Australian Government

Attorney-General's Department

Criminal Justice Division

06/19373

17 December 2007

Mr Oliver Stolpe
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United Nations Office on Drugs and Crime
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AUSTRIA

Dear Mr Stolpe

United Nations Convention against Corruption - Resolution 1/8

Thank you for your correspondence dated 25 June 2007. I apologise that we are late in providing you with our response.

The Australian Government welcomes the opportunity to provide input to Resolution 1/8 entitled 'Best practices in the fight against corruption', in accordance with operative paragraph 2 of the Conference of the State Parties to the *United Nations Convention against Corruption*.

Australia's input to operative paragraph 2 of Resolution 1/8 is at **Attachment A**.

The action officer for this matter is Rebekah Kilpatrick who can be contacted on +61 2 6250 6418.

Yours sincerely

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The Australian Government's input into Resolution 1/8 of the Conference of the States Parties to the *United Nations Convention against Corruption*

Introduction

The Australian Government recognises the destructive effects that corruption can have on a society. Corruption undermines democracy and the rule of law, distorts market forces and facilitates activities such as organised crime and terrorism.

Australia consistently performs well on international anti-corruption surveys and is routinely placed among the top ten least corrupt countries in the world by Transparency International's Corruption Perceptions Index. Australia is proud of its successes, but recognises that the fight against corruption is an ongoing battle, and it remains committed to the fight.

This paper outlines Australia's approach to fighting corruption, which is based on:

- Australia's anti-corruption system including combating existing problems in international anti-corruption cooperation, and
- the legal framework for asset recovery, extradition and denial of safe haven.

Australia's Anti-Corruption System

Australia has a wide-ranging anti-corruption system. Australia signed the *United Nations Convention against Corruption* (UNCAC) on 9 December 2003 and ratified it on 7 December 2005. Since then Australia has implemented the mandatory requirements, and some non-mandatory requirements, prescribed in the provisions of UNCAC. The Australian Government believes UNCAC is an important step in combating corruption.

Australia's approach to fighting corruption is based on four key elements:

- constitutional safeguards
- accountability and transparency
- criminalisation of corruption, and
- international cooperation and technical assistance.

Constitutional safeguards

Australia's constitutional democracy (based on the Westminster system) provides the checks and balances needed to guard against corruption. The separation of powers and the rule of law within that system help to safeguard Australia from corruption and provides fundamental protections for human rights.

Australia has a federal system with three layers of government; Federal, State and local. This paper focuses on the federal level of government.

The Westminster system provides for responsible government. Under the Westminster system, Ministers are elected officials who are answerable to Parliament. Australian Government Ministers are constitutionally responsible for the Departments of State and statutory authorities within their portfolio and are also answerable to Parliament for abuses which may occur within their areas of responsibility.

A key principle in the Australian Constitution is the separation of powers. Under the Constitution the three types of government power (legislative, executive and judicial) are divided between three separate branches of government (legislature, executive and judiciary).

Legislative power is the power to make laws, executive power is the power to administer laws and carry out the business of government through such bodies as government departments, statutory authorities and the defence force and judicial power is the power to hear and determine disputes according to law.

Under the Australian Constitution, each of these powers is allocated to a separate branch of government. 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. This helps to prevent individuals or groups from ignoring the will of the people and/or manipulating government for personal gain.

Another important feature of the Australian Constitution is the implied freedom of political communication. This freedom prevents the making of laws which would hinder the Press in investigating and reporting on bribery and corruption, among other things.

The democratic system also makes governments accountable to the people. At least every three years citizens have the opportunity to vote on whether they would like the current government to remain in power. The Australian Electoral Commission is the independent statutory authority responsible for conducting federal elections, any referendums on constitutional questions and for maintaining the Commonwealth electoral roll.

The rule of law underpins Australia's system of government. It is the principle that subjects every person, regardless of their rank, status or office, to the same legal and judicial processes. All people and bodies, including governments, can have the lawfulness of their actions scrutinised in a court of law and can be held accountable for any activity determined to be inconsistent with the law.

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

Accountability and transparency

The Australian Government's approach to preventing corruption is based on the idea that no single body should be responsible for corruption. Instead, the strong constitutional foundation is enhanced by a range of bodies and government initiatives that promote accountability and transparency. This strategy addresses corruption in both the private and public sectors. We see this distribution of responsibility as a great strength in Australia's approach to corruption because it creates a strong system of checks and balances.

Many aspects of the private sector are regulated at the federal level. Key pieces of legislation include the *Corporations Act 2001*, which governs the way in which corporations can operate, and the *Australian Securities and Investments Commission Act 2001*, which establishes the Australian Securities and Investments Commission (ASIC). ASIC is an independent government body that is specifically tasked to enforce and regulate company laws. The *Australian Prudential Regulation Authority Act 1998* establishes the Australian Prudential Regulation Authority (APRA), which oversees the Australian financial services industry. The Australian Taxation Office also plays an important role in regulating the private sector.

Regulation of the public sector is shared between the Federal and State/Territory governments. Most jurisdictions have independent anti-corruption commissions or police integrity bodies (New South Wales, Queensland, Victoria, South Australia and Western Australia). The Australian Government has established an independent Australian Commission for Law Enforcement Integrity (ACLEI) that has jurisdiction over the Australian Federal Police (AFP) and the Australian Crime Commission (ACC). The *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) commenced operation on 30 December 2006. The Act established a new office of the Integrity Commissioner, supported by the ACLEI. The Integrity Commissioner and the ACLEI are responsible for preventing, detecting and investigating serious and systemic corruption issues in the AFP and the ACC. 'Corruption' is defined in the LEIC Act as applying to three categories of activity by a law enforcement officer: an abuse of office; conduct that perverts the course of justice; or corruption of any other kind. The AFP and the ACC investigate serious crimes and have important roles in the fight against corruption.

Australia has a comprehensive system of administrative law that allows the public to scrutinise government decisions. There are rights to seek review of administrative decisions in various pieces of legislation, including the Australian Constitution. Federal tribunals and other bodies have been established to deal with the review of administrative decisions and actions taken by government officials and the States and Territories have also established bodies to review decisions made by their government officials. Some of these bodies are specialised and deal with a limited range of decisions, while others have a more general jurisdiction. Each jurisdiction has an independent ombudsman.

The establishment of administrative review bodies is complemented by the *Freedom of Information Act 1982* (FOI Act) which extends, as far as possible, the Australian community's right to access information that is in the possession of the Federal Government. The FOI Act imposes a legal duty on federal agencies to provide members of the public with access to government information, including the official documents of Ministers, unless those documents fall within defined classes of exemption. This allows the public to scrutinise government decisions and encourages government accountability and transparency.

The Australian Government has established a financial framework containing requirements about financial governance, financial management and accountability. The management and accountability of public money is addressed through the *Financial Management and Accountability Act 1997* (FMA Act). The FMA Act provides a framework for the proper management of public money and public property, including regulating the way in which public officials spend public money. The *Commonwealth Authorities and Companies Act 1997* (CAC Act) regulates the Commonwealth authorities and companies who are legally and financially separate from the Commonwealth. For Commonwealth authorities, the CAC Act contains detailed rules on reporting and accountability and deals with matters such as banking, investment and the conduct of officers. For Commonwealth companies, the CAC Act contains reporting and other requirements in addition to the requirements of the Corporations Act.

The Commonwealth Fraud Control Guidelines (the Guidelines) clearly define the Australian Government's requirement that all budget funded agencies, and relevant CAC Act funded bodies, put in place practices and procedures for effective fraud control. For the purposes of the Guidelines, fraud against the Commonwealth is defined as 'dishonestly obtaining a benefit by deception or other means'. It encompasses, for example, obtaining benefits by deceit, charging the Commonwealth for non-delivery or incomplete delivery of services, abusing Commonwealth facilities, bribing or corrupting Commonwealth employees, and evading payments owed to the Commonwealth. Commonwealth agencies, in adhering to the Guidelines, are in a better position to prevent and deal with fraud.

One of Australia's key strategies in the prevention of corruption is the requirement that public officials behave appropriately and are held accountable for their actions. Each State and Territory, as well as the Australian Government, has its own public service with its own code of conduct.

Australia's approach is to promote ethical conduct rather than legislate detailed rules for compliance. The *Public Service Act 1999* (PS Act) establishes the Australian Public Service (APS) and sets out guidelines for its management.

The PS Act, which establishes the APS Values, articulates the culture and operating ethos of the APS and provides a philosophical underpinning. Agency heads must uphold and promote the APS Values and have systems in place to ensure that employees understand and apply them. Leadership is important in articulating the role of the Values and how they complement the agency's vision and organisational goals.

The PS Act also sets out the APS Code of Conduct. The Code of Conduct specifies the standard of conduct that is required of all APS employees. Agency heads and statutory office holders are also bound by it. The heads of agencies play a key role in promoting and enforcing the Code of Conduct and must put in place measures directed at ensuring employees are aware of the consequences of breaching it.

If an employee does breach the Code of Conduct, they can be subject to sanctions ranging from a reprimand to reduction in salary or even dismissal. Some breaches of the Code of Conduct may also be crimes which will attract criminal penalties.

The heads of agencies play a key role in promoting and enforcing the Code of Conduct. Agency heads must put in place measures directed at ensuring that employees are aware of the Code of Conduct and of the consequences of breaching it. Agency heads must establish procedures to

determine when a breach has occurred. There are also whistleblower provisions in the PS Act that prohibit the victimisation of, or discrimination against, any employee who reports a suspected breach of the Code of Conduct.

The Australian Public Service Commission is the government agency responsible for the future capability and sustainability of the APS. The Public Service Commissioner's functions include:

- promoting the APS Values and Code of Conduct
- conducting inquiries, evaluations and reviews of people-management practices
- supporting and coordinating APS-wide training and career-development opportunities in the APS
- contributing to, and fostering leadership in, the APS, and
- reporting annually to Parliament on the state of the Service.

As this brief survey shows, there is a wide range of bodies and initiatives to promote accountability and transparency. This is a key element in Australia's anti-corruption strategy.

Criminalisation of corruption

Australia has a strong legislative regime criminalising corrupt behaviour. Australia also has strategies in place to ensure that these laws are understood and enforced.

Corruption offences cover a very broad range of crimes, including bribery, embezzlement, nepotism and extortion. For this reason Australia's corruption offences are not contained in any single Act of Parliament. Usually, different types of corruption are dealt with in different pieces of State/Territory and federal legislation.

At the federal level, for example:

- domestic bribery and foreign bribery offences are contained in the *Criminal Code Act 1995*
- dealing in proceeds of crime is an offence under the *Criminal Code Act 1995*
- obstruction of justice is criminalised in the *Crimes Act 1914*
- offences for improperly dealing with public money are covered by the *Financial Management and Accountability Act 1997* and the CAC Act, and
- breach of duties as a director of a company is dealt with by the *Corporations Act 2001*.

Responsibility for investigating corruption offences is divided between State and Territory police forces, the AFP and specialised bodies such as the ACC and ASIC.

During the period 1 July 2004 to 30 June 2005, 54 corruption matters were reported to the AFP. This figure is comparable to the previous year when 32 corruption matters were reported to the AFP.

Once a matter involving a corruption offence is referred to the Director of Public Prosecutions (DPP), the decision whether to proceed with the prosecution is made by the DPP independently of those who were responsible for the investigation. The independence of the DPP is an important safeguard against corruption.

The DPP has statutory duties under the *Crimes (Superannuation Benefits) Act 1989* (the CSB Act) and Part VA of the *Australian Federal Police Act 1979* (the AFP Act). The CSB Act provides that the employer-funded proportion of a Commonwealth employee's superannuation entitlements may be liable to confiscation if he or she is convicted of a 'corruption offence' within the meaning of the Act. The AFP Act makes similar provision in relation to members of the AFP found guilty of corruption offences or certain disciplinary offences. Six superannuation orders were obtained under the CSB Act in 2005 -2006. There were no orders under Part VA of the AFP Act.

An effective criminal justice system must be responsive to changing circumstances and be receptive to strategies for improvement. Australia's experience with foreign bribery provides a good example.

Australia ratified the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* in 1999. In order to comply with the OECD Convention, Australia introduced a new offence into the *Criminal Code Act 1995*.

Division 70 of the Criminal Code creates the offence of bribing a foreign public official. Any person or company who commits the offence when in Australia can be prosecuted in Australia, and any Australian citizen, resident or company incorporated in Australia who commits the offence, whether or not the offence is committed in Australia, can also be prosecuted in Australia.

In 2003, after the offence had been in place for four years, there had not been one investigation of the offence. Australia identified this as a potential area for improvement and embarked on a campaign to:

- raise public awareness that foreign bribery is a criminal offence with significant penalties
- encourage organisations to implement policies and procedures for reporting allegations of bribery, and
- increase the level of reporting of allegations of foreign bribery.

The key messages of the public awareness campaign are that:

- bribing a foreign public official is a crime with serious consequences
- bribery damages the global economy, and
- allegations of foreign bribery should be reported to the AFP.

The campaign targets government and non-government organisations, including large companies, small- and medium-sized enterprises and professional bodies, and is increasing awareness surrounding foreign bribery through various means, including:

- preparing a Foreign Bribery Information and Awareness Pack which contains a leaflet entitled 'Bribing a Foreign Public Official is a Crime'. This leaflet explains the foreign bribery offence and the penalties associated with it. It also explains the obligation on companies to create and maintain a corporate culture that requires compliance with the law, including an obligation to take reasonable steps to ensure that their employees do not commit the foreign bribery offence. The Australian Government is distributing the Information and Awareness Packs within government, with a particular focus on agencies that are involved in law enforcement or have links to international trade, eg AFP, AusTrade, DPP, Australian Customs Service, the Departments of Foreign Affairs and Trade (DFAT), Finance and Administration and the Treasury. The pack will also be widely distributed within the private sector

- publishing articles on foreign bribery in government newsletters such as the DFAT News and industry newsletters

- raising awareness amongst Australian Government employees by training officers before they are posted overseas and by alerting officers who are already posted overseas. The foreign bribery leaflet has also been forwarded to overseas posts

- promoting the Attorney-General's Department's foreign bribery web site <www.ag.gov.au/foreignbribery> which sets out information about the foreign bribery offence. A number of government and nongovernment organisations have posted links to this web site (eg Australian Customs Service, DFAT and AusAID), and

- conducting a survey of Australia's Top 100 public companies, peak industry bodies and professional bodies requesting information on the initiatives in place in those organisations for raising awareness of the foreign bribery offence. The responses received have been positive.

The initial results of the campaign appear to be positive, with an increased level of awareness of the foreign bribery offence in both government and non-government sectors.

International cooperation and technical assistance

Corruption is a form of transnational crime that has no respect for, or loyalty to, nations, boundaries or sovereignty and is a critical restraint on development that affects countries throughout the Asia-Pacific region. For these reasons, Australia recognises that corruption cannot be dealt with in isolation—a collaborative approach to developing domestic and international techniques to combat corruption is required.

Through the Australian Agency for International Development's (AusAID), 'good governance' activities, Australia is actively involved in assisting countries in the Asia-Pacific region combat corruption. Promoting 'good governance' means promoting democratic, accountable government and effective administration. In 2005–06, AusAID directly funded approximately $897m of governance activities (36 per cent of Australia's total Overseas Development Assistance program).

Examples of Australia's activities in the region include:

- providing assistance to Asia-Pacific countries to combat money laundering by facilitating the implementation of international best practice in regulation and good governance
- assisting Thailand to oversee and regulate relevant activities (ombudsman, competition regulator, financial intelligence)
- working to strengthen public expenditure management in Vanuatu, Samoa, Kiribati, Tuvalu, Solomon Islands and Papua New Guinea, and
- assisting to build the capacity of the police, ombudsman and audit offices, judiciary and prison services in Indonesia, Cambodia, East Timor, Papua New Guinea, Solomon Islands, Nauru and the Philippines.

International legal cooperation ensures that corrupt individuals will not be able to exploit international boundaries to avoid prosecution. The *Mutual Assistance in Criminal Matters Act 1987*, *Mutual Assistance in Business Regulation Act 1992*, *Extradition Act 1988* and *Proceeds of Crime Act 2002* (POC Act) enable Australia to cooperate with other countries to prevent, investigate and prosecute offenders. Australia facilitates cooperation through the AFP International Liaison Network, which consists of 61 officers in 31 posts in 26 countries.

Australia is working to improve its mutual assistance and extradition relationships with other countries in the Asia-Pacific region. The Pacific Legal Knowledge Program is one of the ways Australia is improving its relationships. The Program involves the presentation of a series of workshops to law and justice sector officers from 14 Pacific Island Forum countries, with a focus on both building capacity and developing regional cooperative networks.

The first international criminal justice cooperation workshop, focusing on mutual assistance, extradition and proceeds of crime, was held in Vanuatu in December 2005 and was attended by Pacific Island country officers who are responsible for processing these matters. A second, follow up workshop was held in 2006 and had a practical focus, covering some of the investigative and prosecutorial aspects of these matters.

Australia recognises that corruption is not just one country's problem and, in recognition of this, is an active participant in international initiatives, including:

- ratifying UNCAC on 7 December 2005
- ratifying the *United Nations Convention against Transnational Organized Crime* on 27 May 2004
- ratifying the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* on 18 October 1999
- participating in the Asian Development Bank OECD Anti-Corruption Initiative for the Asia-Pacific

- participating in the Asia-Pacific Economic Cooperation Anti-Corruption and Transparency Experts Task Force (APEC ACT), and

- participating in monitoring exercises operated by both the G8 Financial Action Task Force on Money Laundering and the Commonwealth Secretariat on anti-money laundering measures.

Australia is committed to sharing technical expertise and improving our legal cooperation relationships with other countries to strengthen the fight against corruption, both in Australia and throughout the Asia-Pacific region.

Legal framework for asset recovery, extradition and denial of safe haven

Australia has a comprehensive legal framework for asset recovery, extradition and denial of safe haven.

Asset recovery

Australia supports the prompt return of illicitly acquired assets. Chapter V of UNCAC requires States Parties to return assets obtained through corruption to the country from which they were stolen. This is the first international agreement to do so. Australia complies with the provisions of Chapter V through the POC ACT, *Mutual Assistance in Criminal Matters Act 1987* and *Mutual Assistance in Business Regulation Act 1992*.

The POC Act provides a scheme to trace, restrain, share and confiscate the proceeds of crime against Commonwealth law. Any person (including a foreign State) can initiate civil proceedings in Australian courts (where the offence falls within Australia's jurisdiction).

The POC Act establishes an 'equitable sharing program', which gives the Minister for Justice and Customs the discretion to return the proceeds of crime to a foreign State. The foreign State may then use that money to, for example, pay compensation to the victims.

The *Mutual Assistance in Criminal Matters Act 1987* also establishes procedures for Australia to assist foreign States to deprive persons of the proceeds of crime that are reasonably suspected of being in Australia and provides mechanisms to register and enforce foreign forfeiture orders, obtain restraining orders, and obtain production and monitoring orders.

The Act provides for conviction-based forfeiture of assets. That is, assets may be recovered from a person convicted of an offence in the foreign State and the conviction must not be subject to further appeal.

An alternative forfeiture process also exists under the Act, which does not require the person from whom the assets are recovered to have been convicted of an offence (ie civil forfeiture). However, this alternative forfeiture process only applies to requests from specified countries (currently the US, Ireland, South Africa, UK and Canada).

A foreign forfeiture order registered under the Act can be enforced as if it were a forfeiture order made under the POC Act.

The *Mutual Assistance in Business Regulation Act 1992* establishes procedures for Commonwealth regulators, such as ASIC and APRA, to provide assistance to foreign regulators in the administration or enforcement of foreign business laws by obtaining relevant information, documents and evidence from persons in Australia and transmitting that information and evidence and copies of those documents to foreign regulators. This Act however cannot be used to obtain evidence for use in criminal proceedings. (The *Mutual Assistance in Criminal Matters Act 1987* must be used for this purpose).

Australia's anti-money laundering regulator and specialist financial intelligence unit, Australian Transaction Reports and Analysis Centre (AUSTRAC), assists in tracing the proceeds of crime. Banks and financial institutions have an obligation to report suspect transactions and 'significant cash transactions' to AUSTRAC, who then shares the information it collects with specified law enforcement, security and revenue agencies within Australia.

Australia has a robust anti-money laundering and counter-terrorism financing (AML/CTF) legislative framework consisting of the *Anti-Money Laundering and Counter-Terrorism Financing Act 2006* (the AML/CTF Act) and *Anti-Money Laundering and Counter-Terrorism Financing Rules* (the AML/CTF Rules).

The AML/CTF Act sets out a principles-based framework, setting higher level obligations that encourage a risk-based approach to AML/CTF compliance. Reporting entities under the AML/CTF Act are required to have and comply with AML/CTF programs which are designed to identify, mitigate and manage AML/CTF risks that the reporting entity may reasonably face.

The AML/CTF Act provides for legislative instruments known as the AML/CTF Rules to be developed to provide operational detail.

The AML/CTF Act implements the majority of the international standards for combating money laundering and terrorism financing set by the Financial Action Task Force (FATF). Australia is a member of the FATF.

To complete Australia's compliance with the international standards set by the FATF, the Government is consulting with stakeholders on a proposal to amend the AML/CTF Act to extend the obligations under that Act to specified transactions conducted by lawyers, accountants, jewellers and real estate agents and implementing a separate strategy to oversight the non profit sector.

AUSTRAC, the AFP and the Australian Security Intelligence Organisation cooperate with overseas authorities to share financial intelligence (subject to appropriate safeguards as to confidentiality and use).

Extradition and denial of safe haven

The *Mutual Assistance in Criminal Matters Act 1987*, *Extradition Act 1988* and POC Act all provide for international cooperation in the prevention, investigation and prosecution of offenders as required by UNCAC.

Australia has made regulations that apply the *Extradition Act 1988* and *Mutual Assistance in Criminal Matters Act 1987* to those countries that are a party to UNCAC. The regulations extend mutual assistance and extradition to offences contained in UNCAC.

Australia has numerous programs which cooperate internationally on law enforcement, including:

- the AFP Law Enforcement Cooperation Program, which facilitates cooperation and capacity-building activities agreed by Australia and the receiving (developing) country as priorities for both countries
- the AFP International Network of Liaison Officers, which facilitates information-sharing and good operational working relationships between the AFP and foreign law enforcement agencies
- agency-to-agency Memoranda of Understanding (eg MOUs between the AFP and priority partner law enforcement agencies, particularly in Australia's immediate region)
- cooperation with Interpol, which enables Australia to send and receive information on various law enforcement operations and associated policy, data and analytical issues
- participating in joint investigations (eg with the Indonesian National Police after the terrorist bombings in 2002, 2004 and 2005), and
- providing technical assistance to investigations of serious crime conducted by foreign law enforcement partners.

Australia's best practices

In responding to the operative paragraph 2 of resolution 1/8 the Australian Government proposes the following areas of possible best practice.

Regional Cooperation

Australia recognises that corruption can destabilise nations. Thus, Australia takes a proactive approach in the Asia-Pacific region to assist those countries which do not have the resources to implement UNCAC to combat corruption, with a focus on capacity building and technical assistance. Australia is an active participant in regional anti-corruption initiatives through the Organisation for Economic Co-operation and Development and Asia-Pacific Economic Co-operation and also through AusAID's governance programs.

Mutual legal assistance

Australia works extensively to advance bilateral treaties on mutual assistance and extradition. These treaties play a vital role in improving international legal cooperation in the region.

Money Laundering

Australia has a robust and effective system to combat money laundering and terrorist financing. Australia has a long-standing interest in, and commitment to, assisting countries in the Asia-Pacific region to improve their anti-money laundering and counter-terrorist financing systems.