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FREEHILLS

# AUSTRALIA

**VICTIMS OF CORRUPTION:  
NATIONAL LEGAL  
FRAMEWORKS  
DATABASE  
2022**

SOURCE: HERBERT SMITH FREEHILLS

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VICTIMS OF CORRUPTION WORKING GROUP



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# AUSTRALIA

**SOURCE: Herbert Smith Freehills**

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# Background

Overview of the substantive corruption offences under Australian laws by way of background only

## Australian regime

Australia is a federation consisting of states and territories. In Australia, corruption is prohibited through both federal and state/territory legislation. Generally speaking, these laws target bribery, being the offer, payment or provision of an undue benefit to someone to influence the performance of a person's duty and/or encourage misuse of his or her authority.

The distinction between these regimes is the intended or actual recipient of the bribe:

- the Commonwealth regime criminalises bribery connected with Commonwealth public officials and foreign public officials; and
- state and territory legislation criminalises bribery of agents of the state or state / territory public bodies, as well as agents of private persons or entities, including employees.

In the Australian legal context, the various corruption regimes are focused on criminalisation of conduct, rather than compensation of victims. Accordingly, as is set out below, victims of corruption in Australia might more easily and successfully obtain compensation if a more conventional cause of action was available to them to redress the harm suffered, for example, tort, breach of contract, breach of fiduciary duties. However, in many situations, these conventional causes of action may not be applicable to broader concepts of victims of corruption, for example, where there is more indirect loss caused to the public, or certain communities. For example, it may be that there is no contractual relationship in question. Expanding the classes of relationships where there are duties of care owed, particularly in cases of indirect loss, is difficult.<sup>1</sup>

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<sup>1</sup> See for example the comments made in *Minister for Environment v Sharma* [2022] FCAFC 45 per Beach J [696], [699], although in a different context to victims of corruption.

## Commonwealth regime

The Australian Commonwealth regime criminalises bribery connected with public officials.

The key legislation is the *Criminal Code Act 1995* (Cth), which contains relevant provisions relating to:

- Bribing a foreign public official – Division 70.2;
- Bribery of a Commonwealth public official – Division 141.1.
  - Corrupting benefits given to, or received by, a Commonwealth public official – Division 142;
  - Abuse of public office – Division 142.2;
- Offences connected with intentionally or recklessly concealing illegitimate payments by making, altering or destroying accounting records – Division 490.

Facilitation payments are not considered bribes in relation to foreign public officials, provided they are benefits of a minor value and the person's conduct was engaged in for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature (Division 70.4).

The *Criminal Code* applies where the conduct constituting the offence occurs wholly or partly in Australia, or where the person alleged to have committed it is an Australian citizen or resident, or a body corporate incorporated in Australia. Offences relating to the bribery of a Commonwealth public official apply regardless of whether the conduct occurs within or outside of Australia.

Individuals (including public officials) and legal entities can be prosecuted for bribery offences.

The principal investigatory agency for foreign bribery offences is the Australian Federal Police (**AFP**). The multi-agency Fraud and Anti-Corruption Centre and the Australian Securities and Investment Commission may also carry out investigations. Following investigation, these agencies can forward briefs of evidence to the Commonwealth Director of Public Prosecutions (**CDPP**). The CDPP is responsible for determining whether a criminal prosecution should be instituted.

## **State / Territory regime**

### **Criminalisation of bribery**

In addition to the Commonwealth regime, each state and territory has its own legislation criminalising bribery.

Although each state's and territory's legislation is different, there are common features throughout. In particular, the laws of each state and territory are focused on:

- the provision, offer, or acceptance of a benefit
- to or from an agent
- where such conduct is intended to induce or reward the agent for doing or not doing something regarding the principal's affairs or which might tend to influence the agent to show favour or disfavour regarding the principal's affairs.

Similar to the Commonwealth regime, legislation criminalising bribery at the state level is largely enforced and investigated by the relevant state police forces and the relevant state-based Office of Director of Public Prosecutions (**ODPP**) (the exception is the Australian Capital Territory which remains under the purview of the AFP and CDPP).

### **Corruption commissions**

Each of the six Australian states has also created a dedicated integrity agency that possess broad powers to investigate and report on corrupt conduct in relation to public authorities and public officials in the respective states.

These are the:

- New South Wales Independent Commission Against Corruption
- Queensland Crime and Corruption Commission
- Western Australian Corruption and Crime Commission
- Tasmanian Integrity Commission
- Victorian Independent Broad-based Anti-Corruption Commission
- South Australian Independent Commission Against Corruption

These can be active. For example, the New South Wales Independent Commission against Corruption, has, over the past 10 years, investigated a number of highly publicised cases concerning alleged corrupt inducements and political donations.<sup>2</sup>

Additionally, each commission is subject to independent scrutiny via the following bodies:

- New South Wales Law Enforcement Conduct Commission, which investigates misconduct and maladministration within the NSW Commission and NSW Police force.
- Queensland Parliament Crime and Corruption Committee, which monitors and reviews the performance and structure of the QLD Commission.
- Western Australian Joint Standing Committee on the Corruption and Crime Commission, which monitors and reports on the activities of the WA Commission and suggests improvements to public sector corruption practices.
- Tasmanian Joint Standing Committee on Integrity, which monitors and reviews the performance of the TAS Commission.
- Victorian Independent Broad-based Anti-Corruption Commission Committee, which monitors and reviews the performance of the duties and functions of the VIC Commission.
- South Australian Crime and Public Integrity Policy Committee, which conducts reviews relating to the performance and effectiveness of the SA Commission.

## **1. Legal Standing**

### **1.1 Legal standing for civil society organisations and/or citizens in corruption-related cases**

(A) Commonwealth

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<sup>2</sup> The NSW ICAC has investigated approximately 40 instances of corruption in the years 2012 to 2022 (inclusive). See Independent Commission Against Corruption, Investigations available at <<https://www.icac.nsw.gov.au/investigations/past-investigations/>> for the relevant periods.



There is scope for individuals to bring private prosecutions for Commonwealth corruption offences, unless a contrary intention appears in relation to the particular offence provision in question (which does not appear to be the case for bribery offences under Commonwealth law). The right of a private individual to institute a prosecution for breach of the law has been said to be a “valuable constitutional safeguard against inertia or partiality on the part of authority”.<sup>3</sup>

However, the CDPP may consider that there are public policy reasons why a private prosecution, although instituted in good faith, should not proceed, or at least should not be allowed to remain in private hands.<sup>4</sup> In considering whether the CDPP should intervene in a private prosecution (pursuant to s 9(5) of the *Director of Public Prosecutions Act 1983* (Cth)), the private prosecutor will be permitted to retain conduct of the prosecution unless one or more of the following applies:

1. there is insufficient evidence to justify the continuation of the prosecution (i.e. there is no reasonable prospect of conviction being secured on the available evidence);
2. there are reasonable grounds for suspecting that the decision to prosecute was actuated by improper motives or otherwise constitutes an abuse of the prosecution process;
3. to proceed with the prosecution would be contrary to the public interest;
4. the nature of the alleged offence, or issues to be determined, as such that, even if the prosecution were to proceed, it would not be in the interest of justice for the prosecution to remain in private hands;
5. the nature of the charges do not disclose an offence under any Commonwealth laws; or
6. the Court in which the private prosecutor has commenced proceedings has no jurisdiction.<sup>5</sup>

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<sup>3</sup> Per Lord Wilberforce in *Gouriet -v- Union of Post Office Workers* [1978] AC 435 at 477. See also Prosecution Policy of the Commonwealth at [4.8].

<sup>4</sup> Commonwealth Director of Public Prosecutions, Prosecution Policy of the Commonwealth, available at <<https://www.cdpp.gov.au/sites/default/files/Prosecution%20Policy%20of%20the%20Commonwealth.pdf>> at [4.8].

<sup>5</sup> *Ibid*, at [4.10].

## (B) States and territories

Private prosecutions can be commenced in all states and territories in Australia; however, there are the rules and limitations governing private prosecutions. In some jurisdictions, for example, the right to bring a private prosecution is confined to summary offences (for example Tasmania)<sup>6</sup> or to only a limited number of specified offences.

As with Commonwealth offences, the law on the availability of private prosecutions remains largely untested for many offences. Nonetheless, they remain theoretically available for corruption offences as described above.

## 1.2 Type of Cases

We refer to those matters set out the section above.

## 1.3 Legal basis under which citizens have legal standing

We refer to those matters set out in section 1.1.

## 1.4 Citizens and/or civil society's intervention in corruption cases in other capacities (e.g. third party contributors, expert input, etc)

There is no legislative right for citizens or civil society organisations to intervene in corruption cases in other capacities.

More generally, there is scope for a person, specialist body or organisation, with the court's permission, to advise the court on a point of law or a matter of practice relevant to a particular proceeding.<sup>7</sup> This can be done in two ways: as an *amicus curiae* (friend of the court) whose role is to assist the court in some aspect of a proceeding that might otherwise be overlooked; or by taking the role of an intervener, where the role is to represent the intervener's own interest in the proceedings.

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<sup>6</sup> *Justices Act 1959* (Tas) per s 27(1). See also *Director of Public Prosecutions Act 1973* (Tas) per s 12(1)(a)(ii) and (iii) regarding intervention of the Director where it considers it desirable to take over and continue or discontinue any criminal proceeding in respect of a crime of an offence alleged. See also Director of Public Prosecution (Tasmania), Prosecution Policy and Guidelines, available at <[dpp.tas.gov.au/\\_data/assets/pdf\\_file/0008/643643/DPP-prosecution-guidelines\\_v8-1.pdf](http://dpp.tas.gov.au/_data/assets/pdf_file/0008/643643/DPP-prosecution-guidelines_v8-1.pdf)> at p. 137.

<sup>7</sup> *Levy v Victoria* (1997) 189 CLR 579.

## ***Amicus curiae***

However, the ability of a civil society organisation or a citizen to provide such assistance to the court, known as an *amicus curiae*, will be dependent upon the particular circumstances of the proceedings and rests entirely upon the discretion of the court.<sup>8</sup>

The *amicus curiae* is typically independent and neutral about the outcome of the proceeding, although this is not a prerequisite to the grant of leave.<sup>9</sup> The court will ordinarily not grant leave unless it is of the opinion the person will be able to “significantly” assist the court.<sup>10</sup> This includes whether the arguments will assist in not only deciding the particular case, but also in formulating the principle of the law.<sup>11</sup>

The sorts of factors which the court will consider in determining whether to appoint an *amicus curiae* are:<sup>12</sup>

- whether the intervention is apt to assist the court in deciding the case;
- whether it is in the parties’ interest to allow the intervention;
- whether the intervention will occupy time unnecessarily; and
- whether the intervention will add inappropriately to the costs of the proceeding.

Australian courts have granted leave to public interest and other civil society groups to assist the court in previous civil and criminal proceedings. For example:

- In *Re BMV; Ex Parte Gardner* (2003) 7 VR 487, Morris J granted Right to Life Australia Incorporated, the Catholic Archbishop of Melbourne and Catholic Health Australia Incorporated leave to appear as *amici curiae*. The case concerned a woman with terminal illness, whose Public Advocate was seeking declarations

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<sup>8</sup> *Levy v Victoria* (1997) 189 CLR 579 at [20].

<sup>9</sup> *Priest v West* (2011) 35 VR 225 at [29].

<sup>10</sup> *Roadshow Films Pty Ltd v iiNet Ltd* (2011) 248 CLR 37 at [4].

<sup>11</sup> [National Australia Bank Ltd v Hokit Pty Ltd \(1996\) 39 NSWLR 377](#), 381 (Mahoney P).

<sup>12</sup> *Priest v West* (2011) 35 VR 225 citing [National Australia Bank Ltd v Hokit Pty Ltd \(1996\) 39 NSWLR 377](#), 381 (Mahoney P).

from the Supreme Court of Victoria in relation to provision and refusal of medical treatment.

- In *CES v Superclinics Australia Pty Ltd* (1998) 20 Adel L Rev 183, Australian Catholic Health Care Association and the Australian Catholic Bishops' Conference were granted leave to appear as amici curiae on the basis that they questioned the legitimacy of the defence of necessity in relation to abortion, which was something the litigants had failed to raise, and yet was relevant to the "public interest".<sup>13</sup>
- In *Magaming v The Queen* [2013] HCA 40, a matter relating to mandatory sentencing, the Australian Humans Rights Commission intervened as amicus curiae.

### **Intervener**

Citizens and civil society groups, as well as other public bodies, may seek leave from the court to intervene in proceedings. This may be because the intervener's interests may be directly affected by the court's decision, or may in the future (for example, a decision on the interpretation of laws that will affect the intervener in the future).

For example, Australia's competition and consumer regulator (the ACCC) was granted leave to intervene in private proceedings between *Epic Games, Inc* and *Apple Inc* about an issue relating to the jurisdiction of Australian courts in determining competition law claims.<sup>14</sup>

## **1.5 State's entitlement to represent the citizens collectively in corruption cases and whether its intervention excludes direct intervention by citizens.**

We have not identified any express right in the relevant Commonwealth, state or territory legislation to allow a state entity to represent citizens collectively in corruption cases. Criminal prosecutions for bribery offences are brought by the CDPP or relevant state or territory ODPP or relevant enforcement agency. The

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<sup>13</sup> *Superclinics Australia Pty Ltd v CES* (1998) 20 Adel L Rev 183 at 191.

<sup>14</sup> *Epic Games, Inc v Apple Inc* [2021] FCAFC 122

CDPP and relevant state or territory DPP are independent prosecution offices established by statute.

Whilst private prosecution of corruption offences is a possibility in Australia, there have been no cases brought of this nature and as such, no judicial guidance or precedent.

## **1.6 Legal standing of any foreign government or foreign-based non-governmental institution to bring corruption cases on behalf of this country's citizens**

Aside from those mechanisms canvassed above at section 1.4 (in relation to *amicus curiae*), there is no legislative right for foreign States or non-state institutions of a foreign country invested with legal standing to intervene on behalf of citizens of that country for corruption cases in the relevant bribery regimes.

There may be scope for foreign states or non-state institutions of a foreign country to be granted leave to appear *amicus curiae* or intervene in circumstances where the prosecution was being conducted in Australia, against an Australian citizen or resident, or a body corporate incorporated in Australia, for corrupt conduct engaged in a foreign country.

## **2. Cases**

### **2.1 Existence of corruption-related cases brought to Court by civil society organisations, journalists, or citizens.**

We have not found instances of corruption-related cases being brought to Court by civil society organisations, journalists, or citizens in Australia. However, investigative journalists in Australia have unearthed allegations of bribery which have subsequently been investigated by Australian authorities.

## 3. Collective Damage

### 3.1 Legal instruments that enable claiming reparation, compensation, or restoration of collective damages in any field ( environmental damages, human rights, corruption, among others)

#### General position in respect of corruption related matters

There are presently no legal instruments providing specifically for reparation or victims of corruption at a collective level.

If a criminal prosecution is brought in Australia for a corruption related matter, a sentencing court may make an order that an offender pay compensation, or make reparation or restitution in respect of loss, destruction, personal injury, or damage occasioned by the commission of the offence.<sup>15</sup> The court may also order reparation to be paid to a public body or any other person who has suffered loss resulting from the commission of an offence. However, these types of orders appear confined to addressing the direct loss or harm caused to the victim by the offender and do not contemplate or apply to the type of indirect loss caused to a body politic as a result of corruption.

As above, if there is a conventional cause of action available to a victim or victims of crime (eg under tort, contract or for breach of fiduciary duties), then the ordinary measures of damages for those causes of action would be available.

There may be scope for a dedicated commissioner or specific legislative body to exercise a separate method of awarding compensation unconnected with sentencing of criminal offences in some jurisdictions.<sup>16</sup> However we note that such regimes are ordinarily targeted toward physical or psychological harm caused to an individual, or instances where property is deliberately taken, destroyed or

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<sup>15</sup> See for example *Crimes Act 1914* (Cth) s 21B.

<sup>16</sup> See for example, *Victims of Crime (Financial Assistance) Act 2016* (ACT) s 202; *Victims of Crime Assistance Act 2006* (NT); *Victims Rights and Support Act 2013* (NSW) ss 38, 40, 54, 59, 94 and 97; *Victims of Crime Assistance Act 2009* (Qld) s 25(1); *Victims of Crime Act 2001* (SA) s 18; *Sentencing Act 1997* (TAS) ss 67-69; *Victims of Crime Assistance Act 1996* (Vic) ss 87A, 87B; *Criminal Injuries Compensation Act 2003* (WA).

damaged. Accordingly, it may be difficult to seek such compensation in the context of corruption.

Again, compensation orders made under such regimes are directed towards compensating some direct harm experienced by a person, rather than an indirect harm of a generalised nature which may often be the case for victims of corruption. Absent some indication of physical or psychological harm caused to an individual, or instances where property is deliberately taken, destroyed or damaged, compensation under such regimes appears to be limited.

### **Other mechanisms outside of a corruption context**

- Schemes have been established in Australia which provide remedies to individuals impacted by certain types of criminal conduct, without needing to bring a claim in court. The purpose of such schemes is to make it easier for persons in relevant classes to receive compensation. For example, in some of these schemes, there may be scope for a dedicated commissioner or specific legislative body to exercise a separate method of awarding compensation without any criminal proceedings. However, such schemes are tailored toward addressing particular crimes, none of which are related to corruption. For example, all Australian states and territories have legislation establishing victims' compensation schemes for 'acts of violence' including violent conduct, sexual assault and domestic violence.<sup>17</sup>
- Further, compensation awarded under such regimes is directed towards compensating some direct harm experienced by a person, rather than an indirect harm of a generalised nature which may often be the case for victims of corruption. Absent some indication of physical or psychological harm caused to an individual, or instances where property is deliberately taken, destroyed or damaged, compensation under such regimes appears to be limited.
- The National Redress Scheme allows victims of institutional child sexual abuse to claim reparations. This enables claimants access to a redress payment of up to \$150,000; access to psychological counselling; and a direct personal response from the responsible institution, if requested by the survivor. The scheme is empowered by the *National Redress Scheme*

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<sup>17</sup> *Victims of Crime Assistance Act 1996* (Vic); *Victims Support and Rehabilitation Act 1996* (NSW); *Victims of Crime Assistance Act 2006* (NT); *Victims of Crime Assistance Act 2009* (Qld); *Victims of Crime Act 2001* (SA).

for *Institutional Child Sexual Abuse Act 2018* (Cth) and participating state legislation.

### **3.2 Procedures for advancing class-actions.**

Australia has an active class actions regime which applies for civil matters.

There are class action regimes in the federal court and state/territory supreme courts.<sup>18</sup>

The class actions regimes in Victoria, New South Wales, Queensland, and Tasmania are modeled on and are substantially the same as the federal regime. A class action can be commenced where:

- Seven or more people have claims against the same person(s)
- The claims are in respect of, or arise out of, the same, similar or related circumstances; and
- The claims give rise to at least one substantial common issue of law or fact.

## **4. The Role of the victims of corruption**

### **4.1 Definition of victims of corruption or common definition used by the courts in this country**

There is no common definition of victims of corruption.

### **4. 2 Cases that recognize the role of victims**

We have not found instances of corruption-related cases that recognize the role of victims.

### **4. 3 Corruption-related court cases (criminal, civil, administrative) that awarded compensation to individuals or to identifiable or**

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<sup>18</sup> *Federal Court of Australia Act 1976* (Cth), Part IVA; Division 9.3 of the *Federal Court Rules 2011* (Cth); *Civil Procedure Act 2005* (NSW), Part 10; *Supreme Court Act 1986* (Vic), Part 4A; *Civil Proceedings Act 2011* (Qld), Part 13A; *Supreme Court Civil Procedure Act 1932* (Tas), Part VII; *Court Procedures Rules 2006* (ACT) rr 265-270; *Supreme Court Rules 1987* (NT) (rr 18.01 – 18.04).



## **non-identifiable groups of victims to repair the damage caused by the corruption offense**

We have not found instances of corruption-related cases that awarded compensation to individuals or to groups of victims..

### **4.4 Innovative or effective mechanisms that can be considered good practice regarding the recognition and compensation of victims in corruption-related cases**

Please refer to section 'Background' above.

## **5. Available Information**

### **5.1 Information published by enforcement authorities (including control agencies) about corruption enforcement actions**

Generally speaking, enforcement agencies publish information in relation to enforcement action for criminal conduct, including in relation to corruption. Relevantly, this includes media releases by the AFP as well as state and territory police forces and the CDPP or ODPP as relevant. Such practices recognise that public sector information is a public resource managed for public purposes.<sup>19</sup>

The types of information may include the announcement of the initiation or conclusion of an investigation or the referral of a prosecution to the CDPP or relevant ODPP. However, enforcement agencies, the CDPP and ODPPs will not generally provide information about an ongoing investigation or a prosecution before the courts. This is particularly pertinent where the trial will be heard before a jury and the publication of details of the offence might prejudice the defendant's right to a fair trial.<sup>20</sup>

### **5.2 Feasible access to information on ongoing or concluded cases**

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<sup>19</sup> See for example, Australian Federal Police, Information Public Scheme Pala, available at <<https://www.afp.gov.au/about-us/information-publication-scheme/information-publication-scheme-s8-plan>>

<sup>20</sup> See for example, *R v Glennon* (1992) 173 CLR 592; *Hinch v A-G for Victoria* (1987) 164 CLR 15.

The *Freedom of Information Act 1982* (Cth) (**FOI Act**) gives any person the right to access copies of documents held by the government agencies (including corruption enforcement agencies), subject to certain exemptions. Each Australian state and territory also has legislation equivalent to the FOI Act.<sup>21</sup>

These acts are considered important as they:

- Allow individuals to see what information the government holds about them, and to seek correction of that information if they consider it wrong or misleading;
- Enhance the transparency of policy making, administrative decision making and government service delivery; and
- Ensure the community is better informed so that they can participate more effectively in Australia's democratic processes.<sup>22</sup>

However, not all documents held by enforcement agencies will be made available. Taking for example the Commonwealth regime, the following documents are generally exempt from Freedom of Information access:

- Documents affecting national security, defence or international relations;<sup>23</sup>
- Cabinet documents;<sup>24</sup>
- Documents affecting enforcement of law and protection of public safety;<sup>25</sup>
- Documents to which secrecy provisions of enactments apply;<sup>26</sup>
- Documents subject to legal professional privilege;<sup>27</sup>
- Documents containing material obtained in confidence;<sup>28</sup>
- Parliamentary Budget Office documents;<sup>29</sup>

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<sup>21</sup> See for example, *Government Information (Public Access) Act 2009* (NSW); *Northern Territory Information Act 2002* (NT); *Right to Information Act 2009* (Qld); *Freedom of Information Act 1991* (SA); *Right to Information Act 2009* (Tas); *Freedom of Information Act 1992* (WA).

<sup>22</sup> Australian Government, Office of the Australian Information Commissioner, *Rights and Responsibilities*, available at <<https://www.oaic.gov.au/freedom-of-information/the-foi-act/rights-and-responsibilities>>

<sup>23</sup> *Freedom of Information Act 1982* (Cth) s 33.

<sup>24</sup> *Ibid* s 34.

<sup>25</sup> *Ibid* s 37.

<sup>26</sup> *Ibid* s 38.

<sup>27</sup> *Ibid* s 42.

<sup>28</sup> *Ibid* s 45.

<sup>29</sup> *Ibid* s 45A.

- Documents disclosure of which would be contempt of Parliament or in contempt of court,<sup>30</sup>
- Documents disclosing trade secrets or commercially valuable information,<sup>31</sup> and
- Electoral rolls and related documents.<sup>32</sup>

To the extent enforcement agency documents are captured within one of these exempt categories, access to that information will generally be limited.

We also note that where a person is convicted of a serious criminal offence, the sentencing judgment of the relevant court is generally made publicly available and should include some detail of the proceedings.

### **5.3 Ways for citizens or civil society organisations to gather information on whether corruption cases are being investigated or trialed.**

See response above.

## **6. Supplementary information**

### **6.1 Main identified barriers that prevent CSOs, citizens, and journalists from standing as victims of corruption cases.**

We refer to the answers provided in section 1.

### **6.2 Other aspects, issues, provisions, or practices linked to the role, recognition, and compensation of victims of corruption.**

N/A

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<sup>30</sup> Ibid s 46.

<sup>31</sup> Ibid s 47.

<sup>32</sup> Ibid s 47A.