

# Using compensation funds to support anti-corruption interventions

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## Introduction

Corrupt behaviour can cause monetary loss and can cause loss of governance capacity. When perpetrators are brought to justice the penalty often involves some sort of fine. The policy challenge is how to turn these losses and the resultant monetary penalty into a positive for the cheated community.

Earmarking any recovered assets or fines for corruption prevention is one avenue that should be explored, and this scoping paper does that. It is a scoping paper and not a major research treatise, and as such many of the suggestions need further probing and analysis.

These issues have been addressed over the past thirty or so years, not in the corruption context, but in restoring victims of crime. In many countries considerable legislative initiatives have been undertaken to compensate persons who have become victims of criminal behaviour. However, there is very little evidence of any comparable systems of compensation being directed to persons (or communities) who have been damaged or severely impacted by corruption. Similarly, there is little evidence that any recovered proceeds of crime (including crimes of corruption) have been earmarked for, or directed to anti-corruption activities.

This paper examines a range of existing mechanisms relating to criminal injuries compensation and other remedial processes (redistribution of the proceeds/ profits of crime, whistleblower recoupment, consumer law reparation) to explore whether any of these mechanisms might be adapted for victims of corruption or for anti-corruption programs. However, the adaptation of any such mechanisms for anti-corruption purposes necessarily raises substantial policy issues which are also flagged in brief, but these matters will require further distinct and substantial research.

While the World Economic Forum estimates that about one trillion dollars are paid in bribes each year, and while corruption is estimated to account for about 5% of global GDP (about \$3 trillion) there is no real verification of these numbers and no accurate methods to measure dollar losses through corruption.

As noted the losses are not only dollar losses, but there are also losses in governance capacity, poor quality of services, environmental damage, inferior infrastructure, undermining of the rule of law and a diminution of investment potential and business confidence.

There are significant policy issues in devising a means by which money recovered can be specifically directed to anti-corruption activities. This is a substantial research task and an important piece of policy development.

Of the large dollar amounts, there are definitional issues about corruption. All fraud cases are not corruption cases. All money laundering activity does not always involve corrupt officials. Notwithstanding definitional problems, there is little likelihood that the bulk of these dollars would ever find their way into the law enforcement system, or ever be considered in legal processes. Furthermore an assessment would have to be made about whether the amounts recovered would yield sufficient revenue for worthwhile prevention activities.

This preliminary paper explores some of the mechanisms by which funds recovered from corrupt activities can be directed towards corruption prevention measures. What is produced below is not the policy paper that is ultimately required, but rather a paper that explores the issues that would form and underpin the policy paper. There are several strategic ways forward, and once a path has been agreed upon, further research can shape the policy.

This paper has three parts:

1. An outline of some of the conceptual and policy issues;
2. Practical examples from Australia (where the researchers work);
3. Examples from other policy domains and other jurisdictions (such as consumer law, or false claims legislation).

This report should form a platform of options for any country which wishes to pursue the use of recovered funds for corruption prevention.

## **1 Conceptual and Policy Issues**

We are dealing with large dollar amounts, but poor definitional concepts. In essence there are three spheres of activity by which assets are corruptly obtained:

- Corporations which boost their profits through corrupt activity. These are dealt with through regulatory authorities (settlements and deferred prosecutions) , courts(civil remedies and criminal sanctions) and taxation arrangements;
- Government officials and individuals (or organisations) which collude to manipulate processes to generate personal gains. These are dealt with through anti-corruption agencies and various forms of prosecution;
- Public officials who loot the wealth and income of their country. These are dealt with through various asset recovery programs.

The policy challenges are formidable, and can be addressed by working systematically through the component parts of the problem, and identifying and analysing

- policy instruments,
- stakeholder engagement
- implementation and enforcement processes,
- evaluation processes

Policy is the authoritative choice made by a government. Policy is what government choose to do or not do. In pursuing a direction of using confiscated funds for corruption prevention the government must feel confident it can do this politically and have the legitimacy and governmental machinery to take the policy to fruition.

Four steps need to be taken to orient the policy making process

There needs to be a **philosophy** that corruption is harmful and has caused damage, and that the community needs redress, not necessarily in an individual compensatory manner, but rather in a strategic approach to better remediation and corruption prevention processes. The **product** is likely to be legislation, as there is probably no other way of exercising coercive and extractive power and doing this with legitimacy. The **process** would involve the use of policy instruments that are appropriate to recovering money and redistributing this. It would involve a judgement about how much consultation and stakeholder engagement is required or desirable , or if there is a risk of this undermining the process then the confidence of using the legislative instruments of the state. A **framework for action** would involve a political process to judge support, and an implementation process to make sure the good ideas work in reality.

One policy challenge is when problems and service systems do not match. If the ownership of the problem is with the anti-corruption community, and the only mechanism for redress is with the banking system for example, or with the judiciary, then a process of alignment of problems and opportunity for solutions is a necessary step. This comes about with stakeholder engagement and the use of appropriate policy instruments.

Not all players see the problem in the same way, or even agree that there is a problem. The general public (taxpayers) would want efficient use of their resources, and no corrupt misappropriation. Legislators might see the issues as a way to bestow patronage or to see the issues simply as part of acceptable, if borderline, market behaviour. There will always be those fundamentally opposed to change in policy, and not want to see greater anti-corruption activity. In the end it all comes down to the clearest articulation of the public interest. Getting the policy right is one thing, but getting the politics tight is equally important.

Good policy requires good policy instruments, and some of these are discussed in the report below. While the focus is primarily upon Law, other policy instruments might include

- Advocacy
- Networking
- Money
- Government action
- Law

Governments might wish to decide whether to provide information, regulate, require self-regulation or co-regulation, or mandate. Whichever, there will be a philosophical and legal debate about corruption and its consequences and costs.

No policy, however well formulated will succeed if it is not well implemented and designed with implementation feasibility and effective operational and enforcement mechanisms . This is important in the policy development phase, and includes good governance, risk management, stakeholder management and communication. The implementation must be well resourced. There is no point in recovering assets from corrupt behaviour and seeking a means of earmarking them if the agency whose task it is does not have the human capacity and funds to do its job well.

Attention should be paid to stakeholder management. It is important to identify

- Who are the stakeholders
- What are their interests
- How powerful or supportive they are

In addition to law enforcement, NGOs community groups, government regulators there will be those in other policy domains who will claim that earmarking funds for corruption prevention might not be as worthy as their core business. There are also other levels of government (especially in a federal system) which will create and pursue opposition and complexity. The demands on government are never ending and judgements need to be made, and these carry more credibility if the stakeholder management process is clear and focussed.

How to manage the stakeholders will involve judgements about a mix of consultation, collaboration and co-production. It will assist if reliable and supportive stakeholders can be brought into the problem identification process and asked to assist with the development of policy options. However, oppositional stakeholders should be held off until the post decision process, or minimally acknowledged during the process.

Whatever happens along the policy development and implementation pathway, there should be a mechanism for post- implementation review and evaluation. Each of these policy processes can be expanded in more detail to make the process and the outcome worthwhile.

It is not simply a process of having a good idea, agreeing that it should be done, and then passing a law.

Policies relating to the recovery and distribution of corruptly obtained resources would need to consider the following issues.

### **1.1 What types of corrupt behaviour might be targeted?**

- bribery
- extortion
- conflict of interest
- misuse of information
- pay to play the terminology is American, but the concept is universal. It refers to the requirement to make a political donation to the ruling party in order to be allowed to bid for contracts or to participate in a procurement process (play).
- others

### **1.2 Who might be the offenders and targets of any policy?**

- individuals
- groups
- corporations
- kleptocrats

### **1.3 Who might have power and responsibility to confiscate or recover assets?**

- Nation states would have sovereign rights within their borders. (police, anti-corruption agencies, taxation authorities, supreme audit office etc)
- The United Nations Convention Against Corruption outlines various transnational arrangements
- The Stolen Assets Recovery (StAR) Initiative has mechanisms in place
- Inter-jurisdictional cooperative arrangements for recovery
- The eventual development of a codified model regime with broad application across international jurisdictions

#### **1.4 What could be recovered?**

- stocks/ shares
- bonds
- cash
- real estate
- jewellery

#### **1.5 To whom, and for what reason might it be distributed**

- restitution to victims
- to go into general government revenue
- social re-use (for community purposes)
- specific and targeted corruption prevention and education (Siemens)

#### **1.6 Distribution remedies**

- forfeiture
- fines
- anti-bribery settlements
- bank settlements
- restitution
- disgorgement
- divestment
- specific priority and targeted/allocated funding for victims, including governments, NGOs etc.

#### **1.7 Who would manage the undertaking? (and who would bear the costs)**

- Government (which level/ which department; - Finance/ law enforcement?)
- Specialised anti-corruption agency?
- Supreme audit office
- Third party independent regulatory mechanism.

#### **1.8 What processes would govern the reallocation**

- Legislative prescription – specific ratios, proportion of recoveries? Competitive processes?  
Reporting obligations?

- Ministerial discretion regarding allocation?
- Parliamentary oversight?
- Challenges and appeals to allocative decision making?
- Would/ should a conviction be required to trigger recovery and allocation procedures?
- Blended/hybrid fund with other funds (e. g. victims of crime?)
- Specific hypothecation of corruption recoveries (problems of random recoveries, lumpiness of cash flow/streams of revenue)
- How specific should the direction be framed as to nature or identity of donees of payments from the funds? What are the reporting obligations of the recipients of allocated funds?
- Should/could legislation as to non- judicial settlements (e.g. Siemens) specifically require payments (of a specified proportion) to be paid to ACAs, civil societies, watchdogs etc (Siemens \$100 million allocation to fund anti-corruption initiatives).
- Problems/ dangers of excessive reliance on confiscated or recovered funds (over dependency of USA law enforcement bodies on asset recovery).

The following pages describe some of these questions and illustrate with examples from Australia (a federal system and not a particularly corrupt country).

## 2 Legislation and examples from Australia

Australia is a federal system, and the national government is known as the Commonwealth government and its legislation is Commonwealth legislation. However most criminal activity falls under state laws, including corruption related crimes and there are significant differences in approach between the Commonwealth and the states and between the states.

Existing state statutes could be amended, even though the legislation of the various states does differ. Relatively small legislative changes, which would necessarily involve a range of policy and procedural choice could reshape the existing statutes. Distinctive compensation mechanisms for victims of corrupt criminal behaviour could be structured, and the distribution of recovered criminal proceeds for anti-corruption purposes could be mandated. In the Australian federalism this would be a long and time consuming process. The substance and drafting of the content of any such legislative reform could also be influenced by domestic circumstances, as there is not a lot of uniformity across the Australian states in the adoption of model criminal codes.

Examples are given below from one state, the state of South Australia. Some information is available on some of the other states and is available on request from the researchers.

## 2.1 Commonwealth Proceeds of Crime Acts -payments for crime prevention purposes

At a national level in Australia , the federal government has legislative power to confiscate assets derived from criminal activities by virtue of two separate statutes, the Proceeds of Crime Act 1987 ('POCA 1987'), and the Proceeds of Crime Act 2002 ('POCA 2002'). The 1987 Act establishes the Confiscated Assets Special Account <sup>1</sup>, and the 2002 Act establishes the Confiscated Assets Account<sup>2</sup> , with these Accounts together comprising the net proceeds of the sale of assets confiscated under the respective Acts.

## 2.2 Expenditure of recovered funds on crime prevention etc

Under the POCA Act 2002<sup>3</sup> , the Minister (usually the Attorney –General) has the statutory discretion to approve (in writing) programs for such funds to be expended on;

- **Crime prevention** measures ;
- Law enforcement measures ; and
- Drug related programs.

## 2.3 Broad ministerial discretion as to expenditure

It is important to stress that, under the authorising legislation, the Minister has a very broad discretion for the expenditure of such funds as to all matters of program design and selection, recipients, amounts and indeed as to whether such funding is made available at all. For example, under a previous government directive <sup>4</sup>all funding from the Confiscated Assets Accounts was suspended and was not re- instated until a change of government decision in May 2014.

## 2.4 Moneys recovered from settlements

It is very important to note that the Confiscated Assets Accounts may include '**amounts paid to the Commonwealth in settlement of proceedings connected**' <sup>5</sup> with the Acts. Accordingly, such settlement moneys paid into the Accounts do not necessarily require the authorities to secure a criminal conviction or a civil enforcement or recovery order.<sup>6</sup>The important issue of non-

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<sup>1</sup> POCA Act 1987, section 34A

<sup>2</sup> POCA Act 2002, section 295.

<sup>3</sup> POCA Act 2002, section 298.

<sup>4</sup> <https://www.ag.gov.au/Publications/Budgets/Budget2014-15/Pages/Proceeds-of-crime-unlocked-to-fight-crime.aspx>

<sup>5</sup> POCA 2002, section 296(1) (h).

<sup>6</sup> In Australian, the High Court( in the *Commonwealth of Australia v Director , Fair Work Building Industry Inspectorate* {2015 HCA 46 } ) has recently confirmed ( on 9 December 2015)that it is permissible in civil penalty proceedings for the parties to put submissions to a court or tribunal as to an **agreed** penalty .However, no such agreement is permissible in

prosecution or deferred prosecution agreements as a means of recovery of the proceeds of crime (with particular reference to corrupt activity) is dealt with below in 3.12.

## 2.5 Main types of court Orders under the Proceeds of Crime Act.

Under the Proceeds of Crime Act, there 5 main types of orders<sup>7</sup> that a court may make:

- conviction-based forfeiture;
- non-conviction based forfeiture, which allows confiscation action to be taken independently of the prosecution process, where a court is satisfied that a person has committed a serious offence;
- pecuniary penalty orders, which require a person to pay an amount based on the benefits the person has derived from his or her criminal conduct;
- literary proceeds orders, which require a person to pay an amount based on the literary proceeds that he or she has derived from commercial exploitation of his or her criminal notoriety (e.g. through paid media interviews or book deals); and
- unexplained wealth orders, which require a person to pay a proportion of their wealth, where they cannot satisfy a court that their wealth was legitimately acquired.

## 2.6 How much is recovered annually?

Receipts have exceeded expenditure, and a sizeable surplus has accumulated. Estimates of receipts<sup>8</sup> for the Confiscated Assets Accounts for the 2014-15 financial years total \$26 million, with estimated expenditure of \$25 million. However there is an estimated closing balance of \$90 million, and this represents surpluses accumulated over time.

## 2.7 How are the Accounts administered?

The Confiscated Asset Accounts are administered by the Australian Financial Security Authority (in effect the national statutory Insolvency Agency) as the Official Trustee of the funds. The Official Trustee is paid an annual management fee which is drawn from the Confiscated Assets

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criminal proceedings( *Barbaro v The Queen* {2014 HCA 2}).In this respect it is also relevant to note that Article 54 (1)(c) of the United Convention against Corruption directs State parties to consider taking measures to allow confiscation of property without a criminal conviction, in cases ‘...in which the offender cannot be prosecuted by reason of death, flight or absence or in other appropriate cases...’

<sup>7</sup> For further information on asset confiscation in Australia at both Federal and State levels, see Goldsmith , Gray and Russell , Chapter 6 , “*Criminal Asset Recovery in Australia*”, in “*Dirty Assets* “ edited by King and Walker ISBN 9781409462538. See also Skeal and Murray “The Politics of Proceeds of Crime Legislation “{2015} UNSW JL 16.

<sup>8</sup> Attorney-General’s Department Portfolio Budget Statement 2104-2015, page 181, table 3.1.2(a).

Accounts, as well as recovering amounts expended in costs, charges and expenses incurred in connection with the Official Trustee's exercise of powers and functions under the legislation<sup>9</sup>.

## **2.8 Anti-corruption measures; are they included within "crime prevention"?**

There has been very little attention paid to corruption at the Commonwealth level. Although each state has one, there is no national anti-corruption agency. The term "*crime prevention measures*" is certainly broad enough to encompass "*anti-corruption measures*", but unless there were a specific prescription of such funds being used for the purposes of anti-corruption measures, then there would be no obligation on the Minister's part to even consider any such funding, let alone to *require* such specific funding to be considered as possibly being directed to such purposes. There is no obvious evidence of funding from these accounts being made available at the federal level for anti-corruption purposes, but further detailed research and specific inquiry would be required to verify this assumption.

The nature of federalism (particularly where the constituent states rather than the national government control the criminal justice systems) is an important component when assessing whether uniformity of approach is either desirable or feasible.

## **2.9 Little guidance as to types of programs to be funded**

There is no further specification in the legislation itself as to the design, nature or content of such crime prevention programs or measures. However, the Minister would be able to require the recipients of any such funding to satisfy federal reporting, accounting and auditing obligations relating to the expenditure and administration of such funds.

## **2.10 Who gets the funding?**

It appears from the relevant Commonwealth Portfolio Budget Statements and from an Attorney - General's Department Report<sup>10</sup> (as at 2 March 2015) that many local government councils apply for and receive funding for crime prevention programs which are in turn funded from the Confiscated Assets Accounts. In addition a number of federal and state justice and law enforcement bodies (police, customs etc) obtained specific funding from the Accounts. At a broader level (in the 2013-2014 financial years) funding was approved for a Safer Streets program, for anti-graffiti programs and for the expansion of the National Anti-Gangs Squad in Western Australia, but there is no available evidence of the funding of programs which have any connection to corruption. More research would be needed to uncover the types of programs funded and to identify the rationale or basis for the allocation of such funds.

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<sup>9</sup> Regulations 14 and 16 of the POCA Regulations 2002.

<sup>10</sup> <https://www.ag.gov.au/CrimeAndCorruption/CrimePrevention/Documents/POCA%20Funded%20Projects.PDF>

## 2.11 How are the Confiscation Accounts funded?

In addition to the normal range of confiscated assets proceeds<sup>11</sup>, amounts credited to the Confiscated Assets Accounts include a range of additional sources, including moneys from interstate forfeiture orders and moneys paid by a foreign country in relation to Mutual Assistance Act matters.

Also at an international level, the Accounts may retain moneys paid to the Commonwealth by a foreign country in connection with assistance provided by the Commonwealth in relation to the recovery by that country of the proceeds of unlawful activity or the investigation or prosecution of unlawful activity. These reciprocal arrangements are described in the POCA Act 2002, as “**equitable sharing arrangements**”, and are discussed in greater detail in 2.12 below.

## 2.12 Looking internationally - Equitable sharing program: UNCAC

The United Nations Convention against Corruption (‘*UNCAC*’)<sup>12</sup> obliges States to consider sharing profits of crime where assistance in the recovery of those profits contributes to legal enforcement cooperation. **Note** that the UNCAC recognises only nation states, and any recovery goes to nation states.

Over time the Australian Government has made equitable sharing payments under the *Proceeds of Crime Act 2002*<sup>13</sup>, and in fulfilment of its UNCAC obligations. This has been done on what appears to be a random basis with very little transparency (though we may be wrong about this!)

About \$12 million has been paid out to foreign governments. Some of the reasons given are as follows: For money recovered in Australia by the Australian Federal Police, regarding a matter involving a Chinese national, who was wanted in China for embezzlement and fraud offences; Following an investigation by a joint Australian Indonesian task force; . Recognition of its assistance in the investigation and prosecution of a Singapore national for fraud offences; Recognition of its assistance in the investigation into a series of thefts in the UK; Recognition of its assistance in the recovery of proceeds of crime, and in the investigation and prosecution of a Chinese national for money laundering offences. In all of these cases money was recovered by the Australian authorities, and compensatory (or thankful) payments were made in appreciation of assistance received.

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<sup>11</sup> This will also include moneys/proceeds recovered under the Crimes Act 1914 and the Customs act 1901

<sup>12</sup> UNCAC, Chapter V (*Asset Recovery*), Articles 51-57.

<sup>13</sup> POCA Act, sections 296 and 297.

The Australian Government has also benefited under similar sharing arrangements that other countries have under their laws, and has received about \$4 million for assistance given by Australian Law Enforcement Agencies.

### **2.13 Lessons from the UNCAC requirements**

To our knowledge, there has been no systematic review of the various international mechanisms and bilateral arrangements used by the State parties to give effect to the UNCAC obligations to share profits of crime between cooperating countries. It is however, possible that such mechanisms might also be considered when dealing with the broader question of compensating anti-corruption agencies, non-government bodies and civil societies for their role in preventing, combating and uncovering corruption. However, it is important to note that the Australian equitable sharing arrangements (which are picked up and applied in all State Jurisdictions as well) require the foreign country to have made a significant contribution to the recovery of the proceeds, or to the investigation or prosecution of the unlawful activity.<sup>14</sup>

### **2.14 Lessons from the Australian national level.**

The Commonwealth proceeds of crime legislation does offer a robust mechanism as a source of funding for crime prevention measures. However (at the national level) **corruption prevention** funding (from the proceeds of crime) is not expressly contemplated by the relevant Acts, nor it would seem has any funding been distributed specifically for anti-corruption measures. While funding for anti-corruption measures is not expressly contemplated, it is not ruled out either.

While the term “crime prevention” may theoretically include or encompass anti corruption measures, it would be highly desirable for any enabling legislation to specifically designate “corruption prevention measures” as a potential purpose for funding. This positive shift in direction in public policy making would require a specific legislative amendment. The question of whether (and if so in what way) the legislation should mandate or prescribe that there must be funding for anti-corruption measures is also discussed in 2.17 below.

The national accounts reveal that not very much money is recovered, on an annual basis from Commonwealth proceeds of crime activities. This is not entirely surprising, as the Commonwealth lacks the broader constitutional powers in relation to crime, except so far as these powers attach to particular Commonwealth heads of power (social security fraud etc). By contrast, the States possess much wider powers in relation to crime and the administration of the criminal justice system. Because the States have a much wider source of criminal fines and penalty recoveries, they have much more money to fund compensation for criminal injuries.

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<sup>14</sup> POCA Act 2002, section 296(c).

The federal legislation could be amended so as specifically to direct funds to victims of corruption, or otherwise to anti- corruption activities. This would require significant political will, clear resolution of public policy issues, and concomitant parliamentary support. In its present format, the federal legislation is non-prescriptive as to the recipients (and levels) of funding, and accordingly the rationale as to the decisions and choices made as to recipients is obscure and lacks transparency. If the legislation were to be amended, it would be desirable for the legislation to spell out the qualifying conditions upon which any funding decisions are to be made, and whether such decisions are to be made by a minister, by a dedicated asset management office or otherwise. If the legislation were to too closely prescribe identified recipients of funding (e.g. NGOs, law enforcement bodies etc), then the legislative scheme (whether in the principal act or by subordinate legislation, by regulation, or by proclamation) would need to be flexible enough to deal with changes in circumstances

The experience in one state is described in a little more detail here.

### 2.15 Sub-national examples: Australia

**South Australia** is one of the smaller states in population, but has a long history of policy innovation. The examples cited here are typical of how a sub-national entity might operate in the absence of national laws.

In South Australia, the mechanism for payments to be made for crime prevention purposes derives principally from the interaction of two Acts, the *SA Victims of Crime Act 2001* ('the *VOC Act* ') and the *SA Criminal Assets Confiscation Act 2005* ('the *CAC Act*').

The *VOC Act* establishes the Victims of Crime Fund<sup>15</sup>, and the *CAC Act*<sup>16</sup> requires all proceeds of confiscated assets to be paid to this Fund. By way of contrast with the Commonwealth position, the Victims of Crime Fund receives moneys not only from confiscated profits under the *CAC Act* but also receives other major sources of funding<sup>17</sup> including;

- Specific victim of crime levies imposed automatically as part the court fines and expiation fee processes ;
- Moneys recovered under the *VOC Act*;
- Most importantly, a prescribed proportion of all **fines** paid into the Fund, which at present is 20% of all fines recovered and paid into General Revenue; and finally

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<sup>15</sup> SA VOC Act 2001, section 30.

<sup>16</sup> SA CAC Act 2005, section 209.

<sup>17</sup> SA VOC (*Fund and Levy*) Regulations) 2003; regulations 4 and 5 and Schedule 1.

- In the unlikely event of any shortfall the VOC Act<sup>18</sup> provides that any deficiency in the VOC Fund will be met from the Consolidated Account (general government revenue).

Although the principal purpose of the *VOC Act* is to provide compensation to victims of crime, section 31 of the *VOC Act*<sup>19</sup> gives the Attorney-General;

‘... An absolute discretion to make payments from the Fund to a government or non-government organisation or agency that will, in the Attorney-General’s opinion, assist in the **prevention of crime** or advance the interest of victims of crime... ‘.

It is also relevant to note any decision by the Attorney-General in the exercise of a discretion to make any such payments - ‘... **cannot be challenged or called in question before any court** ...’

This is an unusual example of a so called privative (or ouster of jurisdiction) clause, which seeks to remove judicial supervision from the oversight of the exercise of administrative decision making, but it does serve to emphasise the breadth and untrammelled nature of the ministerial discretion.

## 2.16 Other Australian states

**Victoria** has similar legislation to South Australia in relation to the funding of victims of crime, and as to the funding of crime prevention initiatives. Section 134 of the *Victorian Confiscation Act* 1997 establishes a fund called the **Crime Prevention and Victim’s Aid Fund**, which has less explicit funding sources than the South Australian regime, but which does include confiscated criminal proceeds, and related pecuniary penalties. The Victorian Minister may pay out of the Fund<sup>20</sup> ‘... any sums that he or she deems fit, and subject to any conditions, limitations or restrictions that he or she may determine for or towards...the **development, implementation, co-ordination or evaluation of crime prevention and control programs ... or criminological research...** ‘.

In **Western Australia**, the Confiscation Proceeds Account (‘the *CP Account* ‘) is established by section 130 of the Criminal Property Confiscation Act 2000 (‘the *CPC Act*’) and that Fund is replenished by the proceeds of confiscated money or property. However, there is an additional source of funding specifically made available from the proceeds of confiscated vehicles under the Road Traffic Act 1974<sup>21</sup>. The Confiscation Proceeds Account may be utilised for a number of law enforcement related purposes, but the term ‘**crime prevention**’ is not used. Section 131 of the CPC Act provides that moneys may be paid out of the CP Account, at the direction of the WA Attorney General, for a range of purposes, including:

<sup>18</sup> SA VOC Act 2001, section 30(5).

<sup>19</sup> SA VOC Act 2001, section 31(2).

<sup>20</sup> *Victorian Confiscation Act* 1997, section 134(2) (c) and (d).

<sup>21</sup> Western Australia Road *Traffic Act* 1974, section 80 J (7) (j) (ii).

- for the development and administration of programmes or activities designed to prevent or reduce drug-related criminal activity and the abuse of prohibited drugs; and
- to provide support services and other assistance to victims of crime; and
- to carry out operations authorised by the Commissioner of Police for the purpose of identifying or locating persons involved in the commission of a confiscation offence; and
- to carry out operations authorised by the Commissioner of Police for the purpose of identifying or locating confiscable property; and
- to cover any costs of storing, seizing or managing frozen or confiscated property that are incurred by the Police Force, the DPP or a person appointed under this Act to manage the property; and
- for any other purposes in aid of law enforcement.

In **New South Wales**, a Confiscated Proceeds Account is established under the *Criminal Assets Recovery Act 1990* ('the CAR Act'), which holds moneys confiscated under the CAR Act. Section 32 of the CAR Act authorises payments from the Account to be made "...in aid of law enforcement... (and).. **crime prevention programs** ...as directed by the Treasurer in consultation with the Minister..."<sup>22</sup> By way of contrast with the other States, all moneys recovered under the *Confiscation of Proceeds of Crime Act 1989*, go direct to the Victims Support Fund<sup>23</sup>, but no payments from that Fund can be channelled to crime prevention programs.

Other states have confiscation of profits legislation<sup>24, 25</sup>, and victims of crime legislation<sup>26, 27</sup> but there is no mention of crime prevention or related programs.

## 2.17 Lessons from state level approaches

- South Australia has **diverse funding** (not reliant solely on proceeds of crime), and the Fund is not so dependent on the random or sporadic nature of recoveries derived only from the confiscated profits of crime.
- South Australia has **secure funding** (VOC Fund is guaranteed a top up in the event of any deficiency).
- The nature of the **ministerial discretion** is very broad, and is not easily transparent. While the Minister could allocate funds to corruption prevention, there is great discretion, and this could

<sup>22</sup> NSW CAR Act 1990, section 32(3) (d).

<sup>23</sup> NSW Victims Rights and Support Act 2013, sections 14-16.

<sup>24</sup> Tasmania Crime ( Confiscation of Profits ) Act 1993

<sup>25</sup> Queensland Criminal Proceeds Confiscation Act 2002.

<sup>26</sup> Tasmania Victims of Crime Assistance Act 1976.

<sup>27</sup> Queensland Victims of Crime Assistance Act 2009.

be dangerous if the Minister were easily influenced. There is a policy challenge about how prescriptive any legislation should be.

- To require specific funds for corruption prevention (with further specificity as to the nature of programs, amounts, recipients etc) then a specific legislative amendment to the parent Act would be required. This issue of specificity as to funding (proportions, designated recipients etc) and related legislative options raises very significant public policy issues, which in turn would have different implications across all the individual jurisdictions of each country. It is beyond the scope of this paper to explore this complex issue any further, other than to note that there would be many different alternatives to be explored within each country.
- Victoria is more explicit as to the range or nature of crime prevention programs that *could* be funded at the Minister's discretion, but there is no available evidence that corruption prevention has been funded.
- Western Australia varies only slightly from the South Australian and Victorian models, but boosts revenue from the proceeds of confiscated vehicles. Again the Minister has great discretion in the choice of programs and recipients in the use of the funds, which could include (but need not) anti-corruption initiatives.
- New South Wales, the largest State in Australia (by population) has a more restricted approach for funding crime prevention initiatives. These examples illustrate the lack of uniformity in Australia's federal system and point to the difficulty in achieving a common national approach across important public policy areas.

### 3. Alternative Remedies and Mechanisms

Confiscating profits and seizing proceeds of crime is not the only way to go. Alternative options might include remedies and mechanisms for redress, and restitution or recovery which sit outside those more traditional approaches. The area of consumer law provides some illustrations.

However, it should be noted that there appears to be no other research where this possibility has been mentioned, and so the consumer law remedies have in effect resided in a jurisprudential setting quite outside the context of traditional criminal law. On the surface consumer law is not related to anti-corruption activity, but the purpose of outlining consumer law is to explore avenues not previously explored. It would be helpful to workshop some of these remedies. Paras 3.1 to 3.13 provide a diverse range of funding and remedial mechanisms, drawn from differing sources, which could be further explored for their potential adaptability for funding anti-corruption activities.

#### 3.1 Remedies under the (Australian) Commonwealth Competition and Consumer Act.

National consumer law applies throughout all the Australian States and territories. The kinds of orders<sup>28</sup> that the court may make for the benefit of non-represented parties include;

- Voiding a contract whether *ab initio*, or from a specified date ;
- Varying a contract;
- Refusing to enforce all or any provisions of a contract or arrangement;
- Directing a respondent to refund money or return money or property to a non- party;
- Directing a respondent ( at his or her own expense ) to repair goods=;
- Directing a respondent to supply specified services;
- Directing a respondent to transfer an interest in land;
- Compensation orders<sup>29</sup> for loss or injuries, including orders to prevent , redress or reduce further loss;
- Redress orders<sup>30</sup> for classes of non –parties, where the court may have regard to the contravening conduct of the offending party;
- Injunctions<sup>31</sup> and divestiture<sup>32</sup> for certain contraventions;

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<sup>28</sup> Commonwealth *Competition and Consumer Act* 2010, section 51 ADC

<sup>29</sup> Ibid, section 237.

<sup>30</sup> Ibid, section 239.

<sup>31</sup> Ibid, section 80

<sup>32</sup> Ibid, section 81, 1A.

- Adverse publicity orders<sup>33</sup>, requiring persons to disclose or publish information by way of paid advertisements.
- Orders for proportionate liability<sup>34</sup> for concurrent wrongdoers.

Note, the term ‘non- party ‘refers to a person not represented (as a litigant or otherwise) in the proceedings before the court.

These remedies are broad and far reaching, but the important point to note is that under Australian law the individual persons, classes of persons or communities affected do not themselves have to bear the obligation and expense of litigating these matters in order to obtain redress. In Australia, the regulatory authority, usually the Australian Competition and Consumer Commission, undertakes the litigation on behalf of the consumers or affected parties. This type of approach could be considered when corporations behave in a corrupt manner and cause detriment to the community.

### **3.2 Italy- delivery of confiscated assets to local organisations and communities for social purposes**

Italian law provides that confiscated assets must be delivered to local organisations and associations for social purposes (in preference to selling the asset). This mechanism is developed and explained in a UNODC document <sup>35</sup>which deals with illicit asset recovery in Italy.

Relevant passages (pages 18-19) include:

“...Several countries provide for a type of disposal aimed at the “**social re-use**” of confiscated assets. This happens, in particular, in countries confronting Mafia-type organized crime, where approaches have been developed seeking to compensate the communities and social groups, which have disproportionately suffered from the presence of such types of organized crime. In these cases, the general policy objectives applying to the management and disposal of all seized and confiscated assets (e.g. efficiency, cost-effectiveness, transparency), are complemented by considerations such as ensuring the assets either stolen from the public or accrued through various forms of organized crime activity at the cost of the public are being re-dedicated to the benefit of the public; the “culture of legality”, the state and its institutions are seen to prevail...”

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<sup>33</sup> Ibid, section 86D.

<sup>34</sup> Ibid, Part VIA (sections 87CB to 87CI).

<sup>35</sup>See UNODC / CAC: “*Reported outcome of the expert group meeting on the management, use and disposal of frozen, seized and confiscated assets*”, held in Reggio Calabria (Open- Ended Inter-Governmental Working Group on Asset Recovery.

<https://www.unodc.org/documents/treaties/UNCAC/WorkingGroups/workinggroup2/2014-September-11-12/V1405186e.pdf>

The definition of what constitutes “**social**” re-use appears wide and diverse across countries. Some of the uses include:

- providing grants or assets to NGOs for socially viable programs;
- providing assets to law enforcement agencies, or to the AMO itself;
- providing assets and “start-up costs” to economically viable initiatives that create employment opportunity and contribute to overall economic growth of otherwise poor communities...”

### 3.3 UK Recovered Assets Incentivisation Fund: distribution for community projects

Campbell, “*The Recovery of criminal assets in New Zealand, Ireland and England: fighting Organised and serious crime in the Civil Realm*” (2010) 41 VUWLR 15 compares criminal asset recovery in Ireland, England, and New Zealand. She writes (page 34):

“A facet of the English model which stimulates the vigorous pursuit of civil asset recovery and may explain its popularity is "incentivisation", drawing on the considerable revenue producing capacity of asset recovery. The "Recovered Assets Incentivisation Fund" distributes half of the assets recovered to the agencies involved to improve asset recovery and local crime fighting priorities, and in 2007 police forces received £17m from the recoveries made. Furthermore, assets recovered in England and Wales are allocated to **community projects** administered by the Home Office. In addition, the Assets Recovery Agency (now abolished) was given detailed targets regarding recovery and a comprehensive business plan, while the Serious Organised Crime Agency most recent annual plan speaks of "strategic imperatives" with "planned deliverables", measures and outputs, including the tackling of criminal finance and profits through asset recovery. These factors may betray the underlying rationales for the process, and the imposition of fiscal targets poses a challenge to the administration of justice, as it focuses on the revenue producing capacity of forfeiture to the potential detriment of equity or fairness.”

### 3.4 Pecuniary penalties in consumer law; methods of assessment

There are three major points to be noted about the methods on imposing penalties under the Australian consumer and competition law regime, with possible application as to remedies for addressing damage and loss caused by corruption.

The first point is that, in considering pecuniary penalty, the court may impose a penalty in respect of **each act or omission**<sup>36</sup> by the offending party, and may have regard to the nature and extent of the act or omission, any loss or damage suffered as result, and previous offending conduct.

Secondly, the court in determining overall or total penalty<sup>37</sup> may take one of three courses;

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<sup>36</sup> Ibid, section 76(1).

- For each act or omission, a penalty of up to \$10 million; or
- If the wrongfully benefits obtained are known, a penalty of three times that total value; or
- If the wrongfully obtained benefits are not known, 10% of the annual turnover of the body corporate during the previous 12 month period.

Thirdly, if a defendant does not have sufficient financial resources to pay both a penalty and compensation, then the Court must give preference<sup>38</sup> to making an order for compensation.

### **3.5 Lessons from Australian Consumer law for anti-corruption**

Mechanisms under consumer law demonstrate that these remedies are available to non- parties (which may include individual persons, or classes of persons). The methods of extracting redress (both as to as penalty and also as to compensation) are varied and comprehensive, and may be crafted to individual circumstances, and especially to corruption prevention initiatives.

### **3.6 US False Claims Act – rewards for whistleblowers: a percentage of the damages**

The US False Claims Act {31 U.S.C. ##3729-3733} is a long standing federal law, passed by Congress in 1863, which imposes criminal liability on contractors who defraud government programs. Claims under the Act usually involve health care or military fraud, but more recently have involved very large pharmaceutical settlements.<sup>39</sup>

The False Claims Act also contains a provision that enables private persons (but not government officials) to file a civil suit against the organisation or person allegedly committing the fraud, and entitles the claimant to receive a portion of recovered damages. The complaint is known as a “*qui tam*” action, and the claimant is known as a “*relator*”. The relator may be an employee of the corporation, but need not be.

The proportion of the “reward “varies, but will be in the range of 15 to 25 % of the damages awarded by judicial process or by settlement. This will depend upon the extent to which the person substantially contributed to the prosecution of the action. Once the government investigates the allegations in the complaint, and notifies the court that it will proceed with the action, the government has the primary responsibility to prosecute the action. If the government declines to proceed with the action, the relator may continue the action but the

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<sup>37</sup> Ibid, section 76(1A).

<sup>38</sup> Ibid, section 79 B.

<sup>39</sup> For an example of a large scale settlement involving a whistleblower action against a pharmaceutical corporation, see :

<https://www.lawyersandsettlements.com/articles/healthcare-fraud/insurance-commissioner-state-of-california-dave-21173.html#.Vo6xpg8XerW>

relator's share of the damages is increased from 25 to 30 %. A successful relator is also entitled to reasonable expenses, attorney's fees and costs which must be paid by the defendant.

In effect, the False Claim Act operates as a whistleblower legislative model which permits persons to recover a monetary reward for their specific involvement in unmasking the fraud, which involves serving the government with a comprehensive memorandum detailing the factual basis of the complaint.

More detail of the mechanisms involved in the whistleblower claims is in the USA Department of Justice website at: [www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS\\_FCA\\_Primer](http://www.justice.gov/sites/default/files/civil/legacy/2011/04/22/C-FRAUDS_FCA_Primer).

If legislation of this sort is being contemplated, provision could be made for the proceeds to be split equally between the whistleblower and an anti-corruption fund.

### **3.7 Compensating victims of terrorism**

Lessons might be learned from budget provisions made in the US Congress for American victims of terrorism. The funds are to be drawn from a money laundering settlement in which BNP Paribas Bank was fined \$9 billion in 2014 for violating foreign sanction laws which ultimately funded terrorist activities in corrupt regimes<sup>40</sup>.

This sort of legislative initiative could be adapted to fund anti-corruption interventions.

### **3.8 Ireland**

In Ireland confiscated assets can ? but are not automatically reallocated to communities most affected by corrupt or legal activity.

"The Irish Parliament may make monies available for the purpose of expenditure by the Bureau in the performance of its functions, but this funding is not dependent on the revenue confiscated or forfeited by the Criminal Assets Bureau, nor does it represent a proportion of the property seized. As regards the use of recovered assets, the Select Committee recommended in 1985 that the agency established to examine and trace assets of suspected drug dealers (which took the form of the CAB) should eventually be funded from the proceeds of confiscation orders. The "ring fencing" of assets for those communities who have suffered most at the hands of the drug barons was also mooted when the Proceeds of Crime (Amendment) Bill 2003 was debated, but rejected by the Irish

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<sup>40</sup> [http://www.huffingtonpost.com/frank-vogl/justice-for-us-terrorism\\_b\\_8896402.html](http://www.huffingtonpost.com/frank-vogl/justice-for-us-terrorism_b_8896402.html)

Government.”<sup>41</sup>

### 3.9 Settlements following corruption exposure

Between 1999 and 2012 there were nearly 400 settlements in foreign bribery cases involving both individuals and companies. These settlements and the sanctions imposed are examined in a study by Odour, Hauch (et al) in “*Left out of the bargain: settlements in foreign bribery case and implications*” (27 November 2013) World Bank Publications. There is also a companion database to the study compiled by the Stolen Asset Recovery Initiative (“STAR”) under the auspices of the World Bank and UNODC.<sup>42</sup> There have been a large number of settlements concluded since the 2013 study, and details of these are also contained in the STAR database. It is beyond the scope of this preliminary study to examine these in detail, though it is likely that funds were made available for corruption prevention, or towards community initiatives of for social purposes

The most prominent case is probably the Siemens case. The settlement in the Siemens case required the directing of funds (from corporate wrongdoing including bribery) towards anti-corruption initiatives. The methods and process used to allocate, select recipients and distribute the nominated funding should be examined to determine their more general applicability. There have been two funding rounds completed under the Siemens Integrity Initiative with the second round of funding launched in June 2013 (funding volume of US\$35.5 million, with 24 projects selected. See [www.siemens.com/integrity-initiative/Report2014](http://www.siemens.com/integrity-initiative/Report2014)

### 3.10 The Siemens Settlement

The World Bank Group – Siemens Settlement Agreement Fact sheet states;

*“The World Bank Group (WBG) and Siemens AG agreed on a comprehensive settlement on July 2, 2009, following the company’s acknowledged past misconduct in its global business and a World Bank investigation into corruption in a project in Russia involving a Siemens subsidiary.*

The settlement includes: (quoted from fact sheet)

- **a commitment by Siemens to pay \$100 million over the next 15 years to support anti-corruption work** – Siemens has committed to pay \$100 million to support global efforts to fight fraud and corruption. Siemens will provide funds to organizations and projects aimed at combating corruption through collective action, training, and education. The WBG will have audit rights over the use of these funds and veto rights over the selection by Siemens of anti-

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<sup>41</sup> Liz Campbell, “The recovery of criminal assets in New Zealand, Ireland, and England: fighting organised and serious crime in the Civil Realm” (2010) 41 VUWLR 15 at 35.

<sup>42</sup> <http://star.worldbank.org/corruption-cases/?db=All>

corruption groups or programs receiving funds. Additional information on this commitment is available on Siemens' website.

- **an agreement not to contest a debarment of up to four years for Siemens' Russian subsidiary** – As part of the settlement, Siemens AG has agreed that its Russian subsidiaries and controlled subsidiaries will not contest a debarment of up to four years by the WBG in connection with wrongdoing, committed prior to 2007, uncovered during an investigation into corrupt practices under the Bank- financed Moscow Urban Transport Project.
- **a voluntary undertaking by Siemens to refrain from bidding** on Bank Group business or Bank group financed activities or projects for two years beginning Jan. 1, 2009 and ending December 31, 2010. This 'voluntary restraint' applies to Siemens AG and all of its consolidated subsidiaries and affiliates and covers business with the WBG. Siemens has agreed to withdraw any bids outstanding as of the settlement date.
- Siemens has also agreed to engage in collective action with the WBG to fight fraud and corruption. Siemens will also continue to provide information on any additional cases of wrongdoing related to past, present and future Bank Projects in which Siemens is involved to the Bank's Institutional Integrity Vice Presidency, which investigates fraud and corruption in Bank Group-financed activities."

Full examination of the Siemens settlement would involve studying both legal and informal settlements, and these took place in several countries.

This highlights some of the jurisdictional difficulties we confront. As a term of the Siemens' settlement with the World Bank (for wrongdoing by a Russian subsidiary of Siemens) Siemens AG <sup>43</sup>set aside over US\$100 million to fund anti-corruption initiatives around the world. Part of that money (expenditure of which is subject to audit by the World Bank) will be used to provide collective action, training and education including scholarships to anti- corruption professionals to participate in the International Anti- corruption academy.

The settlement in the Siemens case, in so far as it required the directing of funds (from corporate wrongdoing including bribery) towards anti-corruption initiatives is the most prominent example of this kind of approach, and accordingly merits much closer examination. The methods and process used to allocate, select recipients and distribute the nominated funding should all be vetted to determine their more general applicability. There have been two funding rounds completed under the Siemens Integrity Initiative with the second round of funding launched in June 2013 (funding volume of US\$35.5 million, with 24 projects selected. See [www.siemens.com/integrity-initiative/Report2014](http://www.siemens.com/integrity-initiative/Report2014)

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<sup>43</sup> For details of the USA SEC settlement proceedings in 2008 involving massive bribery claims against Siemens, see <http://www.sec.gov/news/press/2008/2008-294.htm>

### 3.11 US Foreign Corrupt Practices Act; alternative approaches

The US Foreign Corrupt Practices Act ('the FCPA') contains both anti-bribery and accounting provisions. The anti-bribery provisions prohibit American persons and businesses (domestic concerns), U.S. and foreign public companies from making corrupt payments to foreign officials to obtain or retain business. It also extends coverage to some other businesses and certain foreign persons.

The accounting provisions require issuers to make and keep accurate books and records and to devise and maintain an adequate system of internal accounting controls. The accounting provisions also prohibit individuals and businesses from knowingly falsifying books and records or knowingly circumventing or failing to implement a system of internal controls.

There are a variety of enforcement provisions under the FCPA, which include criminal complaints, informations and indictments, plea agreements, deferred prosecution agreements, and non prosecution agreements.

Some commentary to note

- See 22 part article by ("Wal-Mart's Victims, parts1-XXII") by Andy Spalding in the USA Foreign Corruption Practices Act blog site ('the FCPA Blog) at:  
<http://www.fcpablog.com/blog/2013/4/15/wal-marts-victims-part-i.html>.
- These Articles develop the arguments for better remedies and mechanisms than penalty caps and disgorgement of ill-gotten gains (which are returned to the Treasury)). In particular, note Part XVII of this article, which proposes using a civil society as part of Supplemental Transparency Project to address harms from corruption.  
<http://www.fcpablog.com/blog/2013/6/24/wal-marts-victims-part-xvii-using-civil-society.html>

### 3.12 Costa Rica: Alcatel-Lucent Bribery case

The telecommunications giant Alcatel was prosecuted in 2009-2010 for systematic bribery in Costa Rica. It is claimed that the corrupt behaviour of the corporation caused social damage in the country.

The claim for **social damage** had two anchors, the first being the damage resulting from poor public financial management, and the second from an inference that inhabitants rights to a *healthy environment* included the right to a *corruption free environment*. The legal basis for the social damage claim derived from the Costa Rican Criminal Procedural Code , which enables actions to be brought (but only by the Attorney General) in the case of "*...offenses involving*

*collective or diffuse interests...*” . The court accepted the social damage concept, but dismissed the estimation of economic damages and awarded an amount of US \$600,000.

An overview of the facts and complex legal proceedings involving bribery and linked allegations against Alcatel is set out in a paper by Olay, Tasso and Roth ‘*Repairing social damage out of corruption case : opportunities and challenges as illustrated in the Alcatel case in Costa Rica*’ ( 6 December 2010)<sup>44</sup> .

The principal thrust of the paper is directed to an examination of the concept of **social damage** used in the Costa Rica legal proceedings by the Attorney – General, and of the legal instrument used to give effect to the claim and to the remedy.

The paper explores the opportunities and obstacles to the reparation of social damage in particular, but the lessons learned would be of more general application as well, particularly with regard to the need to have legal tool creating a justiciable right of action (pages 18-19, and 22-26). The authors also briefly mention the possible role of civil society in such cases;

“... **The role of civil society.** What role could civil society have played during the process and to help the process? It is clear that the momentum created by the media was determinant for the prosecutions. In addition, the citizen’s opinion was a central element of the methodology to measure the damage, and it was canvassed through a survey. However, there was no direct involvement in the social damage proceedings themselves...”

Alcatel was prosecuted in Costa Rica, and also under the FCPA in the United States. In one of the biggest settlement under the Foreign Corrupt Practices Act, Alcatel–Lucent agreed on 28 December 2010 to pay US\$137 million for bribing officials in Costa, Rica, Honduras, Malaysia and Taiwan. The matter was resolved as a deferred prosecution agreement,<sup>45</sup> with the documentation being filed and registered in the US Federal District Court, southern district of Florida. The company and the three subsidiaries also had to pay US\$92 million to resolve criminal charges with the USA Department of Justice and US\$45 million in disgorgement o the Securities and Exchange Commission. Alcatel also paid US \$10 million to settle corruption charges brought by the Government of Costa Rica, which according to the Department of Justice website<sup>46</sup> marked the first time in Costa Rica’s history that a foreign corporation had agreed to pay damages to the government as a consequence of its corruption.

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<sup>44</sup> <http://14iacc.org/wp-content/uploads/SocialDamagePaper20.01.2011.pdf>

<sup>45</sup> The full text of the deferred prosecution agreement is at –  
<http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2011/07/29/02-22-11alcatel-dpa.pdf>

<sup>46</sup> <http://www.justice.gov/opa/pr/alcatel-lucent-sa-and-three-subsidiaries-agree-pay-92-million-resolve-foreign-corrupt>

### 3.13 Deferred prosecution agreements and non-prosecution agreements.

The USA Department of Justice (DOJ) and the Securities and Exchange Commission (SEC) have made extensive use of **deferred prosecution agreements** under the Foreign Corrupt Practices Act (FCPA) to combat bribery and related accounting malpractices. The Department of Justice website<sup>47</sup> lists the enforcement actions taken under the FCPA, and also a FCPA Resource Guide<sup>48</sup> (of some 130 pages) which is a compilation of information about the FCPA, its provisions, and enforcement.

The role and function of deferred prosecution agreements (DPAs) and non prosecution agreements (NPAs) under the FCPA are set out in chapter 7 of the DOJ Resource Guide, and deal with these types of settlements for both the DOJ and also for the SEC.

Under a DPA, the DOJ files charges with the court but simultaneously requests that the prosecution be deferred or postponed for the purposes of allowing the company to demonstrate its good conduct. DPAs generally require the defendant to agree to pay a monetary penalty, waive the statute of limitations, admit the relevant facts, and enter into certain compliance and remediation agreements, which might involve a compliance monitor. The DPAs describe the conduct of the company, its cooperation with the regulatory authority and remediation efforts, and provide a calculation of applicable penalty. If the Company complies with the terms of the agreement, the DOJ will then ask the court to dismiss the charges after a specified period (2 or 3 years). If the company successfully complies with the DPA, then there is no criminal conviction.

Under a **non prosecution agreement** ('NPA'), DOJ retains the right to file charges but refrains from doing so to allow the company to demonstrate its good conduct during the term of the NPA. There is no court filing, and so the matter is between the parties, but with the contents being published on the DOJ website. The NPA will contain similar matters to the DPA as to remediation, admission of facts, and if there is compliance and complete cooperation and continued law-abiding good conduct, and then the DOJ will not pursue criminal charges.

A wider range of settled enforcement actions (mostly involving Siemens) can be found on the DOJ website <http://www.justice.gov/criminal-fraud/case/related-enforcement-actions-chronological-list-2008>

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<sup>47</sup> <http://www.justice.gov/criminal-fraud/related-enforcement-actions>

<sup>48</sup> <http://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf>

### 3.14 Too big to jail

Of course it is sometimes argued that the offending corporation is too important to take down. It may be a major economic anchor, a major employer, or there may be national security issues invoked. In the BAE/ Saudi Arabia bribery case it was put that the aircraft contract was so big, and so many British jobs depended on it, and furthermore the British government claimed that there were national security issues at stake.

There have been very substantial settlements made by very large corporations in recent times (Bank of America \$17 billion, Goldman Sachs \$1.2 billion and many other top companies) to avoid prosecutorial action by the regulatory authorities.<sup>49</sup> This phenomenon is described in the book by Brandon Garrett *“Too Big to jail: How Prosecutors Compromise with Corporations”* (2014) Harvard University Press.

Accordingly, it will become very important for analysis to shift (at least to a great extent) from the study and analysis of judicial decisions involving corruption, to the **non-curial area of negotiated settlements of corruption cases.**

### 3.15 International mechanisms and technical assistance

The UNCAC provides an example of a proposed mechanism for setting aside a percentage of moneys from the proceeds of corruption in an account to assist developing countries in the implementation of the Convention.

Article 62 (2) (c) states:

*“States Parties shall make concrete efforts to the extent possible and in coordination with each other, as well as with international and regional organizations:*

*To provide technical assistance to developing countries and countries with economies in transition to assist them in meeting their needs for the implementation of this Convention. To that end, States Parties shall endeavour to make adequate and regular voluntary contributions to an account specifically designated for that purpose in a United Nations funding mechanism. States Parties may also give special consideration, in accordance with their domestic law and the provisions of this Convention, to contributing to that account **a percentage of the money or of the corresponding value of proceeds of crime or property confiscated** in accordance with the provisions of this Convention..”*

More research would be needed to determine if any State Party has taken steps to give effect to this

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<sup>49</sup> <http://www.economist.com/news/briefing/21614101-corporate-america-finding-it-ever-harder-stay-right-side-law-mammoth-guilt>

exhortation.

### 3.16 UNODC Manual on International co-operation for confiscation of proceeds of crime

This Manual makes brief reference to funds being made available from asset confiscation funds for the purposes of sharing a portion of confiscated proceeds with an international organisation, and for assistance for foreign investigative agencies and Governments. The relevant passages are at paras 279 to 285 of the Manual, and in summary state:

*“...**Use of confiscated property**....There may be a need for public policy debates on the issue of the public use of confiscated property. However any debate on the use of confiscated property unfolds the need to cover the asset management agencies’ year-to-year operating expenses and losses must be considered. In addition, article 14, paragraph 3, of the Organized Crime Convention should be considered as the issue is evaluated by States. In other words, perhaps a portion of any confiscation realized through sale could be shared with an **international organization** or between the parties.*

*Competing interest in property obtained from confiscation has resulted in laws that require confiscated assets to be liquidated and the proceeds paid into a consolidated Government account or general treasury. A number of jurisdictions have established asset confiscation funds into which realized assets must be paid. There is no perfect solution to this issue but the equities involved in treating victims fairly and responding to all priorities of the State suggest that liquidation is preferable. Proceeds can then be placed in a fund or Government programmes. Any disputes can be resolved through the budget processes.*

*If a fund is set up, it can be used for restitution to victims. In addition, the work of investigative agencies could be recognized through the fund. That could include recognition of assistance by **foreign investigative agencies and Governments**. After such payments, the fund could turn over its yearly diminished balance (diminished through payment of expenses or sharing to a consolidated Government account or the general treasury).”*

## 4. Concluding summary

This brief scan has identified conceptual challenges, policy challenges, and revenue challenges. It has also explored four domains from which lessons can be learned for using compensation funds to support anti-corruption interventions. These domains are

- criminal injuries compensation schemes
- consumer law
- social re-use
- non - judicial settlement of corruption cases

Before exploring the domains a crucial point needs to be made about the revenue source of these compensatory funds. There is a challenge in having a reliable, stable source of revenue available for allocation. Policy clarity is necessary around **funding source** and **funding stability**.

There are two major policy issues - first, where should the money come from? Should it come from settlements, such as penalties, damages, reparations, or should it come from fines. Fines are a more stable source, but may not produce the windfalls that other penalties might produce. Second, how can the funding be guaranteed or at least not subject to unacceptable variations?

1. **Criminal injuries compensation schemes:** This domain relates to mechanisms for the payment of criminal injuries compensation to victims of crime. Many countries already have such schemes, and the legislative adaptation of such schemes to service anti-corruption measures would not be difficult or impractical, subject of course to the resolution of the policy, legislative, operational and enforcement choices identified in part 2 of this paper. The benefit of the adaptation of a broad based scheme, where the sources of funding are derived from general fines or penalties (but not hypothecated or solely dependent on recoveries from corrupt activities) is that the funding base is not random or variable.
2. **Consumer law:** The second domain relates to the possible adaptation of legal remedies to be found in jurisprudential areas such as consumer law, where the state itself (not just the individual) may take action **on behalf of persons or classes of persons** to pursue specific reparation and damages as well as the more usual penalties and fines. Consumer law offers a range of alternative remedies which may be adapted to serve anti-corruption purposes (reparation, injunctions, divestiture, redress orders, adverse publicity orders etc), but this novel subject matter calls for such comparable remedies to be workshopped for adaptation feasibility.
3. **Social re-use:** In this domain confiscated assets or criminal proceeds are redistributed to affected local organisations or communities. The paper identifies two examples of such social reuse (the

Mafia case in Italy, and the UK Recovered Assets Incentivisation Fund) but further research would be required to explore other possible instances in other countries. The research would have to examine the effectiveness of such schemes, and while rigorous evaluation is difficult, this domain would almost certainly yield positive support. There would be significant implementation issues and monitoring issues.

4. **Non - judicial settlement:** Cases such as the Siemens and Alcatel examples required the specific allocation of funding for anti- corruption purposes. The difficulty with such cases is their random and disparate nature, which together with jurisdictional problems at an international level means there would be very little ongoing funding certainty within any particular country. Similarly, the ability of whistleblowers to claim monies under legislation such as the USA False Claims Act means that the individual may recover moneys in individual corruption –type cases, but legislation would be needed to ensure that the adjudication or settlement mandated that a proportion of the funds be allocated for anti- corruption purposes.

These could be the subject of detailed research or a workshop with key stakeholders.