging their responsibilities for managing the business of their court, the Chief Justice or Chief Judge must ensure that arrangements are in place to provide judges with appropriate access to judicial education. They may also take any measures that they believe are reasonably necessary to maintain public confidence in the court, including, but not limited to, temporarily restricting a judge to non-sitting duties.

Allegations of errors by a judicial officer in the conduct of proceedings are matters which can only be determined by way of the appeal process. However, allegations which raise misconduct in relation to the performance of a judicial officer are handled in accordance with the relevant complaints processes and disciplinary mechanisms outlined above.

Each court also has performance indicators, for example, for the delivery of judgments and has in place systems for monitoring performance against those indicators. Where any issues arise in relation to performance against these indicators, the Chief Justice, Chief Judge or other responsible judge works with the relevant judge to put in place steps to deal with those issues.

Transparency in the Court Process

As set out in the AIJA Guide, there is an accepted principle that federal judicial officers should conduct themselves having regard to three objectives: upholding public confidence in the administration of justice, enhancing public respect for the institution of the judiciary and protecting the reputation of individual judicial officers and the judiciary.

In doing so, judges are to be guided by principles such as intellectual honesty, respect for and observance of the law, prudent management of their financial affairs, diligence and care in the exercise of their judicial duties and discretion in personal relationships, social contacts and activities.

In cases where there may be an appearance of bias or a possible conflict of interest, whether this matter is sufficient to disqualify a judge from hearing a case is to be judged against what a reasonable, well-informed observer would perceive. Ultimately, the judge must make the decision about whether it is appropriate to hear the matter before them. Chapter Three of the AJIA Guide provides guidelines on matters requiring consideration in the exercise of a federal judicial officer's duties.

In addition, the other important mechanisms for ensuring judicial accountability include the appeals process, open courts, procedural fairness, the provision of judicial reasons and public and media scrutiny.

'Open justice' is a common law principle, which provides that court proceedings should be conducted publicly and in open view, in order for them to be subjected to public and professional scrutiny. However, there are cases where it will be necessary for the proper administration of justice to limit the principle of open justice. This includes cases that concern the general power of the courts, national security and witness protection (see *Hogan v Hinch* (2011) 243 CLR 506).

The principle of open justice encompasses accessibility, which includes making courts accessible to persons with physical disability, language barriers and visual/hearing impediments. Accordingly, each of the federal courts provide wheelchair access, hearing loops and interpretation and translation services when appropriate arrangements have been made with the registry.

Case Assignment and Distribution

The Chief Justice or Chief Judge may assign particular caseloads, classes of cases or functions to particular Judges (see section 15 of the Federal Court Act, section 21B of the Family Law Act and section 12 of the Federal Circuit Court Act. This mechanism may be used to address any potential conflict(s) of interest.

Most of the federal courts have adopted a random allocation system in accordance with the settled case management guidelines. That allocation may take into account areas of speciality and the need to ensure both reasonably consistent workflow management and appropriate allocation of types of matters that require urgent hearings. Information in relation to the particular case management model adopted is publicly available.

Resourcing of the Federal Judiciary

As stated above, the federal judiciary comprises the High Court of Australia, the Federal Court of Australia, the Family Court of Australia and the Federal Circuit Court of Australia.

These courts encompass the following number of judicial officers, including the relevant Chief Justice or Chief Judge:

- The High Court has 7 judicial officers
- The Federal Court has 51 judicial officers
- The Family Court has 38 judicial officers, including the judges of the Family Court of Western Australia, and
- The Federal Circuit Court has 67 judicial officers.

No federal judicial officers specialise in the prosecution of corruption or offences against the duty of probity. The Federal Circuit Court does not have any criminal jurisdiction, and the Federal Court has only a small criminal jurisdiction in relation to cartel matters.

Reports of Corruption

There have been no cases where a sitting judge of one of the federal courts has been reported for corruption.

State and Territory Judiciary

Each State and Territory has its own legislative framework. Candidates for judicial appointments in local and district courts must complete a 'Private Interests Declaration' as a part of the employment process. This form obliges the applicant to disclose any business, financial, tax matters or tax arrangements that may be relevant to their appointment. The applicant is also required to disclose information about any potential conflicts of interest. This includes listing assets that may give rise to a conflict of interest. Judges are not required to declare other assets. Supreme Court appointments do not have to complete a 'Private Interests Declaration'.

If a judicial officer's assets are relevant to a matter and could give rise to actual bias or an apprehension of bias, the judicial officer must disqualify him or herself from a listing. This matter may also be addressed by adherence to the standards for determining a conflict of interest.

A conflict of interest on the part of a judicial officer comes under the general banner of actual bias or apprehended bias. A judge must disqualify him or herself from a matter if the judge is affected by actual bias. The question for determination in such a case is whether there is a bias in fact. For apprehended bias, the test of whether a judge should disqualify him or herself from a matter is whether a fair-minded lay observer might reasonably apprehend that the judge might not bring an impartial and unprejudiced mind to the resolution of the question the judge is required to decide.⁶ A party can make an application for disqualification, and a refusal by the judge to accede to an application can be appealed.⁷ Case law sets out the circumstances that will usually warrant a judge recusing him or herself.⁸ For example, if a judge has a direct pecuniary interest in the proceedings that will lead to an automatic disqualification.⁹

As stated above, a private interest declaration is made (for Local and District Court appointments) at the time of the judges' appointment, and not at a later time. However, a conflict of interest may be raised at any time. In New South Wales (NSW), it is the responsibility of both the judge and the parties to raise potential conflicts of interest with a listing judge.

The framework in NSW is outlined below as an example:

The judiciary in NSW is separate to and independent of the NSW Parliament and the executive government. Part 9 of the *Constitution Act 1902* (NSW) upholds the independence of the judiciary by providing that the holder of a judicial office can only be removed from the office by the Governor of NSW on a request from both Houses of Parliament in the same session seeking removal on the ground of proved misbehaviour or incapacity.¹⁰

The *Judicial Officers Act 1986* (NSW) established the NSW Judicial Commission, an independent body, which examines and investigates complaints about judicial officers. The NSW Judicial Commission's complaint function enhances judicial accountability by:

- ensuring complaints about the ability and behaviour of judicial officers are investigated quickly, effectively and objectively
- promoting good practices and high standards of judicial performance
- improving public confidence in the administration of justice.

⁶ *Johnson v Johnson* (2000) 201 CLR 488 at [11]; *Ebner v Official Trustee in Bankruptcy* (2000) 205 CLR 337; *Michael Wilson & Partners Ltd v Nicholls* (2011) 244 CLR 427

⁷ *Barakat v Goritsas* (No 2) [2012] NSWCA 36

⁸ See, eg, *Australian National Industries Ltd v Spedley Securities Ltd (in liq)* (1992) 26 NSWLR 411; *Smits v Roach* (2006) 227 CLR 423; *Murlan Consulting Pty Ltd v Ku-ring-gai Municipal Council* [2009] NSWCA 300

⁹ *Dimes v Proprietors of Grand Junction Canal Pty* (1852) 10 ER 301; *Dovade Pty Ltd v Westpac Banking Corporation* (1999) 46 NSWLR 168

¹⁰ *Constitution Act 1902* (NSW), s 53

The NSW Judicial Commission provides continuing education and training for judicial officers to promote high standards of judicial performance and help develop judicial skills and values. It runs seminars, conferences, field trips and judicial education programs.

The NJCA provides continuing education programs for judges and magistrates. It is a National Judicial Educator whose purpose is to support the rule of law and strengthen judicial capacity and independence.

Conferences and seminars are organised on a regular basis to keep judicial officers up to date with current developments and emerging trends. The conference and seminar topics include areas identified as needing review or which have been affected by major changes in the law. They range from sessions on specific aspects of the law and legal procedure to judicial skills and socio-legal matters.

The NSW Judicial Commission also has a YouTube presence which provides an additional channel to provide education to the judiciary.

Additional education services provided by the NSW Judicial Commission include:

- inducting new appointees with comprehensive training and orientation
- updating all judicial officers on important recent changes in law, procedure and practice
- producing bench books for each court, with a process for regular updating
- publishing the Judicial Officers' Bulletin on a regular basis to inform judicial officers of current law and to promote the consideration of important judicial issues
- promoting the development of an improved scheme for indexing and accessing important judgments
- facilitating continuing judicial education through the exchange of experience and discussion of topical issues, convening meetings and discussion groups, and publishing articles and other papers
- providing refresher services to meet the needs of judicial officers
- providing special education services to meet the needs of isolated judicial officers both in the suburbs and country, and on circuit/rotation; specifically relating to improved access to legal information
- promoting the supply of computer support facilities and supplying appropriate training
- providing an extended range of education services for the assistance of judicial officers, including interdisciplinary and extra-legal courses, where appropriate. The delivery of this scheme should integrate conference, publication and computer support services, in order to facilitate the access to and the use of education services in an effective and convenient manner for judicial officers, and
- promoting and conducting the research and development of educational practices to enhance the effectiveness of continuing judicial education.

Judicial officers in NSW are appointed under the following provisions:

- *Local Court Act 2007*, section 13
- *District Court Act 1973*, section 13
- *Supreme Court Act 1970*, section 26
- *Civil and Administrative Tribunal Act 2013*, section 8
- *Coroners Act 2009*, section 7
- *Drug Court Act 1998*, section 20
- *Land and Environment Court Act 1979*, section 8

In each instance, the Governor of NSW may appoint a Magistrate/Judicial Officer if recommended by the Attorney General. With the exception of Supreme Court judicial appointments, appointments are advertised. Supreme Court judicial appointments are nominated by the Attorney-General and approved by Cabinet before being made by the Governor of NSW.

The NSW Judicial Commission examines all complaints against judges according to statutory criteria¹¹ and established protocol. After a preliminary investigation of a complaint, the NSW Judicial Commission must notify the Attorney General as to whether the matter has been summarily dismissed, referred to the Conduct Division,¹² or referred to the relevant head of jurisdiction.¹³

The Conduct Division conducts an examination of the complaint and may initiate such investigations as it thinks appropriate. It can conduct hearings,¹⁴ which may be public or private, at which the judicial officer is entitled to be legally represented.¹⁵

If the Conduct Division finds a complaint to have been wholly or partly substantiated, it may refer the matter to Parliament for consideration of removing the judicial officer from office.¹⁶ Alternatively, the Conduct Division may refer the complaint back to the relevant head of jurisdiction¹⁷ who may counsel the judicial officer or make administrative arrangements within the court to avoid the recurrence of a problem.

A judicial officer may be suspended by the head of jurisdiction if a complaint is made about the officer or a report is made by the Conduct Division. A judicial officer may also be suspended if the judicial officer is charged in NSW with an offence that is punishable by imprisonment for 12 months or more, or a similar offence charged elsewhere, or is convicted in NSW or elsewhere of such an offence.¹⁸

The head of jurisdiction must determine the appropriateness of a judge to continue to sit and adjudicate on matters. The head of jurisdiction can suspend a judge following either a complaint to the Judicial Commission, or in circumstances where the judge has been charged or convicted of an offence.

Some complaints against judges could come within the investigatory powers of the NSW Independent Commission Against Corruption (ICAC) if potentially corrupt conduct is involved. The ICAC is an independent body and was established in 1988 by the *Independent Commission Against Corruption Act 1988* to investigate, expose and prevent corruption in public office. The ICAC is made up of three commissioners under the leadership of former NSW Supreme Court judge Peter Hall. The NSW Supreme Court can review decisions of the ICAC.¹⁹

The principle of open justice is a fundamental aspect of the system of justice in NSW and the conduct of proceedings in public is an essential quality of an NSW court of justice. This principle applies throughout the Commonwealth of Australia. There is no inherent power of the court to exclude the public.²⁰

The only instances where a court may decide to hold proceedings in a closed court, or make a suppression or non-publication order, is in exceptional circumstances, such as where a person's identity needs to be protected. These instances are legislated for in the *Court Suppression and Non-publication Orders Act 2010*. Similar provisions can be found in the *Criminal Procedure Act 1986* and the *Children (Criminal Proceedings) Act 1987*.

In limited circumstances, the court may elect to hold 'closed court' proceedings. The bench book spells out those circumstances and a link to the appropriate section can be found here: https://www.judcom.nsw.gov.au/publications/benchbks/criminal/closed_court_and_non-publication_orders.html.

¹¹ *Judicial Officers Act 1986* (NSW), Part 6

¹² *Judicial Officers Act 1986* (NSW), s 21(1)

¹³ *Judicial Officers Act 1986* (NSW), s 21(2)

¹⁴ *Judicial Officers Act 1986* (NSW), s 24

¹⁵ *Judicial Officers Act 1986* (NSW), s 24

¹⁶ *Judicial Officers Act 1986* (NSW), s 28(1)(a)

¹⁷ *Judicial Officers Act 1986* (NSW), s 28(1)(b)

¹⁸ *Judicial Officers Act 1986* (NSW), s 40

¹⁹ See, eg, *Obeid v ICAC* [2015] NSWSC 1891; *Sandra Lazarus & Ors v ICAC* [2015] NSWSC 1390

²⁰ *John Fairfax Publications Pty Ltd v District Court of NSW* (2004) 61 NSWLR 344 per Spigelman CJ at [18]

In terms of outreach programmes the courts make transcripts of trials available for order for a small fee. Also, all tools used by judges, such as bench books, are available for the public to access. Interested parties are also able to attend court if they so wish.

Service NSW is a whole of NSW Government access point that provides online services and in-person offices that handle 800 types of transactions. The service includes the NSW Supreme, District and Local Courts Online Registry. This online service enables users to track the progress of their cases and provides a better user experience for uses that increases efficiency.

Some of the things a user can do on this service include:

- view case information
- publish and search probate notices
- download documents
- file a wide range of forms
- check judgements, and
- search court lists.

In 2015 a number of the courts established social media presences to further engage with the community.

(b) Observations on the implementation of the article

Appointments and removals from office of the federal judiciary are regulated by section 72 of the Constitution and guided by convention and practice. Candidates for judicial appointments are required to submit private interest disclosure forms in which they provide information about matters that may give rise to conflicts of interest.

There is no compulsory integrity training for federal court judges, but they are encouraged to attend internal and external training and judicial education programmes that may include sessions on judicial ethics and conduct.

Complaints are primarily handled according to the *Judicial Complaints Act 2012* (the Judicial Complaints Act) and the *Judicial Misbehaviour and Incapacity (Parliamentary Commissions) Act 2012* (the Judicial Misbehaviour and Incapacity Act). The Judicial Complaints Act sets out internal procedures for the heads of each of the federal courts (other than the High Court) to consider, investigate and recommend actions in response to complaints. The Judicial Misbehaviour and Incapacity Act provides for parliamentary commissions to be established to investigate specific allegations of misbehaviour or incapacity against judges, that may result in their removal by the Governor-General in Council on an address by a joint session of both Houses of Parliament under section 72 of the Constitution.

Paragraph 2 of article 11

2. Measures to the same effect as those taken pursuant to paragraph 1 of this article may be introduced and applied within the prosecution service in those States Parties where it does not form part of the judiciary but enjoys independence similar to that of the judicial service.

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

The CDPP was established as an independent entity by the CDPP Act. The Director's powers are given legislative force by section 9 of the CDPP Act.

The CDPP prosecutes breaches of Australian federal law, generally in State and Territory courts exercising federal jurisdiction, or in the Federal Court of Australia or the Federal Circuit Court. CDPP cases are conducted in court by CDPP legal employees (in house prosecutors), with some of the more complex appearance work briefed out to private independent counsel. More minor federal cases may also be prosecuted by agencies such as the Australian Taxation Office, by arrangement with the CDPP.

Each Australian State and Territory has established public prosecution offices (DPPs) by enacting legislation in their jurisdiction (for example, the Office of the Director of Public Prosecutions New South Wales is established by the *Director of Public Prosecutions Act 1986* (NSW)). Breaches of State and Territory law are prosecuted by these DPPs, either by permanent Crown prosecutors who are DPP employees, or by briefing private independent counsel. Minor matters may be handled by police prosecutors.

The procedure for the appointment of State and Territory Crown (in house) prosecutors is established by relevant State or Territory laws.

The CDPP Act made a number of significant changes to the Commonwealth prosecution process. The most significant change was the effective removal of the prosecution process from the political arena by affording the Director an independent status in that process. The Attorney-General as First Law Officer is responsible for the Commonwealth criminal justice system and remains accountable to Parliament for decisions made in the prosecution process, notwithstanding that those decisions are now in fact made by the Director and lawyers of the CDPP, subject to any guidelines or directions which may be given by the Attorney-General pursuant to section 8 of the CDPP Act. Such guidelines or directions may only be issued after consultation with the Director, and must be published in the Gazette and tabled in each House of the Parliament. Directions under section 8 occur very rarely and have not been provided in relation to a particular case.

The CDPP Act has also ensured that there is a separation of the investigative and prosecutorial functions in the Commonwealth criminal justice system. Prosecution decisions are made independently of those who were responsible for the investigation. If a prosecution is commenced by an investigative agency, once the case has been referred to the CDPP, the decision of whether to proceed with that prosecution is made by the CDPP.

In appropriate cases, the CDPP provides pre-brief advice to investigative agencies before a full brief of evidence is referred and handles all aspects of the prosecution from when a charge is first laid, through to committal hearing, trial, sentence and any appeal. Over 50 investigative agencies refer cases to CDPP offices in all States and Territories of the Commonwealth with over 3,000 cases referred each year. The CDPP has a national practice group model, and cases are assigned according to crime type to one of six specialist practice groups.

Incoming cases are referred by Commonwealth investigative agencies, including the AFP, to the regional office of the CDPP in the State or Territory where the offence took place. They are then assigned to a specialist practice group to which the type of offence belongs. The regional Branch Head (SES) in that practice group will then assign each new matter depending upon a variety of factors, including the available resources and levels of expertise in the Branch and the level of complexity of the matter. Often the Branch Head will discuss allocation in a meeting with one or more Prosecution Team Leaders before allocation to a particular prosecutor. Prosecutors may not self-select cases. Legal decision-making throughout the case is governed by the Prosecution Policy of the Commonwealth, and guidance is provided by a complex written matrix of decisions and levels at which decisions can be made, including the decision to prosecute and the decision to discontinue a prosecution.

Non-employee prosecutors are generally Counsel briefed from the private Bar by both the CDPP and State or Territory DPPs. In relation to the engagement of Counsel for the CDPP, this consists of a contractual arrangement whereby the selection of counsel follows national published guidelines and the Commonwealth procurement rules and is approved at senior level. In terms of the contract itself, Counsel are briefed to appear on behalf of the CDPP and conduct a prosecution under nationally consistent terms and conditions, which include material relating to security and privacy. Daily and hourly fees are centrally determined within CDPP to maintain national consistency, and an estimate of costs is agreed at the commencement of work. Each time the services of a private Counsel are recommended, approval must be given by a senior officer (Assistant

Director) at SES level within the CDPP. The CDPP maintains a National Junior Counsel Panel, which is refreshed each year by a transparent public application process. Individual counsel is accepted to the panel only if he or she meets the set criteria. The panel system and the CDPP guidelines are designed to promote gender equity, diversity and transparency in the selection of counsel. The CDPP has formally adopted the National Model Gender Equitable Briefing Policy, issued by the Law Council of Australia.

Where any potential conflict of interest is raised, the issue is escalated to a senior level, and the case will inevitably be reassigned. The CDPP Conflict of Interest policy will also apply.

The independent role of the prosecutor features significantly in prosecutor training, and the risks associated with any potential conflict of interest are well known. Once a potential conflict of interest has been revealed by or in relation to a prosecutor—for example, that the defendant is known personally, the prosecutor has a financial interest in the defendant company or otherwise has a vested interest in the outcome the matter will be re-assigned to another prosecutor with no further investigation made. No statistics are kept on this as it happens infrequently and is resolved quickly by reallocation of the case.

The CDPP Performance Framework sets out the overarching approach for managing all aspects of employee performance and the expectations required to build a high-performance culture. The framework is designed to provide a vision of how the CDPP will ensure effective delivery of both organisational and Government goals through the performance of its workforce. The framework is centred on the principles stipulated in the *Australian Public Service Commissioner's Directions 2016* and assists employees to achieve optimal performance against their work goals and manage performance on an ongoing basis. It also provides a fair and equitable way to recognise and reward those who achieve or improve on expected results, to manage performance when expectations are not being met, and plan learning and development opportunities.

The majority of legal employees at the CDPP are recruited through nationally advertised recruitment processes, with the assessment of candidates and resulting outcomes determined by a Selection Panel that is established for each process. This ensures a consistent approach across all regional offices based on a standard position description and the APS Work Level Standards.

Selection Panels established for national recruitment processes generally consist of three members. Two members must be experienced CDPP employees who can bring an awareness of corporate history, organisational knowledge and a clear understanding of the day-to-day aspects of the advertised role. Both CDPP members are at a higher substantive classification than the advertised role. To ensure the third Panel member has a degree of independence from the advertised role, the CDPP uses a member of a legal recruitment agency.

The assessment components in a national recruitment process include a pre-screening process conducted by an external provider, written application, resume, academic transcript, answers to questions at interview and referee checks. Throughout this process, the Panel must ensure each candidate meets the selection criteria, and those candidate(s) recommended have the required skills and experience against the role's key primary outcomes and responsibilities.

Section 24 of the CDPP Act requires the Director of Public Prosecutions to declare any pecuniary interests to the Attorney-General. All CDPP prosecutors are required to undergo a security clearance upon appointment. The Commonwealth has a structured security clearance process that includes, depending on the security clearance level, a declaration of assets and personal interests. As well, CDPP SES officers are required to complete a Conflict of Interest form that includes a declaration of some assets (such as investment properties). The onus is also on CDPP staff to declare all conflicts of interest that may arise during their employment to ensure that all duties are performed in a fair and unbiased way. This includes the declaration of assets where decisions made in the public interest may be perceived, or have the potential to be affected by, a personal or financial advantage. Potential conflicts of interest are expected to be declared by lawyers in the process of assigning cases, so they can be re-assigned immediately as appropriate. Declarations of Conflicts of Interest (COI) are included as standing items in internal meetings throughout the office.

Potential COI declarations made by prosecutors are initially assessed by their immediate supervisor. Depending on the breadth and depth of the COI declaration, it may be escalated to a senior manager for a decision of the potential or perceived COI. The management of COIs is not at the discretion of the prosecutors. COI declarations that have the potential to damage the reputation of the Office are deemed high risk and are escalated to both the Director and the Commonwealth Solicitor for Public Prosecutions.

As the CDPP is an APS agency, CDPP staff are required to abide by the APS Code of Conduct. Where a breach of the Code is determined to have occurred, sanctions can range from counselling to termination of employment. In the last two financial years, there have been no breaches of the APS Code of Conduct that have led to implementing disciplinary measures in the CDPP.

Mechanisms setting standards and providing guidance on ethics and corruption risks within the CDPP include, but are not limited to, the following:

- Scheduled training for new, incoming prosecutors and other staff:
 - New appointments of prosecutors to the CDPP are provided with an induction program which includes training in the APS Values and the CDPP Values and Behaviours.
 - CDPP prosecutors are also provided with a Continuing Legal Education (CLE) program each calendar year that consists of a series of professional development events covering a wide range of legal topics, including integrity and independence. The CLE Program regularly includes topics on prosecutorial ethics, and such a presentation was delivered nationally by the Law Society of Queensland in January 2018.
- Access to a wide range of relevant documents and guidance materials:
 - The CDPP maintains a variety of documentation on its entity portal (intranet), which sets out expected standards of behaviour and/or employee conduct, including:
 - APS Employment Principles
 - APS Ethics Advisory Service
 - APS Values
 - APS Values and Code of Conduct Decision Making Model
 - CDPP Procedures for Determining Suspected Breaches
 - CDPP Suspected Misconduct Guidelines
 - CDPP Values and Behaviours
 - CDPP Workplace Respect and Courtesy Guidelines
 - Conflicts of Interest
 - Fraud Control
 - Guidance on to whom staff should report alleged misconduct
 - Integrity in the APS
 - Privacy
 - Public Interest Disclosure
 - *Public Service Act 1999*, and
 - Risk Management
- Promulgation of dedicated email addresses for specific queries that relate to behaviour, code of conduct or corruption risks:
 - Both the People Services and the Governance teams are available to all CDPP staff to respond to queries that relate to any of the topics mentioned above. Team and individual email addresses (for example, HRAdvisor@cdpp.gov.au) are advertised on internal alerts and announcements.

The CDPP Values and Behaviours Statement (the Statement) was developed as a guide for all CDPP staff in their dealings with colleagues and external stakeholders and is fundamental to the goal of creating a professional workforce that is built on trust, respect and honesty. The Statement sets out the standards of behaviour and conduct that all employees of the CDPP must uphold.

The Statement was developed with reference to materials promulgated by the APS Commission, including the APS Values and Code of Conduct. These documents reflect statutory responsibilities detailed in the *Public Service Act 1999* and the *Public Service Regulations 1999*, which include the promotion of high standards of integrity and conduct in the Australian Public Service. The APS Values and Employment Principles were created to apply to all APS agencies.

Solicitors for the CDPP are employed in various offices located in the different States and Territories of Australia. They are usually also members of their State or Territory Law Society and are governed by formal standards of professional responsibility, subject to audit and to disciplinary proceedings as necessary by the relevant Law Society. The Australian Solicitors' Conduct Rules (ASCR) setting out legal ethics were adopted by the Law Council of Australia in June 2011 and updated in April 2015. These Rules were adopted in Queensland, Tasmania, NSW, Victoria and South Australia. The Legal Profession Conduct Rules 2010 (WA), Legal Profession (Solicitors) Conduct Rules 2015 (ACT) and Rules of Professional Conduct and Practice (NT) are in the same terms. Solicitors employed by the CDPP are governed by the professional ethical rules established for legal practitioners in their State or Territory.

The CDPP is a member of the International Association of Prosecutors (IAP), and its expected behaviours align with the IAP's Standards of Professional Responsibility and Statement of the Essential Duties and Rights of Prosecutors, which were developed by the IAP in 1999.

The Guidelines on the Role of Prosecutors, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders in 1990, has not been formally adopted by the CDPP.

Information on employee conduct is provided in documentary form to new CDPP employees as part of their induction and training. These documents are also accessible to CDPP staff via the CDPP's intranet. The CDPP also has a [Legal Learning and Professional Development Strategy](#), which provides a framework for embedding a learning culture through targeted activities, knowledge-sharing, and career development. Training programmes incorporating both internal and external providers and CLE seminars are offered each year. Part of the Strategy includes an Induction Training Plan for new legal employees.

(b) Observations on the implementation of the article

The CDPP is regulated mainly by the CDPP Act, which provides in sections 5 and 27 that the PGPA Act and the PSA fully apply to the Director and staff of the CDPP.

The Director and Associate Director of the CDPP must disclose any direct or indirect pecuniary interests (section 24, PSA). Furthermore, the CDPP has developed a Values and Behaviours Statement as a guide for its staff and requires them to declare any financial assets and liabilities as part of the security clearance process.

All CDPP staff must declare all conflicts of interest that may arise during their employment which includes the declaration of assets if necessary. Potential conflicts of interest declarations made by prosecutors are assessed by their manager(s). The management of conflicts of interest is not at the discretion of the prosecutors.

Article 12. Private sector

Paragraphs 1 and 2 of article 12

1. Each State Party shall take measures, in accordance with the fundamental principles of its domestic law, to prevent corruption involving the private sector, enhance accounting and auditing standards in the private sector and, where appropriate, provide effective, proportionate and dissuasive civil, administrative or criminal penalties for failure to comply with such measures.

2. Measures to achieve these ends may include, inter alia:

- (a) Promoting cooperation between law enforcement agencies and relevant private entities;*
- (b) Promoting the development of standards and procedures designed to safeguard the integrity of relevant private entities, including codes of conduct for the correct, honourable and proper performance of the activities of business and all relevant professions and the prevention of conflicts of interest, and for the promotion of the use of good commercial practices among businesses and in the contractual relations of businesses with the State;*
- (c) Promoting transparency among private entities, including, where appropriate, measures regarding the identity of legal and natural persons involved in the establishment and management of corporate entities;*
- (d) Preventing the misuse of procedures regulating private entities, including procedures regarding subsidies and licences granted by public authorities for commercial activities;*
- (e) Preventing conflicts of interest by imposing restrictions, as appropriate and for a reasonable period of time, on the professional activities of former public officials or on the employment of public officials by the private sector after their resignation or retirement, where such activities or employment relate directly to the functions held or supervised by those public officials during their tenure;*
- (f) Ensuring that private enterprises, taking into account their structure and size, have sufficient internal auditing controls to assist in preventing and detecting acts of corruption and that the accounts and required financial statements of such private enterprises are subject to appropriate auditing and certification procedures.*

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

The Australian Government continues to be proactive in seeking private sector views on anti-corruption policy. To this end, the Minister for Justice, the Hon Michael Keenan MP, announced at the United Kingdom's Anti-Corruption Summit in May 2016 the Government's commitment to hosting a Government Business Roundtable on Anti-Corruption (the Roundtable). This commitment is also a deliverable under Australia's first OGP NAP. The Government hosted the inaugural Roundtable in March 2017. The event provided a forum for frank and meaningful dialogue on anti-corruption policy, responsible business conduct and corporate culture, and to explore how government can assist business to promote integrity.

The Government has also facilitated close collaboration with the private sector by conducting public consultation on proposed reforms to anti-corruption policy. For example, in early 2017, the Government conducted public consultations on a proposed model for an Australian DPA scheme, and on exposure draft provisions for proposed amendments to Australia's foreign bribery laws. The proposed DPA model reflected feedback received on a previous consultation paper released by Minister Keenan in 2016. Stakeholder views on these matters are currently being considered by Government and will be used to inform next steps on the proposed reforms.

Australia also announced a strong package of reform measures at the landmark Anti-Corruption Summit in the United Kingdom in May 2016. The Summit was a significant event hosted by then Prime Minister of the United Kingdom, David Cameron. One of Australia's commitments was to ensure that adequate, accurate and timely information is available on beneficial ownership of companies in order to assist authorities address issues of tax evasion, money laundering and corruption and consider options for the provision of this information. The Government has conducted a public consultation on improving the transparency of beneficial ownership information for all companies and is currently considering what action may be needed to improve the transparency of beneficial ownership information.

The AFP, as the Commonwealth's law enforcement agency, regularly engages with the private sector and key civil society interlocutors to ensure an ongoing dialogue in relation to corruption. Key outcomes of this engagement are:

- to ensure private sector's understanding of corruption and foreign bribery legislation
- to promote transparency amongst corporate entities in international business transactions
- to discuss contemporary regulatory challenges faced by the private sector, and
- to educate the private sector on changes in legislation and provide advice on how to report foreign bribery matters to the AFP.

Australia also demonstrated its commitment to combating private sector corruption by agreeing to the G20 High-Level Principles on Private Sector Integrity and Transparency in December 2015. These principles were designed to help companies comply with global standards on ethics and anti-corruption, to ensure integrity and transparency in private sector dealings and to strengthen asset disclosure frameworks.

The strong regulatory and co-regulatory framework governing Australia's private sector under the Corporations Act, the ASIC Act, the *ASX Corporate Governance Council's Corporate Governance Principles and Recommendations* (ASX 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.

Company directors

Company directors play a critical role in monitoring the culture of their corporation and ensuring that the culture in place drives good conduct and does not tolerate corruption. There are a number of legal responsibilities imposed on directors in Australia under Chapter 2D of the Corporations Act (sections 180 to 184) and other laws, including the general law. Of these laws, some of the most significant are:

- to act in good faith in the best interests of the company and for a proper purpose
- to exercise care and diligence
- to avoid conflicts between the interests of the company and your personal interests (not to dishonestly use their position to obtain a benefit or advantage for themselves or someone else), and to prevent the company trading while insolvent.

A director that fails to perform his or her duties, may:

- be guilty of a criminal offence with a penalty of up to a maximum of \$200,000, or imprisonment for up to five years, or both
- have contravened a civil penalty provision (and the court may order you to pay to the Commonwealth up to \$200,000)
- be subject to administrative penalties in the form of a banning or injunction
- be personally liable to compensate the company or others for any loss or damage they suffer, or be prohibited from managing a company.

Further, section 13 of the ASIC Act permits ASIC to investigate and take action against contraventions of State or Territory laws that concern the management or affairs of a body corporate or managed investment scheme, or that involve fraud or dishonesty and relate to a body corporate or managed investment scheme or to financial products.

Section 123 of the ASIC Act imposes an obligation on members (Commissioners) to disclose in writing to the Minister "any agreement, understanding or expectation that the member will resume a previous business relationship...or enter into a new business relationship when the member ceases to be a member." This is not a prohibition on future employment in the private sector per se, but is in line with their obligation to disclose actual or perceived conflicts of interest.

In addition, there are other governance requirements that apply depending on the nature of the company. For instance, the ASX Principles and Recommendations promote eight central principles centred around good corporate governance, including:

- Principle 1 - Lay solid foundations for management and oversight.
- Principle 3 - Act ethically and responsibly.
- Principle 4 - Safeguard integrity in corporate reporting.
- Principle 5 - Make timely and balanced disclosure.
- Principle 8 - Remunerate fairly and responsibly.

The ASX Principles and Recommendations are linked to the ASX Listing Rules. Each ASX listed entity must include a corporate governance statement in its annual report disclosing the extent to which the entity has followed the ASX Principles and Recommendations during the reporting period. The ASX Listing Rules act to encourage listed entities to adopt the governance practices suggested. However, they also allow listed entities to adopt alternative governance practices if considered more suitable.

There are also disclosure requirements that promote transparency about a company's operations. All companies, other than small proprietary companies, must lodge audited financial statements with ASIC on a yearly basis, thereby making them publicly available (section 292 of the Corporations Act). Other disclosures that provide transparency about the operations of a company may be required under the Corporations Act depending on transactions undertaken.

Whistleblowers

Whistleblowers, by virtue of their relationships or position, are often particularly well placed to provide direct information about corporate wrongdoing. Statutory legal protections for whistleblower disclosures in the corporate sector are contained in Part 9.4AAA of the Corporations Act (Part 9.4AAA), which was introduced in 2004. A person working in the private sector who makes a disclosure about the company they work for may be able to access these protections.

The Part 9.4AAA whistleblower protections include protection from any civil liability, criminal liability or the enforcement of any contractual right that arises from the disclosure that the whistleblower has made. Part 9.4AAA also includes a prohibition against the victimisation of the whistleblower, and provides a right to seek compensation if damage is suffered as a result of that victimisation.

Access to these protections is only available where the whistleblower is a current officer, employee, or contractor of the company about which they are making a disclosure, and where the disclosure is made to one or more of:

- a) ASIC;
- b) the company's auditor or audit team;
- c) a director, secretary or senior manager of the company; or
- d) a person authorised by the company to receive whistleblower disclosure.

Furthermore, the protections only apply where:

- a) the whistleblower reveals their identity in making their disclosure;
- b) the disclosure is made in good faith; and
- c) the disclosure relates to a suspected contravention by the company or its officers of the Corporations Act, ASIC Act or associated regulations.

Similar protections are available to a whistleblower in possession of information relating to contraventions of banking, insurance and superannuation legislation, under the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995* and the *Superannuation Industry (Supervision) Act 1993*.

ASIC supports the Government's work towards encouraging reporting of corporate wrongdoing and better protection for whistleblowers in Australia. ASIC has established an Office of the Whistleblower and enhanced its internal process for dealing with whistleblower reports, including ensuring ASIC staff who are involved in handling whistleblower matters are appropriately trained. In addition, ASIC has developed targeted information to ensure whistleblower awareness of the protections that may apply to them, and ensure understanding of ASIC's role.

OGP

The Australian Government's first NAP sets out an agenda for 2016 to 2018 and includes a commitment to improve whistleblower protections in the tax and corporate sectors. The Plan notes the current timeframe of December 2017 for the development of legislation for tax whistleblower protections and a recommendation to Government on reforms to strengthen whistleblower protections in the corporate sector.

On 20 December 2016, the Commonwealth Treasury published a consultation paper on the 'Review of tax and corporate whistleblower protections in Australia'. The paper notes that:

"[A]s part of the Open Government National Action Plan, the Government has committed to ensuring appropriate protections are in place for people who report corruption, fraud, tax evasion or avoidance, and misconduct within the corporate sector. The Government has also committed to improving whistleblower protections for people who disclose information about tax misconduct to the Australian Tax Office (ATO), and to pursuing reforms to whistleblower protections in the corporate sector to harmonise these protections with those in the public sector."

The paper notes that although legislative protections have formed part of the Corporations Act since 2004, they have been sparingly used and are increasingly perceived as inadequate having regard to recent advances in the public sector and overseas. It also notes that members of the public can provide information to the ATO about tax evasion and fraud. However, there are no specific legal protections to ensure the protection of or provide compensation to such whistleblowers if they suffer from a reprisal.

Australian parliamentary inquiry into whistleblower protections

On 30 November 2016, the Australian Parliament announced an inquiry into whistleblower protections in the corporate, public and not-for-profit sectors. The PJC on Corporations and Financial Services reported on the inquiry on 14 September 2017. The terms of reference of the inquiry outline matters for inquiry and report, including:

- the development and implementation in the corporate, public and not-for-profit sectors of whistleblower protections, and
- the most effective ways of integrating whistleblower protection requirements for the corporate, public and not-for-profit sectors into Commonwealth law.

Since the release of the PJC on Corporations and Financial Services report, the Government has continued to progress reforms to corporate and tax whistleblower protections with the introduction of the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 ('Bill') into parliament on 7 December 2017.

The Bill was developed in consultation with industry and other stakeholders. The Bill and associated explanatory materials were available for public consultation in October 2017. Treasury received 34 non-confidential submissions, which have been published on the Treasury website.

The Government also received advice on the Bill from its Expert Advisory Panel on whistleblower protections it established on 28 September 2017. The Panel is comprised of academics and practitioners with expertise in

tax law, corporations law, corporate governance and whistleblower protections generally, in addition to senior government agency representatives.

The Bill addresses many of the PJC on Corporations and Financial Services report recommendations and the Government is considering the remaining recommendations and will provide its response in consultation with the Expert Advisory Panel in due course.

The Bill introduces strengthened protections for corporate whistleblowers and new protections for tax whistleblowers. This includes protections that will apply to a broader class of persons as well as to anonymous disclosures. In addition, protections to a whistleblower's identity will be strengthened and provisions have been introduced to make it easier for a whistleblower to bring a claim for civil redress for detriment or damage.

The stronger protections for whistleblowers are designed to encourage information to be disclosed to regulators at an earlier stage. This gives ASIC, APRA and ATO early warning of potential misconduct, including tax misconduct, corporate fraud and corruption, terrorism financing and related activities.

The Bill also introduces a requirement for public and large proprietary companies to have a whistleblower policy in place. Transparent internal whistleblower policies are essential to good corporate culture and governance.

The tax whistleblower provisions in the Bill will provide protections for individuals who disclose tax misconduct from reprisals and enable them to seek compensation. These features are expected to encourage more whistleblowers to come forward and disclose tax misconduct, including in the corporate sector. Tax misconduct includes tax evasion and tax fraud. The ATO uses information from whistleblowers for compliance actions and to determine industry trends, identify new risk areas and to assist in developing compliance strategies.

Audit

In relation to paragraph (f) - while there is no requirement under the Corporations Act for an audit committee, the ASX Corporate Governance Council's Corporate Governance Principles and Recommendations provide that listed entities that do not have an internal audit function should disclose the reasons. ASIC has issued Information Sheet 221 Internal Audit to remind companies of their obligations.

Companies, registered schemes and disclosing entities are also required by section 286 of the Corporations Act to keep written financial records that correctly record and explain their transactions and financial position and performance, and that would enable true and fair financial statements to be prepared and audited.

Subject to size tests, companies and other entities subject to the Corporations Act are required to prepare and lodge audited financial reports. The audit must be conducted in accordance with legally enforceable auditing standards that are consistent with the International Standards on Auditing.

ASIC regulates financial reporting and audit under the Corporations Act. This includes conducting proactive surveillance of financial reports and inspections of audit firms.

Registry

ASIC's registry function covers over 30 legal registers. It provides a valuable source of information about over 4.5 million entities for use by Government and the public, contributing to transparency. The ASIC Registry is a critical part of Australia's economic infrastructure and includes the companies register, Business Names Register, and other corporate and professional registers. The Registry enables businesses to operate in Australia with transparency and accountability. Most registers are publicly available online. Around 2.5 million companies are now registered with ASIC, a 5% increase from 2015-2016, and Australia's highest ever number. In 2016-17, ASIC registered 249,394 new companies. Sections 137.1 and 137.2 of the Criminal Code provide offences for providing false or misleading information to a Commonwealth entity.

A number of government initiatives, for example, establishing Director Identification, are being considered that may impact the ASIC Registry.

Amendments to foreign bribery legislation

On 6 December 2017, the Australian Government introduced into Parliament the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017. This Bill would amend the offence of bribing a foreign public official currently contained in Division 70 of the Criminal Code to:

- ensure that the foreign bribery offence includes the bribery of candidates for public office (not just current holders of public office)
- extend the coverage of the foreign bribery offence to include bribery conducted to obtain a personal advantage (the current offence is restricted to bribery conducted to obtain or retain business or a business advantage)
- replace the existing requirement that the benefit and business advantage be ‘not legitimately due’ with the broader concept of ‘improperly influencing’ a foreign public official
- clarify that the offence does not require the accused to have had specific business or an advantage in mind, and that the business or advantage can be obtained for someone else, and
remove the existing requirement that the foreign public official actually be influenced in the exercise of their official duties for an offence to be established.

The Bill would also create a new corporate offence of failing to prevent foreign bribery. This is modelled on section 7 of the *Bribery Act 2010* (UK). This offence would apply where an associate of a body corporate has committed bribery for the profit or gain of the body corporate. The offence would not apply if the body corporate was able to demonstrate that it had ‘adequate procedures’ in place to prevent the commission of foreign bribery by its associates. The Bill would require the Attorney-General to publish guidance on the types of measures that are likely to constitute ‘adequate procedures’.

Schedule 1 of the Bill would commence 6 months after Royal Assent, to allow sufficient time for Government to publish guidance and for corporations to implement these procedures.

The Bill is currently before the Senate. The Senate Legal and Constitutional Affairs Committee has initiated an inquiry into this Bill. The Committee is due to report on the Bill by 20 April 2018.

Deferred Prosecution Agreements

The Government introduced the [Crimes Legislation Amendment \(Combatting Corporate Crime\) Bill 2017](#) (the Bill) to the Parliament on 6 December 2017. If the Bill is passed by the Parliament, it will implement a Commonwealth Deferred Prosecution Agreement (DPA) scheme. On 7 December 2017, the Bill was referred to the Senate Legal and Constitutional Affairs Legislation Committee for inquiry and report by 20 April 2018.

Under the proposed DPA scheme, the CDPP would have the option to invite a corporation that has engaged in specific types of serious corporate crime to negotiate an agreement (a DPA) to comply with a range of specified conditions. These conditions may typically require a corporation to cooperate with law enforcement, admit to agreed facts, pay a financial penalty and improve (or implement) a compliance programme. Where a corporation fulfils its obligations under a DPA, it would not be prosecuted for the offences specified in the DPA.

The high-level aim of an Australian DPA scheme is to enhance the ability of investigators and prosecutors to identify and address serious corporate crime by encouraging corporations to self-report offending and cooperate with law enforcement. In appropriate cases, DPAs would provide a more effective and efficient way of holding offending corporations to account without the cost and uncertainty of a criminal trial. For corporations, the scheme could provide a way to avoid the damage to reputation and business interests that could be sustained as a result of litigation and conviction. DPAs have been used with significant success to address corporate crime in the United Kingdom and the United States.

The DPA scheme is a novel mechanism for addressing serious corporate crime in Australia. For this reason, the Government proposes to publish a Code of Practice to accompany the legislative provisions and provide detail on the practical operation of the scheme.

The scheme includes a number of features to ensure that DPAs cannot be exploited to escape accountability for

serious corporate crime. All DPAs would need to be approved by an independent former judicial officer who must agree that the terms of the DPA are in the interests of justice and are fair, reasonable and proportionate. The law would also require that the final DPA be published, ensuring transparency and encouraging public scrutiny of the scheme.

Examples of implementation, including related court or other cases

ASIC investigations

In 2015-2016:

- 181 criminal and civil litigation and administrative actions were concluded
- 13 criminals were imprisoned, and
9,751 reports of crime or misconduct were finalised.

Not all of these matters relate to corruption.

In the past five years, there have been 18 criminal convictions for breaches of section 184 of the Corporations Act, which involves criminal lack of good faith, use of position and use of information. However, these are not exactly equivalent to corruption.

ASIC's Office of the Whistleblower

In February 2014, ASIC commenced reporting on reports of alleged misconduct from whistleblowers. Between February 2014 and June 2016, the Office of the Whistleblower received the following whistleblower reports, categorised based on the focus area of the issue or issues raised in the report:

- Corporate governance: insolvency matters; insolvency practitioner misconduct; contractual issues; director's duties (72%)
- Financial services: credit; managed investment schemes; superannuation; insurance; misleading and deceptive conduct (18%)
- Market integrity: insider trading; continuous disclosure; misleading statements; market manipulation (8%)
- Registry integrity: incorrect address recorded on ASIC's register; lodging false documents with ASIC; business name issues (2%)
- Other (0.4%)

The majority (72%) of whistleblower reports related to corporate governance, which was higher than the proportion of general misconduct reports received relating to corporate governance (43% in the 2015-2016 financial year). The financial services issues were raised in 18% of whistleblower reports, which was a much smaller proportion relative to the general misconduct reports received about financial services (43% in the 2015-2016 financial year).

(b) Observations on the implementation of the article

The Australian regulatory and co-regulatory framework to prevent corruption in the private sector consists mainly of the Criminal Code, the Corporations Act, the ASIC Act, the AML/CTF Act, and relevant legislative instruments and regulatory guidance.

The AFP regularly engages with the private sector to, *inter alia*, educate on domestic and foreign corruption and bribery legislation and promote transparency in international business transactions. During the country visit, it was clarified that the engagement is an initiative of the AFP and that the AFP collaborates with other agencies to identify risk sectors and determine outreach activities.

The Department of Foreign Affairs and Trade and the Australian Trade and Investment Commission (AusTrade) conduct outreach activities to ensure that Australian businesses are aware of their obligations under anti-bribery laws. The ASX Corporate Governance Council's Corporate Governance Principles and Recommendations are linked to the ASX Listing Rules and encourage listed entities to adopt good governance practices. As was explained during the country visit, breaches of the ASX codes may lead to various sanctions, including the delisting from the ASX.

Whistleblower protection in the private sector is provided in Part 9.4AAA of Corporations Act, which covers reporting of breaches of the Act and the ASIC Act. The ASIC has established an Office of the Whistleblower, enhanced its internal process for dealing with whistleblower reports and developed targeted information to raise awareness among potential whistleblowers on available protections and ASIC's role. There is a Bill before the Parliament aimed at strengthening protections for corporate whistleblowers and introducing new protections for tax whistleblowers before Parliament.

ASIC maintains 31 legal registers (companies, business names, professional registers, etc) that contain information about over 4.8 million entities. Most of these registers are publicly available online. Accuracy of information in the registers is ensured by ongoing legal obligations to update information, including an annual review requirement, a late fee regime and prescribed offences under the Criminal Code (sections 137.1 and 137.2).

Section 286 of the Corporations Act requires relevant entities to keep written financial records that correctly record and explain their transactions, financial position and performance, and that enable accurate financial statements to be prepared and audited. Section 292 of the Act requires all companies, other than small proprietary companies, to prepare an annual report and make it public by lodging it with ASIC.

While a beneficial ownership register is not available, ASIC does have the power to issue tracing notices to obtain information regarding the beneficial owners of listed companies and managed investment schemes. The Australian Government remains committed to improving the transparency of information around beneficial ownership and control of companies available to relevant authorities. Furthermore, Australia intends to introduce a new measure that would require all directors to confirm their identity and be provided with a unique identifier.

Therefore, and with reference to the related observations under articles 14(1)(a) and 52(1) below, it is recommended that Australia continue its measures to enhance transparency of beneficial ownership of companies and director identification.

It is also noted that there are no general legislative restrictions on post-separation employment of public officials in the private sector. It was explained that individual agencies may adopt the appropriate policies, in line with the PSA and the APS Code of Conduct. The Lobbying Code of Conduct provides that 'Agency Heads or persons employed under the PSA in the Senior Executive Service (or equivalent), shall not, for a period of 12 months after they cease their employment, engage in lobbying activities relating to any matter that they had official dealings with in their last 12 months of employment'. The Statement of Ministerial Standards, which is also a policy document, imposes an 18 months prohibition on ministers lobbying or having business dealings with members of the government, parliament or public service on any matters relating to their official dealings and a general restriction on taking personal advantage of (non-public) information they had access to as a minister. However, the mechanism to enforce these policies is not clear.

Therefore, it is recommended that Australia strengthen legislative or administrative measures to prevent conflicts of interest by introducing appropriate restrictions and effective compliance mechanisms to regulate professional activities and employment of former public officials in the private sector.

Paragraph 3 of article 12

3. In order to prevent corruption, each State Party shall take such measures as may be necessary, in accordance with its domestic laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, to prohibit the following acts

carried out for the purpose of committing any of the offences established in accordance with this Convention:

- (a) The establishment of off-the-books accounts;*
- (b) The making of off-the-books or inadequately identified transactions;*
- (c) The recording of non-existent expenditure;*
- (d) The entry of liabilities with incorrect identification of their objects;*
- (e) The use of false documents;*
- (f) The intentional destruction of bookkeeping documents earlier than foreseen by the law.*

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

There are a number of false document prohibitions within the Corporations Act, the *National Consumer Credit Protection Act 2009*, the Criminal Code and various State and Territory laws.

Section 1307(1) of the Corporations Act makes it an offence for company officers to falsify books by concealing, destroying, mutilating or falsifying the company's securities or books.

Section 1307(2) also makes it an offence, where matter is recorded or stored electronically to:

- report or store matter that is known to be false or misleading in a material particular
- destroy, remove or falsify matter or
- where there is a duty to record or store matters, fail to do so, either with intent to falsify or knowing this will render matter false or misleading in a material particular.

Most notably, section 1309 of the Corporations Act makes it an offence for an officer or employee of a corporation, who, makes available or gives information, or authorises or permits the making available or giving of information, that relates to the affairs of a corporation and that, to the knowledge of the officer or employee, is false or misleading in a material particular or has omitted from it a matter or thing the omission of which renders the information misleading in a material respect. A similar provision exists under s 1101F of the Corporations Act regarding the falsification of records.

Companies, registered schemes and disclosing entities are required by section 286 of the Corporations Act to keep written financial records that correctly record and explain their transactions and financial position and performance, and that would enable true and fair financial statements to be prepared and audited. The financial records must be retained for seven years.

ASIC has regard to the possibility of matters such as foreign bribery payments in its financial reporting surveillance programme.

Division 490 of the Criminal Code was inserted in early 2016 to further strengthen Australia's laws pertaining to false accounting for the purposes of concealing or enabling bribery, including bribery of a foreign public official. It creates offences relating to false dealing with accounting documents making it a criminal offence, punishable by significant penalties, to intentionally or recklessly falsify accounting documents. Importantly, the offences can be established even if the actual giving or receiving of a bribe is not proved, potentially making it easier for prosecutors to pursue convictions for false accounting offences.

(b) Observations on the implementation of the article

The accounting practices listed under this provision are prohibited pursuant to relevant provisions of the Corporations Act and the Criminal Code. The Corporations Act sets out obligations in relation to financial records, including the relevant retention period. The records must correctly record and explain the entity's

transactions, financial position and performance, and enable true and fair financial statements to be prepared and audited. The financial records must be retained for seven years (section 286(2)). Failure to do either of these things is a criminal offence (section 286(3) and 286(4)). Section 490 of the Criminal Code criminalizes false dealing with accounting documents in the private sector.

Section 292 of the Corporations Act requires all companies, other than small proprietary companies to prepare an annual report and make it public by lodging it with ASIC.

Furthermore, during the country visit, it was explained that many entities regulated under the Corporations Act were required to apply accounting standards issued by the Australian Accounting Standards Board (section 334). These standards are based on International Financial Reporting Standards.

Paragraph 4 of article 12

4. Each State Party shall disallow the tax deductibility of expenses that constitute bribes, the latter being one of the constituent elements of the offences established in accordance with articles 15 and 16 of this Convention and, where appropriate, other expenses incurred in furtherance of corrupt conduct.

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

In addition to the bribery-related conduct criminalised in Divisions 70, 140, 141, and 142 of the Criminal Code, the *Income Tax Assessment Act 1997* expressly disallows:

- tax deductibility of bribes to foreign public officials for all tax purposes (at 26-52)
- tax deductibility of bribes to public officials for all tax purposes (at 26-53), and
- tax deductibility of expenditure relating to illegal activities (at 26-54).

The ATO provides guidance in relation to understanding and dealing with bribery of Australian and foreign public officials. This guidance is available to the public via the ATO's website. In January 2017, the ATO updated its publication for businesses: "Tax risk management and governance review guide." This publication is aimed at assisting primarily large and complex corporations to self-evaluate their governance frameworks and strategic and operational tax risks. The guide is designed to assist companies to develop their own tax governance framework, including "Ethical and Responsible Behaviour." In May 2016, the ATO also released a similar publication designed for Private Groups entitled "Tax Governance for Private Groups".

The ATO also provides guidelines for staff on how to deal with the bribery of Australian and foreign public officials. These guidelines, which draw heavily on the 'OECD Bribery Awareness Handbook for Tax Examiners', are designed to provide tax officers with:

- increased awareness of the legislative provisions disallowing a deduction for a loss or outgoing that is a bribe to an Australian or foreign public official
- practical ways to identify how a taxpayer may be concealing bribe transactions to an Australian or foreign public official
- advice on record keeping and audit techniques where bribery is suspected
- guidance for the referral of information where it is suspected that bribe payments may or have been made, and
- information on how to obtain information from Australia's tax treaty partners.

(b) Observations on the implementation of the article

The ITAA 1997 expressly prohibits deductibility of bribes to public officials (sections 26-52 and 26-53) and expenditure relating to illegal activities (sections 26-54). However, during the country visit, it was clarified that certain minor facilitation payments to foreign public officials were not considered bribes under the Australian Criminal Code (CC) and the ITAA 1997 and may be tax-deductible under section 26-52(4) of the ITAA 1997. The authorities further explained that actual practice shows that Australian taxpayers do not claim deductions under this category. Australia continues to periodically review its policies and approach on facilitation payments in order to effectively combat the phenomenon.

It should be noted at the outset that the provision under review is related to articles 15-16 of the Convention in so far as it concerns the definition of bribes. The issue of whether facilitation payments fall under that definition was the focus of the first review cycle and was discussed extensively as part of the first review of Australia, which then led to making the recommendation that Australia review its policies and approach in order to effectively combat the phenomenon.

However, the implementation of article 12(4) should not be limited to expressly listing bribes - irrespective of how they are defined under criminal legislation - as non-deductible expenses under tax laws. It may also include adopting other administrative and/or legislative measures to ensure that bribe payments cannot be concealed under legitimate categories of expenses, such as social and entertainment costs or commissions, in addition to equipping the tax authorities with necessary tools to detect corruption and report it to the law enforcement authorities. While Australia has taken a number of such preventive and detection measures as explained above, concerns remain that expressly allowing the tax-deductibility of facilitation payments runs the risk that bribes (as currently defined in the CC and ITAA Act 1997) or other corrupt expenses could also be deducted in contravention of the requirements of article 12(4) of the Convention.

Further, as one can note from the OECD reviews of Australia, there are similar concerns at the OECD about the risk that some bribe payments could be tax-deductible due to the differences in the record-keeping requirements in the CC and ITAA Act 1997 (paras 109-111 of the Phase 3 OECD Review Report). Reference can also be made to para 55 of the OECD Phase 4 review report that “[Australian Taxation Office] representatives stated that facilitation payments are not coming under the radar because they are probably concealed as allowable expenses” or they are “made entirely ‘off the books’, thereby making detection very difficult without evidence from an informant.” While noting the OECD conclusions made elsewhere in these reports, the reviewers find these observations to be relevant to their concerns above.

Therefore, it is recommended that Australia continue to fully implement the present provision.

Article 13. Participation of society

Paragraph 1 of article 13

1. Each State Party shall take appropriate measures, within its means and in accordance with fundamental principles of its domestic law, to promote the active participation of individuals and groups outside the public sector, such as civil society, non-governmental organizations and community-based organizations, in the prevention of and the fight against corruption and to raise public awareness regarding the existence, causes and gravity of and the threat posed by corruption. This participation should be strengthened by such measures as:

(a) Enhancing the transparency of and promoting the contribution of the public to decision-making processes;

(b) Ensuring that the public has effective access to information

- (c) Undertaking public information activities that contribute to non-tolerance of corruption, as well as public education programmes, including school and university curricula;*
- (d) Respecting, promoting and protecting the freedom to seek, receive, publish and disseminate information concerning corruption. That freedom may be subject to certain restrictions, but these shall only be such as are provided for by law and are necessary:*
 - (i) For respect of the rights or reputations of others;*
 - (ii) For the protection of national security or ordre public or of public health or morals.*

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

See information on Australia's freedom of information laws under article 10. In 2010 major reforms passed in Parliament to promote a pro-disclosure culture across government and to build a stronger foundation for more openness in government.

The *Australian Information Commissioner Act 2010* established the OAIC. The Act sets out three functions of the OAIC:

- freedom of information
- privacy
- information policy

The Information Commissioner is responsible for the information policy function. This requires the Information Commissioner to report to the Attorney-General on how public sector information is collected, used, disclosed, administered, stored and accessed. The Information Commissioner also has formal responsibility for the freedom of information and privacy functions, and for exercising the powers conferred by the FOI Act and the *Privacy Act 1988*.

The Information Commissioner, as agency head, is responsible for reporting to government on the OAIC's work. This can include reports on how the Government can, as part of its information management responsibilities:

- be more open, accountable and transparent
- make the information it holds accessible, discoverable and useable to the public
- securely manage personal information, and better manage the information it holds.

The OAIC's other responsibilities include:

- conducting investigations into matters regarding privacy or FOI
- reviewing agency decisions made under the FOI Act
- handling privacy and FOI complaints
- providing best practice information policy advice to government agencies, and
- monitoring agency compliance.

OGP

Australia's first NAP was developed through a year-long process which included several rounds of consultation, including a public submission process on the draft first NAP. The first NAP was published in December 2016, and since then, the Australian Government has worked with civil society, including through Australia's Open

Government Forum, to monitor, drive, and report on implementation of its commitments. Its Midterm Self-Assessment Report for Australia's first NAP, published in September 2017, concluded that Australia is making steady progress on meeting its Commitments, with only three of fifteen commitments delayed against original timelines. Up-to-date reporting on progress is available from the OGP Australia website at <http://ogpau.pmc.gov.au/>.

The first NAP contains 15 commitments focused on transparency and accountability in business; open data and digital transformation; access to government information; integrity in the public sector; and public participation and engagement. For more information on the OGP, see paragraph 1 of article 5.

The OGP sets high standards for the participation of civil society throughout development and delivery of national action plans, detailed in the OGP Participation and Co-Creation Standards (<https://www.opengovpartnership.org/ogp-participation-co-creation-standards>). As outlined in its Midterm Self-Assessment, Australia assesses that it meets - and in some cases exceeds - these standards.

The OGP Interim Working Group, which consists of government and civil society members, has held two meetings since the inception of the first NAP to discuss issues, including updates on the implementation of the commitments by various Commonwealth agencies and the establishment of an Open Government Forum. Appointments to the Open Government Forum were announced on 21 July 2017. The Open Government membership comprises of eight government members (representing agencies with lead responsibility for implementing commitments in the first NAP) and eight civil society representatives.

The Open Government Forum is expected to drive delivery of the first NAP and to help develop Australia's second National Action Plan 2018-20 (second NAP). Further information on Australia's involvement in the OGP can be found at <http://ogpau.pmc.gov.au/>.

Australia has recently commenced a nine-month process to engage civil society in the development of the second NAP, due August 2018.

Each year, in addition to undertaking a self-assessment, all OGP countries agree to have their progress externally assessed through a process called the Independent Reporting Mechanism (IRM). In 2017, Australia's IRM researcher, Mr Daniel Stewart, held a number of public consultations to inform his assessment of Australia's performance in developing and implementing its first NAP, of which this event was one. The IRM Report is currently still in development and is expected to be published shortly.

Media

Australia has a free, vibrant and diverse media that reports on all aspects of civil and political life. A free, critical and informative media is essential in the proper functioning of Australia's system of government. Independent media is a key forum of public debate and for conveying government actions and issues of concern to the general public. This is an important mechanism which holds the government to account and plays a vital role in Australia's democratic system of government. Free media in Australia plays an important role in protecting against corruption by enabling scrutiny of both the public and private sectors. Investigative journalism increases transparency by uncovering instances of corruption, and Australians regularly use media reporting to inform social and democratic decisions. While separate from civil society, the Australian media has a clear role to play in increasing the transparency of, and promoting contribution to, public decision making, and delivering diversity of information vital to democratic government.

School Curriculum

The Foundation to Year 10 Australian Curriculum sets the expectations for what all Australian students should be taught, regardless of where they live or their background.

The Australian Curriculum focuses on preparing students to be active and informed citizens through the key learning area of Humanities and Social Science: Civics and Citizenship. Students develop the knowledge, skills and values that include the fundamental principles of Australian law, including laws relating to corruption.

The Civics and Citizenship curriculum is designed to develop and support students' commitment to national values of democracy, equity and justice. Students investigate political and legal systems and explore the nature of citizenship, diversity and identity in contemporary society.

While the Australian curriculum strongly focuses on the national context, students also reflect on Australia's position and international obligations and the role of citizens today, both within Australia and in an interconnected world. The Australian Curriculum also incorporates seven 'general capabilities', which include: personal and social capability; ethical understanding; and intercultural understanding.

(b) Observations on the implementation of the article

Australia promotes the active participation of individuals and groups outside the public sector in its corruption prevention measures. Necessary legal and policy frameworks such as the Freedom of Information Act and OGP promote transparency in the public sector and the decision-making processes. The education curriculum in schools covers topics that relate to corruption prevention themes.

As mentioned under article 5(1) above, approaches to stakeholder engagement and public consultations vary across public bodies. Policy development generally requires genuine and timely consultation with businesses, community organizations and individuals. These principles are reflected in the Australian Government Guide to Regulation.

Furthermore, the first NAP seeks to improve the approach in Commitment 5.2 (enhance public participation in government decision-making).

Paragraph 2 of article 13

2. Each State Party shall take appropriate measures to ensure that the relevant anti-corruption bodies referred to in this Convention are known to the public and shall provide access to such bodies, where appropriate, for the reporting, including anonymously, of any incidents that may be considered to constitute an offence established in accordance with this Convention.

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

Telephone Services

The AFP and State police services have telephone and internet services to report crime. Crime Stoppers Australia and the National Security Hotline provide for the anonymous reporting of crime. These services are available seven 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.

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 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. 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.

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.

Community members also participate in the day-to-day operations and financial support of the programme. 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.

As part of the mutual obligation between the community, the police and the media, local media outlets are responsible for promoting Crime Stoppers by publicising unsolved crimes and assisting with appeals to raise funds for the programme.

Newspapers, radio and television stations in the community undertake frequent appeals that 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 programme 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.

ACLEI

In respect of agencies in its jurisdiction, ACLEI accepts referrals of information or allegations about corruption from members of the public. For this purpose ACLEI hosts a website (with on-line reporting form), and a 'hotline' phone number. As part of its corruption prevention function, ACLEI also provides support and advice to law enforcement agencies within the Integrity Commissioner's jurisdiction on effective internal protected reporting frameworks to promote reporting of suspected corruption.

(b) Observations on the implementation of the article

The AFP and State police services have telephone and internet services to report crime. The Crime Stoppers Australia project and the National Security Hotline provide for anonymous reporting of crime. Additionally, ACLEI hosts a website and a hotline phone number to receive information or allegations about corruption with regard to the law enforcement agencies under its jurisdiction.

Article 14. Measures to prevent money-laundering

Subparagraph 1 (a) of article 14

1. Each State Party shall:

(a) Institute a comprehensive domestic regulatory and supervisory regime for banks and non-bank financial institutions, including natural or legal persons that provide formal or informal services for the transmission of money or value and, where appropriate, other bodies particularly susceptible to money-laundering, within its competence, in order to deter and detect all forms of money-laundering, which regime shall emphasize requirements for customer and, where appropriate, beneficial owner identification, record-keeping and the reporting of suspicious transactions;

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

Australia has a robust AML/CTF regime, which has created a comprehensive framework to detect, deter and disrupt money laundering, terrorism financing and other serious crimes, such as corruption. The regime consists of the AML/CTF Act, *Anti-Money Laundering and Counter-Terrorism Financing Rules Instrument (No. 1) 2007* ([AML/CTF Rules](#)), the *Anti-Money Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulations 2018* (AML/CTF Regulations) and the FTR Act and part 10.2 of the Criminal Code.

The AML/CTF Act regulates legal persons and arrangements, natural persons, and other constructs including bodies politic and corporations sole, in the financial, gambling, remittance, digital currency and bullion sectors that provide designated services listed in section 6 of the Act ('reporting entities'). The AML/CTF Rules provide further detail on the AML/CTF Act's obligations. The AML/CTF Regulations list foreign countries in relation to which Australia applies counter-measures. The FTR Act, the predecessor to the AML/CTF Act, contains residual reporting obligations for some businesses. Furthermore, the AML/CTF Act establishes obligations that are supervised and enforced by AUSTRAC.

Section 209 of the AML/CTF Act continues the existence of AUSTRAC, first established under the FTR Act. AUSTRAC is Australia's FIU and specialist AML/CTF regulator. AUSTRAC serves as Australia's national centre for the collection, analysis and dissemination of financial intelligence to detect, deter and disrupt money laundering.

AUSTRAC oversees the compliance of more than 14,250 businesses with their obligations under the AML/CTF Act and the FTR Act. AUSTRAC, as Australia's FIU, disseminates financial intelligence gathered from its regulated businesses to relevant partner agencies, including law enforcement, security, defence and intelligence agencies. Partner agencies can also access this intelligence directly.

Australia's AML/CTF regime places a range of obligations on reporting entities regulated under the Act. This includes:

- enrolling with AUSTRAC
- procedures to identify and verify the identity of customers provided designated services by reporting entities, including identifying and verifying the identity of beneficial owners of the customer and whether the customer is a politically exposed person where appropriate
- providing the following reports to the AUSTRAC CEO:
 - suspicious matter reports
 - threshold transaction reports (physical currency transactions of AUD10,000 or more, or the foreign currency equivalent), and
 - International Funds Transfer Instructions (IFTI) (with no threshold for reporting)
- requiring information about the originators of Electronic Funds Transfer Instructions (EFTI) (i.e. wire transfers)
- creating and complying with an AML/CTF program
- record-keeping requirements
- rules regarding correspondent banking relationships, and
- registering with AUSTRAC as a remittance service provider and digital currency exchange provider if the business provides either a remittance service or digital currency exchange services.²¹

All reporting entities must submit a threshold transaction report (TTR) to AUSTRAC within 10 business days after the entity provides a customer with a designated service involving a 'threshold transaction'. Threshold transactions involve the transfer of physical currency of AUD10,000 or more (or foreign currency equivalent). For example, depositing physical currency of AUD10,000 or more into a person's account is a threshold transaction. Refer to section 43 of the [AML/CTF Act](#); Chapters 19 and 37 of the [AML/CTF Rules](#).

²¹ On 3 April 2018, following an amendment to the AML/CTF Act, AUSTRAC commenced the regulation of digital currency exchange providers, which also have an obligation among other things to formally register.

There is no monetary threshold for submitting a suspicious matter report. Please refer to section 41 of the AML/CTF Act and Chapter 18 of the AML/CTF Rules.

Further information on AUSTRAC reporting requirements can be found on [AUSTRAC's website](#).

Reporting entities are required to apply appropriate customer due diligence measures in accordance with the AML/CTF Act and Rules (see further information at Article 52 below). The regulatory regime established by the AML/CTF Act is subject to regular revision. This includes the introduction of the remittance registration requirements in 2011 and substantial changes to the beneficial ownership, PEP and customer due diligence AML/CTF Rules in June 2014.

The Australian Government completed a comprehensive review of the Act in 2016 and is preparing amendments to the Act to give effect to the recommendations arising from this review.

The legislative amendments were introduced on 17 August 2017 and passed Parliament on 7 December 2017 (now the *Anti-Money Laundering and Counter-Terrorism Financing Amendment Act 2017*).

Further information is detailed in Australia's response to paragraph 3 of article 5 above.

Further information on the AML/CTF obligations applied to reporting entities is available on [AUSTRAC's website](#).

AUSTRAC supervision and enforcement frameworks take a risk-based approach to monitoring compliance with the AML/CTF Act. A national money laundering threat assessment was carried out in 2011, followed by sectoral and product risk assessments commenced in 2016.

In 2017, AUSTRAC further enhanced its supervisory framework through the development and introduction of the Breach Evaluation and Response (BEAR) framework. The BEAR constitutes an intelligence-led, risk-based framework which targets efforts where ML/TF risks are identified as being at their highest. It provides AUSTRAC with a method to make an evidence-based risk assessment in the context of a ML/TF regulatory breach. It gives AUSTRAC a structured decision-making process to determine a proportionate response where compliance failure has been identified or detected.

Information has been provided on "findings and recommendations" issued by AUSTRAC to its regulatory population on their AML/CTF compliance over the past 2 years, including reference to actions taken against reporting entities in the remittance sector and other recent enforcement actions. Enforcement actions are published on [AUSTRAC's website](#).

AUSTRAC enforces a robust supervision and enforcement framework to promote compliance with the AML/CTF regime by reporting entities. AUSTRAC uses a range of tools, ranging from onsite and offsite compliance assessments to pecuniary penalties and registration cancellations.

In the last two years, AUSTRAC has conducted 151 compliance assessments (desk and on-site reviews) of reporting entities. The scope of these assessments covers the broad range of obligations of the AML/CTF Act and AML/CTF Rules. Resulting actions include:

- 201 recommendations for businesses to improve processes and procedures, and
- 274 requirements (non-pecuniary action) in relation to non-compliance in which remediation programmes have been established.

AUSTRAC's supervision teams closely monitor reporting entities' remediation activities to ensure full compliance with the AML/CTF Act.

In addition, AUSTRAC has cancelled 13 remitter registrations, and 6 have been refused from operating a remittance business. In March 2017, the Federal Court issued a AUD45 million civil penalty to three companies in the Tabcorp group, a major gaming provider. This penalty order is related to 108 contraventions of the AML/CTF Act and is the highest civil penalty order ever made in Australian history. Further information is available on the [AUSTRAC website](#).

In August 2017, AUSTRAC commenced civil penalty proceedings in the Federal Court against the Commonwealth Bank of Australia (CBA), Australia's largest bank, for serious and systemic non-compliance

with the AML/CTF Act. AUSTRAC's action alleges over 53,700 contraventions of the AML/CTF Act in relation to the use of 'Intelligent Deposit Machines' (IDMs). In summary, AUSTRAC alleged:

- CBA did not comply with its own AML/CTF programme because it did not carry out any assessment of the ML/TF risk of IDMs before their rollout in 2012. CBA took no steps to assess the ML/TF risk until mid-2015, which was three years after they were introduced.
- For a period of three years, CBA did not comply with the requirements of its AML/CTF programme relating to monitoring transactions on 778,370 accounts.
- CBA failed to give 53,506 threshold transaction reports to AUSTRAC on time for cash transactions of AUD10,000 or more through IDMs from November 2012 to September 2015.
- CBA failed to report suspicious matters either on time or at all involving transactions totalling over AUD77 million.
- Even after CBA became aware of suspected money laundering or structuring on CBA accounts, it did not monitor its customers to mitigate and manage ML/TF risk, including the ongoing ML/TF risks of doing business with those customers.

Further information is available on the [AUSTRAC website](#).

Money laundering is criminalised under Division 400 of the [Criminal Code](#), proceeds of an offence is defined in section 329 [POC Act](#) and proceeds of crime is defined in section 400.1 of the Criminal Code.

(b) Observations on the implementation of the article

Australia has a robust and mature regime for combating money laundering, although certain key areas remain unaddressed. The main legislative instruments for the prevention of and fight against money-laundering are the AML/CTF Act, the AML/CTF Rules Instrument 2007 (AML/CTF Rules), the Anti-Money-Laundering and Counter-Terrorism Financing (Prescribed Foreign Countries) Regulation 2018, the Financial Transaction Reports Act 1988 and part 10.2 of the Criminal Code. . The AML/CTF Act follows a risk-based approach and establishes three levels of customer due diligence measures (standard, enhanced and simplified). A national money laundering threat assessment was carried out in 2011, followed by sectoral and product risk assessments commenced in 2016. Substantial changes to the AML/CTF Rules on beneficial ownership, politically exposed persons (PEPs) and customer due diligence were introduced in 2014.

Australia has adopted an all-crimes approach to money laundering. Money laundering is criminalised under Division 400 of the Criminal Code and covers dealing with proceeds and instruments of crime. Proceeds of an offence are defined in section 329 POC Act, which provides that property is proceeds of an offence if it is wholly derived or realised, whether directly or indirectly, from the commission of the offence.

The AML supervisory authority is AUSTRAC, Australia's financial intelligence unit and AML/CTF regulator. Under the AML/CTF Act, obliged entities are only the financial institutions, the gambling, remittance, digital currency exchange providers, and bullion sectors that provide designated services listed in section 6 of the AML/CTF Act ('reporting entities'). This means non-financial businesses and professions other than casinos and bullion dealers are not subject to AML/CTF obligations. This includes real estate agents and lawyers, both of which have been identified to be of high money-laundering risk in Australia's National Threat Assessment and the FATF's 2015 Mutual Evaluation Report.

Verification of the identity of customers is provided for in Part 2 of the AML/CFT Act (sec. 28-35) and Chapter 4 of the AML/CFT Rules. Ongoing customer due diligence, including enhanced customer due diligence, is required by section 36 of the Act. Within Chapter 15, enhanced due diligence obligations are set out in part 15.8-15.11 of the AML/CTF Rules. According to Part 2 of the AML/CTF Act and Part 4.12 of the AML/CTF Rules, the identity of the beneficial owner is systematically verified. Part 4.13 of the AML/CTF Rules provides for enhanced customer due diligence with regard to politically exposed persons. Under Part 3, Division 2, of the AML/CTF Act (sec. 41), reporting entities have an obligation to make a suspicious matter report to AUSTRAC.

It is recommended that Australia

- **amend the AML/CFT Act to ensure that it covers not only financial institutions but also designated non-financial businesses and professions beyond casinos and bullion dealers, such as real estate agents and lawyers, and**
- **ensure that information on the beneficial owner of legal persons and legal arrangements is maintained and accessible to competent authorities in a timely manner.**

Subparagraph 1 (b) of article 14

1. Each State Party shall: ...

(b) Without prejudice to article 46 of this Convention, ensure that administrative, regulatory, law enforcement and other authorities dedicated to combating money-laundering (including, where appropriate under domestic law, judicial authorities) have the ability to cooperate and exchange information at the national and international levels within the conditions prescribed by its domestic law and, to that end, shall consider the establishment of a financial intelligence unit to serve as a national centre for the collection, analysis and dissemination of information regarding potential money-laundering.

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

A wide range of information is available to AUSTRAC to transform into financial intelligence, including:

- reports required to be submitted by reporting entities to AUSTRAC under Part 3 of the AML/CTF Act, including:
 - suspicious matter reports
 - threshold transaction reports, and
 - international funds transfer instruction reports
- reports relating to Cross-Border Movements of Physical Currency (CBM-PC) and BNI (Part 4 of the AML/CTF Act), and
- information and intelligence provided by domestic and international partners, as well as public information sources.

AUSTRAC analyses and proactively disseminates this information as actionable intelligence to domestic and international partners to help combat and disrupt money laundering, terrorism financing and other serious and organised crime. Certain partner agencies also have direct access to AUSTRAC's financial intelligence database. To boost Australia's efforts to combat money laundering, AUSTRAC launched the Fintel Alliance in 2017 - a public-private collaborative platform. In the Alliance, public sector agencies work side-by-side with private sector partners to share financial intelligence in real-time to:

- help private sector partners more easily identify and report suspicious transactions
- help law enforcement partners more quickly arrest and prosecute criminals, and
- work with academia to build knowledge and gather insight.

Further information on the Fintel Alliance is available on the AUSTRAC website: <https://www.austrac.gov.au/about-us/fintel-alliance>.

AUSTRAC has extensive information-sharing and collaborative arrangements with key counterpart countries to help combat money laundering on a global scale. Section 132 of the AML/CTF Act specifically empowers AUSTRAC to share financial intelligence with its foreign counterparts.

AUSTRAC has an extensive international network of ties which enables AUSTRAC to facilitate the exchange of financial and other intelligence between Australian agencies and overseas counterparts. As of June 2017, AUSTRAC has in place a total of 87 MOUs for the exchange of financial intelligence with international counterparts and two MOUs for the exchange of regulatory information.

A list of all MOUs is available on the AUSTRAC website: <http://www.austrac.gov.au/about-us/international-engagement/exchange-instruments-list>.

As of June 2017, AUSTRAC has 46 domestic partner agencies across law enforcement, national security, revenue protection and corruption. A list of all domestic partner agencies is available on the AUSTRAC website: <https://www.austrac.gov.au/about-us/our-partners/government-partners>.

Officers within Australia's partner agencies have direct online access to query AUSTRAC's database. In the 2016-17 financial year, those officers conducted 2.7 million searches. This is equivalent to over 7,000 searches each day of the year.

Fintel Alliance has transformed AUSTRAC's ability to exchange near real-time intelligence and brings together the collective knowledge and resources of partners to enhance national and international understanding of ML/TF risks. In the 2016/17 financial year, AUSTRAC disseminated 783 intelligence products to law enforcement and intelligence partners to facilitate understanding and the timely detection of suspicious activity.

In 2016/17, AUSTRAC conducted 3,255 exchanges of financial intelligence with international FIUs. Exchanges of financial intelligence occurred with 87 FIUs. AUSTRAC is the Chair of the International Supervisors Forum for 2017 and participated in the December 2016 International Supervisors Forum workshop. AUSTRAC provided a broad range of presentations to industry participants to enhance information sharing and development of best practice supervisory approaches.

(b) Observations on the implementation of the article

In terms of national cooperation, as of June 2017, AUSTRAC has 46 domestic partner agencies across law enforcement, national security, revenue protection and corruption. In 2017, AUSTRAC launched the Fintel Alliance, a public-private partnership to share financial intelligence.

Mutual legal assistance, including in relation to money laundering, is regulated in the *Mutual Assistance in Criminal Matters Act 1987*.

(c) Successes and good practices

The Fintel Alliance, a public-private partnership to share financial intelligence, was highlighted as a good practice.

Paragraph 2 of article 14

2. States Parties shall consider implementing feasible measures to detect and monitor the movement of cash and appropriate negotiable instruments across their borders, subject to safeguards to ensure proper use of information and without impeding in any way the movement of legitimate capital. Such measures may include a requirement that individuals and businesses report the cross-border transfer of substantial quantities of cash and appropriate negotiable instruments.

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

Part 4 of the AML/CTF Act creates reporting obligations in relation to the reporting of CBM-PC and CBM-BNIs. The CBM-PC of AUD10,000 or more (or the foreign currency equivalent) must be reported to AUSTRAC (a 'CBM-PC' report). This requirement captures the carrying, mailing or shipping of physical currency.

There is no threshold value attached to the requirement to report cross-border movements of BNIs. The requirement to report depends on a request being made by an authorised (police or customs) officer. If a person produces one or more BNI to a police or customs officer or is found to have one or more BNI by a police or customs officer, they must make a report to AUSTRAC if requested (a 'CBM-BNI' report).

To support the enforcement of these reporting obligations, Division 8 of Part 15 of the AML/CTF Act establishes questioning, search, arrest and seizure powers for customs and police officers, as well as criminal and civil penalties for the failure to comply with reporting requirements and questioning and search powers.

Australia's cross-border reporting regime does not place any limitations on the ability to move legitimate capital across Australian borders but simply requires the reporting of transfers of cash and BNIs.

The Department of Home Affairs augments the legislative requirements in subsections 53(3) and 200(1) and 200(2) of the AML/CTF Act with the Incoming Passenger Card (IPC), upon which an arriving traveller can indicate whether they have currency in their possession, in excess of AUD10,000 or foreign equivalent. Where a passenger has answered 'yes' on the IPC, this prompts an official at the border to administer the passenger with the appropriate cross-border movement reporting form, which is completed by the passenger and sent to AUSTRAC. The Department of Home Affairs also ensures that each international airport has signage throughout indicating the requirement to declare currency in possession of arriving or departing aircraft passengers.

The number of CBM-PC reports made during the 2015-2016 financial year was 53,764 with a total amount of AUD8,993,541,866. The total number of CBM-BNI reports made during the same period was 510 with a total amount of AUD71,075,940.

The number of CBM-PC reports made during the 2016-17 financial year was 41,950 with a total amount of AUD9,501,437,181. The total number of CBM-BNI reports made during the same period was 449 with a total amount of AUD207,488,135.

Undeclared currency is referred to the AFP, which is responsible for deciding if and how much a traveller may be fined, or whether the currency is seized, and the traveller prosecuted.

CBM-PC

Persons entering or departing Australia must report any currency they are carrying of AUD10,000 or more (or foreign currency equivalent). This includes mailing or shipping currency of AUD10,000 or more (or foreign currency equivalent) into or out of Australia. Reports must be submitted 1) before the physical currency is sent or carried out of Australia, or carried into Australia, or 2) within five business days after receiving physical currency sent to Australia (sections 53-58 of the AML/CTF Act; Chapters 24-26 of the AML/CTF Rules).

CBM-BNI

Persons entering or departing Australia must report - when requested by an Australian Customs and Border Protection or police officer - the movement of bearer negotiable instruments (such as traveller's cheques, cheques, money orders) of any amount into or out of Australia. Reports must be submitted immediately upon request by an Australian Customs and Border Protection or police officer (refer to section 59 of the AML/CTF Act; Chapters 24-26 of the AML/CTF Rules).

Applicable sanctions in the case of false declaration or failure to declare CBM-PC and BNI

A person commits an offence punishable by imprisonment for two years or 500 penalty units if they fail to declare cross-border movements of physical currency of AUD10,000 or more. One penalty unit is AUD210. A civil penalty may also apply to a failure to declare. The maximum pecuniary penalty payable by a body corporate is 100,000 penalty units and individual is 20,000 penalty units (sections 53 and 175 of the AML/CTF Act).

A person commits an offence if they provide false or misleading information to the AUSTRAC CEO punishable by imprisonment for 10 years or 10,000 penalty units, or both. A person commits an offence punishable by imprisonment for two years or 500 penalty units if they fail to report cross-border movements of bearer negotiable instruments when asked to do so by an Australian Customs and Border Protection or police officer. A civil penalty may also apply to a failure to report. The maximum pecuniary penalty payable by a body corporate is 100,000 penalty units, and individual is 20,000 penalty units. Refer to sections 59 and 175 of the AML/CTF Act.

Statistics on detected undeclared cross-border cash transfers

AUSTRAC processed 649 CBM Infringement Notices in the 2015-2016 financial year and 637 in the 2016-2017 financial year. This represented AUD15,590,114.16 and AUD13,805,765.65 respectively.

(b) Observations on the implementation of the article

The legal framework relating to the declaration or disclosure of cross-border movement of currency and bearer negotiable instruments is based on Part 4 of the AML/CFT Act. In particular, the physical cross-border transportation of cash and BNIs in the amount of AUD10,000 or more must be reported (section 53 AML/CFT Act). There is no threshold value attached to the requirement to report cross-border movements of BNIs, but an individual must report the movement of a BNI when requested by a police or customs officer.

Therefore, it is recommended that Australia introduce a threshold value for the requirement to report cross-border movements of bearer negotiable instruments (art. 14(2)).

Paragraph 3 of article 14

3. States Parties shall consider implementing appropriate and feasible measures to require financial institutions, including money remitters:

- (a) To include on forms for the electronic transfer of funds and related messages accurate and meaningful information on the originator;*
- (b) To maintain such information throughout the payment chain; and*
- (c) To apply enhanced scrutiny to transfers of funds that do not contain complete information on the originator.*

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

Part 5 of the AML/CTF Act imposes obligations on various persons involved in EFTI-‘ordering institutions’, ‘beneficiary institutions’ and ‘interposed institutions’ to record, obtain, include and/or pass on certain information about the EFTI (including where it is an International Funds Transfer Instruction (IFTI)) and, if required, report such information to AUSTRAC.

All EFTIs are required to be accompanied by information on the originator or a unique identifier allowing for the transfer to be traced back to the originator. The types of information are referred to as:

- 'Complete payer information', and
- 'Tracing information', for example, the account number of the payer or, in the absence of an account, a unique reference number.

Complete payer information must be included for non-batched international EFTIs. Tracing information may be included instead for domestic EFTIs, EFTIs where the money is to be paid by credit card (other than where this involves an e-currency) and batched international EFTIs. These requirements apply to financial institutions.

Australian financial institutions interposed in the transfer chain of a domestic EFTI, or an outgoing international EFTI, are required to pass on as much of the complete payer information or tracing information as they receive. For incoming international EFTIs, interposed institutions must ensure that the instruction includes the tracing information.

Reporting entities have an obligation to apply enhanced due diligence to transactions, where it determines under its risk-based systems and controls that ML/TF risk is high or a suspicious matter reporting obligation has arisen (section 15.9 of the AML/CTF Rules). This could include situations where an EFTI does not include the required information under Part 5 of the AML/CTF Act. Where information is missing, reporting entities are specifically empowered under the AML/CTF Act to refuse to make the transferred money available until the required information is passed along (Section 65(6) of the AML/CTF Act). The AUSTRAC CEO may also, by written notice to the beneficiary institution, direct it to request the ordering institution to include required transfer information in all future EFTIs.

IFTI

For IFTIs, reporting entities (including remittance service providers) also have an obligation to report the transaction to AUSTRAC (an IFTI report). The requirement to make IFTI reports is set out in Division 3, Part 3 of the AML/CTF Act. These reporting obligations ensure that a range of details on the parties to IFTIs are available to AUSTRAC and other relevant Australian Government authorities.

Chapter 16 of the AML/CTF Rules sets out the reportable details that must be included in IFTI-E reports for each party involved in the funds' transfer. Chapter 17 of the AML/CTF Rules specifies the reportable details for remitters (an IFTI-DRA report).

The 'sender' of an IFTI transmitted out of Australia, or the 'recipient' of an IFTI transmitted into Australia, must report the instruction to AUSTRAC within 10 business days after the day the instruction was sent or received (section 45 of the AML/CTF Act). No thresholds apply.

Refer to sections 45 and 46 of the [AML/CTF Act](#); Chapters 16, 17 and 51 of the [AML/CTF Rules](#).

There is no monetary threshold for reporting wire transfers that meet the definition of an IFTI. Reporting entities must apply a risk-based approach to the application of customer due diligence, and where ML/TF risk is high, enhanced customer due diligence must be applied and may include measures to identify the source of wealth and source of funds as set out in 15.10(2)(a) and (b) of the AML/CTF Rules. Where the customer or beneficial owner is a foreign politically exposed person (PEP), 15.11 of the AML/CTF Rules requires 15.10(2)(a) and (b) to be applied.

IFTI-E

There are two categories of IFTIs:

- international electronic funds transfer instructions (IFTI-E)
- instructions given under a designated remittance arrangement (IFTI-DRA)

An IFTI-E occurs when:

- the ordering institution accepts the instruction at or through a permanent establishment in Australia, and the transferred money is made available to the payee at or through a permanent establishment of the beneficiary institution in a foreign country (an *outgoing* IFTI-E).
- the ordering institution accepts the instructions at or through a permanent establishment in a foreign country, and the money is transferred to a permanent establishment of the receiving institution in Australia (an *incoming* IFTI-E).

The key parties of an IFTI-E are:

- the 'payer', who requests the 'ordering institution' (an institution that accepts the instruction from the payer) to transmit the instruction
 - the 'sender' (either the ordering institution or another institution), who transmits the instruction to the 'beneficiary institution' via any 'interposed institutions' (that is, institutions that take part in the instruction between the sender and the beneficiary institution)
- the beneficiary institution, which ultimately makes the funds available to the 'payee' (the person who receives the transferred funds)

Chapter 16 of the [AML/CTF Rules](#) sets out the reportable details that must be included in IFTI-E reports for each party involved in the funds' transfer. Sections 70-72 of the AML/CTF Act also outlines what needs to be reported in relation to tracing information and complete payer information.

Complete payer information requirements are set out in [section 71 of the AML/CTF Act](#) and include:

- (a) the name of the payer; and
- (b) one of the following:
 - (i) the payer's full business or residential address (not being a post office box);
 - (ii) a unique identification number given to the payer by the Commonwealth or an authority of the Commonwealth (for example, an Australian Business Number or an Australian Company Number);
 - (iii) a unique identification number given to the payer by the government of a foreign country;
 - (iv) the identification number given to the payer by the ordering institution;
 - (v) if the payer is an individual—the payer's date of birth, the country of the payer's birth and the town, city or locality of the payer's birth; and
- (c) if the money is, or is to be, transferred from a single account held by the payer with the ordering institution in Australia—the account number for the account; and
- (d) if paragraph (c) does not apply—either:
 - (i) a unique reference number for the transfer instruction; or
 - (ii) if the money is, or is to be, transferred from a single account held by the payer with the ordering institution—the account number for the account.

IFTI-DRA submitted by money remitters

Reporting entities providing a designated remittance service (under items 31, 32 and 32A, table 1, section 6, [AML/CTF Act](#)) must enrol and register with AUSTRAC before providing remittance services to their customers. Remittance service providers that register with AUSTRAC are placed on the [AUSTRAC Remittance Sector Register](#).

To provide remittance services, remitters must be registered in one or more of the following capacities:

- remittance network provider: an organisation that operates a network of remittance affiliates by providing the systems and services that enables its affiliates to provide remittance services

- affiliate of remittance network provider: a business that provides remittance services to customers as part of a remittance network facilitated by a remittance network provider
- independent remittance dealer: a business that provides remittance services to customers using its own systems and processes, independent of a remittance network

Informal money and value remittance service providers registered and enrolled with AUSTRAC that provides designated remittance services in Australia must comply with the obligations imposed under the AML/CTF regime. The registration requirements are set out in Part 6 – Remittance Sector Register of the [AML/CTF Act](#) and Chapters 56, 57, 58, 59, 60, 61 and 70 of the [AML/CTF Rules](#).

Under a Designated Remittance Arrangement, an IFTI-DRA involves:

- an instruction accepted at or through a permanent establishment of a 'non-financier' in Australia where the person who receives the instruction is to make, or arranges to make, money or property available to the ultimate transferee at or through a permanent establishment of a person in a foreign country; or,
- an instruction accepted at or through a permanent establishment of a person in a foreign country where a 'non-financier' is to make, or arranges to make, money or property available to the ultimate transferee through a permanent establishment of the non-financier in Australia.

Reportable details for IFTI-DRA (items 3 and 4 in section 46) are set out in Chapter 17 of the AML/CTF Rules.

Enforcement

Reporting entities' AML/CTF programs are required to have appropriate systems and controls designed to ensure compliance with their reporting obligations. When reporting entities do not comply with their reporting requirements, AUSTRAC has a range of enforcement powers that may be employed. Enforcement powers are set out in Part 15 of the AML/CTF Act.²²

Statistics

In 2014-2015, AUSTRAC received a total of 91,423,681 IFTI reports. This is an increase of 5,602,257 (6%) on the previous year. In 2015-2016, AUSTRAC received 96,346,973 IFTI reports. This was approximately a 5% increase on the previous year and comparable to increases observed in recent years.

In 2016/17, AUSTRAC received a total of 107,944,005 IFTI reports.

The AUSTRAC guidance includes a chapter on reporting obligations which covers IFTIs:

<https://www.austrac.gov.au/business/how-comply-guidance-and-resources/reporting/money-sent-overseas-ifti>.

(b) Observations on the implementation of the article

Part 5 of the AML/CFT Act covers electronic funds transfers. Part 6 of the Act establishes a remittance sector register and Part 6A establishes a register for digital currency exchange businesses. Reporting entities providing a designated remittance service (under section 6, table 1, items 31, 32 and 32A of the AML/CTF Act), must enrol and register with AUSTRAC before providing remittance services to their customers. Reporting entities providing digital currency exchange services (under section 6, table 1, item 50A) must also enrol and register with AUSTRAC before providing digital currency exchange services. It is an offence for unregistered persons to provide remittance services, including hawalas.

²² The AML/CTF Amendment Act 2017 (commenced April 2018) enhanced AUSTRAC's enforcement powers with respect to remitters, allowing the AUSTRAC CEO to cancel a person's remittance registration if there are reasonable grounds to believe that the registered person no longer carries on a remittance business.

Paragraph 4 of article 14

4. In establishing a domestic regulatory regime and supervisory regime under the terms of this article, and without prejudice to any other article of this Convention, States Parties are called upon to use as a guideline the relevant initiatives of regional, interregional and multilateral organizations against money-laundering.

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

Australia is a member of a number of key regional, interregional and multilateral organizations to combat money laundering. Australia is a founding member of the FATF and a member and permanent co-chair of the APG on Money Laundering, Australia's FATF-style regional body. Australia is a founding member of the Egmont Group of Financial Intelligence Units and chairs the Egmont Group's Information Exchange Working Group. Australia is an observer member of the MENAFATF.

Australia's AML/CTF regime is based on the FATF's global AML/CTF standards. As a member of the FATF and the APG, Australia is periodically assessed against these standards. As outlined in the discussion on paragraph 3 of article 5 above, Australia's AML/CTF regime was assessed against the FATF's revised 2012 standards in 2015 in a joint Financial Action Task Force Asia/Pacific Group mutual evaluation (<http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>). The FATF website also provides a consolidated table that includes Australia's assessment ratings for both effectiveness and technical compliance against the 2012 FATF Recommendations and using the 2013 Assessment Methodology.

The FATF Plenary determined that Australia be placed in 'enhanced follow-up', and Australia has since reported to the FATF in June 2016 and June 2017 on progress to rectify identified deficiencies. Australia's third report is expected to be considered by the FATF Plenary in June 2018. The report will request re-ratings against a number of the FATF standards to reflect enhancements to Australia's AML/CTF regime.

Australia was one of the first countries in the world to be assessed against the FATF's new methodology. Australia's mutual evaluation report highlights a number of areas of strength in Australia's AML/CTF regime, particularly in relation to risk understanding, coordination, financial intelligence and international cooperation. The report also identifies areas where Australia's regime can be strengthened, and Australia is reporting back on those areas on a yearly basis to the FATF.

In conjunction with the statutory review report detailed above, Australia is undertaking a series of reforms to respond to the Australian mutual evaluation report. Further information on how Australia is implementing the recommendations of these reports is on the Home Affairs website: [https://www.homeaffairs.gov.au/help-and-support/how-to-engage-us/consultations/australias-anti-money-laundering-and-counter-terrorism-financing-\(aml-ctf\)-regime](https://www.homeaffairs.gov.au/help-and-support/how-to-engage-us/consultations/australias-anti-money-laundering-and-counter-terrorism-financing-(aml-ctf)-regime).

Australia's 2015 mutual evaluation report is available here: <http://www.fatf-gafi.org/media/fatf/documents/reports/mer4/Mutual-Evaluation-Report-Australia-2015.pdf>.

(b) Observations on the implementation of the article

Australia is a founding member both of the Financial Action Task Force (FATF) and the Asia/Pacific Group on Money Laundering (APG), a FATF-style regional body. Its implementation of the recommendations of the FATF was assessed in a joint APG/FATF mutual evaluation in 2015. AUSTRAC is a member of the Egmont Group of Financial Intelligence Units.

Paragraph 5 of article 14

5. States Parties shall endeavour to develop and promote global, regional, subregional and bilateral cooperation among judicial, law enforcement and financial regulatory authorities in order to combat money-laundering.

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

As at 1 August 2017, the AFP has 73 Liaison Officers in 28 countries. The AFP works cooperatively on a Police-to-Police basis with Australia's international law enforcement partners to combat money laundering. There are currently 35 cooperative agreements (of less than treaty status) in place to combat transnational crime, which include money laundering between the AFP and nation-states supranational bodies.

As noted above, Australia is an active member in a range of international forums that develop and promote international AML/CTF cooperation, including the FATF, the Egmont Group, and the APG.

Beyond this, Australian authorities, including AUSTRAC, provide active international collaboration on areas of related interest (noting the significant commonalities between measures to combat money laundering and those targeting the financing of terrorism):

Technical Assistance and Training

Australia provides assistance to countries in the region to combat transnational crimes, including money laundering, and to improve international cooperation. This includes assistance to strengthen legal frameworks and build the capacity of judicial officers, law enforcement officers, financial intelligence officers and prosecutors to combat money laundering and effectively engage in formal cooperation (including mutual legal assistance and extradition), and informal cooperation.

During 2016/17, AUSTRAC delivered four DFAT-funded technical assistance and training programmes to Indonesia, the Philippines and PNG.

The PPATK-AUSTRAC Partnership Programme (PAPP)

The PAPP-AUSTRAC is a jointly designed programme by AUSTRAC and the Indonesian Financial Transaction Reports and Analysis Centre (PPATK) that continues to build upon the existing AML/CTF partnership and capacity-building programme. The PAPP seeks to address areas of mutual priority, including assisting in the protection of Indonesia's financial sector from ML/TF abuse, sharing knowledge and expertise on international benchmarks as set by the FATF, and building capacity to combat serious ML/TF based crime in alignment with Indonesia's and PPATK's National AML/CTF Strategies.

Supported by DFAT's Government Partnership Fund, the PAPP continues to demonstrate and further strengthen AUSTRAC's relationship with PPATK and other key Indonesian agencies focused on greater collaboration in the AML/CTF space. The close partnership between AUSTRAC and PPATK has further allowed for strong growth in operational activities beyond the exchange of financial intelligence.

Detecting and disrupting AML/CTF through the alternative remittance sector and cash couriers (IndoARCC) programme

The programme was designed to increase awareness and knowledge of the international best practice standards (FATF and World Customs Organisation) while highlighting how Indonesian law and operational policy and processes can best support the standards. The programme was able to develop understanding among key

Indonesian stakeholders of the role and methods of cross-border cash couriers in financing serious organised crimes.

The programme delivered three final workshops in 2016 and was completed on 31 December 2016.

In recognition of AUSTRAC's engagement with Indonesia and PPATK, further funding was approved in 2017/18 under the Australia-Indonesia Partnership for Justice and Security Programme for an Australia-Indonesia Analyst Exchange Programme (AIAEP). The AIAEP will build on the Analyst Exchange Programmes delivered under the PAPP between 2013 and 2016. The AIAEP will continue to bring financial intelligence analysts from AUSTRAC and PPATK together to work on transnational crime types of mutual priority, expanding the programme to include law enforcement and prosecutorial perspectives on financial crime and AML/CTF. The programme encourages capacity building for both agencies, develops relationships between analysts, and increases the level of actionable financial intelligence shared between AUSTRAC and PPATK.

Philippines: The Anti-Money Laundering Council-AUSTRAC Partnership Program 2017.

AUSTRAC commenced a six-month tailored programme of technical assistance to the Anti-Money Laundering Council of the Philippines (AMLC), which acts as the Philippines' FIU. This partnership programme will enhance AML/CTF capabilities of the AMLC and comprises three projects that will focus on:

- Information Technology (IT) systems capability;
- analyst intelligence exchange; and
- preparatory work, which will assist with the Philippines FATF Mutual Evaluation assessment process (scheduled for late 2018).

The Philippines is classified as a high strategic priority and high risk in relation to terrorism finance. Information exchange has increased since 2014, reflecting an increased engagement and collaboration with the FIU and other partner agencies in the Philippines to combating organised crime and AML/CTF matters.

The current capacity-building initiatives build on Australia's previous engagement in the Philippines and support priority AML/CTF reform, policy development, implementation and institutional development in the Philippines. The second phase of planning has commenced for a partnership programme out to 2019.

Papua New Guinea: 'Combating Corruption' programme (PNGCC programme) - Strengthening the financial system against money laundering and recovering proceeds of crime in Papua New Guinea.

The PNGCC programme is aimed at strengthening financial systems against money laundering, corrupt activity and terrorist financing and assisting PNG in recovering proceeds of crime.

In July 2016, AUSTRAC held a workshop to assist PNG's FIU, the Financial Analysis and Supervision Unit (FASU), to review and update its Supervision Policy and Supervision Strategy. AUSTRAC conducted tailored mentoring on international best practices for supervision techniques such as risk assessing PNG's AML/CTF scheme so FASU can better direct its limited supervision resources and assisted FASU in developing three campaign assessments.

In August 2016, AUSTRAC held a workshop with FASU to discuss FASU's database collection, processing and system requirements, and generated a report that outlines FASU's IT roadmap - needed to support its operations under the new AML/CTF legislation. In addition, AUSTRAC discussed the Egmont Group, steps required by FASU to gain Egmont membership, and shared its experience in international exchanges.

In November 2016, AUSTRAC co-hosted a workshop with the AGD, for FASU and DJAG, on international best practices for AML/CTF programmes and suspicious matter reports. AUSTRAC participated in a number of stakeholder meetings at the Australian High Commission. In addition, on 21 November 2016, AUSTRAC disseminated the first-ever intelligence analysis to FASU.

In February 2017, AUSTRAC attended the AGD-led PNG foundational drafting workshop in Canberra. This workshop brought together 11 delegates from PNG's FASU, DJAG, the Department of the Prime Minister and

the National Executive Council, and the Investments Promotions Authority. The workshop focused on teaching core drafting skills for subsidiary instruments that support PNG's AML/CTF scheme, such as compliance rules and guidelines.

In March 2017, AUSTRAC was instrumental in progressing the Australian High Commission's support of FASU's IT roadmap by assisting in securing funding for the capital expenditure required to update FASU's IT infrastructure that is needed to support its operations under the new AML/CTF legislation.

Other

On the request of international and domestic partners, AUSTRAC has also shared experiences with:

- Sri Lanka's FIU
- Bangladeshi delegation
- Pakistan - mutual evaluation training
- Malaysia - analytics training

Counter-Terrorism Financing Summits

The Counter-Terrorism Financing (CTF) Summits, the first in Sydney in 2015 and second in Bali last year, have been central to promoting cooperation and collaboration amongst FIUs in the Asia-Pacific region.

The CTF Summit develops regional solutions to terrorism financing issues and risks through financial intelligence sharing by bringing together heads of FIUs, senior representatives from regulatory, law enforcement, national security, policy and ministries, as well as industry participants, academics and think-tanks. To date, they have been attended by 25 countries.

The first Regional Risk Assessment of Terrorism Financing (RRATF) was launched in August 2016 at the Bali CTF Summit. The RRATF was completed by members of FIUs in Australia, Indonesia, Thailand, Philippines, Singapore and Malaysia. Its release highlights the advancement of regional coordination between government authorities in an effort to improve analysis and dissemination of terrorist financing information.

Australia also funds development cooperation initiatives to develop and promote global, regional, subregional and bilateral cooperation amongst judicial, law enforcement and financial regulatory authorities for the purposes of combating corruption. These initiatives regularly undertake activities aimed at strengthening anti-money laundering legislation and practice. The initiatives include:

- the UNODC's *Asia Pacific Joint Action towards a Global Regime against Corruption* programme, which assists States Parties in Southeast Asia and South Asia to strengthen the operation of the Convention, including its anti-money laundering provisions;
- the *Stolen Asset Recovery Initiative*, a joint initiative of the World Bank and the UNODC, which works with developing countries and financial centres to prevent the laundering of the proceeds of corruption and to facilitate the timely return of stolen assets;
- the UN Development Programme's *Anti-Corruption for Peaceful and Inclusive Societies* project, which is facilitating coalitions spanning government, civil society and the private sector to prevent corruption and money laundering; and
- the *UN Pacific Regional Anti-Corruption* project, a joint initiative of the UNODC and UN Development Programme, which supports Pacific Island countries to ratify and implement the Convention. This has included supporting and facilitating secondments and greater knowledge-sharing between FIUs in the Pacific.

(b) Observations on the implementation of the article

Australia is an active member in a range of international fora that develop and promote international AML/CTF cooperation, including the FATF, the Egmont Group, and the APG.

Beyond this, Australian authorities, including AUSTRAC and the AFP, provide active international collaboration on areas of related interest. Australia provides assistance to countries in the region to combat transnational crimes, including money laundering, and to improve international cooperation. During 2016/17, AUSTRAC delivered four technical assistance and training programmes to Indonesia, the Philippines and PNG. Australia also funds development cooperation initiatives, including the Stolen Asset Recovery Initiative, a joint initiative of the World Bank and the UNODC, and the UN Pacific Regional Anti-Corruption project, a joint initiative of the UNODC and UN Development Programme.

(c) Successes and good practices

Australia's wide range of assistance and training to neighbouring countries and international initiatives was highlighted as good practice.

Chapter V. Asset recovery

Article 51. General provision

1. The return of assets pursuant to this chapter is a fundamental principle of this Convention, and States Parties shall afford one another the widest measure of cooperation and assistance in this regard.

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

In addition to the information provided by Australia in relation to articles 14, 52 and 58, Australia has a comprehensive and mature legislative and policy framework for the return of assets. The *Proceeds of Crime Act 2002* (POC Act), the *Mutual Assistance in Criminal Matters Act 1987* (MACMA), and the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (AML/CTF Act) together provide a well-established regime for identifying, restraining, forfeiting, and returning assets derived-from, or used as an instrument in, the commission of an offence. Action can be taken by either registering a foreign restraining order or confiscation order pursuant to the MACMA or through undertaking domestic action under the POC Act.

In particular, Division 2 of Part VI of the MACMA provides the legislative framework for responding to requests from foreign countries involving the enforcement of foreign orders.

Australia is also a founding member of the Asset Recovery Interagency Network Asia-Pacific (ARIN-AP), and a member of the Steering Group of ARIN-AP. ARIN-AP is a regional network of law enforcement and legal practitioners that facilitates the exchange of operational and preliminary asset tracing information in advance and support of more formal processes, such as mutual legal assistance. Australia has also participated as an observer to the CARIN network for over a decade.

POC Act (Part 4-3) has established a Confiscated Assets Account. Proceeds from the sale of confiscated assets are deposited into the Account. For more details, please see the information provided on paragraph 1 of article 57 below.

(b) Observations on the implementation of the article

Australia has a comprehensive legislative and policy framework for the return of assets. The POCA, the MACMA, and the AML/CTF Act provide a legal basis for identifying, restraining, forfeiting, and returning assets derived from the commission of an offence. A Confiscated Assets Account (or ‘Confiscated Assets Fund’) has been established by the POC Act (Part 4-3).

In the framework of the G20, Australia has published a Step-by-Step Guide for Asset Recovery.

Article 52. Prevention and detection of transfers of proceeds of crime

Paragraph 1 of article 52

1. Without prejudice to article 14 of this Convention, each State Party shall take such measures as may be necessary, in accordance with its domestic law, to require financial institutions within its jurisdiction to verify the identity of customers, to take reasonable steps to determine the identity of beneficial owners of funds deposited into high-value accounts and to conduct enhanced scrutiny of accounts sought or maintained by or on behalf of individuals who are, or have been, entrusted with prominent public functions and their family members and close associates. Such enhanced scrutiny shall be reasonably designed to detect suspicious transactions for the purpose of reporting to competent authorities and should not be so construed as to discourage or prohibit financial institutions from doing business with any legitimate customer.

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

Customer due diligence obligations

As outlined in Australia's response to article 14, Australia has a robust AML/CTF regime. All reporting entities regulated under the AML/CTF Act are required in 'Part B' of their AML/CTF programmes to establish and document their customer due diligence procedures. The primary purpose of Part B is to ensure that the reporting entity knows its customers and understands its customers' financial activities. A reporting entity must be reasonably satisfied that:

- an individual customer is who they claim to be
- for a non-individual customer, the customer exists, and their beneficial ownership details are known.

By knowing its customers, a reporting entity should be better able to identify, mitigate and manage ML/TF risks in the conduct of their financial transactions, particularly where the activity or transactions are unusual or uncharacteristic.

Australia's customer due diligence obligations require that a reporting entity:

- provide for the collection of certain minimum 'know your customer' information - for example, documents, data or other information obtained from a reliable and independent source
- provide for the collection of certain minimum information about beneficial ownership and control of customers
- identify whether a customer is a PEP (politically exposed person)
- include certain requirements in relation to customers who are PEPs (or an associate of a PEP), or who have beneficial owners that are PEPs
- take steps to establish the source of funds and source of wealth used during the business relationship or transaction
- obtaining information on the purpose and intended nature of the business relationship
- include appropriate risk-based systems and controls to determine whether further customer information should be collected
- provide for the verification of customer information
- include appropriate risk-based systems and controls to determine whether further customer information collected from the customer should be verified, and
- provide for the collection of information about the agent of a customer, and include appropriate risk-based systems and controls to determine whether to verify information about the agent.

Part 2 of the AML/CTF Act sets out the broad customer due diligence obligations placed on reporting entities, and Chapters 4, 6 and 15 of the AML/CTF Rules provide more detailed requirements. Further information on the customer due diligence requirements is also available on AUSTRAC's website: <https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/customer-identification-and-verification/customer-identification-and-due-diligence-overview>.

Section 38 of the AML/CTF Act allows for AML/CTF Rules to be made to permit reliance on CDD conducted by third parties. Chapter 7 of the AML/CTF Rules permit reliance in limited circumstances.

In addition, Part 7 of the AML/CTF Act contains the requirement that reporting entities must develop and maintain a written AML/CTF program, while the AML/CTF Rules set out the primary components, which must be included within an AML/CTF program. The requirement for reporting entities to have an AML/CTF program for their business is a cornerstone of Australia's AML/CTF regime. The AML/CTF program establishes the operational framework for a reporting entity to meet its compliance obligations under the AML/CTF Act and sets out how reporting entities manage the risk of their products or services being misused for ML/TF. AML/CTF programs comprise two parts:

- Part A covers how a reporting entity identifies, manages and reduces the ML/TF risks it faces, and
- Part B covers the reporting entity's customer due diligence procedures.

As part of Part A, reporting entities must conduct a ML/TF risk assessment to measure the level of risk (for example, high, medium or low risk) associated with providing each designated service. This risk level determines the risk-based customer identification procedures to be included in Part B of the AML/CTF program.

Part A of the AML/CTF program must include ongoing customer due diligence (OCDD) procedures, which provide for the ongoing monitoring of existing customers to identify, mitigate and manage any ML/TF risks. These include a transaction monitoring program and an enhanced customer due diligence (ECDD) program. A reporting entity's decision to apply the OCDD process to a particular customer will depend on the customer's level of assessed ML/TF risk.

A transaction monitoring program:

- must include appropriate risk-based systems and controls to monitor the transactions of customers
- must identify transactions that are considered to be suspicious
- should be capable of identifying complex, unusually large transactions and unusual patterns of transactions which have no apparent economic or visible lawful purpose.

A reporting entity must apply its ECDD program when:

- (1) it determines under its risk-based systems and controls that the ML/TF risk is high (the AML/CTF Rules ask reporting entities to consider whether any beneficial owner of a customer, including domestic or international organisation politically exposed persons, should be considered high risk); or
- (2) a designated service is being provided to a customer who is or who has a beneficial owner who is, a foreign politically exposed person; or
- (3) an obligation has arisen to submit a suspicious matter report to AUSTRAC; or
- (4) the reporting entity is entering into or proposing to enter into a transaction, and a party to the transaction is physically present in, or is a corporation incorporated in, a prescribed foreign country.

The AML/CTF Regulations may prohibit or regulate the entering into transactions with residents of prescribed foreign countries.

Politically exposed person obligations

A reporting entity must have risk-based procedures to identify whether any individual customer or beneficial owner is a politically exposed person (PEP), or an associate of a PEP. The reporting entity must undertake this identification process before it provides the customer with a designated service or as soon as practicable afterwards (refer to Part 4.13 of the AML/CTF Rules). Additional obligations are set out under Enhanced customer due diligence provisions in Chapter 15 of the AML/CTF Rules.

Chapter 1 of the AML/CTF Rules defines three categories of PEPs:

- Domestic PEPs are individuals who hold a prominent public position or function in an Australian government body.
- Foreign PEPs are individuals who hold a prominent public position or function in a government body of a foreign country.
- International organisation PEPs are individuals who hold a prominent public position or function in an international organisation.

How a reporting entity complies with the obligation to identify PEPs is a matter for the reporting entity. PEP identification procedures examples may include:

- Checking the customer's background through an internet search
- Consulting reports and databases released by various organisations that specialise in analysing corruption risks.
- If the reporting entity needs to conduct more thorough checks, or if there is a high likelihood of a reporting entity having customers who are PEPs, the reporting entity may find that subscribing to a specialist PEP database is an appropriate risk mitigation tool.

The AML/CTF Rules (4.13) have different requirements for:

- medium or lower ML/TF risk domestic and international organisation PEPs; and
- all foreign PEPs, and high ML/TF risk domestic and international organisation PEPs.

For domestic PEPs or international organisation PEPs that are beneficial owners of a customer, a reporting entity must carry out the customer identification and verification procedures which apply to individuals.

Generally, domestic or international organisation PEPs may be considered to be of lower ML/TF risk, but this cannot be assumed - reporting entities must use their risk-based procedures to decide whether a PEP is of higher ML/TF risk.

For foreign PEPs or high ML/TF risk domestic PEPs who are beneficial owners, a reporting entity must carry out the customer identification and verification procedures which apply to individuals. In addition, a reporting entity is also required to:

- obtain senior management approval before establishing or continuing a business relationship with the customer and before providing, or continuing to provide, a designated service to the customer
 - take reasonable measures to establish the customer's source of wealth and source of funds (reasonable measures means, appropriate measures which are commensurate with the ML/TF risks), and
- comply with enhanced customer due diligence requirements under Chapter 15 of the AML/CTF Rules.

Suspicious matter reporting obligations

Under Part 3, Division 2 of the AML/CTF Act, reporting entities have an obligation to make a suspicious matter report (SMR) to AUSTRAC where they have a reasonable suspicion that:

- a person (or their agent) is not the person they claim to be, or

- information the reporting entity has may be:
 - relevant to investigate or prosecute a person for an evasion (or attempted evasion) of a tax law, or
 - an offence against a Commonwealth, state or territory law, or
 - of assistance in enforcing the POC Act (or regulations under that Act), or
 - a state or territory law that corresponds to that Act or its regulations
- providing a designated service may be:
 - preparatory to committing an offence related to money laundering or terrorism financing, or
 - relevant to the investigation or prosecution of a person for an offence related to money laundering or terrorism financing.

There is no threshold for a suspicious transaction – further, it is not required that a transaction actually have been completed. Some incomplete or proposed transactions may be considered unusual. As Australia adopts an “all crimes” approach, it is not necessary to suspect a particular offence in order to form a suspicion.

Under section 41 of the AML/CTF Act, a reporting entity must submit a SMR to AUSTRAC if:

- the reporting entity commences to provide, or proposes to provide, a designated service to a person, or
- a person requests the reporting entity to provide a designated service (of a kind ordinarily provided by the reporting entity), or
- a person inquires of the reporting entity whether it would be willing to provide a designated service (of a kind ordinarily provided by the reporting entity)

AND

the reporting entity forms a suspicion on reasonable grounds that:

- a person (or their agent) is not the person they claim to be, or
- information the reporting entity has may be:
 - relevant to investigate or prosecute a person for
 - an evasion (or attempted evasion) of a tax law, or
 - an offence against a Commonwealth, state or territory law, or
 - of assistance in enforcing the Proceeds of Crime Act 2002 (or regulations under that Act), or
 - a state or territory law that corresponds to that Act or its regulations, or
- providing a designated service may be:
 - preparatory to committing an offence related to money laundering or terrorism financing, or
 - relevant to the investigation or prosecution of a person for an offence related to money laundering or terrorism financing.

AUSTRAC undertakes compliance assessments of reporting entities’ implementation of the customer due diligence obligations and transaction reporting obligations set out in the AML/CTF Act and Rules.

In conducting compliance assessments, AUSTRAC may undertake the following supervisory activities: desk reviews, onsite assessments, ad-hoc meetings with reporting entities to address specific issues face-to-face and campaign/thematic reviews.

In 2016, AUSTRAC undertook a campaign to assess reporting entities' compliance with the customer due diligence obligations, including the PEP requirements in the AML/CTF Rules. These compliance assessments identified shortcomings in the reporting processes used to identify PEPs, and the detection and reporting to AUSTRAC of suspicious matters. AUSTRAC sampled the customer identification records of several reporting entities and assessed the treatment of high-risk customers and PEPs. AUSTRAC's analysis of these records did not identify any suspicion of bribery. The findings from this campaign have been used to further educate reporting entities about their customer due diligence (as they relate to beneficial ownership and control and PEPs) and reporting obligations. AUSTRAC can confirm that the major banks/financial institutions have developed policies and procedures to address the requirements that came into effect from 1 June 2014.

Reporting entities are also required to complete Annual Compliance Reports, which include a self-assessment by reporting entities of their compliance with their AML/CTF obligations. Of reporting entities that have a higher PEP risk (that is, the domestic and foreign banks, credit union & building society sectors), 99% of reporting entities from these sectors have submitted their 2016 Annual Compliance Report. The proportion of entities that have responded indicating they have a fully implemented AML/CTF program in place is currently at 100%. In addition to such self-assessments, AUSTRAC has ongoing interactions with the major domestic and foreign banks, which include the monitoring of their customer due diligence obligations.

The typology and case study reports published on the AUSTRAC website detail a number of examples where AUSTRAC financial intelligence has led to successful actions by law enforcement and other government agencies.

(b) Observations on the implementation of the article

As indicated above, provisions governing verification of the identity of customers and beneficial owners are contained in Part 2 of the AML/CTF Act (sections 28-35) and Chapter 4 of the AML/CTF Rules. There is no register of beneficial owners. Non-financial businesses and professions other than casinos and bullion dealers are not subject to AML/CTF obligations.

PEPs are defined in Part 1.2 of the AML/CTF Rules. The definition includes domestic PEPs. Under Part 4.13 of the AML/CTF Rules, PEPs are subject to special measures and enhanced due diligence. However, Part 4.14 sets out certain exemptions relating to the identification of beneficial owners and PEPs.

The major reporting entities – including the biggest domestic banks – have an informed understanding of their ML/TF risks and AML/CTF obligations.

It is recommended that Australia:

- **Amend the AML/CTF Act to ensure that designated non-financial businesses and professions beyond casinos and bullion dealers, such as real estate agents, accountants and lawyers are subject to AML/CTF obligations in line with FATF standards;**
- **Ensure that information on the beneficial owners of legal persons and legal arrangements is maintained and accessible to competent authorities in a timely manner;**
- **Review the application of the exemptions relating to the identification of beneficial owners and PEPs in Part 4.14 of the AML/CTF Rules at appropriate intervals, in order to ensure that they do not create loopholes for the AML/CTF regime.**

Subparagraph 2 (a) of article 52

2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

(a) Issue advisories regarding the types of natural or legal person to whose accounts financial institutions within its jurisdiction will be expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts; and

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

The AML/CTF Act provides the foundation of Australia's commitment to meet global standards for combating money laundering and terrorism financing developed by the FATF.

Guidance

AUSTRAC published a range of advisories on the application of the AML/CTF Act, including AUSTRAC guidance, which includes detailing the types of natural or legal persons to whose accounts financial institutions are expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts. This includes specific guidance for reporting entities on implementing their obligations with respect to PEPs, which was supplemented by additional material on which persons may be considered PEPs. Guidance is available on the AUSTRAC website at <https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources>.

In addition to the above, AUSTRAC regularly releases guidance on a range of topics to assist reporting entities in addressing, mitigating and managing their ML/TF risk.

In July 2015, AUSTRAC published a Strategic Brief titled "Politically Exposed Persons, Corruption and Bribery" to provide information about money laundering methods, vulnerabilities and indicators associated with PEPs and laundering the proceeds of corruption, including foreign bribery. This report is available at: <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/politically-exposed-persons-corruption-and-foreign-bribery-strategic-analysis-brief>.

To support the broader understanding and education on corruption, AUSTRAC created a dedicated page on its website, which directs businesses to Australian and international resources. <http://www.austrac.gov.au/businesses/important-information-industry/corruption-and-bribery>.

In 2015-2016, there were 910 unique views of that page. As a comparison, in 2016-2017, there were 2,239 unique views (an increase of 146%). This increase reflects AUSTRAC's efforts during this period to collaborate and engage with industry and the increased exposure of AUSTRAC following public releases of risk assessments, case studies and the high-profile enforcement activity.

Risk assessments

AUSTRAC also produces a range of ML/TF risk assessments to help reporting entities to develop better awareness of their ML/TF risks. In October 2016, AUSTRAC released its Superannuation Sector ML/TF Risk assessment, which aims to develop awareness in the sector of ML/TF risks and help harden superannuation funds regulated by the Australian Prudential Regulation Authority against criminal activity. The risk assessment outlined one example where the proceeds of corruption had been deposited into a member account. The risk assessment involved significant industry engagement and outreach. For further information: <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/australias-superannuation-sector-risk-assessment-2016>.

In December 2016, AUSTRAC published a risk assessment on the financial planning sector. The risk assessment provides sector-specific information to the financial planning industry on ML/TF risks at the national level. The risk assessment detailed PEP requirements and stated that financial planners are required under the AML/CTF Rules to screen their customer base for domestic and foreign PEPs. Only a very small number of suspicious matter reports submitted by financial planners in the sample period of the risk assessment related to PEPs. It is considered that this may be because many financial planners do not deal with customers who are classified as PEPs; however, feedback to AUSTRAC from this industry sector indicated that many financial planners were not fully aware of their obligations to detect PEPs and therefore may unknowingly have PEP customers. This risk assessment also aims to help financial planners identify and monitor risks that may be applicable to their individual businesses, and to subsequently report suspicious matters to AUSTRAC. For further information: <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/australias-financial-planning-sector-risk-assessment-2016>.

In July 2017, AUSTRAC released a ML/TF risk assessment on Australia's securities and derivatives sectors which describes the measures some reporting entities use to mitigate the risk posed by PEP customers. For further information, see: <https://www.austrac.gov.au/business/how-comply-guidance-and-resources/guidance-resources/australias-securities-and-derivatives-sector-risk-assessment-2017>.

AUSTRAC has completed a ML/TF risk assessment on "Remittance Corridors - Australia to Pacific Island Countries". The primary purpose of the risk assessment is to provide information on the ML/TF risks associated with remittances sent through remittance providers from Australia to Pacific Island countries. The assessment also aims to assist remittance providers and banks to identify transaction types and scenarios in the corridors between Australia and the Pacific, which are lower risk.

This risk assessment has been developed as a feedback resource. AUSTRAC expects that remittance providers and banks will consider this risk assessment when undertaking their ML/TF risk assessments, noting the requirement for reporting entities to identify, assess and understand their own ML/TF risks. It is also expected that reporting entities will use this assessment to refine their own compliance controls and mitigation strategies and subsequently report suspicious matters to AUSTRAC. Reporting entities will be able to apply information in this assessment in a manner that is consistent with the nature, size and complexity of their businesses, and the ML/TF risk posed by the designated services they offer and their customers. Future AUSTRAC compliance activities will assess how reporting entities in the sector have responded to the information provided as part of the assessment.

Case studies

AUSTRAC also produces case studies based on information that reporting entities and foreign FIUs have provided. Publishing case studies, particularly those based on reporting entities' information, is viewed as an important tool in demonstrating how AUSTRAC, law enforcement agencies, taxation and corporate regulators value this information. These resources provide information to assist businesses in embedding red flags and indicators within their own transaction monitoring and due diligence processes to surface potential suspicious activity for reporting to AUSTRAC.

Case studies are available on the AUSTRAC website. See below for one such case example.

Case Example 1: Banking on a bribe

An investigation commenced after law enforcement received information from a major bank relating to the acceptance of bribes by two of its employees. The investigation revealed the employees had accepted bribes totalling approximately USD2.2 million over seven months from an IT company based in the United States for preferment in relation to a contract between the bank and the company.

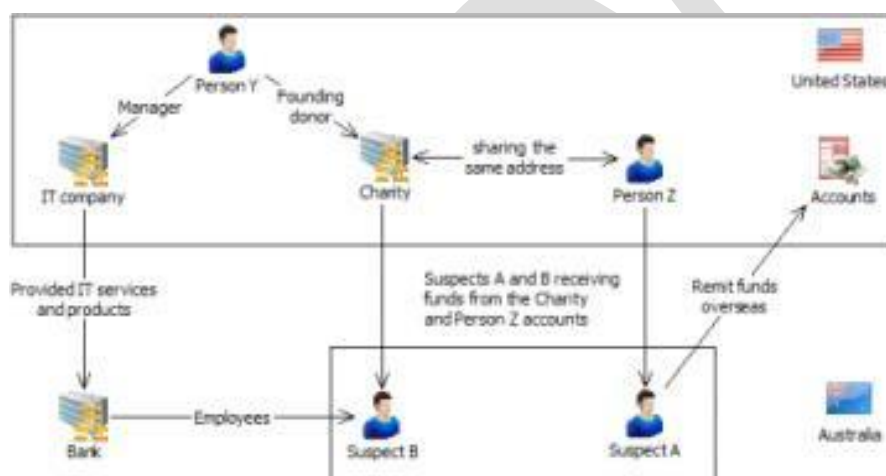
Of the two suspects, one was charged and received a jail sentence of three and a half years, and the other suspect's case is currently before the courts after a not guilty plea.

Investigation outline: The investigation commenced after law enforcement received information from a major Australian bank about two of its employees (suspect A, a United States citizen and suspect B, a New Zealand citizen) accepting bribes. As a result of the internal investigation, the bank uncovered that its employees, both senior IT managers, accepted bribes totalling approximately USD2.2 million in exchange for preferment in relation to a United States-based IT company contracted to provide services and products to the bank.

The employees remained in contact with the United States-based manager of the IT company (person Y) throughout their tenure and in the lead up to receiving bribes. Shortly after the IT company was sold to a publicly listed company in the United States, the suspects received payments from two United States-based accounts. Law enforcement alleged the contract with the bank contributed significantly to the IT company's sale value.

The payments were made from the account of a United States-based charitable organisation of which person Y was also a founding donor, and a United States-based entity sharing the same address as the charitable organisation (person Z). The charity was created for the purpose of transferring funds to the suspects.

Figure 1: The acceptance of bribes by two bank employees.



When questioned by the bank in relation to payments received from the charity, the suspects stated the funds were received for legitimate services provided, with suspect B even producing fake invoices to substantiate the claim. Their employment was terminated after the bank's investigation revealed the suspects' claims were false.

Industry contribution: A suspicious matter report submitted by the bank contained details of the internal investigation conducted on two of its employees and revealed:

- In a seven-month period, approximately USD2.2 million was received by the suspects from the charity and/or person Z's personal account.
- Suspect A received a total of approximately USD630,000 from the charity and/or person Z's personal account.
- Suspect B received a total of approximately USD1.8 million from the charity and/or person Z's personal account.
- Suspect A, assisted by person Z, fabricated invoices to support the false claim that the funds were received for the provision of legitimate services provided by the suspects to the charity.

AUSTRAC contribution: AUSTRAC submitted a financial analysis report to law enforcement which:

- Confirmed suspect A received two transfers, and suspect B received three transfers, valued at approximately USD170,000 and USD642,000, respectively, from the charity and/or person Z's personal account.

- Revealed suspect A sent approximately USD122,000 to the United States to a personal account, and to accounts appearing to be of family members, after receiving payments from the charity.
- Identified further persons of interest to law enforcement, including Australia-based recipients of funds from the United States-based IT company.

Outcome: Both suspects were charged with the offence of receiving a corrupt commission or reward under section 249B(1)(b) of the *Crimes Act 1900* (NSW). Suspect A received a three and a half year sentence with a non-parole period of two years and three months, and suspect B's case is currently before the courts after a not guilty plea.

(b) Observations on the implementation of the article

AUSTRAC published a range of advisories on the application of the AML/CTF Act, including AUSTRAC guidance, which includes detailing the types of natural or legal persons to whose accounts financial institutions are expected to apply enhanced scrutiny, the types of accounts and transactions to which to pay particular attention and appropriate account-opening, maintenance and record-keeping measures to take concerning such accounts.

Subparagraph 2 (b) of article 52

2. In order to facilitate implementation of the measures provided for in paragraph 1 of this article, each State Party, in accordance with its domestic law and inspired by relevant initiatives of regional, interregional and multilateral organizations against money-laundering, shall:

...

(b) Where appropriate, notify financial institutions within its jurisdiction, at the request of another State Party or on its own initiative, of the identity of particular natural or legal persons to whose accounts such institutions will be expected to apply enhanced scrutiny, in addition to those whom the financial institutions may otherwise identify.

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

AUSTRAC advises reporting entities to take statements made by the FATF relating to high-risk and non-cooperative jurisdictions into account when considering whether a transaction should be reported to AUSTRAC as a suspicious matter or a suspect transaction. AUSTRAC as an FIU disseminates intelligence to relevant 'partner agencies', including law enforcement agencies. These partner agencies also conduct their own investigations using AUSTRAC information. Partner agencies, in particular, AFP and State Police, may engage directly with financial institutions on high-risk persons.

AUSTRAC also disseminates reports for limited distribution to relevant reporting entities where high ML/TF risk activity is prevalent. For example, the use of remittance by money mules.

AUSTRAC engages on a regular basis with the banking sector to provide guidance on priority matters in the AML/CTF space, which includes the importance of detecting and reporting suspicious matters pertaining to corruption. This interaction is supplemented with AUSTRAC material, such as typology reports, typological trends, assessment documents of ML/TF risks in certain industry sectors, and case studies available on the AUSTRAC website.

AUSTRAC has maintained ongoing engagement with reporting entities on the quality of suspicious matter reports as part of the compliance assessment process. AUSTRAC's suspicious matter report monitoring team provides feedback on reporting at quarterly AUSTRAC Inter-Bank Fora attended by major banks in addition to meeting with individual banks to brief bank personnel on suspicious matter report matters at regular intervals.

In August 2016, AUSTRAC developed an enhanced list of those entities named in the Mossack Fonseca leaked files (i.e. the Panama Papers) and engaged with six major financial institutions for the purposes of generating enhanced intelligence resulting in the submission of 57 related suspicious matter reports to AUSTRAC by these reporting entities.

As a founding member of the Egmont Group, AUSTRAC also exchanges information on high-risk persons with other FIUs. To boost Australia's efforts to combat money laundering, in 2017, AUSTRAC launched the Fintel Alliance - a public-private collaborative platform. In the Alliance, public sector agencies work with private sector partners to share financial intelligence in real-time to:

- help private sector partners more easily identify and report suspicious transactions
- help law enforcement partners more quickly arrest and prosecute criminals, and
- work with academia to build knowledge and gather insight.

Since the establishment of the Fintel Alliance (to July 2017), the team has issued 28 notices seeking information from all partners to support intelligence development.

Foreign bribery and corruption work has been recently led by Fintel Alliance, specifically in relation to the Panama Papers (outlined above). An early success story was illustrated by a Fintel Alliance industry partner sharing their own methodology for detecting potential off-shore service providers engaging in activities similar to those outlined in the Panama Papers. This methodology and entities of interest were disseminated to a government partner for further assessment. The ATO has indicated an interest in exploring off-shore centres in our region utilising these methodologies and the opportunities presented through the Fintel Alliance.

Further projects are being added to the Operations Hub and can be brought forward for consideration by all members. As the Fintel Alliance matures, there will be opportunity to investigate a broader spectrum of suspicious criminal behaviour and proceeds of crime, including foreign bribery and corruption.

(b) Observations on the implementation of the article

AUSTRAC advises reporting entities to take statements made by the FATF relating to high-risk and non-cooperative jurisdictions into account when considering whether a transaction should be reported to AUSTRAC as a suspicious matter or a suspect transaction. AUSTRAC as an FIU disseminates intelligence to relevant 'partner agencies', including law enforcement agencies.

In addition to ongoing engagement with reporting entities and regular exchanges of information on high-risk persons with other FIUs, AUSTRAC, in 2016, developed an enhanced list of entities named in the Panama Papers and engaged with financial institutions to generate enhanced intelligence.

In practice, obliged entities can consult information in guidance communicated by AUSTRAC, and lists communicated by DFAT and commercial databases to identify PEPs and individuals on UN sanctions lists.

Paragraph 3 of article 52

3. In the context of paragraph 2 (a) of this article, each State Party shall implement measures to ensure that its financial institutions maintain adequate records, over an appropriate period of time, of accounts and transactions involving the persons mentioned in paragraph 1 of this article, which

should, as a minimum, contain information relating to the identity of the customer as well as, as far as possible, of the beneficial owner.

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

Under Part 10, Division 3 of the AML/CTF Act, a reporting entity conducting a customer identification procedure must:

- make a record of the procedure, and
make a record of the information obtained in carrying out the procedure.

Depending on the nature of the service being provided, this could include information regarding the identity of the customer and their beneficial owner where appropriate.

Records of customer identification procedures must be kept for the life of the customer relationship and for seven years after the reporting entity ceases to provide designated services to the customer (section 113 AML/CTF Act). If a reporting entity provides two designated services to a customer, the seven-year retention period does not begin until the entity has ceased providing the final of the two designated services.

Further information on the record-keeping requirements are also available on AUSTRAC's website: <https://www.austrac.gov.au/business/how-comply-and-report-guidance-and-resources/record-keeping>

During AUSTRAC's compliance assessments for the financial years 2015-2016 and 2016-2017, AUSTRAC made four findings relating to record-keeping obligations involving the major reporters cohort; two relating to making or retaining records of identification procedures and two on retention of records of correspondent banking due diligence assessments. AUSTRAC is working closely with these entities to rectify any deficiencies.

(b) Observations on the implementation of the article

Records of customer identification procedures must be kept for the life of the customer relationship and for seven years after the reporting entity ceases to provide designated services to the customer (section 113 AML/CTF Act).

Paragraph 4 of article 52

4. With the aim of preventing and detecting transfers of proceeds of offences established in accordance with this Convention, each State Party shall implement appropriate and effective measures to prevent, with the help of its regulatory and oversight bodies, the establishment of banks that have no physical presence and that are not affiliated with a regulated financial group. Moreover, States Parties may consider requiring their financial institutions to refuse to enter into or continue a correspondent banking relationship with such institutions and to guard against establishing relations with foreign financial institutions that permit their accounts to be used by banks that have no physical presence and that are not affiliated with a regulated financial group.

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

Shell banks are defined in section 15 of the AML/CTF Act. Section 95 of the AML/CTF Act prohibits financial institutions from entering into a correspondent banking relationship with a shell bank, or with another financial institution that has a correspondent banking relationship with a shell bank. Section 96 of the Act requires financial institutions to terminate such business relationships within 20 days after becoming aware that the correspondent institution is a shell bank or within the period of time determined by AUSTRAC. Civil penalties apply to breaches of these provisions. Under section 175 of the AML/CTF Act, the maximum civil penalty available is:

- for a body corporate -100,000 penalty units (i.e. AUD18 million), and
- for a person other than a body corporate - 20,000 penalty units (i.e. AUD3.6 million).

No correspondent banking relationships with shell banks have been identified as part of AUSTRAC's supervision of the above obligations, so no enforcement action has been taken against banks. Nevertheless, in September 2016, AUSTRAC undertook a correspondent banking campaign that involved 41 reporting entities who maintained correspondent banking relationships from 1 January 2015 to 31 December 2015. The purpose of the campaign was to:

- provide information to reporting entities to help them better understand the nature and extent of ML/TF risks presented by correspondent banking relationships and how these risks are mitigated and managed, and
- to collect information about correspondent banking practices in Australia to inform government and policymakers.

Reporting entities were asked to complete a questionnaire, and on-site assessments were conducted on 11 reporting entities. From the on-site assessments, two compliance assessment reports were issued with three findings that required remedial actions. Findings concerned the prohibition of shell banks, correspondent banking due diligence and record-keeping. Twenty-eight recommendations were made on areas where correspondent banking practices could be improved. A wide range of recommendations was made, which included but were not limited to: improving risk assessments, reviewing account activity during due diligence, enhancing documentation and management reporting.

Two financial institutions were directed to undertake remedial actions to address deficiencies identified in their correspondent banking procedures.

1. Financial Institution (FI) No1: FI No1's correspondent banking policy stated FI No1 would not enter into or maintain a shell bank relationship and that FI No1 would take reasonable steps to ensure that its correspondent bank will not use its correspondent account to provide banking services to a shell bank. The policy allowed a period of one month to terminate the relationship, which is in excess of the 20 days permitted. AUSTRAC found the bank had breached subsections 96(1) and 96(2) of the AML/CTF Act because FI No1 had not evidenced that it has documented and implemented procedures or controls to terminate a shell bank or a correspondent banking relationship where the correspondent had a relationship with a shell bank.
2. Financial Institution No2: FI No2's procedures required transaction activity be assessed as part of regular due diligence and for regular due diligence to be completed within specified time periods. AUSTRAC identified contraventions where assessments of transaction activity could not be evidenced or did not occur and where specified time periods were exceeded. Prior to the assessment, FI No2 has also self-disclosed a breach for failing to conduct regular due diligence of correspondent banks within the time periods required by its policy.

A breach of record-keeping obligations was also made because transaction monitoring reports, assessed as part of the due diligence review, were not detailed on the file review summary.

The two financial institutions completed the prescribed remediation actions in mid-2017.

(b) Observations on the implementation of the article

Banks that have no physical presence and that are not affiliated with a regulated financial group (shell banks) are defined in section 15 of the AML/CTF Act. Section 95 of the AML/CTF Act prohibits financial institutions from entering into a correspondent banking relationship with a shell bank, or with another financial institution that has a correspondent banking relationship with a shell bank.

Nonetheless, in its 2015 Mutual Evaluation Report, concerning Recommendation 13, the FATF gave Australia a non-compliant rating due to deficiencies concerning the information reporting entities are required to gather and verify in the context of a correspondent banking relationship. In the meantime, in September 2016, AUSTRAC undertook a correspondent banking campaign, which involved 40 reporting entities who maintained correspondent banking relationships during the period 1 January 2015 to 31 December 2015. As a result, two financial institutions were directed to undertake remedial actions to address deficiencies identified in their correspondent banking procedures.

Therefore, it is recommended that Australia continue to implement the FATF recommendation with regard to correspondent banking relationships with shell banks (art. 52(4)).

Paragraph 5 of article 52

5. Each State Party shall consider establishing, in accordance with its domestic law, effective financial disclosure systems for appropriate public officials and shall provide for appropriate sanctions for non-compliance. Each State Party shall also consider taking such measures as may be necessary to permit its competent authorities to share that information with the competent authorities in other States Parties when necessary to investigate, claim and recover proceeds of offences established in accordance with this Convention.

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

Every Commonwealth parliamentarian is required to maintain a public register of interests.

The Senate Standing Committee of Senators' Interests, established under the Senate Standing Orders, oversees and reports on the Register of Senators' Interests. Interests are disclosed by way of statements of interests, supplemented by forms disclosing alterations of interests from time to time.

1 Registration

- 1) Within
 - a) 28 days after the first meeting of the Senate after 1 July first occurring after a general election; and
 - b) 28 days after the first meeting of the Senate after a simultaneous dissolution of the Senate and the House of Representatives; and
 - c) 28 days after making and subscribing an oath or affirmation of allegiance as a senator for a Territory or appointed or chosen to fill a vacancy in the Senate;each senator shall provide to the Registrar of Senators' Interests a statement of:
 - a) the senator's registrable interests; and
 - b) the registrable interests of which the senator is aware:
 - (i) of the senator's spouse or partner, and
 - (ii) of any children who are wholly or mainly dependent on the senator for support;

in accordance with this resolution and in a form determined by the Committee of Senators' Interests from time to time, and shall also notify any alteration of those interests to the Registrar within 35 days of that alteration occurring.

Any senator who knowingly fails to comply with the relevant Senate resolutions “shall be guilty of a serious contempt of the Senate and shall be dealt with by the Senate accordingly” after the Privileges Committee has inquired into the matter.

Members of the House of Representatives are required to declare and update their interests on the Register of Members' Interests. The Register is established by a resolution of the House of Representatives, initially adopted on 9 October 1984, and applies to all Members of the House. The House Standing Committee of Privileges and Members' Interests, established under House Standing Orders, oversees and reports on the Register.

Within 28 days of making an oath or affirmation, each Member is required to provide to the Registrar of Members' Interests a statement of the Member's registrable interests. The registrable interests of which the Member is aware of the Member's spouse and any children wholly or mainly dependent on the Member for support must also be included in the statement. The statement is to include:

- (i) in the case of new Members, interests held at the date of the Member's election;
- (ii) in the case of re-elected Members of the immediately preceding Parliament, interests held at the date of dissolution of that Parliament, and
- (iii) changes in interests between these dates and the date of the statement.

Members are required to notify any alterations to those interests to the Registrar within 28 days of the alteration occurring. Alterations to Members' statements are tabled at the end of the Autumn, Winter and Spring sessions of Parliament.

Failure to comply with the resolution amounts to “serious contempt of the House of Representatives and shall be dealt with by the House accordingly”. All state and territory parliaments also maintain similar registers.

Public officials

As noted above, relevant financial interest disclosures are contained within the obligation to declare conflict of interest. All APS employees, including SES employees, are required to declare a conflict of interest and to update this declaration as circumstances may change. The APSC provides a [dedicated chapter \(http://www.apsc.gov.au/publications-and-media/current-publications/values-and-conduct/conflict-of-interest\)](http://www.apsc.gov.au/publications-and-media/current-publications/values-and-conduct/conflict-of-interest) in its publication APS Values and Code of Conduct in Practice as guidance material in this issue.

All APS employees, including SES employees, are required to declare conflicts of interest. This requirement includes financial interests. These declarations are kept on individual agency registers; they are not publicly available but may be made available to external agencies with proper authority. Access to information of this kind is regulated by the *Privacy Act 1988* but is available to competent authorities under some circumstances.

Sanctions for failure to declare a conflict of interest are the same as for any other breaches of the Code of Conduct:

- reprimand
- fine
- reduction in salary
- re-assignment of duties
- reduction in classification
- termination of employment.

Data from agencies in 2015-2016 show that there were 52 finalised Code of Conduct investigations about conflict of interest. The individual agencies hold the data about what sanctions were imposed.

All public servants are required to list their financial interests and assets in order to gain security clearances. Heads of government departments and agencies in practice have and maintain security clearances of Top Secret or above. Details provided in gaining and maintaining a security clearance are not publicly divulged.

The register is publicly available at [http://www.aph.gov.au/Senators and Members/Members/Register#sz](http://www.aph.gov.au/Senators_and_Members/Members/Register#sz) [<http://www.aph.gov.au/Senators and Members/Members/Register>](http://www.aph.gov.au/Senators_and_Members/Members/Register).

Please see the publication of the APSC 'Values and Code of Conduct in practice': <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice>.

Financial Statement Disclosures

Sections 48 and 42 of the PGPA Act require the Commonwealth government and Commonwealth reporting entities to prepare annual financial statements in accordance with independently set accounting standards. A requirement of these standards (AASB 124 Related Party Disclosures) is that the financial statements disclose transactions between Ministers, senior government officials, their close family members and organisations they control where they are in a position to plan, direct and control the activities of the reporting entity.

These disclosures are based on those made by Key Management Personnel under International Financial Reporting Standards.

The PGPA Rule provides that Commonwealth entities and companies disclose details of the remuneration of each of their key management personnel and the policies and practices that underpin remuneration in their annual reports. Commonwealth entities are also required to disclose details of the remuneration of their senior executives and other highly paid staff.

Financial statements, including these disclosures, are subject to independent audit by the Auditor-General under Sections 49 and 43 of the PGPA Act. Under Section 49 (4) of the PGPA Act, the Finance Minister must table the Commonwealth Government's consolidated financial statement and audit report in each House of Parliament. Under Section 43 (4) of the PGPA Act, the financial statements are included in the entity's annual report tabled in Parliament.

(b) Observations on the implementation of the article

Every Commonwealth parliamentarian is required to maintain a public register of interests, including domestic and foreign accounts, assets, gifts and any source of income. Under the APS Code of Conduct for public officials, all Australian Public Service employees, including senior executive service employees, are required to declare any potential conflicts of interest and to update this declaration as circumstances may change.

This declaration is to include details of any 'material personal interest' of the employee in connection with the employee's APS employment. While there is no definition of 'personal interests', during the country visit, it was explained that the term "interests" comprises membership in organisations; accounts, assets, gifts, and any source of income; shareholdings, trusts, companies, real estate, partnerships, bonds, savings, travel, and hospitality, as well as any liabilities.

Paragraph 6 of article 52

6. Each State Party shall consider taking such measures as may be necessary, in accordance with its domestic law, to require appropriate public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship to appropriate

authorities and to maintain appropriate records related to such accounts. Such measures shall also provide for appropriate sanctions for non-compliance.

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

Australia referred to the information provided under paragraph 5 of article 52.

(b) Observations on the implementation of the article

Every Commonwealth parliamentarian is required to maintain a public register of interests, including domestic and foreign accounts, assets, gifts and any source of income. There are no requirements for public officials having an interest in or signature or other authority over a financial account in a foreign country to report that relationship.

Article 53. Measures for direct recovery of property

Subparagraph (a) of article 53

Each State Party shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit another State Party to initiate civil action in its courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention;

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

While foreign countries or authorities can commence an action within Australian courts in certain circumstances, the general process is for foreign proceeds of crime-related orders to be registered and enforced using mutual assistance processes.

Section 34 of the MACMA provides a regime that enables a State Party to seek the enforcement of foreign orders. Under this provision, the Australian Attorney-General can authorise a proceeds of crime authority to apply to register the foreign order. The asset confiscation procedure is then governed by the POC Act and the MACMA. If the assets are eventually successfully forfeited, the Commonwealth takes possession of the assets or proceeds of the liquidation of the assets, and via the same legislative framework, the asset or the proceeds of the liquidated assets may then be disbursed to another State Party. Details of the mechanisms of the disbursements of proceeds of crime to other state parties are addressed in the response to paragraph 1 of article 57.

Where a mutual legal assistance request is used to initiate action on behalf of a foreign country, the representation in proceeds of crime and asset recovery matters is provided by a proceeds of crime authority, which is defined to be the CDPP or the Commissioner of the AFP. Action under a mutual legal assistance request can only be initiated in response to a request and the provision of an authorisation by the Attorney-General to a proceeds of crime authority to commence or carry on an application in relation to a proceeds of crime matter.

Where mutual legal assistance processes are not relied on, an Australian court would need to establish that it has jurisdiction if civil proceedings are commenced by a plaintiff. The rules of jurisdiction in private international law in Australia indicate when a court can hear and determine particular multi-state cases in civil matters. In very general terms, Australian courts will look at certain rules (including the common law) to determine if they can hear a case, including personal jurisdiction and subject matter jurisdiction. For personal jurisdiction, the basic principle is that jurisdiction can be established when the defendant is served within the territorial limits of the court or submits to the jurisdiction. Australian courts also have capacity to enable initiating process in some circumstances to be served out of the jurisdiction. A foreign state party may therefore commence a civil action in Australia subject to an Australian court determining that it has jurisdiction.

It is generally easier and cheaper for foreign jurisdictions to seek recovery of criminal assets using the mutual assistance regime.

Australia has taken action to register foreign proceeds of crime orders on behalf of foreign jurisdictions in numerous matters. For example, in January 2017, Australia registered a foreign restraining order on behalf of a foreign country (in accordance with the provisions of the MACMA and the POC Act) over 20 real properties. This matter involved suspected offending in relation to significant fraud and other offences. This matter remains before the Courts.

To date, no particular work has been done by Australia to make other State parties aware of the possibility of using Australian courts to initiate civil action.

(b) Observations on the implementation of the article

As a matter of common law and subject to relevant jurisdictional and procedural requirements, foreign States may initiate civil action in Australian civil courts to establish title to or ownership of property acquired through the commission of an offence established in accordance with this Convention.

Foreign States have to retain local counsel, and the courts have discretion to require a deposit for court fees.

During the country visit, it was added that one such case involved the Sultan of Brunei, who brought a civil action in one of the Australian Territories.

Subparagraph (b) of article 53

Each State Party shall, in accordance with its domestic law: ...

(b) Take such measures as may be necessary to permit its courts to order those who have committed offences established in accordance with this Convention to pay compensation or damages to another State Party that has been harmed by such offences; and

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

Australia referred to comments made under subparagraph (a) of article 53 and subparagraph (1)(a) of article 54.

(b) Observations on the implementation of the article

As a matter of common law and subject to relevant jurisdictional and procedural requirements, foreign States may initiate civil action in Australian civil courts to seek compensation or damages.

Subparagraph (c) of article 53

Each State Party shall, in accordance with its domestic law: ...

(c) Take such measures as may be necessary to permit its courts or competent authorities, when having to decide on confiscation, to recognize another State Party's claim as a legitimate owner of property acquired through the commission of an offence established in accordance with this Convention.

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

Under the POC Act, a person (which includes foreign State parties) may have their legitimate interests in property recognised in confiscation procedures by applying for a range of remedies under the Act, including (but not limited to):

- exclusion from, revocation of or refusal to issue restraining orders – to allow the State to deal with the property (ss 17(4), 19(3), 20(4), 20A(4), 24A, 29, 29(A), 42)
- exclusion from or refusal to issue forfeiture orders – to retain the State's interest in property (ss 47(4), 48(2), 49(4), 73, 94)
- compensation orders – a payment reflecting the value of the proportion of the property that was not an instrument of crime and was not derived from criminal conduct (ss 77, 94A), and
- buy back orders – to buy back an interest in property (ss 57 and 103).

The third-party rights of foreign States in confiscation procedures are also recognised in subsection 330(4), which provides a range of legitimate situations in which property ceases to be 'proceeds' or an 'instrument' of crime and generally cannot be subject to restraint and forfeiture.

In many cases, proceeds of crime authorities that litigate POC Act matters will not take confiscation action against an interest in property that legitimately lies with a foreign State.

Proceeds of crime authorities are Commonwealth agencies that are bound by an obligation to act as model litigants (see paragraph 4.2 and Appendix B of the Legal Services Directions 2017). This obligation requires these authorities to act honestly and fairly in handling litigation brought under the Act and includes (but is not limited to) an obligation not to commence proceedings against property unless the agency is satisfied that litigation is the most suitable method of dispute resolution.

An exclusion order may be sought under section 73 of the POC Act, where the applicant can establish that they have an interest in the property specified in a forfeiture application or forfeiture order, where that interest is neither the proceeds of unlawful activity nor an instrument of a serious offence.

An applicant for an exclusion order under section 73 of the POC Act can be a State Party, as: an applicant can be any person under paragraph 73(1)(a); a person under section 2C of the *Acts Interpretation Act 1901* extends to a body politic or corporate as well as an individual, and; section 13 of the POC Act states that, except as far as the contrary intention appears, the Act extends to foreign countries and all persons, irrespective of their nationality or citizenship.

Provided that the State party can establish jurisdiction (as outlined in the response to subparagraph (a) of article 53), a State Party could apply for an exclusion order under the POC Act. To gain an exclusion order, the other State Party would need to demonstrate that they had an interest in the particular property that is the subject of the forfeiture order (which could be a legal or equitable interest in the property or a right, power or privilege in connection with the thing) and that their interest in the property is not the proceeds of unlawful activity or an instrument of crime.

Exclusion orders under section 73 of the POC Act permit a court to recognise another State Party's claim as a legitimate owner of property acquired through the commission of an offence, allowing the State Party to recover their legitimate interest in property that would otherwise be subject to a forfeiture order.

For example, if a person stole a painting or historical artefact from a foreign government and smuggled it to Australia, Australia could take action on the basis that it is the proceeds of a foreign indictable offence and the foreign government could apply for exclusion of their interest in the property on the basis of being the legitimate legal owner of that property.

If a foreign country successfully applies for an exclusion order, the court must transfer the relevant interest in the property back to the foreign country or, if the interest has been disposed of, direct the Commonwealth to pay the foreign country an amount equal to the value of the interest (see subsection 73(2) of the POC Act).

Where property is subject to a forfeiture order, third parties may also apply for compensation under section 77 of the POC Act. In order to make a compensation order, the Court must be satisfied that the proportion of the applicant's interest was not derived or realised, directly or indirectly, from the commission of any offence. The compensation order will direct the Commonwealth to pay the applicant the amount received from the disposal of the property.

The POC Act also contains mechanisms in Chapter 2, Part 2-3 to provide protection to owners of property where their interest relates to property that is subject to the automatic forfeiture provisions. Section 94 of the POC Act provides the Court with the ability to exclude property from being automatically forfeited where the applicant can prove that their interest in the property is neither the proceeds nor instrument of unlawful activity and was lawfully acquired. Section 94A provides a mechanism to provide a compensation order where the applicant can establish that a proportion of the value of their interest was not derived or realised, directly or indirectly, from the commission of any offence and the applicant's interest in the property is not an instrument of an offence.

The most common example of an exclusion order is carving out a bank/mortgagees interests from forfeiture. The applicant needs to provide sufficient evidence to satisfy the court that their interest is legitimate.

The SK Foods case study outlined in detail at subparagraph 1(b) of article 54 is an example of a matter where a court made a compensation order. SK Foods involved the return of funds to a foreign state authority acting in its capacity as the trustee in bankruptcy. The Trustee was acting on behalf of the creditors, and the funds were returned to the creditors. In that case, 90 % of the forfeited property was returned to the United States bankruptcy trustee for distribution to the creditors and victims.

(b) Observations on the implementation of the article

The POC Act contains a number of mechanisms to ensure that legitimate owners of property, including other State Parties, can have their interest in property recognised, including exclusion orders and compensation orders (sections 29 et seq. and 73 et seq.).

Article 54. Mechanisms for recovery of property through international cooperation in confiscation

Subparagraph 1 (a) of article 54

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to give effect to an order of confiscation issued by a court of another State Party;

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

Requests for the enforcement of foreign confiscation or restraining orders are made and actioned in accordance with Part VI of the MACMA. Section 34 of the MACMA provides the basis for the enforcement of foreign restraining and confiscation orders in Australia. The MACMA also provides for a wide range of international cooperative measures, including taking evidence and producing documents (Part II), and investigation powers in relation to the proceeds of crime (Part VIIA, subdivision C-F).

Under the MACMA, foreign confiscation orders can be enforced in the following circumstances:

- a) foreign forfeiture order, where the property is reasonably suspected of being located in Australia; or
- b) foreign pecuniary penalty order, where some or all of the property is available within Australia to satisfy the order, and
- c) where the order relates to a foreign serious offence.

The foreign confiscation order that is to be registered may be either conviction-based or non-conviction-based.

MACMA

Mutual legal assistance is the process countries use to obtain formal government-to-government assistance in criminal investigations and prosecutions. Mutual legal assistance is also used to recover proceeds of crime. Australia can make a mutual legal assistance request to any foreign country and can receive a request from any foreign country, including those countries which are not signatories to the UNCAC or a bilateral mutual legal assistance treaty with Australia. Australia is a party to 30 bilateral mutual legal assistance treaties, which include obligations regarding the provision of mutual legal assistance, including obligations relating to asset recovery.

The AGD is Australia's central authority for mutual legal assistance in criminal matters. The International Crime Cooperation Central Authority (ICCCA) within the AGD is responsible for all mutual legal assistance casework. The ICCCA may receive mutual legal assistance requests either directly or via diplomatic channels.

Upon ICCCA receiving a mutual legal assistance request from a foreign country requesting the registration or enforcement of a foreign forfeiture order, the ICCCA reviews the request to ensure it includes sufficient information (such as a description of the offending that resulted in the foreign order being made) to enable Australian authorities to consider and progress the request. The mutual legal assistance request should also include an original certified copy of the foreign forfeiture order. The ICCCA considers the request against any requirements and obligations contained in the UNCAC and relevant bilateral mutual legal assistance treaty. In the event the mutual legal assistance request includes sufficient information and meets relevant UNCAC or treaty requirements, and does not enliven any grounds of refusal, the ICCCA then refers the request to the Commissioner of the AFP for consideration. The Commissioner of the AFP considers whether the foreign forfeiture order is in a form that is registrable in an Australian court.

In the event the AFP advises that the foreign forfeiture order is in a form that is registrable in an Australian court, the ICCCA will seek the relevant authorisation from the Attorney-General pursuant to the MACMA. An authorisation from the Attorney-General is required for the Commissioner of the AFP to apply to make an application to an Australian court to register the foreign forfeiture order. This function is vested in the Commissioner in his or her capacity as a proceeds of crime authority, though in practice this is undertaken by the Criminal Assets Litigation team within the CACT.

Since 20 September 2012, the MACMA has enabled registration of both conviction and non-conviction-based proceeds of crime orders from all foreign countries. Prior to this date, Australia was only able to register non-conviction-based proceeds of crime orders from countries specified in regulations.

The MACMA provides for the registration of conviction-based foreign forfeiture orders. Subsection 34(1)(a) of the MACMA provides that the Attorney-General can authorise a proceeds of crime authority (namely, the Commissioner of the AFP) to apply for the registration in an Australian court of a foreign forfeiture order made in respect of a 'foreign serious offence' where a person has been convicted of the offence, and that the conviction and the order are not subject to appeal in the foreign country. The MACMA defines a foreign serious offence as an offence against a law of the foreign country, the maximum penalty for which is death, imprisonment for a period exceeding 12 months or a fine exceeding 300 penalty units (currently AUD63,000).

The MACMA also provides for the registration of non-conviction-based foreign forfeiture orders. Subsection 34(2) of the MACMA provides for the registration of a foreign forfeiture order that has been made on the basis that the property the subject of the order is, or is alleged to be, the proceeds or an instrument of a foreign serious offence, or the benefit derived from a foreign serious offence, *whether or not a person has been convicted of that offence*.

Once the relevant authorisation from the Attorney-General is obtained, the AFP may then apply to an Australian court to register the foreign forfeiture order. Foreign forfeiture orders registered in an Australian court under the MACMA have effect and may be enforced as if they were domestic orders made under the POC Act (section 34B(1) MACMA).

Section 34 of the MACMA also provides the basis for the registration of foreign restraining orders (both conviction and non-conviction based) and foreign pecuniary penalty orders.

An overview of Australia's mutual assistance framework is available at <https://www.ag.gov.au/sites/default/files/2020-03/Mutual-assistance-overview.pdf>.

Recognition of judgments

The recognition and enforcement of foreign civil judgments in Australia are based in part on statute - the *Foreign Judgments Act 1991* for specified types of judgments recognised on a reciprocal basis, and the *Trans-Tasman Proceedings Act 2010* for New Zealand judgments - and in part on common law rules.

Where a court in a foreign jurisdiction delivers a judgment establishing a State's title or ownership of property that is located in Australia, this judgment would not fall within the scope of the *Foreign Judgments Act 1991* or the *Trans-Tasman Proceedings Act 2010*. Such a judgment would therefore not be capable of recognition and enforcement under these pieces of legislation.

However, where a foreign court delivers a judgment establishing an individual's or a corporation's title or ownership of property that is located in Australia, this judgment may be capable of recognition and enforcement under the *Foreign Judgments Act 1991* or *Trans-Tasman Proceedings Act 2010*, where a State Party acts on behalf of the judgment debtor and the judgment is not of a kind otherwise excluded under the legislation.

The recognition and enforcement of foreign judgments at common law are also limited. At common law, Australian courts will not enforce foreign penal or revenue judgments, or foreign judgments that are not for a fixed sum. However, some non-money judgments may be capable of enforcement in equity on the basis of the court's inherent jurisdiction to provide assistance to foreign courts.

Examples of implementation, including related court or other cases:

Since 2012 Australia has received 34 mutual legal assistance requests seeking assistance in relation to the investigation or prosecution of corruption, bribery and extortion offences. The assistance sought in these requests included, for example, the provision of bank records, business records and material lawfully obtained by Australian law enforcement during domestic investigations.

Since 2012 Australia has received 28 mutual legal assistance requests seeking the assistance of Australian authorities to register or otherwise enforce proceeds of crime orders in Australia. The majority of these requests related to offending outside the scope of the UNCAC. Five of the mutual legal assistance requests related to foreign proceeds of crime orders that were obtained by foreign authorities in relation to the investigation or prosecution of corruption, bribery or extortion offences.

In one matter, Australia received a mutual legal assistance request from a foreign country which requested that Australia register restraining orders that were obtained in the foreign country. The authorities of the foreign country had charged an alleged offender with corruption, bribery and money laundering offences relating to his alleged use of his position of authority to pay bribes to a court judge to obtain a favourable outcome. Upon receipt of the mutual legal assistance request, the ICCCA obtained the relevant authorisation from a delegate of the Attorney-General, and the AFP made an application to an Australian court to register the foreign restraining order.

The Australian court made an order that the foreign restraining order be registered. The property the subject of the foreign restraining order (three bank accounts and three properties totalling approximately AUD4.3 million) is currently restrained. The law enforcement authorities in the foreign country are currently in the process of obtaining a forfeiture order. Once the ICCCA receives the supplementary mutual legal assistance request attaching this order, a decision can be made about whether to authorise the Commissioner of the AFP to make an application to register the foreign forfeiture order.

Although Australia has not registered a foreign forfeiture order that was obtained by a foreign country as a result of an investigation into corruption or related offences, there is in place the legal framework to do so if requested. This legal framework has been used to register foreign forfeiture orders that were obtained by foreign countries in respect of alleged criminal offending that falls outside the scope of the UNCAC.

The Commissioner of the AFP has successfully obtained the registration of six foreign restraining orders on behalf of various State parties. Five of the six matters relate to multiple offences, including money laundering. Two of these matters also relate to corruption. The further matter relates to the misappropriation of property.

Details regarding the procedure for enforcement of confiscation orders under the MACMA:

Upon receipt of a request for proceeds of crime action (including enforcement of a foreign confiscation order), the AGD (Australia's central authority for mutual legal assistance) reviews the request to assess whether sufficient information is provided, including the facts of the case, the offence provisions, the assistance sought and the foreign authority on whose behalf the request is made. A complete list of considerations is at section 11(2) of the MACMA, although a failure to comply with these requirements is not a ground for refusing a request (section 11(3)). Where the request seeks Australia's assistance to register a foreign order, the department will also consult with the relevant 'proceeds of crime authority' (being either the CDPP or the Commissioner of the AFP). If a request is deficient or an order is not in a form that would enable it to be registered in an Australian court (e.g. lacking specificity as to the property to be confiscated), the department may revert to the requesting country seeking further or better information.

Where there is sufficient information to progress a request, and the order is capable of registration, the department will conduct an assessment of whether the assistance can and should be provided by reference to the mandatory (section 8(1) of the MACMA) and discretionary (section 8(2) of the MACMA) grounds for refusal. Where no such grounds apply, the department may make a recommendation to the Attorney-General to authorise the provision of assistance. If the Attorney-General approves the provision of the assistance, the department will consult with the proceeds of crime authority around the making of the application. Australia's proceeds of crime regime allows the registration of conviction-based (section 34(1)) and non-conviction-based (section 34(2)) proceeds of crime orders.

The application before the court is made by the proceeds of crime authority, in reliance on the authorisation by the Attorney-General and the power to register foreign confiscation orders under section 34 of the MACMA. Throughout the process, the AGD liaises with the requesting country around the timing of the application and whether service needs to be effected on interested parties. The department may arrange the service of court process in Australia and will make arrangements with the requesting country (or third countries) to serve persons located outside of Australia.

For example, Australia received a request from a Pacific country seeking the registration of a non-conviction-based proceeds of crime order over property alleged to be the proceeds of significant fraud and corruption. The requesting country alleged that the alleged offender held significant property interests in Australia, including residential property, a business, vehicles and a boat.

Australia assisted by (1) providing comments on the request and the orders to ensure that the request was directed at meeting Australia's requirements and that the orders were in a form that could be registered in Australia; and (2) providing advice on how to best 'phase' the assistance to ensure that the suite of assistance sought (which also covered search and seizure and production orders) could be provided without compromising proceeds of crime action. Finally, after the foreign restraining order was registered, Australian authorities made an application to the court seeking 'custody and control orders', enabling the Official Trustee in Bankruptcy a statutory corporation whose functions are performed by the Australian Financial Security Authority²³ to manage the property. These orders were important as the property seized included assets that could be subject to devaluation if not effectively managed. The custody and control orders allowed the Official Trustee in Bankruptcy, in consultation with the foreign country, to make decisions with respect to the management of these chattels.

The property has remained restrained pursuant to the mutual legal assistance request and some assets have been liquidated (with the consent of the foreign country) and further managed by the Official Trustee in Bankruptcy.

(b) Observations on the implementation of the article

Subdivision A of Division 2 of Part VI of the MACMA (sections 33A et seq.) deals with the "Enforcement of foreign orders". The Attorney-General can authorise a domestic proceeds of crime authority to register a foreign forfeiture order in a court with proceeds jurisdiction upon receiving a request from a foreign country (sections 34 and 34A MACMA). The foreign order then has effect, and may be enforced, as if it were a forfeiture order made by the court under the POCA (section 34B MACMA).

Subparagraph 1 (b) of article 54

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

...

(b) Take such measures as may be necessary to permit its competent authorities, where they have jurisdiction, to order the confiscation of such property of foreign origin by adjudication of an offence of money-laundering or such other offence as may be within its jurisdiction or by other procedures authorized under its domestic law; and

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

The POC Act provides a range of tools to confiscate the proceeds and instruments of crime, as well as unexplained wealth. The POC Act contains a range of orders, including freezing orders (section 15B), restraining orders (sections 17, 18, 19, 20, 20A), pecuniary penalty orders (section 116), unexplained wealth orders (section 179E), and forfeiture orders / automatic forfeiture (section 47, 48, 49 or 92) that can be sought by proceeds of crime authorities (the Commissioner of the AFP and the Director of Public Prosecutions) to seize and confiscate property linked to, or suspected of being linked to, the commission of a foreign indictable

²³ The Official Trustee in Bankruptcy is a body corporate created under the *Bankruptcy Act 1966*, which administers bankruptcies and other personal insolvency arrangements when a private trustee or other administrator is not appointed. The Australian Financial Security Authority, which is the agency responsible for the administration of the Bankruptcy Act, provides personnel and resources to ensure that the Official Trustee in Bankruptcy can fulfil its responsibilities. The Official Trustee in Bankruptcy also has responsibilities under the POC Act, the MACMA and the *Customs Act 1901* to control and deal with property under court orders made under those statutes.

offence.. Confiscation of assets can be based on the commission of a domestic offence such as a money laundering offence (section 47, 48, 49 or 92 of the POC Act), noting that the money laundering offences in Division 400 of the *Criminal Code Act 1995* also cover the laundering of the proceeds of crime from foreign indictable offences. Alternatively, certain provisions of the POC Act allow for restraint and confiscation on the basis that the property is the proceeds of a foreign indictable offence (sections 19 and 49).

Foreign indictable offences for the purposes of proceedings under sections 19 and 49 are defined in section 337A as:

‘if the conduct had occurred in Australia ..., the conduct would have constituted an offence against a law of the Commonwealth, a State or a Territory punishable by at least 12 months imprisonment.’

The particular legal tests that apply and the process that is followed depend on the particular order being sought, whether action is conviction based or non-conviction based, the type of offence relied on, and whether action is commenced in relation to the criminal conduct of the person more broadly or against a specific asset on the grounds that it is suspected to be the proceeds or instrument of crime.

Case study: Operation SK Foods

In February 2010, Scot Salyer was arrested by Agents of the FBI and charged with alleged tax fraud and United States racketeering for offences dating back to 1998. As a consequence of that arrest, companies controlled by Salyer in the United States and overseas were placed into bankruptcy, in particular a company identified as SK Food LP (A Californian Limited Partnership) (SKF LP). Mr Salyer pleaded guilty to conducting the affairs of SKF LP through a pattern of racketeering activity and was sentenced to 6 years imprisonment.

AFP CACT Investigators and Litigators were contacted by the liquidators responsible for the ongoing liquidation of the companies SK Foods Australia Pty Ltd, SS Farms Australia Pty Ltd and Cedenco JV Australia Pty Limited (collectively SKFA) regarding their suspicion that surplus liquidated funds of almost AUD\$50 million were potentially the proceeds of the tax fraud and racketeering offences allegedly committed in the United States.

Around the same time, the United States bankruptcy trustee for SKF LP commenced civil proceedings in both the Federal Court of Australia and the United States Bankruptcy Court to ensure that SKF LP recovered the shares in SKFA after an attempt by Salyer to transfer the shares in SKFA from SKF LP to entities associated with Salyer.

In 2013, the Commissioner of the AFP, acting in his capacity as a Proceeds of Crime Authority, sought restraint of approximately AUD\$50 million (being in the surplus of the liquidation of SKFA in Australia) under section 19 of the POC Act in the Supreme Court of Victoria.

On 28 November 2013, the Commissioner of the AFP obtained orders in the Supreme Court of Victoria by consent, following negotiations with the other parties, that the surplus of the liquidation of SKFA be restrained and subsequently forfeited.

The court further ordered that compensation to the value of 90 % of the forfeited property be returned to the United States bankruptcy trustee (the foreign state authority acting in its capacity as the trustee in bankruptcy) by virtue of section 77 of the POC Act representing that proportion of the value of the forfeited property that was agreed could not be proven was unlawfully derived. The Trustee was acting on behalf of the creditors and the funds were returned to the creditors.

A further example where assets have been restrained based on a money laundering charge is in the matter of *Director of Public Prosecutions (Cth) – Re: Section 19 of the Proceeds of Crime Act 2002; Re Funds in a Bank Account; Re Sunshine Worldwide Holdings Ltd and South East Group Ltd* (2005) 62 NSWLR 400; (2005) 215 ALR 369; [2005] NSWSC 117, where funds were restrained on the basis that the funds were the proceeds of an offence, namely money laundering.

(b) Observations on the implementation of the article

The MACMA makes provision for the Attorney-General to authorise an application for a domestic restraining order if requested to do so by the foreign country, in circumstances where property located in Australia is likely to be the subject of a foreign restraining order (section 34J). However, Australia requires a foreign restraining order to be sent to Australia and registered within a prescribed time after the interim order is made. The foreign country would in due course need to provide a foreign forfeiture order to Australia under cover of a mutual assistance request seeking the assistance of Australian authorities to register the forfeiture order. The foreign forfeiture order may then be registered in an Australian court pursuant to the relevant provisions in the MACMA.

Through the POC Act and subject to the relevant legislative thresholds being met, Australia's asset confiscation regime permits its competent authorities to apply for the restraint and forfeiture of property of foreign origin acquired through or used in connection with the commission of an offence established in accordance with this Convention. This includes asset confiscation action based either on the commission of a domestic offence (such as money laundering) or a foreign indictable offence. It is not necessary for a mutual assistance request to initiate action under these provisions, though cooperation with overseas authorities often assists in providing evidence to support proceedings before the court. The particular legal test that applies depends on the particular provisions that are relied on, however for non-conviction based forfeiture orders it will generally be necessary for a restraining order to have been in force for at least six months before forfeiture can occur.

Australia provided relevant examples of the implementation of the provision under review.

Subparagraph 1 (c) of article 54

1. Each State Party, in order to provide mutual legal assistance pursuant to article 55 of this Convention with respect to property acquired through or involved in the commission of an offence established in accordance with this Convention, shall, in accordance with its domestic law:

...

(c) Consider taking such measures as may be necessary to allow confiscation of such property without a criminal conviction in cases in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases.

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

The POC Act provides for non-conviction-based forfeiture, which allows confiscation action to be taken independently of the criminal prosecution process. This includes where a person cannot be prosecuted or has died or absconded (though it is not a requirement of these provisions) and also more broadly where it can be shown on the balance of probabilities that a person has committed a serious offence or that property is the proceeds of crime.

Section 47 enables action to be taken where a court is satisfied on the balance of probabilities that a person has committed a serious offence. No conviction is required, and it is therefore possible to use this provision even where the person is not within the jurisdiction. Further, section 325 of the POC Act provides that an order can be applied for and made under the Act in respect of a person's interest in property even if the person has died or on the basis of the activities of a person who has died.

Section 49 of the POC Act enables the forfeiture of property suspected of being the proceeds of indictable offences, regardless of whether the particular person who committed the offence can be identified or that a particular offence was committed, it is sufficient that some offence was committed. This non-conviction based forfeiture provision can be used where a person who engaged in the offending is not known, has died, absconded or is out of the jurisdiction (though this is not a criteria of the making of an order and section 49 forfeiture orders can also be made in relation to property where the owner is known and within the jurisdiction).

Section 49(1)(c) provides that property may be forfeited if the court is satisfied that the property is proceeds of one or more indictable offence, any foreign indictable offence, any indictable offences of Commonwealth concern, or the property is an instrument of one or more serious offence.

A finding of the court for the purpose of section 49(1)(c) need not be based on a finding that a particular person committed any offence and need not be based on a finding as to the commission of a particular offence, and can be based on the finding that some offence or other of a kind referred to in section 49(1)(c) was committed.

Where a person has absconded, in certain circumstances, they will be deemed for the purposes of the POC Act to have committed the offence with which they were charged, and the conviction based provisions of the Act may also apply in addition to the non-conviction based provisions (see section 331 and 334).

Registration of foreign order under the MACMA

In circumstances where an offender cannot be prosecuted by a foreign country by reason of death, flight or absence of the offender from that jurisdiction, Australia has the ability to register a foreign forfeiture or pecuniary penalty order made by a court in the foreign country in relation to the relevant offender. As previously outlined, registration of the foreign forfeiture or pecuniary penalty order would be possible once authorisation is obtained by the Attorney-General for the AFP to apply to register the foreign forfeiture order (see section 34(2)(a)(i) and section 34(2)(b)(i) of the MACMA).

The MACMA preserves the interests in property (or other forfeitable things) of bona fide third parties claiming an interest in the property. Section 34C of the MACMA sets out a process allowing an application by an affected third party to a court to determine that person's legitimate interest in property that may be the subject of a foreign forfeiture order.

Australia is able to provide assistance to foreign countries in non-conviction-based forfeiture cases. For example, section 34(2) of the MACMA also allows for the application to be made to a court for registration of a foreign forfeiture order or pecuniary penalty order, whether or not the person has been convicted of the related offence.

Case study 1

In June 2013, the Commissioner of the AFP, acting in his capacity as a Proceeds of Crime Authority, applied for a restraining order in relation to two bank accounts with a combined balance of over \$4 million. The basis of the application was that it was suspected that the owner of the bank account had committed a serious offence of dealing with property that was reasonably suspected of being the proceeds of crime (money laundering).

The proceeds action was taken without the suspect being prosecuted for any offence. The matter was ultimately settled with the suspect consenting to the forfeiture of the funds.

Case study 2

In October 2012, property consisting of AUD1,495,000 in cash was seized from a suspect at Crown Casino, Melbourne. The suspect was charged with *Dealing with Property Reasonably Suspected of Being Proceeds of Crime* pursuant to section 400.9(1) *Criminal Code 1995* (Cth). A contested committal hearing took place and he was committed on 6 June 2014 to stand trial. However, before the trial took place, the suspect was the victim of a fatal shooting. Consequently, the Commissioner obtained a restraining order pursuant to section 19 of the POC Act on the basis that the property was reasonably suspected to be the proceeds of a money laundering offence.

A number of exclusion applications were lodged by family members of the deceased, though ultimately the matter settled on the basis that AUD300,000 was to be paid into Court and held on trust for the deceased's daughter's education and welfare and the balance of the seized funds with accrued interest was forfeited to the Commonwealth.

(b) Observations on the implementation of the article

Australia's mutual assistance regime allows for the registration of non-conviction-based foreign forfeiture and pecuniary penalty (value based confiscation) orders, in addition to the registration of conviction-based foreign forfeiture and pecuniary penalty orders.

In addition, the POC Act provides for Australian authorities to take non-conviction-based forfeiture action. Section 47 enables action to be taken where a court is satisfied that a person has committed a serious offence. Section 49 enables the forfeiture (in rem) of property that is the proceeds of one or more indictable offences or foreign indictable offences, regardless of whether the particular person who committed the offence can be identified. It will generally be necessary for a restraining order to have been in force for at least six months before forfeiture under section 47 or 49 can occur. These provisions provide a legislative framework for the confiscation of property associated with offences established in accordance with the Convention without a conviction having to be obtained. .

Subparagraph 2 (a) of article 54

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

(a) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a freezing or seizure order issued by a court or competent authority of a requesting State Party that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article;

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

As noted above, upon receipt of a mutual legal assistance request from a foreign country that requests a foreign restraining order be registered or otherwise enforced, Australia may register the foreign restraining order in an Australian court.

Case study

Between 2012 and 2014, Australia received nine requests for mutual assistance from a foreign country in relation to an individual.

The requests alleged that the individual misappropriated funds from the government of the foreign country. A company controlled by the individual was successful in winning a government tender to renovate a government building. The foreign country alleged that the works were not completed in accordance with the terms of the contract and that the funds that were intended to be used for the project were diverted by the individual for personal use.

The individual was residing with his family in Australia at the time, where he had business interests and significant property holdings.

Amongst other assistance sought, in April 2013, Australia received a request from a foreign country seeking the enforcement of a restraining order for Australian-based property.

On 26 April 2013, the former Minister for Justice authorised the application for the registration of the foreign restraining order under subsection 34(3) of the MACMA, and the restraining order was granted later on the same day. On 14 May 2013, under section 35 of the MACMA, the court further ordered for the Official Trustee in Bankruptcy to take custody and control of the individual's real properties, bank accounts, motor vehicles and the sale proceeds of some property/assets. Australian authorities have restrained property in Australia belonging to the individual.

(Please note that as the original order was not provided within 45 days as required under subsection 34F(2) of the MACMA, Australia re-registered this order with the court.)

In December 2013, Australia received a sixth supplementary request from the foreign country in this matter, seeking the enforcement of a further foreign restraining order dated 6 December 2013. On 12 December 2013, the Minister for Justice authorised the application under subsection 34(3) of the MACMA for the registration of this second restraining order.

On 11 September 2015, Australia received the eighth supplementary request asking Australia to register the foreign country's Ancillary and Further Orders dated 24 July 2015, amending the previously registered restraining order. The Court registered the Ancillary and Further Orders on 31 January 2016.

In March 2017, the individual was convicted of misappropriating funds from the State totalling approximately AUD\$2.7 million and sentenced to 10 years imprisonment. The individual has appealed his conviction. Australia has not yet received any further requests for the confiscation of the individual's restrained assets in Australia.

Evidentiary threshold and available duration of such measures:

Concerning the standard of proof in the matter, proceeds of crime matters are civil proceedings with a civil standard of proof (balance of probabilities). The MACMA does not provide for the termination of pecuniary penalty orders or restraining orders, except on application by the proceeds of crime authority for the purpose set out in section 34G (essentially, if the foreign country has advised that the reason for the order no longer applies).

(b) Observations on the implementation of the article

A restraining order issued by a foreign court may be registered and enforced under sections 34 and 34E of the MACMA, upon receipt of a request from a foreign country and pursuant to an authorisation from the Attorney-General under section 34.

Subparagraph 2 (b) of article 54

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

...

(b) Take such measures as may be necessary to permit its competent authorities to freeze or seize property upon a request that provides a reasonable basis for the requested State Party to believe that there are sufficient grounds for taking such actions and that the property would eventually be subject to an order of confiscation for purposes of paragraph 1 (a) of this article; and

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

Where a foreign country requests Australia to take proceeds of crime action but has not obtained or provided a restraining order to Australia, the MACMA makes provision for the Attorney-General to authorise a proceeds of crime authority to apply for an interim restraining order.

To authorise such an application at the request of a foreign country, the Attorney-General must be satisfied of the following requirements set out in section 34J of the MACMA:

- a criminal proceeding has commenced, or there are reasonable grounds to suspect that a criminal proceeding is about to commence, in the foreign country in respect of a foreign serious offence; or
- foreign confiscation proceedings have commenced, or there are reasonable grounds to suspect that such proceedings are about to commence in the foreign country; and
- there are reasonable grounds to believe that property that may be made or is about to be made the subject of a foreign restraining order is located in Australia.

This is a form of **interim** restraining order pending receipt of a restraining order made in the requesting foreign country. Demonstrated urgency is required for Australian authorities to seek an authorisation from the Attorney-General for the AFP to make an application for a restraining order. For example, urgency may be demonstrated by providing information that the assets may dissipate if they are not urgently restrained.

An interim restraining order made on this basis ceases to operate 30 days after it was made, although this period can be extended (section 34M(1) of the MACMA). Prior to making the application for an interim restraining order, Australian authorities may ask that the foreign country provide an assurance that the foreign restraining order in a registrable form will be provided in a supplementary mutual legal assistance request within the requisite 30 days.

The interim restraining order ceases to have effect upon registration of a foreign restraining order (section 34M(2) of the MACMA).

In this situation, Australian authorities could also decide to take action in their own right under the POC Act on the basis of the alleged foreign indictable offence or a money laundering offence. However, the Australian authorities may seek assurances from the foreign country that they would support and assist the Australian-based proceeds of crime action by providing evidence when requested in support of the action.

Details of the legislative/regulatory authority in place and the evidentiary threshold required for issuing freezing or seizure orders based on a request by another State:

The process for registering a foreign proceeds of crime order is the same as that provided for in relation to the response to Article 54(1)(a) (above). In summary, the Attorney-General must be satisfied that the mandatory and discretionary grounds for refusal do not apply and that there is no reason to not provide the assistance.

As noted above, the making of an order under this provision is an interim measure, designed to ensure that the property is not dissipated before the foreign country can obtain an order capable of being registered in an Australian court. A relevant consideration for the Attorney-General is whether there is any reason to believe that such an order would not be forthcoming were the court to grant the application under section 34K of the MACMA.

(b) Observations on the implementation of the article

Where a foreign country has not provided a restraining order to Australia, the MACMA makes provision for the Attorney-General to apply for a domestic interim restraining order (section 34J). However, Australia will require a foreign restraining order to be sent to Australia and registered within a prescribed time after the interim order was made. The applicable standard of proof is reasonable suspicion that the criminal proceedings or confiscation proceedings are about to commence in a foreign country.

(c) Successes and good practices

Australian authorities may act on information provided by foreign law enforcement to commence domestic proceedings against property in Australia that is the proceeds of a foreign indictable offence.

Subparagraph 2 (c) of article 54

2. Each State Party, in order to provide mutual legal assistance upon a request made pursuant to paragraph 2 of article 55 of this Convention, shall, in accordance with its domestic law:

...

(c) Consider taking additional measures to permit its competent authorities to preserve property for confiscation, such as on the basis of a foreign arrest or criminal charge related to the acquisition of such property.

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

In the absence of a request, Australian authorities could also decide to take action in their own right where there is a reasonable suspicion that a person has committed a serious offence (such as money laundering) or that property is the proceeds of an indictable or foreign indictable offence (sections 18 and 19 POC Act). However, the Australian authorities may seek assurances from the foreign country that they would support and assist the Australian-based proceeds of crime action by providing evidence when requested in support of the action.

(b) Observations on the implementation of the article

Pro-active measures without request can be taken under sections 18 and 19 of the POC Act.

Article 55. International cooperation for purposes of confiscation

Paragraph 1 of article 55

1. A State Party that has received a request from another State Party having jurisdiction over an offence established in accordance with this Convention for confiscation of proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention situated in its territory shall, to the greatest extent possible within its domestic legal system:

(a) Submit the request to its competent authorities for the purpose of obtaining an order of confiscation and, if such an order is granted, give effect to it; or

(b) Submit to its competent authorities, with a view to giving effect to it to the extent requested, an order of confiscation issued by a court in the territory of the requesting State Party in accordance with articles 31, paragraph 1, and 54, paragraph 1 (a), of this Convention insofar as it relates to

proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, situated in the territory of the requested State Party.

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

Australia referred to comments made at article 54(1)(a).

In addition, the ICCCA at AGD attempts to provide foreign counterparts with information about Australia's legal framework relating to proceeds of crime and the processes for requesting assistance from Australia in the context of restraining and confiscating assets. The AGD's website includes information about what type of information is required in a mutual legal assistance request in order for Australian authorities to consider and action the request. This information is also included in many bilateral mutual legal assistance treaties to which Australia is a signatory.

The ICCCA at AGD may receive requests for assistance via diplomatic channels or directly from a foreign central authority counterpart. The transmission of mutual legal assistance requests is irrespective of the nature of the proceeds of crime proceeding to which the request relates (criminal, civil or administrative). Additionally, in circumstances of urgency, a foreign country may seek to provide a foreign confiscation order to the ICCCA (attached to a letter of request) electronically. The MACMA provides for the ability to register a copy (including an electronic copy) of an order, although any Australian order based on an electronic copy will cease to have effect if the original or a certified copy of the original foreign order is not produced within 45 days to the court that registered the order (MACMA, section 34F).

Information about submitting formal requests for assistance is available on the AGD website: <https://www.ag.gov.au/Internationalrelations/Internationalcrimecooperationarrangements/Pages/default.aspx>.

The ICCCA at AGD regularly meets with representatives from foreign countries to present an overview of the mutual legal assistance framework in Australia, the assistance that Australia can provide in relation to the tracing, restraining, confiscation and repatriation of the proceeds of crime and to discuss how best to streamline and manage the transmission of requests to ensure the expeditious provision of assistance.

Australia actively encourages foreign counterparts to submit draft requests—particularly where the assistance sought includes the registration of foreign restraining or confiscation orders. Australia has previously provided countries with comments and advice on draft requests to facilitate the most favourable consideration of mutual legal assistance requests and associated foreign proceeds of crime orders.

Also, the ICCCA regularly meets with the AFP to discuss active incoming mutual legal assistance requests from foreign countries and to determine the best ways to progress these requests in order to provide the widest range of assistance to the foreign country.

(b) Observations on the implementation of the article

Australia has created a Criminal Assets Confiscation Taskforce (CACT) within the AFP. The objectives of the CACT are to

- Disrupt and deter serious and organised crime;
- Prevent reinvestment of criminal profits in criminal activity;
- Take away the benefits derived from crime;
- Provide coordinated and integrated investigative and legal approach to asset confiscation.

A number of cases dealt with by the Criminal Assets Litigation (CAL) Team within the CACT include UNCAC offences:

CACT MATTERS RELATING TO UNCAC OFFENCES

Ch III Offence	Number of CAL matters on foot as of last quarter of 2017/2018
Article 15: Bribery of National Public Officials	2
Article 17: Embezzlement, misappropriation or other diversion of property by a public official	1
Article 18: Trading in influence	1
Article 19. Abuse of functions	2
Article 20. Illicit enrichment	2
Article 22. Embezzlement of property in the private sector	3
Article 23. Laundering of proceeds of crime	71

With regard to the application of the provisions implementing art. 54 to a concrete case under art. 55(1), section 34 of the MACMA provides that the Attorney-General enjoys discretion (“may authorise”) whether or not to take any measures.

Therefore, it is recommended that Australia ensure that obligations under article 55(1) and (2) of UNCAC are considered by the Attorney-General as part of the exercise of his or her discretion under section 34 of the MACMA.

Paragraph 2 of article 55

2. Following a request made by another State Party having jurisdiction over an offence established in accordance with this Convention, the requested State Party shall take measures to identify, trace and freeze or seize proceeds of crime, property, equipment or other instrumentalities referred to in article 31, paragraph 1, of this Convention for the purpose of eventual confiscation to be ordered either by the requesting State Party or, pursuant to a request under paragraph 1 of this article, by the requested State Party.

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

Australia referred to comments made at article 54(2)(a) and (b).

In addition, the POC Act (in conjunction with the MACMA) contains a number of mechanisms that can be used to obtain information to assist in the identification, tracing, freezing and seizure of the proceeds of crime. For this to occur, a State Party needs to seek formal assistance through the MACMA process for the issuing of production orders, monitoring orders and search warrants in relation to a proceedings or investigation of a foreign serious offence. The Attorney-General will consider the request under section 34ZG of the MACMA and authorise an officer of an enforcement agency to make any applications that are necessary to respond to the request by the foreign country. The authorised officer (usually a member of the Criminal Assets Confiscation Taskforce within the Australian Federal Police) can then apply to a Magistrate or Judge for the required orders.

Production orders can be issued to obtain property tracking documents that are relevant to locating and identifying property. For more information, refer to section 34P of the MACMA and section 202 of the POC Act.

Monitoring orders can be obtained in relation to specific types of offences that are punishable by imprisonment for 3 or more years, including money laundering. A monitoring order requires a financial institution to provide details of transactions conducted during a particular period through an account or a stored value card. For more information, refer to section 34Y of the MACMA and section 219 of the POC Act.

Search warrants can be issued to search for tainted property and evidential material that relates to the offence and other circumstances as specified in section 34ZC of the MACMA. The warrant authorises the seizure of proceeds of an instrument of the offence or a property tracking document in relation to the offence in circumstances where there are reasonable grounds to believe that the property will be concealed, lost, destroyed or used to commit an offence. For more information, refer to section 34ZB of the MACMA and section 228 of the POC Act.

A notice can also be issued by a specified law enforcement official to a financial institution under section 34R of the MACMA requiring the production of certain information in relation to accounts and stored value cards held by the institution.

All of these investigative methods can be used to help identify, trace and value property.

As outlined above, Australia is also a member of the Asset Recovery Interagency Network – Asia-Pacific (ARIN-AP) network and an observer of the Camden Assets Recovery Interagency Network (CARIN). These networks provide informal channels of communication that can be used to discuss publically available sources of information within a particular country. This local knowledge may assist state parties to identify additional sources of information and evidence when framing their requests for assistance.

In addition to procedures available under the POC Act, the CACT engages with foreign counterparts in a variety of fora. In addition to matters being dealt with by way of formal requests for mutual legal assistance, police-to-police assistance is also available via the AFP International Liaison Office or via direct referral to the AFP in certain circumstances. Additionally, the AFP is represented at both the CARIN and ARIN-AP.

CARIN and ARIN-AP are informal interagency networks of law enforcement and legal practitioners who specialise in the field of asset tracing, freezing, seizure and confiscation. Each member state is represented by a law enforcement officer and a legal expert (prosecutor, investigating judge, etc., depending on the legal system).

The purpose of CARIN and ARIN-AP is to increase the effectiveness of its members' efforts, on a multi-agency basis, to deprive criminals of their illicit profits.

(b) Observations on the implementation of the article

With regard to the application of the provisions implementing art. 54 to a concrete case under art. 55(2), section 34 MACMA provides that the Attorney General enjoys discretion ("may authorise") whether or not to take any measures.

Therefore, it is recommended that Australia ensure that obligations under article 55(1) and (2) of UNCAC are considered by the Attorney-General as part of the exercise of his or her discretion under section 34 of the MACMA.

Paragraph 3 of article 55

3. The provisions of article 46 of this Convention are applicable, mutatis mutandis, to this article. In addition to the information specified in article 46, paragraph 15, requests made pursuant to this article shall contain:

(a) In the case of a request pertaining to paragraph 1 (a) of this article, a description of the property to be confiscated, including, to the extent possible, the location and, where relevant, the estimated value of the property and a statement of the facts relied upon by the requesting State Party sufficient to enable the requested State Party to seek the order under its domestic law;

(b) In the case of a request pertaining to paragraph 1 (b) of this article, a legally admissible copy of an order of confiscation upon which the request is based issued by the requesting State Party, a statement of the facts and information as to the extent to which execution of the order is requested, a statement specifying the measures taken by the requesting State Party to provide adequate notification to bona fide third parties and to ensure due process and a statement that the confiscation order is final;

(c) In the case of a request pertaining to paragraph 2 of this article, a statement of the facts relied upon by the requesting State Party and a description of the actions requested and, where available, a legally admissible copy of an order on which the request is based.

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

Australia referred to the above explanations to subparagraphs (2)(a)-(c) of article 54 as well as paragraph 1 of article 55.

Australia responds to mutual legal assistance requests from foreign countries on a case-by-case basis, subject to any relevant bilateral mutual legal assistance treaties, multilateral treaties/conventions and the MACMA. As a general guide, Australian authorities will require the following information to be provided in order to respond to a request:

- a) the name of the authority conducting the investigation, prosecution, or proceeding to which the request relates
- b) a description of the nature of, and the conduct giving rise to, the investigation, prosecution, or proceeding and the specific offences to which the request relates
- c) a description of the evidence, information, or other assistance sought (including the registration of foreign proceeds of crime order), and
- d) the purpose for which the evidence, information, or other assistance is sought.

In order for the Attorney-General to authorise an application for the registration of a foreign order under section 34 of the MACMA, the following information is required:

- a) the name of the foreign court that made the order and the date upon which the order was made
- b) the name of the person whose property is the subject of the order, and
- c) a description of the offence from which the proceeds of crime are alleged to have been derived.

In the event a foreign country does not provide all the information required in order for Australian authorities to consider and respond to a mutual legal assistance request, Australian authorities will request that the foreign country provide further information.

Australia has found that having foreign countries regularly submit mutual legal assistance requests that include all relevant information enables Australian authorities to more effectively consider and action a request.

However, the AGD, as a matter of practice, encourages foreign authorities to submit draft mutual legal assistance requests for review prior to formally submitting the requests to ensure that the requests include all of the information required for Australian authorities to consider and action the request. This is particularly the case in proceeds of crime matters where the foreign country attaches a copy of a foreign proceeds of crime order and requests that the order be registered in Australia.

In the event a mutual legal assistance request is submitted which does not include all of the required information or the foreign order is not in a registrable form, the AGD does not formally reject the request. Instead, the AGD will liaise with the foreign authorities and seek additional information. Similarly, if a foreign proceeds of crime order is not in a form that can be registered in an Australian court, the AGD will liaise with the foreign country and provide advice on the form that the order is required to take and request that such an order be provided.

In one particular matter, the AFP and the AGD had ongoing discussions, over a number of months, with a State party in relation to the form and content of a particular order that they were seeking to have registered. The discussions ensured that the order complied with the relevant Australian laws and was able to be registered.

(b) Observations on the implementation of the article

The requirements for valid mutual legal assistance requests for purpose of confiscation is determined by the MACMA.

Paragraph 4 of article 55

4. The decisions or actions provided for in paragraphs 1 and 2 of this article shall be taken by the requested State Party in accordance with and subject to the provisions of its domestic law and its procedural rules or any bilateral or multilateral agreement or arrangement to which it may be bound in relation to the requesting State Party.

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

The POC Act, the MACMA), and the AML/CTF Act provide a legal basis for identifying, restraining, forfeiting, and returning assets derived from the commission of an offence.

(b) Observations on the implementation of the article

The decisions or actions provided for in paragraphs 1 and 2 of article 55 are taken by Australia in accordance with the MACMA and the POC Act.

Paragraph 5 of article 55

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

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

English versions of the relevant provisions have been submitted to the UNODC and are available at <https://www.unodc.org/unodc/treaties/CAC/country-profile/CountryProfile.html?code=AUS>.

(b) Observations on the implementation of the article

Australia has furnished copies of its laws and regulations that give effect to article 55.

Paragraph 6 of article 55

6. If a State Party elects to make the taking of the measures referred to in paragraphs 1 and 2 of this article conditional on the existence of a relevant treaty, that State Party shall consider this Convention the necessary and sufficient treaty basis.

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

Australia does not require a treaty to provide mutual legal assistance. Australia is able to provide the measures referred to in paragraphs 1 and 2 of this article on behalf of foreign countries in the absence of a bilateral treaty or other multilateral convention which contains mutual legal assistance obligations.

Australia enjoys productive mutual assistance relationships with a number of foreign countries with which it does not have a bilateral mutual assistance treaty. In such circumstances, requests are made and received on the undertaking that any assistance afforded by the requested state will be provided on the basis of reciprocity.

As a dualist country, Australia cannot rely on the Convention directly.

(b) Observations on the implementation of the article

As a dualist country, Australia cannot rely on the Convention directly. However, Australia does not make cooperation for purposes of confiscation conditional on the existence of a treaty.

Australia has concluded a significant number of bilateral treaties, which include a framework for recovery of property and the confiscation of assets.

Paragraph 7 of article 55

7. Cooperation under this article may also be refused or provisional measures lifted if the requested State Party does not receive sufficient and timely evidence or if the property is of a de minimis value.

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

Australia seeks to ensure that it can provide the fullest measure of assistance possible to requesting countries. Australia's legislation has been developed for the purpose of ensuring that the widest measure of investigative and enforcement tools are available to foreign counterparts in response to formal mutual legal assistance requests.

Section 8 of the MACMA outlines the grounds for refusing to provide assistance to a foreign country in response to a mutual legal assistance request. Section 8 is comprised of mandatory and discretionary grounds of refusal.

Section 8 does not specifically provide for refusal (either mandatory or discretionary) of a request if the property to be restrained or forfeited is of a *de minimis* value, although the Attorney-General can consider whether the provision of assistance may impose an excessive burden on the resources of the Commonwealth or a State or Territory. In having regard to this ground of refusal, the Attorney-General may consider whether the costs associated with proceeds of crime action in matters that do not involve a significant amount of property outweigh the crime cooperation benefit. All such cases are considered on a case-by-case basis and Australia does not set a minimum amount of money that needs to be recovered in order to authorise the provision of such assistance to a foreign country.

Australia may consider that further evidence is required from the requesting state, in a form admissible in an Australian court, in order for Australian authorities to provide, or continue to provide, assistance to the requesting state. In the absence of this evidence being provided by the requesting state, Australian authorities may, after repeated requests for the evidence, determine that further assistance is not to be provided in response to the foreign request.

The grounds for refusal set out in section 8 of the MACMA reflect Australia's international law obligations as they relate to those multilateral agreements and conventions that Australia has given effect to. For example, the Attorney-General must not authorise the provision of assistance if, in the opinion of the Attorney-General, there are substantial grounds for believing that, if the request was granted, the person would be in danger of being subjected to torture (MACMA, section 8(1)(ca)). This provision gives effect to Australia's ratification and obligations expressed under the United Nations Convention Against Torture. Australia's bilateral mutual legal assistance treaties all reflect the same provisions.

(b) Observations on the implementation of the article

Section 8 of the MACMA outlines the grounds for refusal of assistance, which do not include the *de minimis* value of the property.

Paragraph 8 of article 55

8. Before lifting any provisional measure taken pursuant to this article, the requested State Party shall, wherever possible, give the requesting State Party an opportunity to present its reasons in favour of continuing the measure.

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

In a matter whereby Australian authorities have taken an action in response to a mutual legal assistance request from a foreign country, and for whatever reason, that action is set to discontinue, Australian authorities afford the requesting state an opportunity to submit reasons and/or further information to support continuing the assistance. Australian authorities would not discontinue a measure without first giving the requesting state an opportunity to outline why the measure should be continued.

The mechanism of discharging an order registered pursuant to a mutual legal assistance request is provided under section 34G of the MACMA. This contemplates that the order no longer has effect in the foreign country or the foreign country has requested the cancelling of the order.

Under Australia's mutual legal assistance regime for proceeds of crime matters, Australia's position is that any challenge to the applicable order be brought in the jurisdiction (i.e. country) in which the order originated.

However, an example of where a measure may be discontinued without giving the requesting state the opportunity to outline why the measure should continue is where a copy of a foreign restraining order is registered pursuant to section 34F of the MACMA. If a sealed or authenticated copy of the order has not been received by Australian authorities and registered within 45 days the registration ceases to have effect. Australian authorities would be regularly following-up with the requesting state in advance of the 45-day deadline in an attempt to ensure that the sealed or authenticated copy of the order is received prior to the deadline to negate the registration of the order ceasing to have effect.

(b) Observations on the implementation of the article

Australian authorities would not discontinue a measure without first giving the requesting State an opportunity to outline why the measure should be continued.

Paragraph 9 of article 55

9. The provisions of this article shall not be construed as prejudicing the rights of bona fide third parties.

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

The MACMA contains provisions to ensure that the rights of bona fide third parties are protected. For example, section 34L (extracted below in full) provides that any person with an interest in restrained property can apply to the court to exclude their interest from the restraining order, provided they can satisfy the court that they:

- a) were not involved, in any way, in the commission of the offence; and
- b) if the interest was acquired at the time of or after the commission of the offence, that the property was neither the proceeds or an instrument of the crime.

Section 34L also provides that an interest in property can be excluded if it is in the public interest to do so, after taking into account financial hardship or other factors.

It is also possible to claim an interest in property which is the subject of a foreign forfeiture order under section 34C. In this case, the court will declare the nature, extent, and value of the interest, provided:

- a) the applicant was not, in any way involved in the commission of the foreign serious offence; and
- b) if the interest was acquired at the time of or after the commission of the offence, that the property was neither the proceeds or an instrument of the crime.

A person affected by a restraining or forfeiture order also has the option to contest that order within the foreign state that requested the registration of that order. Any variation to the order made in the foreign state would then also need to be registered with the Australian courts.

Where property is sought to be excluded by an affected third party this may be done through a court making orders *by consent* after evidence is provided to the Commissioner of the AFP or DPP to establish the parties'

legitimate interest. There were no reported cases Australia could refer to on this topic to demonstrate compliance with this article. The exclusion of bona fide third party interests may also be resolved by consent in appropriate cases. Any consent to vary the restraining or exclusion order would be done working in conjunction with the requesting jurisdiction and following the legal procedures and requirements outlined in the MACMA (including notice to any affected person).

MACMA

Section 34L Excluding property from restraining orders

If:

- a) a person (the defendant) has been alleged, in a criminal proceeding in a foreign country, to have committed a foreign serious offence; and*
- b) a court makes a restraining order under Part 2-1 of the Proceeds of Crime Act against property in respect of the offence; and*
- c) a person having an interest in the property applies to the court under Division 3 of Part 2-1 of that Act for an order varying the restraining order to exclude the person's interest from the restraining order;*

the court must grant the application if the court is satisfied that:

- d) in a case where the applicant is not the defendant:*
 - (i) the applicant was not, in any way, involved in the commission of the offence; and*
 - (ii) if the applicant acquired the interest at the time of or after the commission, or alleged commission, of the offence-the property was neither proceeds nor an instrument of the offence; or*
- e) in any case-it is in the public interest to do so having regard to any financial hardship or other consequence of the interest remaining subject to the order.*

(b) Observations on the implementation of the article

The rights of bona fide third parties with respect to foreign forfeiture order (section 34C) and foreign restraining order (section 34L) are protected under MACMA.

Article 56. Special cooperation

Without prejudice to its domestic law, each State Party shall endeavour to take measures to permit it to forward, without prejudice to its own investigations, prosecutions or judicial proceedings, information on proceeds of offences established in accordance with this Convention to another State Party without prior request, when it considers that the disclosure of such information might assist the receiving State Party in initiating or carrying out investigations, prosecutions or judicial proceedings or might lead to a request by that State Party under this chapter of the Convention.

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

Section 59AA(1) of the ACC Act authorises disclosure of Australian Crime Commission information (including criminal information and intelligence) to certain foreign and international agencies.

Section 266A of the POC Act allows for the dissemination of material sought under information gathering provisions contained in the Act to be provided to:

- the Authority of a foreign country that has a function of investigating or prosecuting offences against a law of the country for the purpose of assisting in the prevention, investigation or prosecution of an offence against that law constituted by conduct, that, if it occurred in Australia, would constitute an offence against a law of the Commonwealth, or of a State or Territory, punishable on conviction by imprisonment for at least 3 years or for life;
- the Authority of a foreign country that functions to either investigate or prosecute offences against a law of that country, or that functions to identify, locate, trace, investigate or confiscate proceeds of instruments of crime under a law of that country for the purpose of assisting in identifying, locating, tracing, investigating, or confiscating, proceeds of instruments of crime if the identification, location, tracing, investigation or confiscation could take place under the POC Act, or under a corresponding law of a State or a self-governing Territory, if the proceeds of instruments related to an offence against a law of the Commonwealth, State or Territory subject to certain provisions.

AUSTRAC is actively using its information-sharing powers. It has engaged in 22 bribery and corruption-related exchanges (July 2017 to April 2018). A breakdown by exchange type is:

- 11 requests for information from other FIUs
- 5 requests for information to other FIUs
- 2 incoming disclosures from other FIUs
- 4 outgoing spontaneous disseminations to other FIUs.

(b) Observations on the implementation of the article

The sharing of information held by AUSTRAC with foreign countries is governed by Part 11.4.D of the AML/CFT Act (“Communication of AUSTRAC information to foreign countries”). Pursuant to Section 132, the AUSTRAC CEO may also authorise the Commissioner of the AFP to have access to AUSTRAC information for the purposes of communicating the information to a foreign law enforcement agency.

AUSTRAC cooperates with other FIUs through the Egmont Group of Financial Intelligence Units. AUSTRAC can and does share information pro-actively, without a prior request. With regard to other Egmont members, AUSTRAC can share information without the need for a Memorandum of Understanding. Nevertheless, as of June 2017, AUSTRAC has 87 MoUs for the exchange of financial intelligence and two MOUs for the exchange of regulatory and compliance information with other institutions all over the world, including non-Egmont countries like China.

Article 57. Return and disposal of assets

Paragraph 1 of article 57

1. Property confiscated by a State Party pursuant to article 31 or 55 of this Convention shall be disposed of, including by return to its prior legitimate owners, pursuant to paragraph 3 of this article, by that State Party in accordance with the provisions of this Convention and its domestic law.

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

The standard procedure set out in the POC Act requires that, once a forfeiture order is made by a court, the property is liquidated, and the funds from the liquidation are credited to the Confiscated Assets Account under section 296 of the POC Act.

Section 297 also allows the Minister to share a proportion of proceeds recovered under the POC Act with a foreign country if the Minister considers that the foreign country has made a significant contribution to the recovery of those proceeds or to the investigation or prosecution of the unlawful activity.

POC Act

Section 296 Credits to the Account

...

(4) The equitable sharing program is an arrangement under which any or all of the following happen:

...

(c) the Commonwealth shares with a foreign country a proportion of any proceeds of any unlawful activity recovered under a Commonwealth 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.

Section 297 Payments out of the Account

*The following are purposes of the * Confiscated Assets Account:*

- a) making any payments to the States, to * self-governing Territories or to foreign countries that the Minister considers are appropriate under the * equitable sharing program;*
- b) making any payments under a program approved by the Minister under section 298;*
- c) making any payments that the Minister administering the Mutual Assistance in Criminal Matters Act 1987 considers necessary to satisfy the Commonwealth's obligations in respect of:*
 - (i) a registered * foreign forfeiture order; or*
 - (ii) an order registered under section 45 of the International War Crimes Tribunals Act 1995; or*
 - (iii) a registered * foreign pecuniary penalty order;*

In addition to the equitable sharing programme, the POC Act provides other mechanisms to return assets to foreign countries. Section 70 of the POC Act provides a mechanism for the Minister to direct how property can be dealt with after it has been forfeited, provided the Official Trustee in Bankruptcy has not begun dealing with the property. This section can be used to return property to the country of origin. This mechanism is discretionary, permitting, but not requiring, the Minister to direct the Official Trustee in Bankruptcy 'that the property be ... disposed of, or otherwise dealt with, as specified in the direction.'

POC Act

Section 70 How must the Commonwealth deal with forfeited property?

...

*(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.

Examples:

In December 2017, over AUD12 million was returned to the United States under the equitable sharing provisions of the POC Act. This money was recovered as the result of a non-conviction-based confiscation action pursued in Australia in relation to gold and silver bullion that was suspected to be the proceeds of money laundering and illegal money remitting offences committed in the United States.

In September 2017, over AUD200,000 was returned to China under the equitable sharing provisions of the POC Act. The Chinese government authority requested the return of the funds so that these could be provided to the victims of the crime. The offences that were the basis of the POC Act action were under section 400.9(1) of the Criminal Code and passport offences.

In addition to the above payment, Australia has made equitable sharing payments under the POC Act to Singapore, the People's Republic of China, Indonesia and the United Kingdom that total AUD13,029,700.83. These include payment of AUD3.86 million from the proceeds of frauds to Singapore in 2008 and a payment of AUD280,446 representing stolen funds to the United Kingdom in 2008. The payments to Singapore and the United Kingdom were made on the basis of the contributions made by each country to the recovery of those proceeds or to the investigation or prosecution of the associated unlawful activity. In June 2017, the Minister for Justice approved a payment of AUD220,000 to the People's Republic of China as a result of a proceeds of crime action under the POC Act.

Under the equitable sharing programme, previous disbursements have occurred as follows:

- To the Chinese Government for the amount of AUD3,372,807.49 for money recovered in Australia by the AFP, regarding a matter involving a Chinese national, who was wanted in China for embezzlement and fraud offences.
- To the Indonesian Government for the amount of AUD642,540.46 following an investigation by a joint Australian-Indonesian task force.
- To the Singaporean Government for the amount of AUD3,860,000 for the recognition of its assistance in the investigation and prosecution of a Singapore national for fraud offences.
- To the United Kingdom for the amount of AUD280,446 for the recognition of its assistance in the investigation into a series of thefts in the United Kingdom.
- To the Chinese Government for the amount of AUD4,160,259.81 for the recognition of its assistance in the recovery of proceeds of crime, and in the investigation and prosecution of a Chinese national for money laundering offences.
- To the Indonesian Government for the amount of AUD493,647.07 for the assistance in the Hendra Rahardja.
- To the Lebanese Government for the amount of AUD683,500 for the recognition of assistance in investigating tobacco excise fraud.

The SK Foods case study contained at subparagraph 1(b) of article 54 is an example where funds were returned to an entity in a foreign state using the compensation provisions of the POC Act.

(b) Observations on the implementation of the article

Australia cannot return confiscated property in direct application of the Convention.

Pursuant to the POC Act, once a forfeiture order is made by a court, the property is liquidated and credited to the Confiscated Assets Account (section 296). Under the equitable sharing program, Australia can share with a foreign country a proportion of any proceeds recovered if the foreign country has made a significant contribution to the recovery or to the investigation or prosecution of the unlawful activity (section 296(4)(c) of the POC Act). During the country visit, it was added that the use of the term “sharing” did not imply that Australia would always keep a share of the proceeds. The “sharing” could also result in returning 100% of the assets to the country of origin.

Moreover, before liquidated property is credited to the Confiscated Assets Account, the Minister may direct under section 70 of the POC Act that the property be alternatively disposed of. This section can be used to return property to the country of origin. However, this mechanism is discretionary.

Paragraph 2 of article 57

2. Each State Party shall adopt such legislative and other measures, in accordance with the fundamental principles of its domestic law, as may be necessary to enable its competent authorities to return confiscated property, when acting on the request made by another State Party, in accordance with this Convention, taking into account the rights of bona fide third parties.

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

As described above, in response to paragraph 1 of article 57, Australian authorities can return the proceeds of confiscated assets to foreign countries under the POC Act.

In addition, payments can be made out of the Confiscated Assets Account where the Minister considers it necessary to satisfy the Commonwealth’s obligation in relation to a registered foreign forfeiture order or a registered foreign pecuniary penalty order.

As described above in response to paragraph 9 of article 55, the rights of bona fide third parties can be protected through the use of exclusion orders.

As outlined previously, the POC Act allows foreign parties with a legitimate interest in the property to exclude property from forfeiture (sections 73, 94), which will lead to the property being returned to them, or to obtain compensation orders for the portion of the value of the property that was legitimately acquired (sections 77, 94A).

Under Australia’s federated model of criminal law, the majority of victim-based crime (including assault, murder, sexual assault and domestic violence) is the responsibility of the States and Territories, which are responsible for administering their own victim compensation schemes.

A foreign victim of a Commonwealth crime may also seek compensation through the civil courts or, under section 21B of the Crimes Act, through an order that an offender pay restitution or reparation to the victim as part of their sentence.

(b) Observations on the implementation of the article

Ways to return the confiscated assets to a requesting State Party are:

- A ministerial direction pursuant to section 70 of the POC Act or 34B(3) of the MACMA, to deal with the property in an alternate manner set out in the direction; or Payments pursuant to the equitable sharing programme where the foreign country has made a significant contribution to the recovery of the proceeds or to the investigation or prosecution of the unlawful activity (section 296(4)(c) POC Act); or
- Recovered amounts in respect of a registered foreign forfeiture order or a registered foreign pecuniary penalty order can be returned pursuant to section 297(c)(i) and (iii) of the POC Act.

The POC Act also contains mechanisms to ensure that legitimate owners of property can have their interest in property recognised, including exclusion orders and compensation orders (sections 29 et seq. and 73 et seq.).

Subparagraph 3 (a) of article 57

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

(a) In the case of embezzlement of public funds or of laundering of embezzled public funds as referred to in articles 17 and 23 of this Convention, when confiscation was executed in accordance with article 55 and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party;

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

The general process with regard to the handling of forfeited assets is that the assets are forfeited to the Commonwealth and then liquidated. The proceeds are deposited into the Confiscated Assets Account pursuant to section 296 of the POC Act. Recovered amounts in respect of a registered foreign forfeiture order or a registered foreign pecuniary penalty order can be returned pursuant to section 297(c)(i) and (iii) of the POC Act, which allows the Minister who has responsibility for administering the MACMA to make payments that he or she considers necessary to satisfy the Commonwealth's obligations in respect of a registered foreign forfeiture order or a registered foreign pecuniary penalty order. Funds could also be returned pursuant to the equitable sharing program (section 296(4)(c) POC Act).

Refer to the response under paragraph 1 of article 57 relating to previous disbursements provided under the equitable sharing programme.

Alternatively, section 34B(3) of the MACMA provides that property that is subject to a foreign forfeiture order registered pursuant to section 34 of the MACMA may be disposed of, or otherwise dealt with, in accordance with any direction of the Attorney-General.

(b) Observations on the implementation of the article

Under sections 297(c)(i) and (iii) of the POC Act, the Minister with responsibility for the MACMA may make any payment that they consider necessary to satisfy the Commonwealth's obligations in respect of a registered foreign forfeiture order or a registered foreign pecuniary penalty order.

Under the equitable sharing program, Australia can share with a foreign country a proportion of any proceeds recovered if the foreign country has made a significant contribution to the recovery or to the investigation or prosecution of the unlawful activity (section 296(4)(c) of the POC Act).

Alternatively, section 34B(3) of the MACMA provides that property that is subject to a foreign forfeiture order

registered pursuant to section 34 of the MACMA may be disposed of, or otherwise dealt with, in accordance with any direction of the Attorney-General. Given the binding obligation under art. 57(3)(a), **it is recommended that Australia consider including a reference in the legislation to the specific mechanisms and mandatory requirements of article 57 and monitor the application thereof in all asset recovery cases.**

Subparagraph 3 (b) of article 57

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

...

(b) In the case of proceeds of any other offence covered by this Convention, when the confiscation was executed in accordance with article 55 of this Convention and on the basis of a final judgement in the requesting State Party, a requirement that can be waived by the requested State Party, return the confiscated property to the requesting State Party, when the requesting State Party reasonably establishes its prior ownership of such confiscated property to the requested State Party or when the requested State Party recognizes damage to the requesting State Party as a basis for returning the confiscated property;

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

In addition to the information contained above in response to article 57(1), the Minister may make a payment out of the Confiscated Assets Account under section 297 of the POC Act:

297 Payments out of the Account

*The following are purposes of the *Confiscated Assets Account:*

- (a) making any payments to the States, to *self-governing Territories or to foreign countries that the Minister considers are appropriate under the *equitable sharing program;*
- (b) making any payments under a program approved by the Minister under section 298;*
- (c) making any payments that the Minister considers necessary to satisfy the Commonwealth's obligations in respect of:*
 - (i) a registered *foreign forfeiture order; or*
 - (ii) an order registered under section 45 of the International War Crimes Tribunals Act 1995; or*
 - (iii) a registered *foreign pecuniary penalty order;*
- (d) making any payments to a State or to a self-governing Territory that the Attorney-General considers necessary following a crediting to the Account under paragraph 296(1)(b) of money received from a foreign country;*
- (e) paying the *Official Trustee amounts that were payable to the Official Trustee under regulations made for the purposes of paragraph 288(1)(a) but that the Official Trustee has been unable to recover;*
- (f) paying the annual management fee for the Official Trustee as specified in the regulations;*
- (fa) making any payments the Commonwealth is directed to make by an order under paragraph 55(2)(a), section 72, paragraph 73(2)(d), section 77 or 94A, subparagraph 102(d)(ii) or section 179L;*

- (g) *making any payments under an arrangement under paragraph 88(1)(b) or subsection 289(2);*
- (ga) *making any payments in relation to the conduct of an *examination, so long as the payments have been approved by the *responsible authority for the *principal order, or application for a principal order, in relation to which the examination was conducted;*
- (h) *making any payments to a *legal aid commission under Part 4-2.*

Refer to the response provided under paragraph 1 of article 57 relating to previous disbursements provided under the equitable sharing programme.

(b) Observations on the implementation of the article

Under sections 297(c)(i) and (iii) of the POC Act, the Minister with responsibility for the MACMA may make any payment that they consider necessary to satisfy the Commonwealth's obligations in respect of a registered foreign forfeiture order or a registered foreign pecuniary penalty order.

Under the equitable sharing program, Australia can share with a foreign country a proportion of any proceeds recovered if the foreign country has made a significant contribution to the recovery or to the investigation or prosecution of the unlawful activity (section 296(4)(c) POC Act).

Section 34B(3) MACMA provides that property that is subject to a foreign forfeiture order registered pursuant to section 34 of the MACMA may be disposed of, or otherwise dealt with, in accordance with any direction of the Attorney-General. This could be used to return property to the country of origin. Given the binding obligation under art. 57(3)(b), **it is recommended that Australia consider including a reference in the legislation to the specific mechanisms and mandatory requirements of article 57 and monitor the application thereof in all asset recovery cases (art. 57(3)).**

Subparagraph 3 (c) of article 57

3. In accordance with articles 46 and 55 of this Convention and paragraphs 1 and 2 of this article, the requested State Party shall:

...

(c) In all other cases, give priority consideration to returning confiscated property to the requesting State Party, returning such property to its prior legitimate owners or compensating the victims of the crime.

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

The purpose of the exclusion provision contained in the MACMA and the POC Act is to give prior legitimate owners of property the right to apply to the court to have their interest recognised. This enables the court to test the veracity of their claim of legitimate ownership.

As described above in response to paragraph 1 of article 57, assets restrained under the POC Act where custody and control orders are granted are managed by the Australian Financial Security Authority, on behalf of the Official Trustee in Bankruptcy. Once a forfeiture order is made by a court, the property is liquidated, and the funds from the liquidation are credited to the Confiscated Assets Account under section 296. Payments may then be made out of the account for purposes identified in section 297.

The SK Foods case study at subparagraph 1(b) of article 54 is an example where funds were returned to the victims of the crime.

(b) Observations on the implementation of the article

Section 34B(3) MACMA provides that property that is subject to a foreign forfeiture order registered pursuant to section 34 of the MACMA may be disposed of, or otherwise dealt with, in accordance with any direction of the Attorney-General. This complements other powers available within the POC Act that may also allow for payments to foreign countries.

Paragraph 4 of article 57

4. Where appropriate, unless States Parties decide otherwise, the requested State Party may deduct reasonable expenses incurred in investigations, prosecutions or judicial proceedings leading to the return or disposition of confiscated property pursuant to this article.

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

The Official Trustee in Bankruptcy (which is a statutory corporation whose functions are performed by the Australian Financial Security Authority) deals with forfeited property on behalf of the Commonwealth. The Official Trustee in Bankruptcy has the legislative power to charge for costs and expenses incurred with its exercise of powers and performance of functions or duties under the POC Act or under Part VI of the MACMA (section 288 of the POC Act / regulation 14 of the *Proceeds of Crime Regulations 2002*). Pursuant to section 297(e) of the POC Act, payments can be made out of the Confiscated Assets Account to the Official Trustee in Bankruptcy for the above-mentioned purposes. These payments would assist with the cost of the process of administering forfeited property on behalf of the Commonwealth.

Likewise, pursuant to section 297(ga) of the POC Act, payments can be made out of the Confiscated Assets Account for the purposes of conducting examinations of people, which is part of the legislative framework for information gathering regarding potential proceeds of crime matters.

On occasions where costs are incurred in the administration of the confiscated assets, Australia may choose to ensure that the costs incurred by the Official Trustee in Bankruptcy (the statutory corporation with responsibility for managing restrained and confiscated assets) are covered before the liquidated assets are realised and transmitted to a requesting country. Without specifying the nature of the costs that may be incurred, they may relate to any costs associated with maintaining assets (i.e. if a confiscated vessel requires mooring and maintenance) or costs associated with court proceedings where challenges to the orders have been brought.

(b) Observations on the implementation of the article

Cooperation requests are, in principle, executed free of charge. Australia will not reclaim expenses incurred for investigations, prosecutions or judicial proceedings. Where costs are incurred in the administration of the confiscated assets, Australia may choose to ensure that the costs incurred by the Official Trustee in Bankruptcy (the statutory corporation with responsibility for managing restrained and confiscated assets) are covered.

Paragraph 5 of article 57

5. Where appropriate, States Parties may also give special consideration to concluding agreements or arrangements, on a case-by-case basis, for the final disposal of confiscated property.

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

Australia has concluded a significant number of bilateral mutual legal assistance treaties that provide for the process of dealing with confiscated assets. These provisions are negotiated between Australia and its partners. Some of these allow for the return of assets, some allow for the sharing of confiscated assets, and some allow for the retention of confiscated assets by the requested country.

Additionally, both the MACMA and the POC Act allow for the sharing of confiscated assets with a foreign country. The MACMA conveys a discretion on the Attorney-General to direct how confiscated assets may be dealt with. This direction is given in writing upon the final confiscation of assets and having regard to the protection of third-party interests (MACMA, section 34B(3)). The POC Act conveys a discretion on the Minister for Home Affairs to share confiscated assets with a foreign country that has significantly contributed to the criminal investigation or prosecution or proceeds of crime action to which the proceeding relates (POC Act, section 296). The Department of Home Affairs maintains a register of monies shared with foreign countries under the POC Act scheme.

Both of these provisions enable the decision-maker to determine, on a case-by-case basis, whether it is appropriate in all of the circumstances to share confiscated assets.

(b) Observations on the implementation of the article

Australia does not make cooperation for the purposes of sharing and disposal of assets conditional on the existence of a treaty. Australia has concluded a significant number of bilateral mutual legal assistance treaties that provide for the process of dealing with confiscated assets.

Australia can also conclude agreements, on a case-by-case basis, for the final disposal of confiscated property, subject to any requirements in its domestic legislation.

Article 58. Financial intelligence unit

States Parties shall cooperate with one another for the purpose of preventing and combating the transfer of proceeds of offences established in accordance with this Convention and of promoting ways and means of recovering such proceeds and, to that end, shall consider establishing a financial intelligence unit to be responsible for receiving, analysing and disseminating to the competent authorities reports of suspicious financial transactions.

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

See Australia's response to subparagraph 1(b) of article 14 above, which provides information on Australia's FIU – AUSTRAC (www.austrac.gov.au). AUSTRAC receives, analyses and disseminates the suspicious matter reports it receives under the AML/CTF Act.

Under Division 2, Part 3 of the AML/CTF Act, reporting entities have an obligation to make a suspicious matter report to AUSTRAC where they have a reasonable suspicion that:

- a person (or their agent) is not the person they claim to be, or information the reporting entity has may be:
 - relevant to investigate or prosecute a person for an evasion (or attempted evasion) of a tax law, or
 - an offence against a Commonwealth, state or territory law, or
 - of assistance in enforcing the POC Act (or regulations under that Act), or
 - a state or territory law that corresponds to that Act or its regulations
- providing a designated service may be:
 - preparatory to committing an offence related to money laundering or terrorism financing, or
 - relevant to the investigation or prosecution of a person for an offence related to money laundering or terrorism financing.

Section 123 of the Act makes it a criminal offence to disclose suspicious matter reports to any person unless permitted by the Act.

Under section 132 of the [AML/CTF Act](#), AUSTRAC is able to share its information holdings with the governments of foreign countries. In practice, this generally comprises AUSTRAC's foreign FIU counterparts following the establishment of a formal exchange instrument. As of June 2017, formal arrangements are in place with 87 international exchange instruments (and in addition 2 regulatory MOUs).

AUSTRAC provides actionable financial intelligence to domestic partners as well. As of June 2017, there are 46 domestic partner agencies across law enforcement, national security, revenue protection and corruption. A small number of these partner agencies are able to disclose AUSTRAC information to their foreign counterparts.

Australia is a founding member of the FATF and of the Asia/Pacific Group on Money Laundering (APG), of which it is a permanent co-chair. AUSTRAC is a member of the Egmont Group of Financial Intelligence Units.

(b) Observations on the implementation of the article

The AML/CTF Act (Section 209) continued the existence of AUSTRAC, first established under the FTR Act, and enhanced its powers. AUSTRAC is Australia's FIU and specialist AML/CTF regulator. It is an administrative FIU in the portfolio of the Department of Home Affairs. The obligation to report suspicious transactions is established in Part 3, Division 2 of the AML/CTF Act.

Article 59. Bilateral and multilateral agreements and arrangements

States Parties shall consider concluding bilateral or multilateral agreements or arrangements to enhance the effectiveness of international cooperation undertaken pursuant to this chapter of the Convention.

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

AUSTRAC has an extensive international network of ties which enables AUSTRAC to facilitate the exchange of financial and other intelligence between Australian agencies and overseas counterparts.

As of June 2017, AUSTRAC has in place a total of 87 MOUs for the exchange of financial intelligence with international counterparts and 2 MOUs in place for the exchange of regulatory information.

A list of all MOUs is available on the AUSTRAC website: <http://www.austrac.gov.au/about-us/international-engagement/exchange-instruments-list>.

Australia actively seeks to develop and promote cooperation with other partner countries for the purposes of combating crime, including offences relating to corruption and money-laundering. The development and promotion of cooperation in this area is done on a bilateral basis through specific treaty arrangements with partner countries.

Mutual assistance relationship with the United States of America

A prominent example of such a relationship is provided by the mutual assistance relationship with the United States Government under *The Treaty between the Government of Australia and the Government of the United States of America on Mutual Assistance in Criminal Matters* (the United States Treaty). This Treaty has been implemented into Australian law by the *Mutual Assistance in Criminal Matters (United States of America) Regulations 1999* (the Treaty Implementing Regulations) made under the MACMA. The Act applies to the United States subject to the United States Treaty (see regulation 3 of the Treaty Implementing Regulations and section 7 of the MACMA).

Article 1 of the United States Treaty provides that:

“The Contracting Parties shall provide mutual assistance, in accordance with the provisions of this Treaty, in connection with the investigations, prosecution, and prevention of offences, and in proceedings related to criminal matters.

The International Crime Cooperation Central Authority within the Commonwealth Attorney-General’s Department has been designated by the Attorney-General as Australia’s Central Authority, which is responsible for managing mutual assistance requests made to and from Australia. Its counterpart is the Office of International Affairs in the United States Department of Justice.”

The mutual assistance relationship with the United States is one of Australia’s most significant crime cooperation relationships. The Australian Government makes a large number of mutual legal assistance requests to the United States every year on behalf of Commonwealth, State and Territory law enforcement agencies.

The United States Treaty contains a provision that governs the repatriation of confiscated assets between Australia and the United States.

Since 2002 the United States has repatriated funds to Australia in response to one outgoing mutual legal assistance request. Australia has taken action to register United States restraint and forfeiture orders, although Australia has not repatriated funds to the United States to date.

Examples of agreements that Australia has engaged in to enhance the effectiveness of international cooperation are as follows:

- *Mutual Assistance in Criminal Matters (Argentine Republic) Regulations;*
- *Mutual Assistance in Criminal Matters (Brazil) Regulation 2016;*
- *Mutual Assistance in Criminal Matters (Canada) Regulations;*
- *Mutual Assistance in Criminal Matters (Convention against Corruption) Regulations 2005;*
- *Mutual Assistance in Criminal Matters (Cybercrime) Regulation 2013;*
- *Mutual Assistance in Criminal Matters (Finland) Regulations;*
- *Mutual Assistance in Criminal Matters (French Republic) Regulations;*

- *Mutual Assistance in Criminal Matters (Grand Duchy of Luxembourg) Regulations;*
- *Mutual Assistance in Criminal Matters (Greece) Regulations 2004;*
- *Mutual Assistance in Criminal Matters (Hong Kong) Regulations 1999;*
- *Mutual Assistance in Criminal Matters (India) Regulations 2010;*
- *Mutual Assistance in Criminal Matters (Kingdom of the Netherlands) Regulations;*
- *Mutual Assistance in Criminal Matters (Malaysia) Regulations 2006;*
- *Mutual Assistance in Criminal Matters (Monaco) Regulations 2001;*
- *Mutual Assistance in Criminal Matters (Money-Laundering Convention) Regulations 1997;*
- *Mutual Assistance in Criminal Matters (Republic of Austria) Regulations;*
- *Mutual Assistance in Criminal Matters (Republic of Ecuador) Regulations;*
- *Mutual Assistance in Criminal Matters (Republic of Hungary) Regulations;*
- *Mutual Assistance in Criminal Matters (Republic of Indonesia) Regulations 1999;*
- *Mutual Assistance in Criminal Matters (Republic of Italy) Regulations;*
- *Mutual Assistance in Criminal Matters (Republic of Korea) Regulations;*
- *Mutual Assistance in Criminal Matters (Republic of Portugal) Regulations;*
- *Mutual Assistance in Criminal Matters (Republic of the Philippines) Regulations;*
- *Mutual Assistance in Criminal Matters (Spain) Regulations;*
- *Mutual Assistance in Criminal Matters (State of Israel) Regulations;*
- *Mutual Assistance in Criminal Matters (Suppression of Terrorist Bombings) Regulations 2002;*
- *Mutual Assistance in Criminal Matters (Suppression of the Financing Terrorism) Regulations 2006;*
- *Mutual Assistance in Criminal Matters (Sweden) Regulations 2001;*
- *Mutual Assistance in Criminal Matters (Switzerland) Regulations;*
- *Mutual Assistance in Criminal Matters (Thailand) Regulations 2008;*
- *Mutual Assistance in Criminal Matters (The People's Republic of China) Regulations 2007;*
- *Mutual Assistance in Criminal Matters (Traffic in Narcotic Drugs and Psychotropic Substances) Regulations;*
- *Mutual Assistance in Criminal Matters (United Arab Emirates) Regulations 2010;*
- *Mutual Assistance in Criminal Matters (United Kingdom) Regulations 1999;*
- *Mutual Assistance in Criminal Matters (United Mexican States) Regulations;*
- *Mutual Assistance in Criminal Matters (United States of America) Regulations 1999;*
- *Mutual Assistance in Criminal Matters (Vietnam) Regulation 2015;*
- *Mutual Assistance in Criminal Matters (Transnational Organised Crime) Regulations 2004.*

(b) Observations on the implementation of the article

AUSTRAC has an extensive international network to facilitate the exchange of financial and other intelligence between Australian agencies and overseas counterparts. As of June 2017, AUSTRAC has a total of 87 MOUs for the exchange of financial intelligence with international counterparts.

Between July 2017 and April 2018, AUSTRAC engaged in 22 bribery and corruption-related exchanges with other FIUs.

The AFP is the national contact bureau (NCB) for Interpol. It has MoUs with many partner institutions and is a member of the ARIN-AP as well as an observer in the CARIN.

UNODC