

Australia

Legal system

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

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

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

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

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

IMPLEMENTATION OF CHAPTERS III AND IV

Criminalisation and Law Enforcement (Chapter III)

2.1.1 Main findings and observations

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

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

Australia continues to improve its measures to combat foreign bribery. In 2010, penalties were increased to a maximum of 10 years imprisonment and/or a fine of 10,000 penalty units (\$1.1 million). The maximum penalty for a body corporate was also increased. Broad jurisdiction applies both to conduct within Australia, and to conduct by Australian citizens, residents and companies overseas. In addition, the definition of "foreign public official" extends to officials designated by law or custom. Detection of foreign bribery crimes is facilitated under the Anti-Money Laundering and Counter Terrorism Financing Act (2006).

Although passive bribery by foreign public officials has not been made a criminal offence in Australia, its laws provide for evidence sharing with the respective government so that the official may be prosecuted domestically.

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

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

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

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

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

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

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

In addition, the money laundering offences apply to both proceeds (i.e., money or property that is derived or realized, directly or indirectly, from the commission of an indictable offence - an offence with a prison term of more than 12 months) and instruments of a crime (i.e., money or property used in or to facilitate the

commission of an indictable offence). Importantly, the money laundering offences apply to the proceeds of crime derived from both Commonwealth indictable offences and foreign indictable offences. To proceed with the money laundering charge, there is no need for there to be a conviction for the predicate or underlying offence.

All “indictable offences”, which means offences with a penalty of at least 12 months imprisonment, count as predicate offences. It was noted that the range of indictable offences at the Commonwealth level is comprehensive of Convention offences.

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

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

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

An illicit enrichment offence was considered during development of unexplained wealth powers in the Crimes Legislation Amendment (Serious and Organised Crime) Act (2010). Australia concluded that it would not be appropriate to implement such a criminal offence due to concerns that it may trespass on the presumption of innocence. Nevertheless, under the Proceeds of Crime Act (2002) (POCA), unexplained wealth can be restrained and confiscated in civil proceedings. Where there are reasonable grounds to suspect that a person’s total wealth exceeds the value of that wealth that was lawfully acquired, the court can compel the person to prove that his or her wealth was not derived from an offence against a law of the Commonwealth, a foreign indictable offence, or a State offence with a federal aspect. If the person cannot demonstrate this, the court may order them to pay the proportion of wealth that they cannot demonstrate was legitimately obtained. This innovative approach to addressing concerns of unexplained wealth and illicit enrichment outside the scope of the criminal justice system was particularly noted. As these provisions are implemented in the context of the considerable protections afforded to the defendant under the Australian legal system, the effectiveness of these measures will be of interest to future reviews.

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

Obstruction of justice (article 25)

The Criminal Code prohibits the obstruction of justice, including intimidating or corrupting witnesses, inducing false testimony, deceiving a witness, preventing the attendance of a witness in court, tampering with or destroying evidence and

attempting to pervert justice. These measures go beyond the minimum standards in the Convention.

Liability of legal persons (article 26)

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

Participation and attempt (article 27)

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

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

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

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

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

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

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

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

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

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

In addition, the Witness Protection Act allows for the court to hold proceedings in private and suppress the publication of evidence given. The Criminal Code empowers the court to issue orders to protect witnesses, their identities and their families.

With regard to the protection of reporting persons, the Public Service Act 1999 and the Parliamentary Service Act 1999 provide that a person must not victimize, or discriminate against, an Australian Public Service (APS) or Parliamentary Service employee because that employee has reported breaches (or alleged breaches) of the applicable Codes of Conduct. Regulation 2.4 of the Public Service Regulations 1999 requires an APS Agency Head to establish procedures for dealing with a report made by an APS employee under the Public Service Act.

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

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

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

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

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

Statute of limitations; criminal record (articles 29, 41)

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

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

Jurisdiction (article 42)

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

Consequences of acts of corruption; compensation of damage (articles 34, 35)

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

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

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

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

Australian Commission for Law Enforcement Integrity (ACLEI): In 2006, the *Law Enforcement Integrity Commissioner Act 2006* (LEIC Act) established a new independent office of Integrity Commissioner, supported by the ACLEI. The Integrity Commissioner has jurisdiction to investigate activities of the AFP, ACC

and since 1 January 2011, the Australian Customs and Border Protection Service. The LEIC Act contains measures to maintain ACLEI's integrity and to ensure that it remains free from political interference.

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

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

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

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

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

Successes and good practices

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

- The broad jurisdiction of the foreign bribery offence, applying both to conduct within Australia, and to conduct by citizens, residents and companies overseas.
- The definition of "foreign public official," which extended to officials designated by law or custom.
- The money laundering offences, which incorporate elements of intent, recklessness and negligence, and which go beyond the minimum standards in article 23.
- Australia's position that no individual is immune from prosecution for corruption cases, including parliamentarians.
- The development and expansion of the federal non-conviction based forfeiture regime in Australia.
- Australia's positive efforts to ensure severe consequences for public officials who engage in corruption, including the possible forfeiture of the public sector contribution to the convicted official's pension fund.

Challenges and recommendations

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

- Continue to periodically review policies and approach on facilitation payments in order to effectively combat the phenomenon and continue to encourage companies to prohibit or discourage the use of such payments, including in internal company controls, ethics and compliance programmes or measures.
- Consider adopting a written policy on parole that sets forth the factors for consideration.
- The adoption and implementation of legislation currently under review for the establishment of a comprehensive scheme for public sector whistleblower protection and to expedite access to existing protections for private sector whistleblowers.
- Continue the consultative process for the development of a comprehensive national anti-corruption action plan, which will include an examination of how to make anti-corruption systems more effective.

International cooperation (Chapter IV)

2.2.1 Main findings and observations

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

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

Australia does not make extradition conditional on the existence of a bilateral treaty, and considers the Convention as the basis for extradition cooperation with other States parties. Australia is a party to several multilateral conventions that deal with extradition and has 38 bilateral extradition treaties in force. In the absence of a bilateral extradition treaty, Australia is able to receive extradition requests, provided that the requesting country is declared to be an extradition country in regulations made under the Extradition Act. To date, 31 countries have been declared extradition countries in the absence of a bilateral extradition treaty.

Dual criminality, a prerequisite to extradition from Australia, is determined based on the conduct underlying the extradition request. The offence for which extradition is sought must be punishable by at least 12 months imprisonment or as otherwise agreed by treaty. If extradition is sought for offences that are not "extradition offences", an accessory extradition can occur if the person has consented to extradition.

Most of Australia's extradition relationships are conducted on a "no evidence" basis. The requesting country shall provide relevant authenticated documentation, such as a statement of the offence and the applicable penalty, warrant for arrest or evidence

of conviction or sentence, and statement setting out the alleged conduct constituting the offence. A full brief of evidence is not necessary.

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

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

Due process is observed at all stages of the consideration of an extradition request. Moreover, the Extradition Act applies a range of human rights safeguards to the extradition process.

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

Mutual legal assistance (article 46)

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

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

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

Australia's international assistance includes taking evidence, locating witnesses, production of documents, executing search warrants, providing material from Australian investigations, and locating, restraining and forfeiting proceeds of crime.

Information relating to criminal matters can be transmitted, without the involvement of formal requests, on an informal basis. Any exercise of coercive powers, such as a search warrant, must be sought through a formal request. Australia will comply with a foreign country's request to keep information confidential except insofar as

disclosure of the request is required in the performance of one's duties or approval of disclosure is provided by the Attorney-General.

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

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

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

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

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

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

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

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

2.2.2 Successes and good practices

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

- The AFP's impressive cooperation measures at both the domestic and international levels, and their experience and expertise in detecting and investigating corruption, which could further assist foreign law enforcement counterparts.
- The existence of a comprehensive range of investigative tools for fighting corruption in Australia.

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

2.2.3 Challenges and recommendations

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

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

TECHNICAL ASSISTANCE NEEDS

Australia has identified no technical assistance needs at this time.