

QUESTIONNAIRE

Country self-assessment report on implementation and enforcement of G20 commitments on foreign bribery

G20 countries are invited to complete the questionnaire, below, on the implementation and enforcement of G20 commitments on foreign bribery.

Part I questions are drafted directly from the principles outlined in the G20 Guiding Principles on Enforcement of the Foreign Bribery Offence endorsed by G20 Leaders in St. Petersburg, and its background note on Enforcement of Foreign Bribery Offences. Part II questions are drafted from the G20 Anti-Corruption Action Plan and the St. Petersburg Leaders' Declaration.

Responses to this questionnaire could be compiled into a summary on the "state of play" in G20 countries on steps taken to date to implement the aforementioned commitments, as well as plans for future actions in this area.

I. Implementation of the Guiding Principles on Enforcement of the Foreign Bribery Offence in G20 Countries

Note 1: This section of the questionnaire is drafted from the principles outlined in the G20 Guiding Principles on Enforcement of the Foreign Bribery Offence and the background note on Enforcement of Foreign Bribery Offences.

A. A robust legislative framework

In your jurisdiction:

1. Is there a clear and explicit foreign bribery offence that covers the key elements of the internationally agreed definition for foreign bribery, including offering, promising or giving of a bribe, bribery through intermediaries, and bribes paid to third party beneficiaries?

- *If your jurisdiction criminalises foreign bribery, please provide references to the relevant provisions and/or the full text, if possible.*
- *If your jurisdiction does not have a foreign bribery offence:*
 - *Please note whether an offence has been "drafted", "submitted for government review", or "adopted but not yet entered into force".*

Please provide a timeline for the entry into force of draft legislation, where applicable.

Response:

Yes. Section 70.2 of Australia's *Criminal Code Act 1995* (Cth) (the Criminal Code) comprehensively criminalises foreign bribery, in accordance with the internationally agreed definition. The text of the offence is reproduced below:

70.2 Bribing a foreign public official

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

Note: For defences see sections 70.3 and 70.4.

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

Benefit that is not legitimately due

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

Business advantage that is not legitimately due

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

Subparagraphs 70.2(1)(a)(ii) and (iv) implement the obligation to criminalise bribery offered through intermediaries.

Paragraph 70.2(1)(c) criminalises the conduct of paying a bribe to a third party beneficiary. Under this paragraph the person paid the bribe need not be the foreign public official the person is trying to influence—for instance, a person who gives lavish gifts to the spouse of a foreign public official with the intention of influencing that foreign public official could be caught by this paragraph (assuming all other elements of the offence are satisfied).

Note 2: For questions 2 through 11, jurisdictions without a foreign bribery offence should include updates on plans to address the following issues in efforts to establish the criminalisation of foreign bribery and a framework for enforcing this offence.

2. What is the statute of limitations for investigating and prosecuting foreign bribery? Please indicate the criteria for suspension, interruption or extension of the statute of limitations?

Response:

No statute of limitations applies in relation to investigating or prosecuting the offence of bribing a foreign public official (see section 15B of the *Crimes Act 1914* (Cth)).

3. Please describe the form of jurisdiction available over the foreign bribery offence (i.e. territorial or nationality jurisdiction).

Response:

Both territorial and nationality jurisdiction are available in relation to the offence of bribing a foreign public official.

Section 70.5 of the Criminal Code sets out the requirements for exercising territorial and national jurisdiction:

70.5 Territorial and nationality requirements

- (1) A person does not commit an offence against section 70.2 unless:
 - (a) the conduct constituting the alleged offence occurs:
 - (i) wholly or partly in Australia; or
 - (ii) wholly or partly on board an Australian aircraft or an Australian ship; or
 - (b) the conduct constituting the alleged offence occurs wholly outside Australia and:
 - (i) at the time of the alleged offence, the person is an Australian citizen; or
 - (ii) at the time of the alleged offence, the person is a resident of Australia; or
 - (iii) at the time of the alleged offence, the person is a body corporate

incorporated by or under a law of the Commonwealth or of a State or Territory.

Note: The expression **offence against section 70.2** is given an extended meaning by subsections 11.2(1), 11.2A(1) and 11.6(2).

- (2) Proceedings for an offence against section 70.2 must not be commenced without the Attorney-General's written consent if:
- (a) the conduct constituting the alleged offence occurs wholly outside Australia; and
 - (b) at the time of the alleged offence, the person alleged to have committed the offence is:
 - (i) a resident of Australia; and
 - (ii) not an Australian citizen.
- (3) However, a person may be arrested for, charged with, or remanded in custody or released on bail in connection with an offence against section 70.2 before the necessary consent has been given.

4. Please indicate whether your jurisdiction has a corporate liability regime for the offence of foreign bribery.

If your jurisdiction does not have a corporate liability regime for the offence of foreign bribery, please provide a timeline for implementation of corporate liability.

Response:

Division 12 of the Criminal Code establishes a comprehensive scheme for corporate criminal responsibility.

A body corporate is liable for an offence committed by an employee, agent or officer acting within the actual or apparent scope of his or her employment, or within his or her actual or apparent authority, if the body corporate expressly, tacitly or impliedly authorised or permitted the commission of the offence. Such authorisation or permission can be established by:

- proving that the board of directors or a high managerial agent intentionally, knowingly or recklessly carried out the relevant conduct, or expressly, tacitly or impliedly authorised or permitted the commission of the offence
- proving that a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision, or
- proving that the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.

Where the relevant misconduct is committed by a high managerial agent, the body corporate

will not be liable if it can prove that it exercised due diligence to prevent the conduct, or the authorisation or permission.

A ‘board of directors’ is defined in Division 12 of the Criminal Code as ‘the body exercising the executive authority of the body corporate’.

A ‘corporate culture’ is defined in Division 12 as ‘an attitude, policy, rule, course of conduct or practice existing within the body corporate generally or in the part of the body corporate in which the relevant activities takes place’.

A ‘high managerial agent’ is defined in Division 12 as ‘an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate’s policy’.

Under the Criminal Code, a parent company may be held to have committed an offence that a subsidiary has committed in those instances where the parent has aided, abetted, counselled or procured the commission of the offence by the subsidiary or where the parent company has jointly committed that offence with the subsidiary. It is also an offence for a parent company to incite a subsidiary to commit an offence.

In addition, under Australian law a parent company can be considered a shadow director of a subsidiary if the directors of the subsidiary are accustomed to exercising their powers in accordance with the instructions or wishes of the parent company. If a wholly-owned subsidiary of an Australian parent company is a foreign entity, a similar concept of shadow directors may be recognised in the country in which the foreign subsidiary is incorporated. A shadow director essentially has the same obligations and liabilities as a director of a subsidiary, including any liability for foreign bribery incurred by a subsidiary.

5(a) Please describe the sanctions and confiscation measures available for natural and legal persons for the crime of foreign bribery.

5(b) Please provide the number of criminal, administrative, and civil cases of foreign bribery that have resulted in a final disposition, and indicate (i) how many of these cases have resulted in a criminal conviction or acquittal, or similar findings under an administrative or civil procedure, and (ii) the number of natural and legal persons who have been convicted or otherwise sanctioned.

- *Where possible, please provide references to the relevant provisions and/or the full text, if possible.*

Response:

5(a)

Sanctions for natural persons

Subsection 70.2(4) of the Criminal Code sets out the sanctions available for a natural person found guilty of the offence of bribing a public official. The maximum penalty for foreign bribery

committed by natural persons is 10 years' imprisonment and/or a fine of AUD\$1.7 million.

In addition, offenders are automatically disqualified from managing corporations for five years, which may be extended to up to 20 years upon application to the court (*Corporations Act 2001* (Cth), sections 206B, 206BA). They may also be disqualified from being a responsible officer in a financial institution (section 126H of the *Superannuation Industry (Supervision) Act 1993* (Cth), section 21 of the *Banking Act 1959* (Cth), section 25A of the *Insurance Act 1973* (Cth), and section 245A of the *Life Insurance Act 1995* (Cth)).

Sanctions for legal persons

Subsection 70.2(5) of the Criminal Code sets out the sanctions available for legal persons found guilty of the offence of bribing a foreign public official. The maximum penalty for foreign bribery committed by legal persons is a fine equal to the greatest of:

- a fine of AUD\$17 million, or
- if the court can determine the value of the benefit that the body corporate, and any body corporate related to the body corporate, have obtained directly or indirectly and that is reasonably attributable to the conduct constituting the offence – three times the value of that benefit, or
- if the court cannot determine the value of that benefit – 10% of the annual turnover of the body corporate during the period of 12 months ending at the end of the month in which the conduct constituting the offence occurred.

'Benefit' is defined in section 70.1 of the Criminal Code as including 'any advantage and is not limited to property'. This includes both non-financial and non-pecuniary advantages such as a customer base, a market share, or an undefined increase in the profit obtained from the sale of a good or service.

Confiscation measures

Any proceeds of crime identified in relation to a foreign bribery offence may be pursued under the *Proceeds of Crime Act 2002* (POCA).

POCA establishes a comprehensive scheme to trace, restrain and confiscate the proceeds of criminal activity which constitutes a serious or indictable offence under Australian Commonwealth law. POCA also applies to foreign indictable offences.

POCA includes provision for conviction-based confiscation orders (which can only be made after a person has been convicted of a criminal offence), non-conviction based confiscation orders (which can be made irrespective of whether there has been a prosecution), pecuniary penalty orders (which require a person to pay an amount based on the benefits the person has derived from their conduct), and unexplained wealth orders (which can be made where a person cannot satisfy a court that their wealth was not illegitimately acquired).

Under POCA, Australian authorities are able to initiate asset tracing and recovery in relation to domestic and foreign indictable offences. Assets which are the proceeds of foreign indictable

offences may be identified in a mutual assistance request received by Australia, through notification through police or Financial Intelligence Unit channels or as the result of domestic investigations.

POCA provides for a range of investigative tools that can be used to trace the proceeds of crime. These tools include notices to financial institutions, search warrants, production orders and monitoring orders. Compulsory witness examinations may also be used.

5(b)

To date, one criminal case of foreign bribery has resulted in a final disposition:

- (i) This case resulted in three criminal convictions of foreign bribery offences (suppression orders are in place).
- (ii) Two legal persons and one natural person were convicted (suppression orders are in place).

In addition, the Australian Federal Police currently has approximately 13 foreign bribery investigations underway, some of which are also the subject of parallel investigations by the Australian Securities and Investments Commission.

B. Effective detection and domestic coordination

In your jurisdiction:

6. What steps have been taken to engage with relevant agencies, such as overseas missions, broader tax administrations, trade promotion, public procurement and export credit agencies, as well as with the private sector, on issues related to implementation and enforcement of the foreign bribery offence? Where possible, please cite specific examples.

Response:

Australia has a comprehensive, whole-of-government approach to foreign bribery, which seeks to coordinate and strengthen Australian Government efforts to combat and prevent foreign bribery, including by extensive engagement with the private sector. Agencies involved in Australia’s response to foreign bribery include the Attorney-General’s Department (AGD), the Australian Federal Police (AFP), the Australian Securities and Investments Commission (ASIC), the Commonwealth Director of Public Prosecutions (CDPP), the Department of Foreign Affairs and Trade (DFAT), the Australian Taxation Office (ATO), the Australian Trade Commission (Austrade), and the Export Finance and Insurance Corporation (EFIC).

AGD has whole of-government policy responsibility for foreign bribery and undertakes outreach activities to raise awareness of the foreign bribery offence. AGD also leads Australia’s engagement with the OECD Working Group on Bribery.

More detail on the roles played by the agencies referred to in the question is provided below.

Department of Foreign Affairs and Trade

Department of Foreign Affairs and Trade (DFAT) officials are under an obligation to report all allegations of extra-territorial offences committed by Australian citizens, permanent residents or companies, including information they receive about bribes paid to foreign public officials. Information regarding allegations of foreign bribery can be reported to the Transnational Crime Section within DFAT and referred to the Australian Federal Police.

DFAT has formalised and clarified these obligations and reporting procedures through a number of policy documents, including: Administrative Circular N543/09 – Australian extraterritorial offences and the responsibility to report; Administrative Circular P0874 – Assisting Australian Businesses Overseas; the Conduct and Ethics Manual; and the Consular Handbook. DFAT staff receive mandatory training regarding the foreign bribery offence both as part of their initial induction training and prior to undertaking any overseas posting. DFAT has also provided training for staff working overseas through regional training programs.

DFAT seeks to ensure that Australian companies are aware of their obligations under Australian anti-bribery laws and conducts outreach activities to the private sector about these laws. This program outlines the Government's zero tolerance approach to foreign bribery, discourages payment of facilitation payments, and encourages any Australian individuals or entities unable to repel a corrupt approach through their own efforts to contact the relevant Australian diplomatic mission for assistance.

DFAT's outreach activities target a broad audience, including industry, legal professionals, financial institutions, universities and relevant Commonwealth and state government departments. Outreach is conducted in a variety of formats, including DFAT hosted events, in partnership with non-government or private sector organisations, individual briefings, and as keynote conference speakers. DFAT's website also includes a page outlining Australia's measures against corruption.

Australian Trade Commission

The Australian Trade Commission (Austrade), the Australian Government's trade facilitation agency, has led a program of internal education for staff in its 100 offices in 60 countries and an outreach program to Business Chambers, industry and bespoke presentations to Australian business, in collaboration with DFAT, AFP, Transparency International and AGD to raise awareness and warn on specific issues such as the use of agents and the law in Australia regarding facilitation payments. This has involved a visit program in June 2014 by Austrade lawyers to high risk locations such as Malaysia, Philippines, PNG, Indonesia, Cambodia, Vietnam and China.

Austrade has followed up their 'all staff' training of 2011 with an anti-bribery outreach program to business and with a further staff refresher. The initial training in 2011 focused on staff awareness of the mechanics of the Australian law concerning bribery of foreign public officials, facilitation payments, use of agents and the obligation to report all allegations of extra-territorial offences committed by Australian citizens to the AFP.

In response to the OECD Phase 3 report on compliance with the recommendations of the

Working Group on Bribery, Austrade has initiated a series of client outreach meetings. Locations were selected based on Austrade presence in low rated (at-risk) countries based on the Transparency International Corruption Perception Index 2013.

In June 2014, Austrade Legal developed and delivered a program to staff and businesses in Manila, Kuala Lumpur, Jakarta, Port Moresby, Hanoi, Ho Chi Minh City, Phnom Penh, Beijing and Shanghai.

Staff training built on previous knowledge and focused on the changing social mood/current enforcement of local law, the subtleties of in-market practice involving facilitation payments, the selection and referral of agents, gifts, hospitality, public service obligations, reporting, Badge of Government assistance and the obligation to raise awareness amongst clients (large and SME's) when approached by Australian business—in various stages of understanding and preparedness—in entering 'at risk' markets. All staff in-country were reached by this series of presentations, both in person and via video link to outlying offices.

Outreach to business to raise awareness of the law and describe mitigation strategies was delivered to businesses and industry representatives via local AusCham chapters which drew in support from AFP, Towards Transparency, Transparency International, Treasury, DFAT and a range of local Australian industry representatives seeking guidance, including representatives of Rio Tinto, BHP, Origin Energy, Milsearch, Ernst & Young, the Royal Melbourne Institute of Technology (RMIT), the English Language Institute, Boral, Jones Lang La Salle, Control Risks, ANZ, Westpac, Cundall Engineering, Bagots Woods, Freight Forwarding, Pacific Brands, local lawyers and media.

In addition, bespoke presentations to business were arranged to address anti-bribery and corruption issues where individual issues could be aired (eg in Ho Chi Minh City, at ANZ banks and to the Chancellor of RMIT at its Vietnam campus).

Sessions focused on raising awareness of the issues involved in facilitation payments, the use of local agents, and the nature of the risk of bribery and mitigation strategies that can be employed. Challenges faced in different jurisdictions were examined in detail, extraterritorial and local legislation were discussed, common themes that arose in all meetings were analysed and recommendations were made as to how to make practical changes to avoid breaking the law in business practice.

Two offers were enthusiastically taken up:

1. Participants welcomed Austrade's offer of the use of 'Badge of Government', an offer by Austrade to make representations on behalf of Australian business faced with solicitation of bribery, to provide active assistance in street-level transactions and to give government weight to rejecting any activity that could lead to a breach of law.
2. Given the poor state of preparedness of some business to appreciate and make preparation for doing business in corrupt markets, an offer was made by Austrade to prepare a generic compliance package (including training materials, policies, statements of intent, disclaimers, gift register, a risk management flow chart, audit and monitoring guidance etc) to be made available at no cost via Austrade or (with a view to building and supporting the local

Chamber) the local AusCham chapter, to bring businesses up to a basic level of awareness of the risks of bribery and corruption and arm them with some basic mitigation tools. Following this offer, a number of AusCham have indicated they will run their own programs for middle managers, intended to raise awareness of the issues addressed in the Austrade presentations.

Domestic training on current issues is to be conducted in-person or via video by Austrade Legal, scheduled for all offices and all staff in July 2014.

Further training in at risk locations is currently being planned for August 2014. Those locations include Chile, Argentina, Russia, UAE, Mongolia, Myanmar, Mexico and India.

Australian Taxation Office

The Australian Taxation Office (ATO) focuses on bribes and facilitation payments as part of its compliance activities, with the intention of ensuring that only legitimate expenses are claimed as deductions. This includes:

- reviewing significant, one-off, regular or embedded payments by Australian businesses to entities in jurisdictions where bribes and facilitation payments are known to be 'part of doing business'
- checking that businesses with particular international trade profiles have appropriate codes of conduct and systems in place to detect bribes and confirm facilitation payments, and
- reviewing organisations that do not have appropriate systems in place.

The ATO pays particular attention to all businesses that have significant trading activities in countries that are given a low rating on Transparency International's Corruption Perceptions Index.

The ATO has also issued guidelines for its staff on the treatment of bribes and facilitation payments, the *Guidelines for Tax Office auditors – Understanding and dealing with bribery*, which are available publicly on the ATO website. These guidelines are modelled on the OECD publication, *OECD Bribery Awareness Handbook for Tax Examiners*. Although the ATO's work in this area is primarily concerned with protecting revenue and maintaining community confidence in the administration, the ATO also plays an important role in Australia's whole-of-government effort to combat corruption and bribery by referring information on suspected or actual bribe transactions to the AFP.

The ATO also works with businesses on the issue of bribes and facilitation payments. The cornerstone of this work is boosting self-regulation and enhancing governance processes that help identify risks before they eventuate. The ATO strongly recommends to businesses that they have a code of conduct across the business relating to bribes, have a strong internal audit function and audit committee, and act to rectify any relevant internal control weaknesses identified and reported to the board by external auditors. The ATO has also prepared a publication for businesses, *Bribes and facilitation payments: A guide to managing your tax obligations*, which is available on the ATO website. This publication provides practical guidance

to businesses, including suggested initiatives that company boards can put in place and suggestions to help businesses meet their obligations under the law. This publication complements the OECD publication, *OECD Bribery Awareness Handbook for Tax Examiners*, and builds on advice from Transparency International.

Export Finance and Insurance Corporation

Australia's Export Finance and Insurance Corporation (EFIC) engages with other Australian Government agencies on issues related to the implementation and enforcement of the foreign bribery offence and related anti-corruption initiatives under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (Anti-Bribery Convention) in the following ways:

- EFIC liaises with DFAT Trade Finance, OECD and Investment Section and jointly monitors on-going developments to fight corruption in international business transactions.
- EFIC refers cases to the AFP for investigation where there is credible evidence of bribery in an export transaction where EFIC support has been requested or is in place. If a matter were accepted by the Commonwealth Director of Public Prosecutions (CDPP) for prosecution, EFIC's role would be to assist in the provision of evidence relating to the prosecution.
- EFIC has responded to recommendations contained in the review of Australia by the OECD Working Group on Foreign Bribery in its 2012 Phase 3 Report, including by updating relevant procedures within EFIC.

EFIC engages its staff in connection with the implementation and enforcement of the foreign bribery offence and related anti-corruption initiatives under the Anti-Bribery Convention in the following ways:

- EFIC has developed the following policies and procedures:
 - Anti-Corruption Policy
 - Incident and Breach Escalation and Whistleblower Policy
 - Incident and Breach Escalation Procedures
 - Whistleblower Procedures
 - Anti-Money Laundering and Counter-Terrorism Financial Program, Parts A and B
 - Fraud Control Policy
 - Public Interest Disclosure Policy, and
 - Public Interest Disclosure Procedures.
- EFIC provides induction and ongoing annual online compliance training to staff on EFIC's anti-bribery and anti-corruption initiatives in order to ensure that the above policies and procedures can be implemented in practice.
- EFIC uses a proprietary search engine that provides risk intelligence on persons and

entities, including matters relating to corruption or potential corruption, which is used when evaluating potential transactions and as part of ongoing due diligence for existing transactions. The information derived from this source is used to make a risk assessment of the transaction in order to reduce the likelihood that EFIC may unwittingly support a transaction involving bribery.

As Australia's export credit agency, EFIC engages with clients and potential clients on issues related to the implementation and enforcement of the foreign bribery offence in the following ways:

1. For EFIC's small-medium-sized enterprises (SME) customers: at the time of sending an indication letter (indicating that EFIC may be prepared to offer the potential customer financial assistance) EFIC requires that the customer sign a form that includes the acknowledgements set out below.

Anti-Corruption Initiatives

- The Customer acknowledges EFIC's Anti-Corruption Initiatives, published by EFIC and available on its website at: www.efic.gov.au/corp-responsibility/Pages/anticorruptioninitiatives.aspx) and, to the extent that the Customer is a multinational enterprise, the Customer is aware of the OECD Guidelines for Multinational Enterprises published by EFIC and available on its website at: www.efic.gov.au/corp-responsibility/Pages/Guidelinesformultinationalenterprises.aspx
- The Customer declares that to the best of its knowledge and belief, neither the Customer nor any person acting on behalf of the Customer or acting with its consent or authority (eg any of its employees or agents):
 - has engaged, or will engage, in corrupt activity in relation to any Relevant Matter, or
 - is currently under charge in a national court, or within a five year period preceding the date of this declaration, has been convicted in a national court or been subject to equivalent national administrative measures for violation of laws against bribery of foreign public officials of any country.
- The Customer understands that for the purposes of this declaration 'Relevant Matter' means this application or a transaction, agreement, arrangement or event contemplated by, or referred to in, this application.
- In making this application, the Customer acknowledges and agrees that the involvement of the Customer, or the involvement of any person acting on behalf of the Customer or with its authority or consent, in corrupt activity in relation to a Relevant Matter may have serious consequences, including, without limitation:
 - evidence of corrupt activity being referred to the appropriate authorities, or
 - termination of a Relevant Matter, acceleration of repayments or the cancellation of insurances, guarantees or other financial accommodation, as the case may be.
- The Customer further acknowledges and agrees that EFIC may require the Customer to disclose to EFIC, on demand, the identity of persons acting on our behalf in

connection with any Relevant Matter, and the amount and purpose of commissions or fees paid or agreed to be paid to those persons.

2. For EFIC’s Structured Trade and Project Finance (ST&PF) customers: the application form used to initiate a transaction which is signed on behalf of a potential customer includes the same acknowledgements set out in the SME letter of indication.
3. In addition, EFIC’s contractual terms for all customer types require the customer to make a representation and warranty that it is not aware of any Corrupt Activity in connection with any Relevant Matter. This representation and warranty is of ongoing effect during the life of the contract:

‘Corrupt activity’ is defined to mean any activity which would in the ordinary course of business be understood to be corrupt, wrongful, dishonest or a criminal act or omission (including the offering of any payment, reward or other benefit or advantage to any public official or other person, including EFIC employees, in order to influence the person concerned in the exercise of their duties) and which has been:

- found or is likely to be found by a court in a competent jurisdiction to render a Relevant Matter illegal, void, voidable or unenforceable under its governing law
- admitted to by the person initiating or engaging in that activity to have taken place
- found or is likely to be found by a court in any competent jurisdiction to constitute an offence under any applicable law, or
- found or is likely to be found by a court in Australia to constitute an offence under the *Criminal Code Act 1995* (Cth) in relation to the *Criminal Code Amendment (Bribery of Foreign Public Officials) Act 1999* (Cth), as amended from time to time and including any successor or replacement legislation or any equivalent State based legislation.

7(a) Are appropriate reporting channels available for whistleblowers in both the private and public sectors?

7(b) Are appropriate protections available for whistleblowers in both the private and public sectors?

Where possible, specific reference should be made to implementation of the G20 Study on Whistleblower Protection Frameworks, Compendium of Best Practices and Guiding Principles for Legislation.¹

Response:

Australia has appropriate reporting channels and protections for whistleblowers in both the public and private sectors.

¹ Available online here: <http://www.oecd.org/corruption/48972967.pdf>

7(a)

Reporting channels for whistle-blowers in the public sector

Within the Australian Commonwealth public sector, the *Public Interest Disclosure Act 2013* (PID Act) promotes integrity and accountability by encouraging the disclosure of information about suspected wrongdoing, protecting people who make disclosures and requiring agencies to take action. Wrongdoing is broadly defined in the PID Act as ‘disclosable conduct’ which includes a contravention of a law, abuse of public trust and corruption. The PID Act applies across the Australian government public sector. The PID Act establishes a mandatory framework for investigation of a public interest disclosure which includes notification obligations and timeframes.

The intention of the scheme is that disclosures will be made and investigated within government. A public official can make a disclosure outside government where the requirements are met for an ‘external’, ‘emergency’ or ‘legal practitioner’ disclosure. In all cases external disclosures must not divulge intelligence information.

The Commonwealth Ombudsman is responsible for promoting awareness and understanding of the PID Act, and monitoring and reporting on its operation to Parliament. The Ombudsman also provides general information, guidance to agencies about their management of the PID scheme, and advice to people who are thinking about making a disclosure of wrongdoing.

All Australian states and territories have public interest disclosure or whistleblower protection legislation which sets out protection arrangements within their jurisdiction. These pieces of legislation vary in the reporting channels available to whistleblowers, in the range of protections provided, in who can make a protected disclosure and in the types of conduct covered.

Reporting channels for whistle-blowers in the private sector

Provisions in the *Corporations Act 2001* (Corporations Act) and the Australian Securities and Investments Commission’s (ASIC) organisational approach to dealing with whistle-blowers provide reporting channels for corporate whistle-blowers.

A ‘corporate whistle-blower’ is a person working in the private sector who makes a disclosure about a company that he or she works for, where a suspected contravention has occurred. Corporate whistle-blowers may be able to access protections under Pt 9.4AAA of the Corporations Act, and similar protections in relation to financial institutions are available under the *Banking Act 1959*, the *Insurance Act 1973*, the *Life Insurance Act 1995* and the *Superannuation Industry (Supervision) Act 1993*.

Australia’s whistle-blower protection legislation reflects key aspects of the *G20 Compendium of Best Practices and Guiding Principles for Legislation on the Protection of Whistleblowers* (G20 Principles). For example, the protections provided to corporate whistle-blowers:

- are extended to independent contractors
- prohibit the victimisation of whistle-blowers, and provide the right to compensation for any

damages to a person who has been victimised

- establish confidentiality requirements, and
- cover internal and external disclosures.

While Pt 9.4AAA does not impose any specific or general obligations on a person to disclose contraventions, company auditors must notify ASIC about matters that they have reasonable grounds to suspect amount to a contravention of the Corporations Act. This obligation exists for 'significant' contraventions, as well as contraventions that are not significant, but that the auditor believes has not or will not be adequately dealt with.

Access to protections under Pt 9.4AAA is available where the whistle-blower is a current officer, employee or contractor of the company about which they are making the disclosure, and where the disclosure is made to:

- ASIC
- the company's auditor or audit team
- a director, secretary or senior manager of the company, or
- a person authorised by the company to receive whistle-blower disclosure.

Furthermore, protections apply where:

- the whistle-blower reveals their identity in making the disclosure
- the disclosure is made in good faith, and
- the disclosure relates to a suspected contravention of the Corporations Act, *Australian Securities and Investments Commission Act 2001* (ASIC Act) or associated regulations.

Where a report of misconduct is made outside these requirements, no statutory protection is available. However, ASIC provides additional reporting channels at an organisational level as part of its approach to dealing with whistle-blowers. That approach includes:

- maintaining a coordinated, centralised procedure for the tracking and monitoring of all whistleblower reports
- giving appropriate weight to the inside nature of the information provided by whistleblowers in its assessment and ongoing handling of the matter
- providing prompt, clear and regular communication to whistleblowers to the extent possible and appropriate during our investigations, and
- maintaining the confidentiality of whistleblowers within the applicable legal framework.

ASIC has extended this approach to persons who do not fall within the definition of

whistle-blower under the Corporations Act, but who still have inside information (for example, because they are no longer employed at the company about which they are making the disclosure, or because they make the disclosure anonymously).

7(b)

Protections for whistle-blowers in the public sector

The PID Act gives protection to public officials who make disclosures about wrongdoing and maladministration.

- A discloser cannot be subject to any civil, criminal or administrative liability, including disciplinary action, for making a disclosure in accordance with the PID Act, and no contractual or other remedy can be enforced against the discloser on the basis of his or her disclosure. This protection does not apply if the discloser knowingly made a statement that is false or misleading.
- It is also an offence for any person to cause a discloser detriment because they suspect or believe that the discloser made or will make a public interest disclosure. Detriment includes any disadvantage to the discloser, including dismissal, injury, discrimination between the discloser and other employees or alteration of the discloser's position to his or her disadvantage.

Protections for whistle-blowers in the private sector

The whistle-blower protections Pt 9.4AAA of the Corporations Act include protection from any civil liability, criminal liability or the enforcement of any contractual right that arises from the disclosure, as well as the prohibition against victimisation of whistle-blowers, and the right to seek compensation if damage is suffered as a result of the disclosure.

A disclosure which qualifies for protection under Part 9.4AAA of the Corporations Act, the identity of the person making the disclosure, and any information which is likely to lead to the identification of this person, must be treated as confidential information by the person to whom the protected disclosure has been made. The whistle-blower's consent is required when releasing such information to anyone other than ASIC, the Australian Prudential Regulation Authority, or the AFP.

In addition, ASIC's enhanced approach to dealing with whistle-blowers seeks to ensure that it maintains the confidentiality of persons that make disclosures, but do not fall under the statutory definition of a corporate whistle-blower.

Additional information

In October 2009, Australia's Treasury released the options paper *Improving Protections for Corporate Whistleblowers*, and sought public feedback on this paper concerning whether the current framework offered adequate protection and how it could be improved. The comment period closed on 21 December 2009. The feedback provided no strong consensus on reform for the protections for whistle-blowers.

On 26 June 2014, the Senate Economics References Committee tabled a report on the performance of ASIC. The report called for a Government review into the adequacy of Australia's current whistle-blower framework, and made further recommendations, including that:

- the Part 9.4AAA definition of a whistle-blower be expanded (to include a company's former employees, financial services providers, accountants and auditors, unpaid workers and business partners)
- an 'Office of the Whistle-blower' be established within ASIC
- subject to the findings of the review, protections for corporate whistle-blowers be updated and made consistent with the protections afforded to public sector whistle-blowers under the PID Act (for example, protecting anonymous disclosures), and
- the Government explore options for reward-based incentives for corporate whistle-blowers.

The Government is currently considering the recommendations of that report.

C. Effective investigation and prosecution

In your jurisdiction:

8(a) Please describe the investigative powers granted to law enforcement authorities to proactively and effectively investigate and prosecute foreign bribery.

8(b) Please describe the specialized training on detecting, investigating and prosecuting foreign bribery provided and/or planned to be provided to law enforcement authorities.

Response:

8(a)

The Australian Federal Police (AFP) has available all statutory investigation techniques and powers for the investigation of serious offences when investigating foreign bribery offences, including:

- search warrants
- use of financial investigators
- use of the AFP's international network
- mutual legal assistance
- digital forensics
- physical surveillance
- telephone intercepts, and
- technical surveillance.

8(b)

A dedicated Fraud & Anti-Corruption area comprising specialist investigative teams has been established within the AFP in an effort to enhance Australia’s response to deterring, identifying and investigating serious and complex fraud against the Commonwealth, corruption, foreign bribery and complex identity crime. Through these teams, the AFP will continue to actively pursue foreign bribery investigations.

The AFP conducts a range of specialised training in relation to foreign bribery. For example, in October 2013 the AFP Foreign Bribery Panel of Experts held a four-day workshop on foreign bribery investigations that was attended by the investigators and supervisors in the Fraud and Anti-Corruption business area. The workshop focused on legislation, methodologies and investigation strategies specific to foreign bribery.

9(a) Please describe the procedures in place for ensuring prompt and effective handling of outgoing and incoming mutual legal assistance requests in relation to foreign bribery cases.

9(b) Please describe how informal assistance is encouraged, in conformity with your jurisdiction’s legal system.

Where possible, specific reference should be made to implementation of the G20 High-Level Principles on Mutual Legal Assistance.²

Response:

9(a)

Australia’s Mutual Assistance Framework

Australia has developed a comprehensive framework for dealing with incoming and outgoing Mutual Assistance Requests (‘MARs’). In accordance with Principle 2 of the *G20 High-level Principles on Mutual Legal Assistance* as agreed by the G20 in 2013 (‘2013 G20 MLA Principles’), Australia has a central authority for ensuring the prompt and effective handling of both incoming and outgoing MARs, being the International Crime Cooperation Central Authority (‘ICCCA’) within the Commonwealth Attorney-General’s Department.

Mutual assistance in Australia is governed by the *Mutual Assistance in Criminal Matters Act 1987* (‘MA Act’). This legislative framework is consistent with Principle 1 of the 2013 G20 MLA Principles, and offers a comprehensive range of mutual assistance. Under the MA Act Australian authorities can execute search warrants, take evidence from a witness in Australia (including by video link), arrange for the production of documents or other articles, arrange for prisoner witnesses to travel with their consent to a foreign country to give evidence, and take action to locate assets and register or otherwise enforce foreign orders restraining and forfeiting the proceeds of crime. Australia can also provide other assistance such as voluntary

² Available online here: <http://www.oecd.org/g20/topics/anti-corruption/High-Level-Principles-on-Mutual-Legal-Assistance.pdf>

witness statements or service of documents.

Australia has entered into bilateral mutual legal assistance treaties with 29 countries but can receive MARs from any country on the basis of reciprocity.

ICCCA is responsible for all incoming and outgoing MARs, including requests in relation to foreign bribery matters. Foreign bribery matters are prioritised in accordance with procedures discussed below.

Over recent years Australia has made and actioned an increasing number of MARs relating to foreign bribery investigations.

Procedures and processes for handling MARs

Incoming MARs

ICCCA is able to receive MARs via regular post, fax, email, or via diplomatic or Interpol channels, allowing a foreign country to determine the most appropriate channel depending on their domestic requirements or the urgency of the request.

MARs are considered by ICCCA and allocated to a case officer who is responsible for the timely progression of a matter. ICCCA prioritises matters having regard to priorities of the ICCCA and the executing agency, the urgency of the MAR, including risk of dissipation of the proceeds of corruption, and court deadlines or other sensitivities which require immediate action.

ICCCA refers most incoming MARs to the Australian Federal Police (AFP) for execution, and liaises with the AFP regarding the provision of the assistance requested by the foreign country. ICCCA transmits material obtained in response to the MAR, back to the foreign country.

Pursuant to the MA Act and many of Australia's bilateral mutual legal assistance treaties, Australia commits to maintain the confidentiality of MARs received from foreign countries insofar as is possible, noting the particular importance of confidentiality in foreign bribery investigations.

Outgoing MARs

ICCCA drafts the majority of outgoing MARs in consultation with the domestic requesting agency, often the AFP or the Commonwealth Director of Public Prosecutions (CDPP). The designated ICCCA case officer drafts requests in line with any relevant bilateral treaty or multilateral convention, and may make enquiries with foreign counterparts to seek information about requirements.

Australia generally sends MARs directly to the relevant foreign central authority or via diplomatic channels. In making MARs, Australia provides an indication of the urgency of the request. Once a request has been sent, ICCCA will liaise with the foreign central authority (or via diplomatic channels or the AFP International Liaison Network) to respond to any queries that may arise in executing the request or seek updates within a reasonable time period.

General MAR processes for handling MARs

ICCCA maintains a single casework database of its MARs, which allows for cases to be easily tracked and facilitates effective prioritising. It allows case officers to manage their respective

cases in a manner which ensures that timely follow-up occurs on routine matters, and that appropriate attention is given to more pressing MARs. Of course, the timeliness in the handling of MARs may depend on a broad range of factors, including the complexity of the MAR, the nature of the assistance sought, the quality of the MAR, procedural requirements of the foreign country, whether substantial clarification or follow-up is required, and the responsiveness to such follow-up.

ICCCA continues to build strong relationships with domestic investigatory and prosecutorial agencies. Fostering these stakeholder relationships has promoted timely assistance in MARs. ICCCA holds regular periodic meetings with its stakeholders—particularly the AFP and the CDPP—in order to identify any matters that require progression, and to discuss the best approach in achieving results.

ICCCA has also established direct lines of contact with foreign central authorities where possible. This has facilitated direct enquiries about potential MARs which enables preliminary issues to be addressed and discussed at an early stage (ie possible impediments or foreseeable difficulties and time frames), which in turn expedites the MAR once it is officially made.

9(b)

In some circumstances, Australian law enforcement and regulatory agencies are able to share information on an informal basis with their foreign counterparts via agency-to-agency assistance. Such assistance includes both police-to-police assistance and cooperation between non-police agencies such as AUSTRAC (Australia's financial intelligence unit), the Australian Taxation Office ('ATO') and the Australian Securities and Investments Commission ('ASIC') with their overseas counterparts.

Australia can provide a range of assistance on a police-to-police basis, including the following:

- taking voluntary witness statements and conducting voluntary witness interviews (including via audio-visual link)
- sharing intelligence
- conducting optical surveillance without a warrant
- conducting crime scene analysis where material is not obtained under an Australian warrant
- taking fingerprints
- obtaining criminal records, and
- obtaining publicly available material.

The AFP routinely shares and requests information on a police to police basis. The AFP can facilitate police-to-police assistance either directly or through Interpol channels. The AFP also maintains an extensive international network where officers are posted in Australian overseas missions. These officers provide a conduit for Australian and overseas law enforcement agencies to exchange information and progress investigations. This information sharing is further

enhanced with the US Federal Bureau of Investigation, Royal Canadian Mounted Police and City of London Police as a result of arrangements with the International Foreign Bribery Taskforce.

Australia encourages the use of sharing intelligence on a police-to-police basis, where practicable, to save time and resources where a more formal MAR process is not required by the form of information sought.

II. Implementation of Foreign Bribery Provisions in the 2012-2013 G20 Anti-Corruption Action and the St Petersburg Declaration

Note 3: This section of the questionnaire is drafted from the 2012-2013 G20 Anti-Corruption Action Plan and the St. Petersburg Leaders’ Declaration. It also seeks updates from G20 countries on next steps for fighting foreign bribery.

10. Please specify next steps for continuing “efforts to adopt and enforce laws and other measures against foreign bribery”.³

Australia continues to explore options to improve the effectiveness of our anti-bribery regime. This work is focused on the recommendations made by the OECD Working Group following Australia’s Phase 3 review in 2012.

Key activities underway include:

- continuing to undertake outreach activities to raise awareness of the laws on foreign bribery
- developing an online learning module which will be available publicly, for use by government, industry and interested members of the public. It will provide advice the Australian Government’s position on foreign bribery, relevant laws, steps that businesses should take to minimise their risk of breaking these laws and the assistance that Australian agencies can provide.
- incorporating training in the use of corporate liability in foreign bribery cases as part of the standard operating procedures of the Australian Federal Police (AFP)
- developing bilateral memoranda of understanding between the AFP, Australian Securities and Investments Commission (ASIC) and the Australian Prudential Regulation Authority (APRA), to further clarify roles and responsibilities in relation to foreign bribery matters and information sharing
- considering further options to ensure that state and territory police recognise and refer possible foreign bribery cases to the AFP
- consulting AUSTRAC concerning how to raise awareness that foreign bribery is a predicate offence to money laundering
- continue work to raise awareness of the need for companies to conduct due diligence

³ G20 Anti-Corruption Action Plan 2013 – 2014, Point 2.

on agents, and

- consulting the Australian Public Service Commission on possible reforms to the Australian Public Service Guide to ensure consistent requirements apply to all public servants (including those working overseas or employed by independent statutory authorities) to report suspicions of foreign bribery.

Legislative measures

Australia is also considering possible legislative amendments to ensure the effective operation of our laws on foreign bribery. This includes considering relevant recommendations made by the Working Group on Bribery, such as:

- clarifying that proof of an intention to bribe a particular foreign public official is not a requirement of the foreign bribery offence, and
- ensuring that the offences for false accounting fully cover the requirements of Article 8 of the Anti-Bribery Convention and provide effective, proportionate and dissuasive penalties.

Ongoing consideration is being given to the current facilitation payment defence, which applies to the offence of bribing a foreign public official under s 70.2 of the *Criminal Code Act 1995* (Cth).

The Government will also consider recommendations from relevant parliamentary committee reports, including the Senate Economics References Committee inquiry into the performance of the Australian Securities and Investments Commission (referred to in the response to Question 7(b)).

11. Please specify next steps for engagement with the OECD Working Group on Bribery with a view to explore possible adherence to the OECD Anti-bribery Convention as appropriate. Specifically and where applicable, please indicate any plans to:

- Attend meetings of the WGB in 2014;
- Co-organize or attend meetings on foreign bribery; and/or
- Engage in technical assistance activities on the issue of implementation and enforcement of the foreign bribery offence;
- Open discussion for Membership in the WGB, with a view to acceding to the OECD Anti-Bribery Convention.

- Australia participated in the meeting of the OECD Working Group on Bribery held in Paris in June 2014.
- In June 2014 the Attorney-General's Department hosted a roundtable meeting of Commonwealth Government agencies to discuss Australia's implementation of the recommendations of the OECD Working Group on Bribery's Phase 3 Report.
- Commonwealth Government agencies are developing Australia's response to the recommendations of the Phase 3 Report.
- Australia will present its update on the implementation of the recommendations of the Phase 3 Report at the Working Group on Bribery meeting to be held on 9-12 December 2014.
- The Australian Attorney-General's Department works with partner countries to build capacity to combat transnational crime. This includes assistance to build partner countries' capacity to combat the challenges of corruption, transnational crime, domestic crime and policing, and international crime cooperation – including extradition and mutual assistance.
- Examples of the Department's work includes:
 - assisting Cook Islands to draft a new Crimes Bill which includes provisions to criminalise foreign bribery, and
 - assisting Kiribati and Tuvalu to review and reform their police legislation, including provisions relating to police integrity.
- The Department's assistance is valued by partner countries because it involves peer to peer assistance.
- Since 2005, the Department has provided direct assistance to countries including the Cook Islands, Solomon Islands, Tonga, Palau, Fiji, Samoa, Kiribati, Tuvalu, Nauru, Papua New Guinea, Indonesia, Vietnam, Pakistan, Sri Lanka and Malaysia.