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Public consultation: Foreign bribery amendments
Criminal Law Policy Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600

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

To whom this may concern

Consultation on proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995*

Thank you for the opportunity to provide a submission on the Australian Government's proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995* (Cth) (**Criminal Code**), as set out in the *Crimes Legislation Amendment Bill 2017 (Exposure Draft)*, and the accompanying consultation paper titled 'Combatting bribery of foreign public officials' (**Consultation Paper**).

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 40,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD fully supports the government's aim of combatting bribery of foreign public officials. Foreign bribery stifles economic development, fair competition and the rule of law. It erodes confidence in competitive markets, and stifles investment and entrepreneurialism in export markets.

The AICD acknowledges the difficulties faced by the Australian Federal Police and the Office of the Commonwealth Director of Public Prosecutions in investigating and prosecuting foreign bribery offences. These prosecutions are complex and often protracted. We note that there have been very few prosecutions in Australia since the current foreign bribery laws were introduced in 1999.¹ Accordingly, the AICD welcomes the government's efforts to improve the legislation regarding Australia's foreign bribery offences.

1. Summary

Given our support for the government's efforts to enhance the effectiveness of Australia's foreign bribery laws, this submission aims to ensure that any legislative changes are effective, clear, balanced and, to the extent possible, consistent with existing regulation.

In summary, the AICD:

¹ Working Group on Bribery in International Business Transactions, Organisation for Economic Co-operation and Development', 'Australia: Follow-up to the Phase 3 Report & Recommendations' (Report, April 2015) 4; Attorney-General's Department, 'Cross-agency submission to Senate Standing Committee on Economics' (Submission, September 2015).

- does not support the creation of a new foreign bribery offence based on the fault element of ‘recklessness’;
- suggests that the proposed ‘failure to prevent’ offence only apply to a subsidiary in a corporate group where factual elements of both control and fault are attributable to the parent company;
- suggests that the evidentiary burden, rather than a legal burden, apply in relation to the ‘exception’ to the ‘failure to prevent’ offence in section 70.5A(5) of the Exposure Draft;
- favours a test of ‘dishonesty’, based on the interpretation of that term in *Peters v R*,² over the proposed test of ‘improperly influence’;
- supports the proposed extension of the definition of ‘foreign public official’ to include candidates for office; and
- opposes the proposed clarification that the accused need not have a ‘specific’ business or advantage in mind when the benefit is offered or provided.

These views are discussed below in sections 2 to 6 of this submission.

2. Proposed new offence based on the fault element of ‘recklessness’

The AICD is opposed to the introduction of a new offence based on a fault element of recklessness, being the taking of an unjustified substantial risk.

The proposal would broaden the scope of Australia’s foreign bribery regime beyond that required by the relevant OECD Convention. The Convention stipulates that each party make it ‘a criminal offence under its law for any person *intentionally* to offer, promise or give any undue pecuniary or other advantage...to a foreign public official’.³ Relevantly, the Australian government rejected the introduction of a foreign bribery offence based on recklessness when it was first proposed back in 1999,⁴ in order to achieve consistency with the OECD Convention. The introduction of a new offence with a fault element would also render Australian law inconsistent with UK and US foreign bribery law, which use intention-based or offences.⁵ In our view, there is considerable merit in Australia’s foreign bribery offence being predicated on the internationally endorsed fault element of ‘intention’. The continued use of internationally recognised standard would support business’s understanding of and compliance with the law, particularly those with multinational operations. It would also reduce the complexity and cost of the compliance burden on business.

The AICD is further concerned that a fault element of ‘recklessness’ would add a significant degree of uncertainty to the operation of the law. Unlike other offences which are based on recklessness, it would be difficult to know when a ‘substantial risk’ exists in the context of bribery because it is dependent upon the possible effect that a benefit may have on a foreign official. A fault element of recklessness would require that persons engaging with foreign public constantly evaluate whether there is a risk that certain conduct *might* influence an outcome and, if there is a risk, whether it is substantial or insubstantial. This may prove extremely difficult, particularly when dealing with foreign governments. As the UK Law Commission observed with respect to foreign bribery laws: ‘recklessness may be an acceptable fault element when it is likely to be relatively easy to assess the risk that conduct will bring about the forbidden outcome, as in cases of criminal damage or manslaughter. It is

² (1998) 192 CLR 493.

³ Organisation for Economic Co-operation and Development, *Convention on Combating Bribery of Foreign Public Officials in International Business Transactions*, (Adopted by the Negotiating Conference on 21 November 1997).

⁴ Government Response to the Joint Standing Committee on Treaties Report ‘OECD Convention on Combating Bribery and Draft Implementing Legislation

⁵ See *Bribery Act 2010* (UK) s 6(1). See also the *Foreign Corrupt Practices Act of 1997* 15 USC §§ 78dd-1, which invokes the concept of ‘corrupt motive’, which is an equivalent concept to intent.

a less helpful – indeed, potentially unfair – fault element when that risk is inherently likely to be harder to assess’.⁶

Given that many corporations are involved in legitimate relationship-building activities (including hospitality), a new offence based on recklessness would also make it very difficult for business to develop appropriate and clear guidelines for such activities. Policies and guidelines would likely take a conservative and risk-averse position, with the consequence that Australian companies will be put at a relative disadvantage when compared with international competitors. Legitimate relationship-building activities are an important part of international business. These activities should not be jeopardised.

In addition, tacit or impliedly authorised bribery is already covered by general principles of corporate criminal responsibility, as set in Part 2.5 of the Criminal Code. If an employee commits a physical element of an offence within the apparent scope of his or her employment or authority, that element will be attributed to the corporation, and the fault element of intention in relation to that physical element must also be attributed to the corporation that ‘tacitly or impliedly authorised or permitted the commission of the offence’.⁷ This offence, in a practical sense, resembles the fault element of recklessness. A prosecution could demonstrate that a ‘corporate culture existed which encouraged, tolerated, or led to non-compliance with the requirement not to bribe’.⁸

Given these comments, the AICD urges the government to reconsider whether it is necessary or desirable to introduce a new offence based on recklessness. As the UK Law Commission report on bribery noted when recommending against a proposed foreign bribery offence based on recklessness in the UK, ‘considerations of simplicity, certainty and fairness combine to favour a fault element confined to an intention to influence’.⁹

3. Proposed new corporate offence of failing to prevent foreign bribery

Australian companies are already burdened with a complex array of compliance costs associated with doing business in Australia and overseas. Many of these companies are small or family-owned companies. Accordingly, while the government’s desire to introduce a new corporate offence based on failing to prevent foreign bribery is understandable, given that many Australian companies have already incurred significant costs in adjusting to the equivalent offence in the *UK Bribery Act*, this new offence, if not crafted carefully, has the potential to impose additional and unnecessary compliance costs on these companies.

Against this backdrop, the AICD has some significant concerns with this new offence. First, the proposed legislation purports to pierce the corporate veil. It is the strong view of the AICD that the corporate veil should only be lifted when there is a compelling justification. The mere fact that a company is a subsidiary to another company is not sufficient justification of itself, to pierce the corporate veil. It is relevant to consider that in some corporate groups a parent company has a very limited degree of control over the day-to-day management of the subsidiary. Policies which are adopted by a parent may be deemed unsuitable by the directors of the subsidiary and amended or rejected. Given this, where the government sees a justification for the corporate veil to be pierced, such an incursion should only occur in circumstances of demonstrable control and fault by the parent company. Accordingly, the AICD recommends the government amend the definition of ‘associate’ in the Exposure Draft to reflect these considerations.

Secondly, the offence requires a company to satisfy the *legal burden* that it has adequate procedures in place to prevent the commission of a foreign bribery offence. This would place

⁶ UK Law Commission, *Reforming Bribery*, Report No 313 (2008) [5.116].

⁷ Government response to the Joint Standing Committee on Treaties Report ‘OECD Convention on Combatting Briber and Draft Implementing Legislation’.

⁸ *Ibid* 6.

⁹ UK Law Commission, *Reforming Bribery*, Report No 313 (2008) [5.118].

an unnecessarily onerous burden of proof on corporations. Given the government is proposing the offence to be an ‘absolute liability’ offence, and the purpose of the offence is to encourage corporations to adopt processes to prevent bribery rather than simply to punish corporations for the wrongdoing of their associates, the AICD recommends the government consider imposing the *evidentiary burden*, rather than the legal burden.

The AICD is also concerned that a ‘failure to prevent’ offence, when triggered by the proposed ‘recklessness’ based offence discussed above, potentially amplifies the uncertainties associated with that recklessness-based offence, leading to greater uncertainty in the law of itself. The AICD recommends limiting the proposed ‘failure to prevent’ offence to apply only in the event of an intentional breach of the primary offence.

4. Replacement of ‘not legitimately due’ with ‘improperly influence’ within the foreign bribery offence

The Consultation Paper proposes three alternative approaches to improving the foreign bribery offence in s 70.2 of the Criminal Code. These are as follows:

- a test based on whether the person had an intention, or was reckless as to whether they would ‘improperly influence’ a foreign public official, where ‘improper influence’ is a matter of to be determined by the trier of fact, with reference to a list of factors set out in s 70.2B(3);
- a test based on the *Ghosh* dishonesty test; or
- a test based on the *Peters* dishonesty test.

The AICD recommends the government adopt a test of dishonesty. The concept of dishonesty is well known and understood in Australian criminal law, and would provide the greatest level of certainty to those dealing with foreign officials, and prosecutorial authorities alike.

A dishonesty-based offence would also broadly align the foreign bribery provisions with the domestic bribery provisions set out at Division 141 of the Criminal Code. The offence of bribing a Commonwealth public official refers to ‘dishonestly’ providing a benefit.¹⁰ It is logically coherent and reflective of a well-ordered legal system that the test for bribery is the same or as similar as possible, whether the official is a foreign public official or not.

We recommend against the government adopting the concept of ‘improper influence’. While this concept can be found in some (relatively limited State and Commonwealth statutes,¹¹ it has never been judicially considered. Nor does it arise in the Criminal Code in any other context. Given this, the trier of fact would need to rely on the ordinary meaning of the phrase, with reference to the factors set out in s 70.2B(2).¹² In practice, this means that there will be little certainty for the Courts (and business) regarding the meaning of ‘improper influence’, at least until a significant body of case law emerges subsequent to its introduction.

In addition, we are concerned that the factors in s 70.2B(2) would add additional complexity to the offence, both for companies and for prosecutorial authorities. Each individual element would, if introduced, be the subject of judicial interpretation and explanation. Each factor, whether compulsory or not, would likely cause an expansion of the evidence required for a

¹⁰ Criminal Code, ss 141.1 – 142.1

¹¹ See section 78 of the *Commonwealth Electoral Act 1918* (Cth) (a person shall not improperly seek to influence an official of an electoral commission) and section 84 of the *Building Professionals Act 2005* (NSW) (improper influence with respect to conduct of accredited certifiers).

¹² Improper is defined in the Macquarie Dictionary as ‘abnormal or irregular’, ‘not proper; not strictly belonging, applicable, or right’, or ‘not in accordance with propriety of behaviour, manners’. The Oxford English Dictionary defines ‘improper’ as ‘not truly or strictly belonging to the thing under consideration; not in accordance with truth, fact, reason, or rule; abnormal, irregular; incorrect, inaccurate, erroneous, wrong’.

prosecution and a defence. Dishonesty, on the other hand, has an established meaning in law, and would be readily interpreted and understood by stakeholders if adopted.

Is recklessness compatible with dishonesty?

AICD does not see any issue of incompatibility with the fault element of recklessness being combined with dishonesty. Should the government choose to enact an offence of recklessness (which we oppose), an offence would be committed where a person dishonestly provides or offers someone a benefit and is reckless as to whether it would influence a foreign public official in the exercise of their duties.

To set the operation of the section, a person would be guilty of an offence if the prosecution can establish that (a) a person dishonestly provided or offered bribe; (b) he or she is aware of the substantial risk that they might influence a foreign public official in the exercise of their duties (though may not be certain of it); and (c) having regard to the circumstances known to him or her, it was unjustifiable to take the risk.

If structured in this way, the offence would operate in a similar way to the operation of ss 184(2)(b) and 184(3)(b) of the *Corporations Act 2001* (Cth).

Which test of dishonesty should be adopted?

The AICD recommends a test of dishonesty based on *Peters v R* (1998) 192 CLR 493. While the AICD recognises that Chapter 7 of the criminal code contains a definition of ‘dishonesty’ which reflects the *Ghosh* test, the *Ghosh* test has been criticised in the past for, *inter alia*, distracting a jury from ‘the true factual issue to be determined’.¹³ The *Peters* test, on the other hand, is simpler to understand and wholly objective. It therefore enables the trier of fact to consider the standards of dishonesty by reference to an ordinary person in Australia.

Separately, the AICD recommends amending the test of dishonesty in Chapter 7 to accord with the *Peters* test. This would ensure that the definition of dishonesty is consistent throughout the Criminal Code.

5. Extension of the current definition of ‘foreign public official’

The AICD supports the extension of the current definition of ‘foreign public official’ to include candidates for office. While the existing definition of foreign public official in the Criminal Code is extensive, the inclusion of candidates for office is consistent with the rationale of the offence, and removes a potential ‘loophole’ for an accused offender to avoid prosecution, should the bribe have occurred before a public official’s formal appointment to office.

6. Clarification regarding business advantage

The government is proposing to clarify that a person does not need to have a *specific* business or advantage in mind when offering or providing a benefit to a foreign public official. The AICD has concerns regarding this proposal, as it has the potential to criminalise legitimate business practices, including the provision of hospitality.

Relationship-building activities, such as the provision of hospitality and entertainment, may reasonably be undertaken by businesses in the development of positive and productive relationships with foreign governments. By unlinking the conferring of a benefit from the possibility of receiving a specific business or advantage, it could be relatively easy, and yet unjust, for the provision of any benefit to be retrospectively characterised as ‘bribery’ should the foreign official provide or continue providing some form of business or advantage.

¹³ (1998) 192 CLR 493.

Accordingly, the AICD recommends that the government retain the requirement that the offer or provision of a benefit relate to a specific business or advantage. This provides greater certainty to companies in relation to legitimate activities.

7. Conclusion

We hope our comments will be of assistance to you. If you would like to discuss any aspect of this submission, please contact Matt McGirr, Policy Adviser, on (02) 8248 2705 or at mmcgirr@aicd.com.au.

Kind regards



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