SUBMISSION TO THE CONSULTATION ON COMBATING BRIBERY OF FOREIGN PUBLIC OFFICIALS

Proposed Amendments to the Foreign Bribery Offence in the *Criminal Code Act 1995*
1 Introduction

This submission has been prepared by Allens in response to the Federal Government's consultation on Combating Bribery of Foreign Public Officials (the Consultation Paper).

Bribery is a pernicious crime that erodes competitiveness, distorts the marketplace and undermines the rule of law. We fully support the Federal Government's commitment to strengthen Australia's foreign bribery laws. We welcome the opportunity to be able to make submissions on the proposed changes to the Criminal Code Act 1995 (the Criminal Code) and commend the Federal Government for consulting with stakeholders.

As legal advisors, Allens will be working with businesses to interpret and apply any changes to the law to their operations. In this regard, we consider clarity and consistency of law to be particularly important. It is also important that any amendments do not overreach and make compliance disproportionately burdensome or too difficult to achieve.

Our submissions are limited to observations concerning technical aspects of the proposed amendments, alignment with international legal standards, including the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (the OECD Convention), and the anticipated impact on business. None of our submissions should be read as criticisms of the Government's underlying policy objectives.

This submission has two parts:

- First, we will deal with the two new proposed offences (Section 2).
- Second, we will deal with a number of the proposed amendments to the existing offence of foreign bribery (Section 3).

2 Proposed New Offences

2.1 Recklessly Bribing a Foreign Public Official

We do not consider that the Federal Government should introduce a new separate foreign bribery offence for where a person is reckless (ie, took an unjustified substantial risk) as to whether their conduct would improperly influence a foreign public official.

When the offence of bribery of a foreign public official was introduced in Australia, the Federal Government considered and rejected recklessness as an alternative fault element. In doing so, the Government stated that 'intention is a fault element which is consistent with the terminology of the OECD Convention' and 'the use of recklessness would broaden the offence beyond recognised standards for an offence of this type'. In our view, this reasoning remains sound.

In particular, we note the following:

- Many Australian companies are currently subject to the laws of other jurisdictions, including the United Kingdom and the United States of America, that prohibit foreign bribery. Accordingly, their policies, systems and compliance practices and procedures in respect of foreign bribery have been drafted to comply with legislation from several jurisdictions. Introducing this offence would be inconsistent with the legislative position in these jurisdictions.
- In fact, US Congress considered, and rejected, a fault standard of 'reckless disregard' in the Foreign Corrupt Practices Act (FCPA). Similarly, the UK Law Commission (UKLC) rejected the...
inclusion of recklessness as a fault element for foreign bribery in the now *Bribery Act 2010* (UK) (the *UK Bribery Act*) in no uncertain terms — concluding that ‘considerations of simplicity, certainty and fairness combine to favour a fault element confined to an intention to influence a foreign public official’. ³

- Unlike the offences of false accounting and money laundering in Divisions 490 and 400 of the Criminal Code, the offence of bribery of a foreign public official is defined in ‘inchoate’ mode, meaning that it will suffice where a person merely *offered* or *promised* a benefit. In such cases, as the UKLC has observed, reliance on intention alone is the ‘principled approach’. ⁴

- This offence would introduce considerable uncertainty for Australian corporations operating overseas. Prior to providing, offering or promising any benefit to any person (who need not be a foreign public official), it will be necessary to consider:

  - whether doing so involves a ‘substantial risk’ that any foreign public official (the identity of whom need not be known to the provider of the benefit) will be improperly influenced; and

  - whether it is ‘unjustifiable’ to take that risk.

- The introduction of this offence in tandem with the proposed amendment to clarify that the accused does not have a particular advantage in mind (see Section 3.2 below) would have significant implications for the manner in which Australian corporations conduct business overseas, and may preclude them from participating in legitimate relationship-building activities and promotional expenditure. The offence could even put at risk community investment programmes in overseas jurisdictions.

As an illustration, if these amendments are introduced, a corporation that proposes to provide complimentary training to employees of a foreign government body would need to consider whether there is a ‘substantial’ risk that a trainee, or another foreign public official connected with the trainee, could be improperly influenced to provide the corporation with some undetermined advantage in the future. It would be very challenging, if not impossible, to develop policies and procedures that govern the assessment of such a risk.

- If, notwithstanding the above, this offence is introduced, we agree that the maximum penalty should be half that of the corresponding intention offence.

### 2.2 Failure to Prevent Foreign Bribery

While in principle the concept of a strict liability offence for ‘failing to prevent’ bribery with a correlating defence of adequate procedures makes sense from a crime prevention perspective, we recommend that the Federal Government proceed with caution in considering whether to introduce the new corporate offence as described in the Consultation Paper.

The broad extraterritorial application of the equivalent offence in the *UK Bribery Act* (upon which this proposed offence appears modelled), caused many Australian companies with international operations to adopt significant amendments to their anti-bribery and corruption policies and procedures. For the reasons set out below, the drafting of the proposed offence is, in some respects, significantly broader than the equivalent offence under the *UK Bribery Act* and risks imposing a substantially heavier compliance burden on Australian companies operating overseas.

If the Federal Government decides to proceed with adopting an offence of failure to prevent bribery, we recommend that it considers:

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⁴ Ibid [5.116].
Engaging with business and industry groups on guidance as to what will constitute 'adequate procedures', and issuing an 'exposure draft' of its guidance for broad and detailed consultation. We also recommend that guidance be developed for particular sectors of the economy, such as the extractive industry, pharmaceutical industry and finance industry, to provide more meaningful and practical direction for companies. Guidance that is consistent with existing international standards (such as exists in the US and the UK) will also avoid unnecessarily increasing the compliance burden.

Limiting the offence to 'intentional' (rather than 'reckless') bribery. As set out above, it is our submission that the Federal Government should not adopt a separate foreign bribery offence based on 'recklessness'. If it does, we do not consider it appropriate that a company be criminally liable for failing to prevent someone else engaging in conduct that carries a 'substantial risk' of improperly influencing a foreign public official.

Amending the definition of 'associate'. While we have concerns that the equivalent definition in the UK Bribery Act of 'those who perform a service for or on behalf of a company' creates some uncertainty in its application, it does serve to limit the categories of persons (including subsidiaries) who are captured. The proposed definition of 'associate' here, however, captures all employees, agents, contractors and subsidiaries. In particular, we note that, as currently drafted, the definition would include non-controlled subsidiaries. There already exist circumstances where the 'corporate veil' can be pierced if a corporate structure is a sham. This definition pierces the corporate veil between parent and subsidiary without any requirement of parental control through governance, management or financial accounting means.

Amending the requirement at the proposed s 70.5(1)(c) that a company will be liable where an associate pays a bribe for the 'profit or gain' of the company. This is capable of broad interpretation and would be particularly problematic in the context of subsidiaries. As explained above, in effect, the definition of associate, and by extension its use in s 70.5(1)(c), would pierce the corporate veil. We recommend that a more direct link be required to be proven between the associate's conduct and the company. For example, in the UK, an offence will only be committed by a commercial organisation where the 'associated person' intended 'to obtain or retain business' for that organisation. Liability will not accrue through corporate ownership or investment, or the payment of dividends by subsidiaries.

As an illustration of the breadth of the current formulation of the offence, an Australian company could be liable for the conduct of an uncontrolled subsidiary operating in an overseas jurisdiction, of which a parent company knows nothing, and from which it only benefits indirectly as a result of a dividend payment. We do not consider it appropriate for the offence of bribery to apply in this manner.

### 3 Amendments to the Existing Offence

#### 3.1 Extending the definition of 'foreign public official' to include candidates for office

While the OECD Convention does not expressly prohibit inducements to candidates for public office, the Commentary to the Convention states that this form of bribery is a 'commonly shared concern' among member states. We are, however, aware of only two OECD member countries that

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1 See, for example, Dennis Willcox Pty Ltd v Federal Commissioner of Taxation (1988) 79 ALR 267, 272 (Jenkinson J).
2 Bribery Act 2010 (UK) c 23, s 7.
3 Ministry of Justice, Parliament of the United Kingdom, The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (March 2011) [42].
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presently extend the bribery offence to bribery of candidates: Belgium (candidates for public function)\(^9\) and the US (any candidate for foreign political office).\(^10\)

Candidates for foreign public office are vulnerable to influence in much the same way as foreign public officials. As the Consultation Paper recognises, such conduct ‘equally undermines good governance and free markets’.\(^11\) Further, in our experience, many multinational corporations already prohibit their employees from engaging in such conduct and, as such, we do not consider that this amendment would materially, if at all, increase the compliance burden faced by Australian corporations.

We note, however, that the OECD Working Group has observed that Australia’s existing foreign bribery offence may be broad enough to capture bribery of a person in anticipation of him or her becoming a foreign public official, since the offence is providing a benefit *with the intention of influencing a foreign public official*.\(^12\) Therefore, while we agree with the aim of the amendment, it is not clear that the amendment is necessary.

3.2 Clarifications as to business advantage

The Federal Government is proposing two ‘clarifications’ in relation to business advantage. First, to clarify that a person is prohibited from bribing a foreign public official to obtain a business advantage for someone else. This clarification is uncontroversial and we support it. Second, to clarify that a person does not need to have a specific business or advantage in mind. We have concerns about this proposed amendment.

In our view, the latter amendment would significantly curtail Australian corporations’ ability to engage in promotional expenditure and legitimate relationship-building abroad for fear of investigative bodies ‘inappropriately joining the dots’. A practical reality of doing business in many jurisdictions is that companies are required to deal with foreign public officials on a regular basis, and legitimate business practice requires healthy, appropriate working relations.

If this amendment is introduced, it may make it impossible for companies to engage in hospitality with government employees without fear of this being subsequently characterised as bribery if some business advantage is later received, where that advantage was neither solicited nor in contemplation at the time the hospitality was provided. This concern would be particularly acute should the Government introduce a foreign bribery offence based on ‘recklessness’. Even if the prosecution is required to establish that the company had intended to improperly influence a foreign public official, companies are concerned not only with being prosecuted, but also with the making of unmeritorious allegations in such a politically sensitive area.

3.3 Clarifying that the offence is about ‘improperly influencing’ a foreign public official

If the Federal Government proceeds with removing the concepts of giving a benefit and receiving an advantage that were ‘not legitimately due’, we recommend that these concepts be replaced with the concept of ‘improperly influencing’ rather than with the concept of ‘dishonesty’:

- While we recognise that the offences of bribery of a Commonwealth public official refer to ‘dishonestly’ providing a benefit,\(^13\) as the UKLC has observed, not all bribes are ‘dishonest’ in the sense required. An advantage conferred may be ‘illegitimate, unreasonable, disproportionate or otherwise “improper” without being dishonest’.\(^14\)

\(^9\) See Penal Code 1999 (Belgium) art 246 § 3.


\(^12\) OECD, above n 10, [25].

\(^13\) Criminal Code Act 1995 (Cth) ss 141.1,142.1.

\(^14\) UK Law Commission, above n 3, [4.90].
• It is proposed that whether influence is ‘improper’ will be determined by reference to specific factors to which the Court ‘must’ and ‘must not’ have regard. This will provide greater clarity and certainty for companies than the test of ‘dishonesty’, which is to be determined ‘by the application of the standards of ordinary, decent people’.  

• If the test of dishonestly is introduced, it will be imperative that the Federal Government also: (i) introduces a new definition of dishonesty in the Criminal Code that, in accordance with Peters,16 removes the subjective requirement that the accused knew their conduct to be dishonest according to the standards of ordinary people; and (ii) specifies that ‘dishonesty’ is to be judged by the standards of ordinary people in Australia. Otherwise, the introduction of this concept may effectively create a ‘defence’ where the accused was mistaken about the ethics or legality of bribes, or paid a bribe in a business environment where such behaviour is the norm.17

We endorse the Government’s proposal to specify factors to which the Court ‘must’ and ‘must not’ have regard in determining what constitutes an ‘improper influence’. The factors outlined in the Consultation Paper provide a useful starting point. It is important, however, that it is made clear that the list of factors to which the Court ‘must’ have regard does not constitute an exhaustive list, and that it remains open to the Court to have regard to any other matters it considers relevant (other than those to which it ‘must not’ have regard). It is also a matter for the Court to determine the appropriate weight to be given to each factor.

4 Other Comments

For all new offences and changes to existing offences, we recommend that legislation include a period of time between the date of assent and commencement. This will be particularly important for the ‘failure to prevent’ offence (if adopted), to allow companies time to ensure compliance with any guidance issued on the meaning of ‘adequate procedures’. We also recommend that guidance is issued at the same time as, or promptly after, any legislation is given assent.

5 Next Steps

Allens welcomes the opportunity to answer any queries the Federal Government may have in relation to our submissions. For further information, please contact:

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