

AUSTRALIA

REVIEW OF IMPLEMENTATION OF THE CONVENTION AND 1997 RECOMMENDATION

A. IMPLEMENTATION OF THE CONVENTION

Formal Issues

Australia signed the Convention on December 7, 1998, and deposited the instrument of ratification on October 18, 1999. Legislation to implement the Convention was passed by the Australian Parliament and received the Royal Assent on June 17, 1999. It came into effect on December 18, 1999.

Convention as a Whole

Australia chose to implement the Convention through amendments to the Criminal Code Act 1995.¹ The amendments include a codification of the offence of bribing a foreign public official in section 70.2, all the relevant definitions including one of “foreign public official” in section 70.1, and section 70.5, which provides for the territorial and nationality requirements of the offence.

Other existing laws, including the Proceeds of Crime Act 1987, the Mutual Assistance in Criminal Matters Act 1987, the Extradition Act 1988 and the Corporations Law contain provisions relevant to the other obligations under the Convention.

Where someone seeks to influence a foreign public official in a State of Australia, the person may be prosecuted under a State secret commissions offence, which is a corruption offence that applies to the making of payments for the purpose of influencing anyone (private or public sector). Section 70.6 of the Criminal Code clarifies that an offence may be prosecuted under State legislation, provided that the relevant law is not excluded or limited by the Commonwealth legislation. However, the Australian authorities anticipate that the majority of prosecutions for the bribery of foreign public officials will be instituted under the Criminal Code.

1. ARTICLE 1. THE OFFENCE OF BRIBING A FOREIGN PUBLIC OFFICIAL

The offence of bribing a foreign public official is set out in section 70.2 of the amendments to the Criminal Code Act as follows:

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

(a) the person:

(i) provides a benefit to another person; or

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

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

(iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit,

to be made to another person; and

(b) the benefit is not legitimately due to the other person; and

¹ The Australian Constitution provides the Federal government with criminal law power incidental to specific powers it has under the Constitution. One of the specific powers is the external affairs power, which provides the basis for the federal government to legislate to implement the Convention.

(c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official's duties as a foreign public official in order to:

(i) obtain or retain business; or

(ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Penalty: Imprisonment for 10 years.

Section 70.3 provides a defence where the conduct is not prohibited under the law of the foreign public official's country (see discussion under 1.1.4 on "any undue pecuniary or other advantage"), and section 70.4 provides a defence for "facilitation payments" (see discussion under 1.1.9 on "in order to obtain or retain business or other improper advantage"). In addition, Part 2.3 of Chapter 2 of the Criminal Code contains general defences, including mental impairment, intoxication, mistake or ignorance of fact and duress. Chapter 2 of the Criminal Code is new and has not yet been applied to the domestic offences. However, similar defences exist under the common law. The Australian authorities provide that most of the defences are not relevant to the foreign bribery offence, but some, including mistake of fact and duress could be relevant in certain circumstances.

The defence of duress applies where a person carries out conduct constituting an offence under the reasonable belief that²:

1. a threat has been made that will be carried out unless an offence is committed (i.e. unless a bribe is paid);
2. there is no reasonable way that the threat can be rendered ineffective; and
3. the conduct is a reasonable response to the threat.

The defence of duress is not available if the threat is made on or behalf of a person with whom the person under duress is voluntarily associating for the purpose of carrying out the conduct of the kind actually carried out.³ The Australian authorities provide as an example of where the defence would apply the case where the briber threatens to destroy a ship or its cargo, or to harm employees of the person being bribed unless he/she makes a payment. They provide that the defence would not apply where it can be shown that the defendant was going to bribe the official in any case. Although the defence of duress has not yet been applied to domestic bribery cases, it is a concept that has existed in the common law for a long time.

1.1 The Elements of the Offence

1.1.1 any person

Subsection 70.2 (1) of the Criminal Code applies to "a person". The Australian authorities provide that pursuant to paragraph 22(1)(a) of the Acts Interpretation Act 1901, "person" includes a body corporate as well as an individual, and pursuant to paragraph 22(1)(aa), an individual is a natural person.

² Subsection 10.2 (2) of the Criminal Code.

³ Subsection 10.2(3) of the Criminal Code.

1.1.2 intentionally

Under paragraph 70.2(1)(c) an offence is committed where the person providing a benefit, etc. did so with the “intention of influencing a foreign public official...in the exercise” of his/her duties in order to “obtain or retain business”, etc. Section 5.2 of Chapter 2 of the Criminal Code provides that a person has “intention” with respect to conduct if he/she means to engage in that conduct. A person has intention with respect to a circumstance if he/she believes it exists or will exist or with respect to a result if he/she means to bring it about or is aware that it will occur in the ordinary course of events.

1.1.3 to offer, promise or give

Section 70.2 applies where a person “provides a benefit”⁴, “causes a benefit to be provided”⁵, “offers to provide...a benefit”⁶, “promises to provide a benefit”⁷, “causes an offer of the provision of a benefit”⁸ or “causes...a promise of the provision of a benefit”⁹. As the term “provide” corresponds to “give”, all of the elements in the Convention in this respect are covered.

1.1.4 any undue pecuniary or other advantage

Subsection 70.2(1) pertains to the providing, etc. of a “benefit” that is “not legitimately due”¹⁰. Under section 70.1 of the definitions, “benefit includes any advantage and is not limited to property”. In the explanatory memorandum on the amendments to the Criminal Code, it is stated that “benefit” contemplates a “pecuniary or non-pecuniary benefit”.¹¹

The prosecution bears the burden of proving that a benefit is “not legitimately due to a person in a particular situation”. Subsection 70.2 (2) requires that in proving this element of the offence, the following be disregarded:

- a) *the fact that the benefit may be customary, or perceived to be customary, in the situation;*
- b) *the value of the benefit;*
- c) *any official tolerance of the benefit.*

Subparagraphs (a) and (c) codify Commentary 7 on the Convention, and subparagraph (b) provides that there is no *de minimis* rule in this regard. The Australian authorities explain that these concepts are not used in the domestic bribery legislation and, therefore, there is no judicial guidance on their interpretation.

⁴ Subparagraph 70.2(1)(a)(i)

⁵ Subparagraph 70.2(1)(a)(ii)

⁶ Subparagraph 70.2(1)(a)(iii)

⁷ Ibid.

⁸ Subparagraph 70.2(1)(a)(iv)

⁹ Ibid.

¹⁰ Paragraph 70.2(1)(b).

¹¹ Explanatory Memorandum (1999) circulated by authority to the Minister of Justice (Senator, the Honourable Amanda Vanstone) on Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999, paragraph 24, page 15.

Defence where Conduct is Lawful in Foreign Public Official's Country

Subsection 70.3 (1) provides a table, which essentially clarifies that in relation to all the categories of foreign public officials, an offence is not committed if the advantage is not prohibited under the law of the foreign public official's country. A note below the table clarifies that the defendant bears the evidential burden of proving the defence. In the case of a foreign public official in the service of an international organisation, the relevant law is the law of the "place" where the "headquarters of the organisation is located". The Australian authorities comment that the choice of the relevant law in the latter case is intended to prevent misuse of the defence by ensuring that persons cannot deliberately locate themselves in a particular jurisdiction in order to avoid liability.¹²

Subsections 70.3 (2) and (3) appear to clarify that where the offer, etc. is made to an intermediary who is acting or pretending to act on behalf of a foreign public official, an offence is not committed if the advantage is not prohibited under the law of the foreign public official's country on behalf of whom the intermediary acts or pretends to act¹³.

The Australian authorities note that Commentary 8 on the Convention states that an offence is not committed where "the advantage was permitted or required by the written law or regulation of the foreign public official's country, including case law". They do not interpret this to mean that there must be an express permission for the conduct to be lawful. It is their interpretation that the conduct does not constitute an offence as long as it is not prohibited under the law of the foreign public official's country.

1.1.5 whether directly or through intermediaries

Subparagraph 70.2(1)(a)(ii) applies where a person "causes" a benefit to be provided, and subparagraph 70.2(1)(a)(iv) applies where a person "causes" an offer or a promise of the provision of a benefit to be made. It seems clear that the term "causes" addresses the situation where a person causes a benefit to be provided, offered or promised through an intermediary.

1.1.6 to a foreign public official

The definition of "foreign public official" and all the complementary definitions, such as "foreign country" and "public enterprise" are contained in section 70.1 of the amendments.

The definition of "foreign country" is very broad, and unlike the definition in Article 1.4(b) of the Convention, is not restricted to "government" entities. It includes a territory outside Australia "where a foreign country is to any extent responsible for the international relations of the territory" or "that is to some extent self-governing, but that is not recognised as an independent sovereign state by Australia".

The first part of the definition of "foreign public official" in Article 1.4(a) of the Convention (i.e. "any person holding a legislative, administrative or judicial office of a foreign country, whether appointed or elected") is covered by paragraphs (f) and (k) of the definition in the Criminal Code amendment. Although these paragraphs do not expressly apply whether the person in question has been "appointed or elected", it would appear that this is the intent. By including the reference to a "part of the foreign country" it seems that these definitions apply when the person in question holds the type of office described for "all levels and subdivisions" of the foreign country, as is required by the Convention.

¹² Ibid, paragraph 35, page20.

¹³ Again, it appears where the foreign public official is in the service of an international organisation, the relevant law is the "place" where the "headquarters" of the international organisation is located.

The second part of the definition of “foreign public official” in Article 1.4(a) of the Convention (i.e. “any person exercising a public function for a foreign country, including for a public agency or public enterprise”) is covered by various paragraphs in the definition in section 70.1 of the Criminal Code amendments, including (a), (b), (c), (d) and (e). The Australian definition is structured a little differently than the definition in the Convention, in that it does not define a “foreign public official” in terms of performing a “public function”. Instead, under the Criminal Code amendments, the definition is tied to the tasks performed by the various individuals. The result, however, is the same, and it does not appear that the Australian definition overlooks any person that would be covered by the definition in the Convention. In fact, the Australian definition clarifies that persons under contract are covered, as well as persons performing the duties of their tasks under a law of a foreign country or pursuant to the custom or convention of a foreign country. The definition of “foreign government body” under section 70.1 includes “an authority of the government of a foreign country” or “a part of the government of a foreign country”, thus covering “public agencies” as required by the Convention. It further clarifies that “foreign government body” includes “a foreign local government body or foreign regional government body”, and “a foreign public enterprise”.

“Foreign public enterprise” is broadly defined in section 70.1 of the Criminal Code. Consistent with Commentary 14 on the Convention, *de facto* control of a foreign government or governments over an enterprise is sufficient for it to be considered a “public enterprise”. The definition of “control” under section 70.1, which includes control through “trusts, agreements, arrangements, understandings and practices, whether or not having legal or equitable force and whether or not based on legal or equitable rights”, covers “indirect” control as required by Commentary 14. Furthermore, section 70.1 clarifies that the definition of “public enterprise” applies to an enterprise receiving special legal rights, benefits or privileges, etc. due to its relationship with the government of the foreign country (or of part of the foreign country).

The definition of “foreign public official” in section 70.1 of the Criminal Code amendments in relation to “public international organisations” covers every person contemplated by the corresponding part of the definition in the Convention.

1.1.7 for that official or for a third party

The offence of bribing a foreign public official under subsection 70.2(1) of the Criminal Code amendments applies to the case where a third party receives a benefit. Paragraph 70.2(1)(a) requires that the benefit be provided, etc. “to another person” and paragraph 70.2(1)(c) states that the foreign public official “may be the other person” to whom the benefit was not legitimately due. Paragraph 26 of the explanatory memorandum¹⁴ states that “another person” could be “the foreign public official or a third person, for example, the partner of the official”.

1.1.8 in order that the official act or refrain from acting in relation to the performance of official duties

Subsection 70.2(1) applies where a benefit is provided, etc. with the intention of influencing a foreign public official “in the exercise of the official’s duties as a foreign public official”. The term “duty” is defined under section 70.1 as “any authority, duty, function or power that”:

- (a) *is conferred on the official; or*
- (b) *that the official holds himself or herself out as having.*

¹⁴. *Supra*, 11.

Together, the two parts of the definition fulfil the requirement under Article 1.4(c) of the Convention that “any use of the public official’s position” is covered, “whether or not within the official’s authorised competence”. The Australian authorities explain that because “duty” is defined broadly and includes “function”, subsection 70.2(1) covers acts and omissions in the exercise of a public official’s duties, as required by the Convention.

1.1.9 in order to obtain or retain business or other improper advantage

The foreign bribery offence applies to the provision of benefits, etc. in order to “obtain or retain business”, pursuant to subparagraph 70.2(1)(c)(i), or in order to “obtain or retain a business advantage¹⁵ that is not legitimately due to the recipient, or intended recipient of the business advantage (who may be the first-mentioned person)”, pursuant to subparagraph 70.2(1)(c)(ii). Only the obtaining or retaining of a “business advantage” is qualified by the requirement that the advantage not be legitimately due. In paragraph 28 of the explanatory memorandum to the Criminal Code amendments¹⁶, it is stated that the focus in subparagraph (c)(i) is “on benefits significant enough to influence trade and its scope is such that on its own it would not include smaller ‘facilitation’ benefits”. Thus, the second branch was added in relation to a “business advantage” under subparagraph (c)(ii), which is much “less specific” than the first branch and in the absence of the defence under section 70.4 (discussed below) would be “more likely to catch smaller ‘facilitation’ payments”.¹⁷

Consistent with Commentary 7 on the Convention, subsection 70.2(3) provides that in proving that “a business advantage is not legitimately due to the recipient” the following must be disregarded:

- (a) *the fact that the business advantage may be customary, or perceived to be customary, in the situation;*
- (b) *any official tolerance of the business advantage.*

Moreover, in the explanatory memorandum the Australian authorities indicate that subparagraph 70.2(1)(c)(ii) is intended, consistent with Commentary 5 on the Convention, to cover the situation where a benefit is provided, etc. in order to obtain or retain a business advantage to which the person was clearly not entitled, such as an operating permit for a factory that does not meet the required standards.¹⁸ They provide further that the courts will look for an absence of any legal entitlement to the payment, which would be the case, for instance, where the person is not owed the money as a debt. There is no case law on this element because this concept is not used in the domestic bribery legislation.

Defence for Facilitation Payments

Section 70.4 of the Criminal Code amendments provides a defence to the offence under section 70.2 in relation to “facilitation payments”, which must be raised and argued by the defendant. It states that a person is not guilty of the foreign bribery offence where:

- (a) *the person’s conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine governmental action of a minor nature; and*

¹⁵ “Business advantage” is defined in 70.1 of the Criminal Codes amendments as “an advantage in the conduct of business”.

¹⁶ See page 16, supra, 11.

¹⁷ Paragraph 29, page 17, supra 11.

¹⁸ Ibid, paragraph 30, page 17.

(b) *as soon as practicable after the conduct occurred, the person made a record of the conduct that complies with subsection (3).*

Moreover, pursuant to paragraph 70.4(1)(c), for the defence to apply the record must be retained at all relevant times, or lost or destroyed for reasons beyond the person's control, or the prosecution must be instituted more than 7 years after the conduct occurred. Subsection 70.4(3) particularises the required contents of these records. The Australian authorities state that the purpose of the record requirement is to ensure that the defence is only available where a person fully discloses the nature of the payment in a record, clearly showing that the payment was a "genuine facilitation payment to secure or expedite non-discretionary routine government action of a minor nature".¹⁹

"Routine government action" is defined under subsection 70.4(2) as an action of a foreign public official that "is ordinarily and commonly performed by the official" and includes the following:

1. granting a permit, licence or other official document that qualifies a person to do business in a foreign country or in part of a foreign country;
 2. processing government papers such as a visa or work permit;
 3. providing police protection or mail collection or delivery;
 4. scheduling inspections associated with contract performance or related to the transit of goods;
- and
5. any other action of a similar nature.

Paragraphs 70.4(2)(c) and (d) clarify that "routine government action" does not involve a decision about (or encouraging a decision about) whether to award new business or continue business with a particular party, or the terms of a new or existing business.

Although section 70.4 is not expressly restricted to situations where the value of the benefit given to the foreign public official is minor, the Australian authorities explain that the defence is only available where the benefit is of a "minor nature". They explain further that this approach is preferable to particularising a specific value because it enables the court to take into account all the circumstances of the payment, and avoids the inevitable distortions that would result from identifying a specific amount (e.g. due to differing exchange rates and the impact of different sized payments in different countries).

In addition, the Australian authorities state that although some of the "routine governmental actions" listed under subsection 70.4(2) involve a certain degree of discretion (e.g. processing a work permit), these actions are not a matter of absolute discretion.

1.1.10 in the conduct of international business

The offence of bribing a foreign public official under subsection 70.2(1) applies in relation to the obtaining or retaining of "business" or a "business advantage", and is not qualified by the term "international".

1.2 Complicity

Article 1.2 of the Convention requires Parties to establish as a criminal offence the "complicity in, including incitement, aiding and abetting, or authorisation of an act of bribery of a foreign public official".

The Australian authorities provide that aiding, abetting, counselling and procuring the commission of an offence is treated as the commission of an offence under subsection 11.1(1) of the Criminal Code. The

¹⁹ Paragraph 51, page 24-25, supra, 11.

terms “counselling” and “procuring” would appear to encompass incitement and authorisation. It is assumed that subsection 11.1(1) is a general provision that applies to all offences under the Criminal Code.

1.3 Attempt and Conspiracy

Article 1.2 of the Convention further requires Parties to criminalise the conspiracy and attempt to bribe a foreign public official to the same extent as they are criminalised with respect to their own domestic officials.

The Australian authorities state that an attempt to “commit the bribery of a foreign public official” is an offence pursuant to subsection 11.1(1) of Part 2.4 (Chapter 2) of the Criminal Code, and is punished as if the offence had been committed.

In addition, a conspiracy to commit the offence of bribery of a foreign public official is an offence pursuant to subsection 11.5(1) of Part 2.4 (Chapter 2) of the Criminal Code, and is punished as if the offence had been committed.

The ancillary provisions under Part 2.4 of Chapter 2 of the Criminal Code apply to all the alternative elements of the offence of bribing a foreign public official under section 70.2 (i.e. offering, promising, causing to provide, causing to offer and causing to promise).

2. ARTICLE 2. RESPONSIBILITY OF LEGAL PERSONS

Article 2 of the Convention requires each Party to “take such measures as may be necessary, in accordance with its legal principles, to establish the liability of legal persons for the bribery of a foreign public official”.

2.1.1 Legal Entities

Pursuant to subsection 12.1 (1) of Part 2.5 (Chapter 2) of the Criminal Code, the Code applies to bodies corporate in the same way as it applies to individuals with the modifications required in Part 2.5 on corporate criminal responsibility, as well as with such other modifications as are necessitated by the fact of imposing criminal liability on a body corporate rather than an individual.

The Australian authorities explain that the term “body corporate” is commonly used in Australian statutes but is rarely defined. It is defined in Butterworths Australian Legal Dictionary²⁰ as “an artificial legal entity having separate legal personality” including “bodies created by common law (such as a corporation sole or corporation aggregate), by statute (such as the Australian Securities Commission) and by registration pursuant to statute (such as a company, building society, credit union, trade union or unincorporated union)”. Although there has not been much case law produced on this issue, the Australian authorities are certain that the term covers all companies including those that are state-owned or state-controlled.

²⁰ Ed. Dr. Peter E Nygh and Peter Butt (1977).

2.1.2 Standard of Liability

Pursuant to section 12.2 of the Criminal Code, where an employee, agent or officer of a body corporate commits “a physical element” of an offence while acting within the actual or apparent scope of his/her employment or authority, the “physical element” shall also be attributed to the body corporate. Subsection 12.3(1) provides further that if intention, knowledge or recklessness is required in relation to the “physical element” of an offence, it shall be attributed to a body corporate that “expressly, tacitly or impliedly authorised or permitted the commission of the offence”. The Australian authorities confirm that all the ways of committing the offence of bribing a foreign public official under section 70.2 of the Criminal Code amendments (e.g. providing, offering to provide or promising to provide a benefit) would be considered physical elements. Section 4.1 of the Criminal Code provides that a physical element of an offence may be conduct (an act, an omission to perform an act or a state of affairs), a circumstance in which conduct occurs or a result of conduct.

The ways in which it may be established that the body corporate authorised or permitted the commission of an offence may include proof of one of the following:

1. The body corporate’s “board of directors” intentionally, knowingly or recklessly carried out the conduct in question or expressly, tacitly or impliedly authorised or permitted the commission of the offence.²¹ Pursuant to subsection 12.3(6) of the Criminal Code, the “board of directors” is defined as the body (regardless of its name) exercising the executive authority of the body corporate. The Australian authorities add that, although there is no case law on the point, it would be sufficient for one member of the board of directors to carry out the conduct in question. Since a member of a board of directors would be considered a “high managerial agent”, a case of this nature would be covered under the next category.

2. A “high managerial agent” of the body corporate intentionally, knowingly or recklessly carried out the conduct in question or expressly, tacitly or impliedly authorised or permitted the commission of the offence.²² Pursuant to subsection 12.3(6) of the Criminal Code, a “high managerial agent” is defined as an employee, agent or officer of the body corporate with such duties and responsibilities that it is fair to assume that his/her conduct represents the policy of the body corporate.

If the body corporate proves that it exercised “due diligence” to prevent the conduct, authorisation or permission in question, this provision would not apply.²³

3. A “corporate culture” existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision;²⁴ or the body corporate failed to create and maintain a “corporate culture” that required compliance with the relevant provision.²⁵ Although there is no case law on this provision, the Australian authorities are confident that the term “relevant provision” would be interpreted as a reference to the relevant offence.

Pursuant to 12.3(6) of the Criminal Code, “corporate culture” is defined as an attitude, policy, rule or course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities take place.

²¹ Paragraph 12.3(2)(a) of the Criminal Code.

²² Paragraph 12.3(2)(b) of the Criminal Code.

²³ Subsection 12.3(3) of the Criminal Code.

²⁴ Paragraph 12.3(2)(c) of the Criminal Code.

²⁵ Paragraph 12.3(2)(d) of the Criminal Code.

In determining whether the provisions on “corporate culture” apply, the factors that may be considered include the following:

- (a) Whether a “high managerial agent” had previously authorised the commission of the same or a similar offence.²⁶
- (b) Whether the employee, agent or officer who committed the offence believed on reasonable grounds, or entertained a reasonable expectation, that a “high managerial agent” of the body corporate would have authorised or permitted the commission of the offence.²⁷

3. ARTICLE 3. SANCTIONS

The Convention requires Parties to institute “effective, proportionate and dissuasive criminal penalties” comparable to those applicable to bribery of the Party’s own domestic officials. Where a Party’s domestic law does not subject legal persons to criminal responsibility, the Convention requires the Party to ensure that they are “subject to effective, proportionate, and dissuasive non-criminal sanctions, including monetary sanctions”. The Convention also mandates that for a natural person, criminal penalties include the “deprivation of liberty” sufficient to enable mutual legal assistance and extradition. Additionally, the Convention requires each Party to take such measures as necessary to ensure that the bribe and the proceeds of the bribery of the foreign public official are subject to seizure and confiscation or that monetary sanctions of a “comparable effect” are applicable. Finally, the Convention requires each Party to consider the imposition of additional civil or administrative sanctions.

3.1/3.2 Criminal Penalties for Bribery of a Domestic and Foreign Public Official

The current penalty for the offence of bribing a domestic public official is a maximum of 2 years imprisonment and/or a fine of \$13, 200²⁸, where the offender is a natural person, and a fine of \$66,000 where the offender is a “body corporate”.

The penalty prescribed under the Criminal Code amendments for the offence of bribing a foreign public official is a maximum of 10 years imprisonment. Natural persons are also liable to a fine of \$66,000, in addition to imprisonment or in lieu thereof,. A “body corporate” is liable to a fine of \$330,000.²⁹

The Australian authorities state that the penalties for the foreign bribery offence are in accordance with the penalties applied in relation to other offences. They state that the fine should not be considered alone, but together with imprisonment of the relevant directors and the recording of a criminal conviction, which will disqualify many individuals and bodies corporate from numerous areas of business activity.

Section 16A provides guidelines that the court must consider in determining the appropriate sentence in a particular case. These include consideration of the personal circumstances of any victim of the offence; the injury loss or damage resulting from the offence; and the degree to which the person has shown contrition for the offence.

²⁶ Paragraph 12.3(4)(a) of the Criminal Code.

²⁷ Paragraph 12.3(4)(b) of the Criminal Code.

²⁸ On 9 November 1999, 1.63 Australian dollars were valued at 1 U.S. dollar.

²⁹ Subsection 4B(2) of the Crimes Act 1914 provides that where the penalty prescribed for an offence is a term of imprisonment, the court may impose a fine in addition to or in lieu of imprisonment. The subsection provides a formula for calculating the fine for an individual and a body corporate.

3.3 Penalties and Mutual Legal Assistance

Pursuant to the Mutual Legal Assistance in Criminal Matters Act 1987, Australia is able to request and provide mutual legal assistance for “serious criminal offences”, which are those for which the maximum term of imprisonment is not less than 12 months.

3.4 Penalties and Extradition

The Australian authorities explain that pursuant to the Extradition Act 1988, an extraditable offence is one for which the maximum term of imprisonment is not less than 12 months.

3.6 Seizure and Confiscation of the Bribe and its Proceeds

The Proceeds of Crime Act 1987 applies where a conviction has been obtained for an offence that carries a penalty of 12 months or more of imprisonment and, thus, applies to the offence of bribing a foreign public official.

Pursuant to section 19 of the Act, a court has the discretion to order that “tainted property” be forfeited. “Tainted property” is defined in section 4 as “property used in, or in connection with, the commission of the offence”, or “proceeds of the offence”. “Proceeds” is defined in section 4 as “any property that is derived or realised, directly or indirectly, by any person from the commission of (an) offence”. The Australian authorities state that pursuant to these provisions, the bribe payment and the proceeds of bribing a foreign public official can be forfeited. They state further that the language in section 4 clarifies that any kind of property that has been acquired with the proceeds can be ordered forfeited by the court.

Pursuant to section 9A of the Act, property may be forfeited from a third party where the court finds that it is under the effective control of the offender. The third party can resist a forfeiture order by establishing that he/she was not involved in the offence, acquired the property for sufficient consideration and had no reason to suspect that it had been derived from an offence.³⁰

4. ARTICLE 4. JURISDICTION

4.1 Territorial Jurisdiction

Article 4.1 of the Convention requires each Party to “take such measures as may be necessary to establish its jurisdiction over the bribery of a foreign public official when the offence is committed in whole or in part in its territory”. Commentary 25 on the Convention clarifies that “an extensive physical connection to the bribery act” is not required.

Paragraph 70.5(1) establishes jurisdiction over a person who commits the foreign bribery offence wholly or partly in Australia or wholly or partly on board an Australian aircraft or ship.

4.2 Nationality Jurisdiction

Article 4.2 of the Convention requires that where a Party has jurisdiction to prosecute its nationals for offences committed abroad, it shall, according to the same principles, “take such measures as may be necessary to establish its jurisdiction to do so in respect of the bribery of a foreign public official”. Commentary 26 on the Convention clarifies that where a Party’s principles include the requirement of dual criminality, it “should be deemed to be met if the act is unlawful where it occurred, even if under a different criminal statute”.

³⁰ Section 21 of the Proceeds of Crime Act 1987.

Subparagraph 70.5(1)(b)(i) establishes jurisdiction over an Australian citizen who commits the offence of bribing a foreign public official wholly outside of Australia and paragraph 70.5(b)(ii) establishes jurisdiction over a body corporate incorporated under the laws of Australia who commits the foreign bribery offence wholly outside Australia. The Australian authorities explain that subparagraph 70.5(1)(b)(i) also covers natural persons who are residents. The Australian authorities indicate that jurisdiction was extended beyond the traditional territorial jurisdictional principle pursuant to the recommendation of the Federal Parliamentary Joint Standing Committee on Treaties³¹. The Committee was of the opinion that jurisdiction was central to ensuring the effectiveness of the foreign bribery offence. It concluded that since foreign bribery is in essence international criminal activity likely to take place wholly outside Australia, the objectives and intent of the Convention would not be met without broadening the jurisdiction over the offence.³²

4.3 Consultation Procedures

Article 4.3 of the Convention requires that where more than one Party has jurisdiction, the Parties involved shall, at the request of one of them, consult to determine the most appropriate jurisdiction for prosecution.

Australia's bilateral treaties on mutual legal assistance and extradition commonly provide for consultation in the case of conflicting claims of jurisdiction, but they do not provide for detailed procedures. Consultations would be carried out through the normal diplomatic channels, and where appropriate, through channels established for extradition and mutual legal assistance in criminal matters.

4.4 Review of Current Basis for Jurisdiction

Article 4.4 of the Convention requires each Party to review whether its current basis for jurisdiction is effective in the fight against the bribery of foreign public officials, and if it is not, to take remedial steps.

A review of jurisdiction as it relates to the foreign bribery offence was made by the Federal Parliamentary Joint Standing Committee (see discussion under 4.2 on "Nationality Jurisdiction").

5. ARTICLE 5. ENFORCEMENT

Article 5 of the Convention states that the investigation and prosecution of the bribery of a foreign public official shall be "subject to the applicable rules and principles of each Party". It also requires that each Party ensure that the investigation and prosecution of the bribery of a foreign public official "shall not be influenced by considerations of national economic interest, the potential effect upon relations with another State or the identity of the natural or legal persons involved".

5.1 Rules and Principles Regarding Investigations and Prosecutions

Investigations are normally initiated by the Australian Federal Police and are carried out in accordance with the procedures set out in Parts 1AA, 1C and 1D of the Crimes Act 1914. Where it is determined that there is sufficient evidence to prosecute, the established procedure is to transfer the file to the Commonwealth Director of Public Prosecutions (DPP). In turn, the DPP determines whether a prosecution should be initiated and upon what charge or charges. In certain cases, it is deemed necessary or appropriate for the Australian Federal Police to initiate a prosecution by way of arrest and charge without

³¹ The Federal Parliamentary Joint Standing Committee on Treaties is a mutipartisan committee.

³² Paragraph 54, page 26, supra, 11.

prior consultation with the DPP. In these cases the DPP determines whether the prosecution should proceed and whether the charge or charges laid by the police should be changed.

All decisions to initiate or terminate a prosecution must be made in accordance with the guidelines in paragraphs 2.8 to 2.13 of a document entitled the “Prosecution Policy of the Commonwealth”, pursuant to which the two principal considerations are as follows:

1. Whether the evidence is sufficient to justify the initiation or continuation of a prosecution. The strength of the case must be evaluated to determine whether there is a reasonable prospect of securing a conviction.
2. Whether a prosecution is required in the public interest. The factors to be considered in making this determination vary from case to case, but generally the public interest is given less consideration in relation to more serious offences.

Section 2.10 of the Prosecution Policy Statement provides a list of the guidelines that may be considered in determining whether the public interest requires a prosecution, which includes:

1. any mitigating or aggravating circumstances;
2. the effect on public order and moral;
3. whether the alleged offence is of considerable public concern;
4. any entitlement of the Commonwealth or other person or body to criminal compensation, reparation or forfeiture if prosecution action is taken; and
5. the attitude of the victim of the alleged offence to a prosecution.

There is no clear entitlement for victims (e.g. competitors) to challenge a prosecutor’s decision not to prosecute an alleged offence. Pursuant to the Administrative Decisions (Judicial Review) Act 1977 (ADJR Act) a decision taken under an Act may be sought to be reviewed. Therefore, it may be possible to request a review of a decision taken by a prosecutor to refuse to give consent to the institution of a prosecution pursuant to the Director of Public Prosecutions Act 1983 or section 70.5(2) of the Criminal Code. However, the Australian authorities explain that it is not clear whether a person or body who was adversely affected by the conduct of the prospective defendant would be a “person aggrieved” for the purpose of the ADJR Act by a decision not to prosecute the latter. They further comment that while the exercise of discretion to prosecute has not been open to review by the courts under the common law, some recent decisions of the courts in the United Kingdom indicate that such decisions can be reviewed in exceptional circumstances. The Australian authorities state that it remains to be seen whether the Australian courts will follow this new trend.

5.2 Considerations such as National Economic Interest

The Australian authorities state that the factors listed in Article 5 of the Convention do not have any bearing on the determination by the Commonwealth Director of Public Prosecutions of whether a prosecution is required in the public interest.

6. ARTICLE 6. STATUTE OF LIMITATIONS

Article 6 of the Convention requires that any statute of limitation with respect to the bribery of a foreign public official provide for “an adequate period of time for the investigation and prosecution” of the offence.

Under Australian law, there is no limitation period with respect to the prosecution of a natural person or a body corporate for the offence of bribing a foreign public official.³³

7. ARTICLE 7. MONEY LAUNDERING

Article 7 of the Convention requires that where a Party has made bribery of a domestic public official a predicate offence for the application of money laundering legislation, it must do so on the same terms for bribery of a foreign public official, regardless of where the bribery occurred.

The Australian authorities indicate that the foreign bribery offence as well as the domestic bribery offence is a predicate offence for the application of the money laundering provisions in the Proceeds of Crime Act 1987. A conviction for the predicate offence is not necessary to trigger the relevant provisions of the money laundering legislation. Pursuant to subsection 81(3) of the Act, the money laundering offence is defined as follows:

A person shall be taken to engage in money laundering if, and only if:

(a) the person engages, directly or indirectly, in a transaction that involves money, or other property, that is proceeds of crime; or

(b) the person receives, possesses, conceals, disposes of or brings into Australia any money, or other property, that is proceeds of crime;

and the person knows, or ought reasonably to know, that the money or other property is derived or realised, directly or indirectly, from some form of unlawful activity.³⁴

Under subsection 4(1) “proceeds of crime” is defined as:

(a) the proceeds of an indictable offence³⁵; or

(b) any property that is derived or realised, directly or indirectly, by any person from acts or omissions that:

(i) occurred outside Australia; and

(ii) would, if they had occurred in Australia, have constituted an indictable offence or a State indictable offence

³³ Section 15B of the Crimes Act 1914 (Commonwealth).

³⁴ This provision was referred to in: G. Moens, ‘Bank Confidentiality and Governmental Control of Exchange Operations and of Their Unlawful Effects—Australia’, P. Bernasconi (ed.) *Money Laundering and Banking Secrecy*, 31-48 (1996 Kluwer Law International).

³⁵ The Australian authorities indicate that the offence of bribing a foreign public official is an indictable offence.

Thus it would appear that the proceeds of bribing a foreign or domestic public official, but not the bribe, are subject to the money laundering offence. It would also appear that it does not matter where the bribery occurred with respect to the domestic bribery offence or the foreign bribery offence, as long as the conduct in question would have constituted an offence in Australia had it occurred in Australia. However, the Australian authorities state that the ambit of the money laundering offence is restricted by the limitations on jurisdiction over the offence in Australia. Therefore, for instance, it does not extend to conduct wholly outside Australia where the briber is a body corporate that is not incorporated under the laws of Australia.

8. ARTICLE 8. ACCOUNTING

Article 8 of the Convention requires that within the framework of its laws and regulations regarding the maintenance of books and records, financial statement disclosures and accounting and auditing standards, a Party prohibits the making of falsified or fraudulent accounts, statements and records for the purpose of bribing foreign public officials or of hiding such bribery. The Convention also requires that each Party provide for persuasive, proportionate and dissuasive penalties in relation to such omissions and falsifications.

8.1/8.2/8.3 Accounting and Auditing Requirements/Companies Subject to Requirements/Penalties

Financial Records

Pursuant to section 298 of the Corporations Law, all companies (including those that are not required by the Corporations Law to prepare annual financial statements), registered management investment schemes and disclosing entities are required to keep written “financial records” that:

- (a) correctly record and explain their transactions and financial position and performance; and
- (b) would enable true and fair financial statements to be prepared and audited.

“Financial records” are defined in section 9 of the Corporations Law as including invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers and documents of prime entry.

The Australian authorities explain that the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of non-existent expenditures, the entry of liabilities with incorrect identification of their object and the use of false documents would be contrary to the requirements under section 298 of the Corporations Law, because they would not correctly record and explain transactions and would not enable true and fair financial statements to be prepared and audited.

Failure to comply with section 298 is a criminal offence and upon conviction a company is punishable by a fine up to \$12,500.

The Australian authorities state that the Federal Parliamentary Joint Standing Committee on Treaties recommended that an examination be undertaken of the benefits and practicalities of introducing a requirement that payments of bribes be disclosed in business accounts.³⁶ This recommendation is addressed by subsection 70.4(3) of the Criminal Code amendments, by requiring that a record of facilitation payments be kept.

³⁶ At the time that the review was prepared, the details of the examination had not yet been released, but it appeared likely that the Government would give serious consideration to the recommendations of the Joint Standing Committee.

Financial Report for a Financial Year

Pursuant to section 296 of the Corporations Law, the financial report for the financial year must comply with the Australian Accounting Standards, which include requirements in relation to the disclosure of contingent liabilities.

Entities that are required to prepare a financial report for the financial year are:

- disclosing entities (mainly listed corporations and registered managed investments schemes) that have listed securities or have issued shares and other securities as a result of the circulation of a prospectus;
- public companies that are not listed and large proprietary companies (i.e. companies that meet at least two of the following criteria: 1. gross operating revenue of \$10 million or more; 2. gross assets of \$5 million or more; and 3. 50 or more employees); and
- small proprietary companies that are controlled by a foreign company or are subject to a shareholder request to prepare financial statements.

The Australian Accounting Standards have the force of law for the purposes of the Corporations Law³⁷. Most apply to various aspects of financial statement preparation, although some are industry specific as in the case of financial institutions and insurance providers. Most standards pertain to the methodology of accounting for particular items and the requirements on disclosure in financial statements. Where a director of a company, registered scheme or disclosing entity fails to take all reasonable steps to comply with or secure compliance with the requirements in relation to financial records (Part 2M.2) or financial reporting (Part 2M.3)³⁸, he/she is liable to a civil penalty which may, depending on the circumstances, involve an order prohibiting a person from managing a corporation or imposing a penalty not exceeding \$200,000.

Auditing Requirements

The Australian authorities indicate that companies, registered schemes and disclosing entities are responsible for developing internal controls according to accounting standards, and that auditors' reports review the effectiveness of such controls. They also indicate that, pursuant to section 310 of the Corporations Law, these same entities must provide the Australian Securities and Investment Commission (ASIC) with an external audit report. It also appears that the auditor is required to prepare a report for the members of the board of directors stating whether he/she is satisfied that the financial report is in accordance with the law. Moreover, the auditor is required to notify the ASIC in writing if he/she:

- has reasonable grounds to suspect that a contravention of the Corporations Law has occurred; and
- believes that the contravention has not been or will not be adequately dealt with by commenting on it in the auditor's report or bringing it to the attention of the directors.

Where a person fails to carry out the duties of an auditor satisfactorily, the ASIC may refer the matter to the Companies Auditors and Liquidators Disciplinary Board. The Board may cancel or suspend the auditor's registration if a complaint is proven. An auditor may also be liable for civil damages where the performance of his/her audit functions causes a loss to other parties.

³⁷ The Australian Accounting Standards Board (AASB) has issued about 40 such standards.

³⁸ See section 344 of the Corporations Law.

In order to ensure the independence of external auditors, a person³⁹ (who must be a registered company auditor) cannot accept an appointment as the auditor of a company if:

- the person, or a body corporate in which the person is a substantial shareholder, owes more than \$5,000 to the company, to a related body corporate or to an entity that the company controls; or
- the person is an officer of the company, or a partner, employer or employee of an officer of the company.

9. ARTICLE 9. MUTUAL LEGAL ASSISTANCE

Article 9.1 of the Convention mandates that each Party cooperate with each other to the fullest extent possible in providing “prompt and effective legal assistance” with respect to the criminal investigations and proceedings, and non-criminal proceedings against a legal person, that are within the scope of the Convention. Under Article 9.2, where dual criminality is necessary for a Party to be able to provide mutual legal assistance, it shall be deemed to exist if the offence for which assistance is sought is within the scope of the Convention. Pursuant to Article 9.3, a Party shall not decline to provide mutual legal assistance on grounds of bank secrecy.

9.1 Laws, Treaties and Arrangements Enabling Mutual Legal Assistance

9.1.1 Criminal Matters

Australia states that it can provide mutual legal assistance in respect of criminal matters for the offence of bribing a foreign public official pursuant to the Mutual Assistance in Criminal Matters Act 1987, and treaties and arrangements made with other countries pursuant to that Act. The Australian authorities explain that mutual legal assistance can be provided to any country irrespective of the existence of a treaty or arrangement, but assistance would normally not be provided to a country that does not provide an undertaking of reciprocity.

Subsection 8(1) of the Mutual Assistance in Criminal Matters Act 1987 sets out various grounds for which the Attorney-General shall refuse to provide mutual legal assistance. For instance, assistance shall be refused if the request relates to an offence of a political character or the granting of the request would prejudice the sovereignty, security or national interest of Australia or the essential interests of a State or Territory. Pursuant to subsection 8(2), the Attorney-General has discretion to refuse to provide assistance where for instance, dual criminality is not satisfied, the statute of limitations has lapsed or the provision of assistance could prejudice an investigation or proceeding in relation to a criminal matter in Australia. The Australian authorities state that the Attorney-General is never obliged to provide mutual legal assistance, but his/her discretion is more restricted under some bilateral treaties.

Pursuant to section 74 of the Act, the following types of assistance are available:

- the taking of evidence and production of documents or other articles;
- search and seizure;
- arrangements for persons (including prisoners) to give evidence or assist in investigations (and associated custody or persons in transit);
- the tracing, restraint and confiscation of proceeds of crime (including enforcement of foreign confiscation orders); and

³⁹ Similar requirements apply to the appointment of a firm (i.e. partnership) as auditor of a company.

- access to compulsorily acquired financial intelligence (“financial transaction reports information”).

Additionally, bilateral treaties on mutual assistance in criminal matters normally provide for a range of non-compulsory measures including the taking of unsworn voluntary witness statements, service of criminal process (without giving effect to foreign penalties), provision of official and publicly available documents and any other type of assistance that is not inconsistent with Australian law.

In appropriate circumstances, mutual legal assistance may be given in relation to a legal person.

9.1.2 Non-Criminal Matters

Pursuant to the Mutual Assistance in Business Regulation Act 1992, the Attorney-General may authorise Commonwealth business regulatory agencies to obtain evidence, information and documents at the request of a foreign business regulatory agency and forward it to that agency for purposes relating to the administration or enforcement of a foreign business law. The Australian authorities indicate that this legislation would enable Australia to provide assistance in relation to some non-criminal proceedings against legal persons.

9.2 Dual Criminality

Pursuant to paragraphs 8(2)(a) and (b) of the Mutual Assistance in Criminal Matters Act 1987, dual criminality is generally a discretionary ground upon which Australia can refuse to provide mutual legal assistance. However, the Australian authorities state that they shall not rely on this ground where requests are received for assistance in relation to alleged offences of bribing foreign public officials.

9.3 Bank Secrecy

In Australia, the relationship between a banker and his/her customer is protected by a duty of confidentiality.⁴⁰ Since this is a common law duty, it may be overridden by legislation.⁴¹ This duty has been overridden to some extent by the Financial Transaction Reports Act 1988, which requires “cash dealers”⁴² to provide information about customers’ transactions to the Australian Transaction Reports and Analysis Centre⁴³ (AUSTRAC) in the following circumstances:⁴⁴

1. Pursuant to section 7 of the Act, “significant cash transactions” within Australia must be reported. A “significant cash transaction” involves the transfer of currency worth not less than \$10,000 in the coin or paper money of Australia or of a foreign country.

⁴⁰ Tournier v. National Provincial and Union Bank of England, [1924] 1 KB 461.

⁴¹ G. Moens, *supra*, 34, page 33.

⁴² “Cash dealers” are defined in section 3 of the Act as a “financial institution”, “insurer or insurer intermediary” “securities dealer”, “futures broker”, “trustee or manager of a unit trust”, “person who carries on a business of operating a gambling house or casino”, etc.

⁴³ AUSTRAC is the reporting authority established pursuant to the Act for the purpose of assisting the Australian Taxation Office and Federal and State law enforcement agencies in uncovering tax evasion and criminal activity.

⁴⁴ G. Moens, *supra*, 34, page 40 and pages 42-44.

2. Pursuant to section 17B of the Act, instructions regarding the international telegraphic transfer of funds to and from Australia must be reported where the “cash dealer” is acting for a person who is not a bank or the cash dealer is not a bank.

3. Pursuant to section 15 of the Act, it is an offence to transfer Australian or foreign currency worth \$5,000 or more into or out of Australia without making a report. Financial institutions including banks, building societies and credit unions are exempted from this reporting requirement. The penalty for contravening these provisions is a fine of not more than \$5,000 or imprisonment for 2 years or both in relation to natural persons, and a fine of not more than \$20,000 in relation to bodies corporate.

4. Pursuant to subsection 16(1) of the Act, a “cash dealer” must report transactions where there are reasonable grounds to suspect that the information might assist the investigation of tax evasion or another offence under Commonwealth law.

Pursuant to section 27 of the Act, the information collected by AUSTRAC may be released to the Attorney-General in order to be able to respond to a request by a foreign country to which the Mutual Legal Assistance in Criminal Matters Act applies.⁴⁵ In addition, pursuant to section 37 of the Mutual Legal Assistance in Criminal Matters Act, Australia can provide access to information about bank records even if the information has not been reported to AUSTRAC. A search warrant or production order can be obtained in respect of an offence punishable by a maximum of at least one-year of imprisonment where criminal proceedings or an investigation has been initiated in the requesting country. Where bribery of a foreign public official constitutes a “foreign organised fraud offence” as defined in the Act, it would also be possible to obtain an account monitoring order to identify subsequent transactions for a period of up to 3 months. Moreover, there is scope for obtaining bank records under the general search and seizure powers under Part III of the Act.

10. ARTICLE 10. EXTRADITION

10.1 Extradition for Bribery of a Foreign Public Official

Article 10.1 of the Convention obliges Parties to include bribery of a foreign public official as an extraditable offence under their laws and the treaties between them.

Pursuant to the Extradition Act 1988, Australia may provide extradition to an “extradition country”, which is defined under paragraph 5(a) of the Act as “any country (other than New Zealand⁴⁶) that is declared by the regulations to be an extradition country”. The Australian authorities provide that as a matter of policy, a country is normally declared an “extradition country” where:

- (a) Australia has a bilateral extradition treaty with the country;
- (b) the country and Australia are both parties to a multilateral treaty that includes extradition provisions; or
- (c) there is a bilateral arrangement or understanding with the country, with less than treaty status, that guarantees reciprocity.

Pursuant to the Extradition Act 1988, the offence of bribing a foreign public official is an extraditable offence if the offence is punishable by not less than 12 months of imprisonment in the requesting country. However, before a person can be extradited he/she must first be found eligible for extradition by a

⁴⁵ G. Moens, *supra*, 34, page 45.

⁴⁶ Under Part III of the Extradition Act 1988, extradition to New Zealand is not subject to the normal restriction on extradition between independent States, therefore extradition for an offence under the Convention would automatically be available.

magistrate.⁴⁷ A person cannot be found eligible for extradition if the magistrate conducting the hearing is satisfied that there are substantial grounds for believing that there is an “extradition objection” in relation to the offence. In summary, these objections are that the extradition offence is political or military in nature, the alleged offender may be placed in double jeopardy or may be prejudiced at his/her trial or punished, etc. by reason of race, nationality or political opinions.⁴⁸ Pursuant to section 22, the Attorney-General shall not order the extradition of a person unless he/she is satisfied that no extradition objection applies and that the person will not be subjected to torture or suffer the death penalty. The Attorney-General has overriding discretion, pursuant to paragraph 22 (3)(f) of the Act, to refuse extradition unless he/she “considers that the person should be surrendered in relation to the offence”.

The Australian authorities indicate that where a bilateral extradition treaty is applicable, additional mandatory or discretionary grounds for refusing extradition may apply. The Attorney-General’s residual discretion is normally not provided for under a bilateral treaty.

10.2 Legal Basis for Extradition

Article 10.2 states that where a Party that cannot extradite without an extradition treaty receives a request for extradition from a Party with which it has no such treaty, it “may consider the Convention to be the legal basis for extradition in respect of the offence of bribery of a foreign public official”.

The Australian authorities provide that Australia does not require a treaty to provide extradition, and therefore strictly speaking the requirements under Article 10.2 of the Convention are not applicable. However, when Australia considers it would be bound in international law to extradite under a treaty, it gives effect to the obligation by making regulations under the Extradition Act to give effect to the obligation. For this reason regulations have been made under the Extradition Act [Extradition (Bribery of Foreign Public Officials) Regulations 1999] to provide lawful authority, subject to the grounds for refusal (see above under 10.1) and the conditions applicable under any bilateral extradition treaty with a country that is a Party to the Convention, for Australia to surrender to a Party to the Convention a person who is sought for extradition in relation to the offence of bribing a foreign public official. The Australian authorities state that in this generalised sense it can be said that the Convention is regarded as a legal basis for extradition for the offence of bribery of a foreign public official.

10.3/10.4 Extradition of Nationals

Article 10.3 of the Convention requires Parties to ensure that they can either extradite their nationals or prosecute them for the bribery of a foreign public official. And where a Party declines extradition because a person is its national, it must submit the case to its prosecutorial authorities.

Australia indicates that Australian nationals can be extradited for the offence of bribery of a foreign public official on the same basis as other persons. Although bilateral treaties usually provide discretion to refuse the extradition of nationals, it is rarely relied on.

Where extradition is refused on grounds of nationality, section 45 of the Extradition Act provides a mechanism for initiating criminal proceedings in Australia in relation to conduct that occurred outside of Australia that would have constituted an offence if it had occurred in Australia. The Attorney-General has discretion to institute proceedings under this provision. The Australian authorities provide that no one has ever been tried for an offence pursuant to this section, and believe that this in part reflects that Australia does not normally refuse extradition on grounds of nationality. They concede that it may also partly reflect

⁴⁷ Section 19 of the Extradition Act 1988.

⁴⁸ Section 7 of the Extradition Act 1988.

that it is practically difficult in a common law system to try a person for an offence committed outside the normal territorial jurisdiction of the court.

10.5 Dual Criminality

Article 10.4 of the Convention states that where a Party makes extradition conditional on the existence of dual criminality, it shall be deemed to exist as long as the offence for which it is sought is within the scope of the Convention.

The Australian authorities provide that dual criminality is a condition for extradition, but that it would be met where the offence for which extradition is requested is within the scope of Article 1 of the Convention and it carries a minimum term of 12 months of imprisonment in the requesting country.

11. ARTICLE 11. RESPONSIBLE AUTHORITIES

Article 11 of the Convention requires Parties to notify the Secretary-General of the OECD of the authority or authorities acting as a channel of communication for the making and receiving of requests for consultation, mutual legal assistance and extradition.

The Attorney-General's Department (Canberra) has been designated as the channel of communication in respect of the matters listed in Article 11.

B. IMPLEMENTATION OF THE REVISED RECOMMENDATION

3. TAX DEDUCTIBILITY

At the time that the review was prepared, bribes paid to foreign public officials by Australian resident persons or businesses in producing assessable income or in carrying on a business for the purpose of producing assessable income were tax deductible. Similarly, bribes paid to foreign public officials by non-resident persons or businesses in producing Australian source assessable income or in carrying on a business for the purpose of producing Australian source assessable income were tax deductible.

A bill denying the deductibility of bribes paid to foreign public officials has been adopted by the House of Representatives and is currently before the Senate. It is anticipated that, subject to passage by the Parliament, the Bill will come into force early in 2000.⁴⁹

The Bill expressly denies the deductibility of bribes given to foreign public officials and does not require a criminal conviction in order to deny deductibility.

The Bill provides that a payment does not constitute a bribe to a foreign public official where no person would have been guilty of an offence against the law of the foreign public official's country, if the benefit had been provided, and all the related acts had been done, in that country. The Australian authorities state that this means that a deduction will not be disallowable if the provision of a benefit was lawful in the foreign public official's country.

The Bill also contains an exception for facilitation payments, which are payments incurred for the sole or dominant purpose of securing or expediting the performance of a routine government action of a minor nature. In order to be able to avail oneself of this exception, a taxpayer would have to substantiate the claim with the record that is required to be made of the facilitation payment under paragraph 70.4(1)(c) of the Criminal Code amendments. Subsection 25-52(4) of the Bill provides as an example of a facilitation

⁴⁹ The Bill will apply to 1999-2000 and later years of income.

payment the case where, upon arriving in a foreign country, a person is informed that his/her visa is invalid and a fee must be paid to a foreign public official for the sole purpose of expediting the issue of a new visa.

EVALUATION OF AUSTRALIA

General Remarks

The Working Group on Bribery thanked the Australian authorities for their co-operation and transparency in providing very thorough responses. The Group noted that while Australia took some time to sign the Convention, due to its local processes, it was able to ratify it and adopt the implementing legislation in less than one year after signature.

In particular, the Group welcomed the fact that Australia felt it appropriate to introduce a specific and detailed act (the Criminal Code Amendment Bribery of Foreign Officials Act 1999) to deal comprehensively with this question.

The Working Group considered that the Australian legislation conforms to the standards set by the Convention.

Specific Issues

1. The offence of bribery of foreign public officials

The Group had some queries in relation to two defences provided for in the Australian legislation.

1.1 Interpretation of paragraph 8 of the Commentary to the Convention

Section 70.3(1) provides a table according to which an offence is not committed if the advantage is not prohibited under the law of the foreign public official's country. This is a consequence of Australia's interpretation of paragraph 8 of the Commentary to the Convention.

Paragraph 8 of the Commentary states that an offence is not committed « if the advantage was permitted or required by the written law or regulation of the foreign public official's country ; including case law ».

It is the Australian view that this paragraph shall be interpreted to mean that the conduct does not constitute an offence as long as it is not prohibited under the law of the foreign public official's country. However another interpretation, taking into account the « autonomous » definition of bribery as well as the language employed in paragraph 8, is that this paragraph deals merely with the case in which the advantage has been expressly permitted or required by the law of that foreign country. According to such an interpretation, the advantage covered by paragraph 8 of the Commentary is « due ». In that context, the mere fact that the bribed person would not have been guilty of an offence under the legislation of the foreign country would not constitute a defence.

It is therefore the Group's opinion that this issue warrants further discussion as part of the first stock-take at the end of Phase 1.

1.2 Defence for facilitation payments

The Group raised two points in relation to this defence. The first one is the fact that Australia decided not to outline a specific money value in order to better define the « small » nature of such facilitation payments. Australia indicated that while this would have provided more certainty, it proved to be very difficult to agree on a specific amount.

The Group further noted that some of the items mentioned as « routine government action» defined under subsection 70.4(2) of the Australian legislation entail a certain discretion (e.g. processing of a work permit). Australia argued that while it was correct to say that there is some discretion in such instances, it is not a matter of absolute discretion.

2. Sanctions

The Group took note of the comments of the Australian authorities according to which, given the maximum term of imprisonment provided for in such legislation (10 years), it is very unlikely that a natural person bribing a foreign public official would not be imprisoned.

With regard to the level of monetary fines for legal persons, the Australian authorities indicated that such level was comparable to that of other criminal offences at federal level. They further noted that a conviction for a bribery offence would disqualify the company from a number of business activities (e.g. casinos, broadcasting).

The Group felt that these issues could appropriately be revisited in Phase 2 of the evaluation process.