

1st May 2017

Criminal Law Policy Branch,
Attorney-General's Department,
3-5 National Circuit,
BARTON, ACT 2600

via email: foreign.bribery@ag.gov.au

Dear Sir/Madam,

PUBLIC CONSULTATION PAPER: PROPOSED AMENDMENTS TO THE FOREIGN BRIBERY OFFENCE IN THE CRIMINAL CODE ACT 1995

The Australia-Africa Minerals & Energy Group ("AAMEG") was established in 2011 to support the Australian resources sector active in the countries of Africa, to deal with non-technical risk issues. These issues include, but are not limited to, political and social risk, bribery and corruption, health risk, security and military issues and other Africa-specific issues, as well as promoting partnerships with the Australian Government, African Governments, international organisations, NGOs and academia.

We refer to the **Public Consultation Paper: Proposed amendments to the foreign bribery offence in the Criminal Code 1995**, which invites submissions on the following proposed changes to the *Criminal Code Act 1995* (Cth), which include:

- Extending the definition of foreign public official to include candidates for office,
- Removing the requirements that the benefit/business advantage must be "not legitimately due" and replacing it with the concept of "improperly influence" a foreign public official,
- Extending the offence to cover bribery to obtain a personal advantage,
- Creating a new foreign bribery offence based on the fault element of recklessness,
- Creating a new corporate offence of failing to prevent foreign bribery,
- Removing the requirement of influencing a foreign public official in the exercise of their official capacity, and
- Clarifying that the offence does not require the accused to have a specific business or advantage in mind, and that business or an advantage can be obtained for someone else.

In response to the call for public comment, AAMEG is pleased to provide the attached submission.

Yours faithfully,



Trish O'Reilly
Chief Executive Officer

Australia-Africa Minerals & Energy Group¹ (“AAMEG”)

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Introduction

1. Following widespread criticism of Australia's position on foreign bribery, particularly by the OECD, Australia has been taking steps to strengthen the enforcement of its foreign bribery laws. This is now extending to a review of the current regulatory regime.
2. On 4th April 2017, the Minister for Justice, Michael Keenan, released a Foreign Bribery Public Consultation Paper and Exposure Draft outlining proposed reforms to Australia's current foreign bribery regime. The reforms, which include a new offence for failing to prevent foreign bribery, and extension of the definition of foreign public official to candidates for office, demonstrably draw on provisions found under the laws of other countries, namely the US and the UK.
3. Importantly, it does not propose to amend the existing facilitation payment defence, which it considers has not presented as an issue in the enforcement of the foreign bribery offence.
4. A separate public consultation paper, released 31st March 2017, proposes a model for Deferred Prosecution Agreements (“DPA”), again drawing on similar schemes available under the US and UK legislation, for which AAMEG will provide a separate submission.

About AAMEG

5. AAMEG is committed to efforts that enhance the capacity of its member companies to mitigate the risks associated with foreign bribery and corruption.
6. In December 2011, AAMEG, with substantial support from Clayton Utz, provided a submission to the Federal Attorney-General's Department entitled, “**Public Consultation Paper: Assessing the ‘Facilitation Payment Defence’ to the Foreign Bribery Offence and Other Measures**”, and a follow-up submission in August 2015 to the Senate Standing Committee on Economics entitled: “**Public Consultation Paper: Foreign Bribery**”.
7. AAMEG has held Anti-Bribery & Corruption (“ABC”) workshops in Perth, Melbourne, Sydney and Brisbane and has also presented at various conferences and external workshops, and this work continues.
8. In May 2012, AAMEG appeared before the **OECD's Australian Anti-Bribery Review Panel** comprising officials from Japan, Canada and the OECD Paris Secretariat. The meeting was in Sydney.
9. In May 2013, AAMEG presented at the **Extractive Industries Transparency Initiative** (“EITI”) Global Conference in Sydney.

¹ www.aameg.org

10. In April 2015, AAMEG held an ABC networking session in Perth at which three related presentations addressed members:
 - AAMEG member Deloitte spoke on its Bribery & Corruption Survey of Australia & New Zealand (2015);
 - a senior representative of the Federal Attorney-General's Department presented its on-line learning module² on foreign bribery and other matters; and
 - a senior representative from the Australian Federal Police presented on the establishment of the Fraud and Anti-Corruption Centre and other initiatives.
11. In October 2016, AAMEG developed a 17-page guidance document for its members entitled "**Mitigating Foreign Bribery & Corruption – An Implementation Toolkit**".
12. In March 2017, AAMEG provided an opinion to its members on the US Senate vote to repeal a US Securities Exchange Commission rule, adopted under the *Dodd-Frank Act 2010*, that would have required US-listed mineral and energy companies to disclose each year, all payments to US and foreign governments.
13. AAMEG encourages its members to familiarise themselves with the Australian Government's on-line learning module and will promote future published guidance as proposed by the Ministry of Justice and flagged in the public consultation papers.
14. AAMEG is committed to efforts that improve governance, including efforts specifically directed at combatting bribery and corruption, which if unattended, can have a serious negative effect on a host country's attractiveness as an investment destination, and the sustainability of a company's operations.

Proposed amendments to the Foreign Bribery Offence

15. The Australian Government's proposed reforms are captured in its Exposure Draft of the *Crimes Legislation Amendment Bill 2017* ("Exposure Draft").
16. The proposed reforms are intended to improve the Australian Government's effectiveness in addressing foreign bribery, and to remove possible impediments to a successful prosecution. The amendments would:
 - (a) extend the definition of foreign public official to include candidates for office;
 - (b) remove the requirements that the benefit / business advantage must be 'not legitimately due' and replace with the concept of 'improperly influence' a foreign public official;
 - (c) extend the offence to cover bribery to obtain a personal advantage (e.g. personal titles or honours, or the processing of visa / immigration requests);
 - (d) create a new foreign bribery offence based on the fault element of recklessness;
 - (e) create a new corporate offence of failing to prevent foreign bribery (similar to that provided for under the UK *Bribery Act 2010*);
 - (f) remove the requirement of influencing a foreign public official in the exercise of their official capacity; and

²<https://www.ag.gov.au/CrimeAndCorruption/Foreignbribery/OnlineModule/Index.html>

- (g) clarify that the offence does not require the accused to have a specific business or advantage in mind, that business or an advantage can be obtained for someone else.
17. Importantly, it does not propose to amend the existing facilitation payment defence, which it considers has not presented as an issue in the enforcement of the foreign bribery offence. This position is consistent with the views expressed by AAMEG in its submissions to the Attorney-General of 15th December 2011, and its submission to the Senate Standing Committee on Economics on 24th August 2015.
 18. The key proposed reforms are briefly addressed below along with suggestions designed to improve the proposed changes, based on substantial experience in overseas emerging/developing country environments, primarily on the African continent.

Candidates for office

19. The Foreign Bribery Public Consultation Paper suggests law enforcement experience indicates companies not only target existing officials, but also candidates for public office with the intent of gaining advantages once the candidate takes office. From a policy perspective, this is considered inappropriate, as it undermines good governance and free and fair markets.
20. Legitimate donations to candidates for office would not be prohibited (though resource companies tend to avoid this kind of activity), as the prosecution would still be required to show the benefit was provided, offered or promised in order to improperly influence the candidate to obtain/retain an advantage.
21. The Foreign Bribery Public Consultation Paper proposes extending the definition of 'foreign official' to include candidates for public office, by adding the following to the definition in section 4:
 - ; or (m) an individual standing, or nominated, (whether formally or informally) as a candidate to be a foreign public official covered by any of paragraphs (a) to (k) of this definition.*
22. This change to the legislation would take it beyond the OECD Anti-Bribery Convention requirements. It is further noted, that candidates are currently captured under the US *Foreign Corrupt Practices Act* ("FCPA"), however the UK *Bribery Act* does not currently extend this far.
23. **AAMEG Opinion:** There is no strict legal impediment in extending the definition to include candidates for foreign political office (in line with the US FCPA), however, the proposed amendment as currently drafted is ambiguous and potentially problematic, as:
 - (a) It includes informal, as well as formal candidates for any of the positions in (a) to (k) of the definition (thereby excluding individuals who are authorised intermediaries of a foreign public official).
 - (b) How and when a candidate is classified as an 'informal' candidate is unclear, other than informally standing or being nominated as a candidate. For example, it is unlikely the Australian Government intended to capture people who simply have a desire to be a candidate or put themselves forward as a candidate. There is also no indication of a sufficient timeframe to link a purported intention to run, with meeting the definition.

- (c) A company will likely find it difficult to reasonably ascertain whether someone is standing or nominated as a candidate for one of those roles, particularly informally. For example, it will likely be difficult to identify an 'informal' candidate for a role in a public international organisation, despite extensive due diligence.
24. **AAMEG's preliminary opinion** is that this ambiguity should be addressed before the proposed amendments are finalised. As a minimum, the candidate should have some nexus to an official capacity, so that there is either:
- (a) a link to the ability to influence some official function at the time of the alleged conduct; or
 - (b) a reasonable prospect of their future official capacity being influenced (e.g. within a specified timeframe of receipt of an alleged benefit).
25. Furthermore, AAMEG is of the opinion, that the Government should also carefully consider the interplay between this amendment and other proposed amendments, in particular, the removal of the link to an official capacity. Combined, these amendments would appear to allow a company or individual to be prosecuted under the foreign bribery offence for bribing a non-public official in a non-public capacity. This is arguably beyond the purpose and intent of the foreign bribery offence.

Improperly Influencing a foreign public official

26. The Government proposes to remove challenges faced by the prosecution in showing the benefit/business advantage was 'not legitimately due', and replace those elements with the concept of "improperly influencing a foreign public official to obtain or retain business or an advantage".
27. Potential factors to be considered in determining 'improper influence' include:
- (a) the recipient or intended recipient of the benefit;
 - (b) the nature of the benefit;
 - (c) how the benefit was provided;
 - (d) whether, and to what extent, the benefit, offer or promise is recorded or documented;
 - (e) whether there is evidence that due diligence was exercised; and
 - (f) whether the business or advantage was awarded on a competitive or non-commercial basis.
28. Other approaches considered by the Australian Government were:
- (a) to replace the threshold of 'not legitimately due' with the concept of 'dishonesty', which is considered known and understood under Australian law, and would align the foreign bribery provisions with the domestic bribery provisions of the *Criminal Code* (Division 141). However, some concerns were raised with this approach, including the uncertainty with the interaction with the corporate criminal liability provisions of the *Criminal Code*; and
 - (b) to provide that the benefit must be 'improper', which it argues would increase the number of factors the court could consider in determining whether the benefit constitutes bribery, and would focus attention on the "nature of the benefit" rather than "all relevant surrounding circumstances".

29. **AAMEG opinion:** Outside of the potential factors listed in the Foreign Bribery Public Consultation Paper which may be considered in determining 'improper influence', the legislative use of the term 'improper influence' is very limited in Australia, and there is little guidance at this stage on how the Courts may interpret the phrase.
30. Should the proposed amendment be implemented, it would be beneficial if the Australian Government were to publish detailed guidance on factors it might consider in assessing whether there has been improper influence or not, similar to the guidance published by the UK's Ministry of Justice or the US Department of Justice ("DOJ") and Securities and Exchange Commission ("SEC").
31. Such guidance would be useful in revealing how prosecutors might approach the matter, although it does not necessarily reflect the legal position, as it has not been judicially tested. This can create problems (e.g. in the US, in particular) wherever there is an aggressive or overreaching regulatory environment, given the inherent cost and risks from mounting any substantive legal challenge or defence.

Extend the offence to cover personal advantage

32. As foreign bribery is not necessarily restricted to a company obtaining or retaining business or a business advantage, but can also involve personal gain, the Australian Government is proposing an extension to cover bribery to obtain a personal advantage.
33. Should the offence be extended in this way, the existing defences, including the facilitation payment defence and the defence of duress would still be available.
34. The proposed amendment goes beyond the OECD Anti-Bribery Convention requirements.
35. **AAMEG opinion:** This proposed amendment raises a few potentially complex questions which should be considered by the Government, particularly concerning corporate liability.
36. In particular, in what other area of the law (AAMEG would venture none), would a company be held responsible for the personal ambitions of its executives and officers? Arguably, in those circumstances, the director is using the company fraudulently to his or her own advantage. This conduct would typically be covered by local bribery laws, as well as by Australia's *Corporations Act 2001* (Cth).
37. AAMEG would contend that a company should arguably only be liable for the above where normal principles apply to justify corporate liability for an individual's conduct (e.g. accessorial liability). That should be a higher threshold than the existing obligations regarding indirect corporate involvement in bribery (e.g. to create and maintain a corporate culture that does not encourage or tolerate foreign bribery).
38. The Foreign Bribery Public Consultation Paper identifies that such matters would likely constitute offences in the foreign country, however it adds that there is a "sound policy justification" for ensuring that such conduct is also criminalised under Australian law. The Government should be able to explain this policy justification with more clarity rather than a mere statement that there is indeed a justification. Although there may be a justification for holding individuals responsible in Australia, it is difficult to see why that would be appropriate for a company.

Separate offence based on recklessness

39. Under the Australian Government's proposal, a new offence would apply where a person is reckless as to whether the conduct of providing, promising or offering the benefit would improperly influence a foreign public official in relation to the obtaining or retaining business or an advantage.
40. A person is reckless with respect to a circumstance, if he or she is aware of a substantial risk that the circumstance exists or will exist, and having regard to the known circumstances, it would be unjustifiable to take on the risk (section 5.4, *Criminal Code*).
41. The inclusion of an offence based on recklessness is consistent with the Australian Government's approach with other offences, including the false accounting and money laundering offences. Appropriately, it includes a maximum penalty half that of the intention offence, to reflect the lower degree of culpability.
42. The UK and the US do not have equivalent offences.
43. **AAMEG opinion:** If this offence is included, the likelihood of overlap and confusion with other potential offences, such as the proposed failure to prevent foreign bribery (discussed below) ought to be seriously considered by the Australian Government. With this example, due to the lower thresholds to meet the two offences, it is easy to envisage a situation where it is unclear whether a company is captured by one or both offences (recklessly bribing a foreign public official, and failing to prevent foreign bribery), despite their differences.

Failing to prevent foreign bribery

44. The complex nature of foreign bribery can make it difficult to hold companies accountable for the bribery of foreign public officials.
45. The Australian Government is consulting on a possible new corporate offence of failing to prevent bribery, whereby a company would be automatically liable for bribery by employees, contractors and agents (including those operating overseas), except where they can show that a proper system of internal controls and compliance procedures was in place to prevent bribery from occurring.
46. The proposed amendments would bring the Australian legislation in line with that of the UK *Bribery Act 2010*.
47. **AAMEG preliminary opinion:** The proposed corporate offence of failing to prevent bribery will effectively achieve the same objective as the provisions covering corporate culture. That is, section 12.3(c)-(d) of the Criminal Code provides that a body corporate can be held to have expressly, tacitly or impliedly authorised or permitted the commission of the foreign bribery offence by proving that:
 - (a) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to non-compliance with the relevant provision;
or
 - (b) the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.
48. Australia is the only jurisdiction that is proposing to double up on the offences, which immediately creates confusion. The UK *Bribery Act 2010* does not include similar

corporate culture provisions. The US does not have equivalent corporate culture or failure to prevent bribery provisions, however significant emphasis on organisational culture is found in numerous guidance materials, including:

- (a) Department of Justice's ("DOJ") FCPA Guidance and Enforcement Plan;
- (b) DOJ / SEC FCPA Resource Guide; and
- (c) US Sentencing Guidelines.

- 49. AAMEG is of the opinion, that the Australian Government should avoid ambiguity within the Criminal Code, as to what it means to be an accessory for failing to prevent foreign bribery. Therefore, if it opts to pursue this proposed offence, it should consider removing the existing offences or articulate why they ought to remain and how the provisions interact.
- 50. As an aside, it is positive that the proposed offence requires the Minister to publish guidance on the steps that a company can take to prevent an associate from bribing foreign public officials (proposed clause 70.5B), as this is something that is currently lacking from the Australian Government.
- 51. Finally, AAMEG recognises that the directors and senior management of companies have a Duty of Care responsibility to their employees, to provide an appropriate level of guidance and training in anti-bribery and corruption matters before they are deployed to resource project sites in often unfamiliar overseas operating environments.
- 52. Furthermore, the directors and senior management of companies need to set the tone as to how the company intends to operate with respect to governance matters (including for contractors and agents). This involves establishing appropriate policy documents, systems and processes for dealing with bribery and corruption issues, including training manuals, regular risk analysis, identification of red flag issues, access to external legal advice and ongoing review and monitoring.
- 53. The approach needs to be proportionate to the size of the company and the complexity of the risks likely to be encountered.
- 54. AAMEG supports actions designed to encourage company directors and senior management to implement appropriate measures to prevent bribery and corruption and in so doing, demonstrate they are promoting the development of an ethical corporate culture in their company.

A foreign official can be influenced outside 'their official capacity'

- 55. The Australian Government is also considering removing the need for a foreign public official to be acting "in the exercise of their duties" to make out a foreign bribery offence. This is to address circumstances where officials have been bribed to act outside their official scope of work, and to remove the requirement to obtain a statement from the foreign jurisdiction to establish the scope of the foreign official's duties (which may be difficult and time consuming).
- 56. This proposed change also reflects the Australian Government's opinion that the most relevant factor is that the foreign official holds a position of power and ability to influence.

57. As the Foreign Bribery Public Consultation Paper recognises, this requirement (as well as extending the offence to bribes for personal advantage and bribes made to candidates for public office) would go beyond the requirements of the OECD Anti-Bribery Convention.
58. **AAMEG opinion:** The Government proposal to remove the link to an exercise of the foreign official's official capacity is potentially problematic, as a link to the exercise of some official capacity (even if through another 'foreign public official') sits at the heart of the purpose of the foreign bribery offence.
59. The law as it stands captures causing a benefit (or causing an offer of, or promising the provision of a benefit) to a person with the intention of influencing a foreign public official in the exercise of their official duties.
60. There may be commercially legitimate circumstances where a company is dealing with a foreign official purely in that official's personal capacity, for example as a director or shareholder of a third-party company. Although that raises inherent red flags, in any event it ought not be an offence under foreign bribery laws.
61. Removing the link to the exercise of some official capacity will effectively modify the foreign bribery offence into a simple bribery or fraud offence. It is the societal cost and adverse implications from the improper influence of public functions that underpins:
- (a) the significant increased penalties and greater obligations relating to dealings with persons in an official capacity; and
 - (b) the need for extraterritorial reach of the offence.
62. It will also extend beyond the US and UK positions, which both require the public official to be influenced in his or her capacity as a foreign public official.
63. AAMEG is of the opinion, that the Australian Government should either leave this requirement as is, or consider an alternate way of modifying the provision to capture circumstances where officials are bribed to act outside their official scope of work, but still within some official capacity (as opposed to a solely personal capacity). This will help remove any ambiguity with the proposed amendment.

Specific business or advantage or advantage for someone else

64. The Australian Government is considering removing the ambiguity in the legislation to explicitly provide that a person who obtains the business or business advantage does not have to be the same person who provides/offers the benefit.
65. Furthermore, it is consulting on amendments to clarify that in obtaining business (eg via "currying favour"), the accused does not need to have a specific business or advantage in mind.
66. **AAMEG opinion:** The proposed amendments relating to "Specific business or advantage or advantage for someone else", are considered appropriate.

Concluding Comments

67. AAMEG supports the proposed changes, subject to the qualifications outlined above, to the Australian Anti-bribery and Corruption legislation outlined in the Public Consultation Paper of 31st March 2017, on the basis that doing so:
- (a) enhances consistency with other leading legislative frameworks (US, Canada & UK) that Australian resource companies are already subject to, as a result of extraterritorial reach provisions,
 - (b) delivers on the provisions of the “OECD Convention on Combatting Bribery of Foreign Public Officials in International Business Transactions”, which Australia ratified in 1999, and
 - (c) where the proposed changes parallel or exceed those of the other leading legislative, it demonstrates timely Australian leadership in continuing to refine ABC legislation so that it appropriately addresses what are evolving operating circumstances companies are faced with, particularly in emerging/developing countries.
68. AAMEG is committed to supporting its members to continue enhancing the systems and processes that will credibly demonstrate that they are appropriately positioned to deal with foreign bribery and corruption risk, especially for operations in emerging/developing countries, thereby enhancing the capacity of Australian resource industry companies to be “Partners of Choice” and “Employers of Choice” in international business transactions.
69. AAMEG recognises that the systems and processes that member companies need to implement should be proportionate to the size and stage of the company’s development, the nature of the sectors and the countries in which it operates, as well as the scale and complexity of the situations likely to be encountered.

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