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Australian Government
Attorney-General's Department

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

Dear Sir/Madam

Combatting bribery of foreign public officials: Proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995* – Public Consultation Paper

Submission of Control Risks

We refer to the Public Consultation Paper released by the Attorney-General's Department (**AGD**) in April 2017 (**PCP**).

We welcome the opportunity to make a written submission to the AGD in relation to the proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995* (**Criminal Code**) (**Proposed Amendments**). This submission follows our previous submissions to the Senate Economics Committee on 24 August 2015 and the Department of Foreign Affairs and Trade on 27 February 2017, in relation to the foreign bribery inquiry and foreign policy whitepaper, respectively. This submission is also being made simultaneously with a separate submission in relation to a proposed model for a Deferred Prosecution Agreement (**DPA**) scheme in Australia.

Overall, we welcome law reform in the area of foreign bribery. We largely agree with the proposed reforms, subject to our various comments set out below. In particular, we welcome the proposed additional clarity to the current language in the Criminal Code and the proposed introduction of new 'reckless' and corporate 'failure-to-prevent' offences. The main area in which we disagree with the government's position relates to facilitation payments. The government, in our view, cannot be credible in its attempts to reform foreign bribery legislation without addressing facilitation payments. We make more specific comments below.

Our credentials

Control Risks is an independent, specialist risk consultancy practice with a global network of 36 offices worldwide. We help organisations mitigate risk and succeed in complex and challenging environments. Our diverse suite of intelligence- and investigative-guided solutions assists companies and counsel in identifying, evaluating and minimizing integrity risk when facing and responding to regulatory, operational and strategic challenges around the world. We also currently perform the role of independent monitors in relation to regulatory matters in the US and are therefore able to draw on significant experience and expertise in this area.

The author, Mark Pulvirenti, leads Control Risks' Compliance, Forensics and Intelligence practice for the Australia Pacific region. He is a Chartered Accountant, Certified Public Accountant, Certified Fraud Examiner and Insolvency Practitioner.

Based in Sydney, Mark directs Control Risks' compliance consulting services, complex multi-jurisdictional investigations and diverse technology solutions. Prior to his return to Australia in 2014, Mark spent most of his 23 year career overseas in Hong Kong, the Cayman Islands and

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Thailand, including case management experience in 26 countries across Asia Pacific, Europe and the Americas.

He specialises in financial crime and dispute advisory and investigation matters with a particular bribery and corruption speciality, having led multi-national teams in a number of high profile global corruption investigations. In addition to leading European and Asian regional forensic components of one of the largest global Foreign Corrupt Practices Act (FCPA) investigations to date, Mark has been engaged in corruption, asset-tracing and fraud-related investigations from Europe to Asia and South America, and has also been accepted by the District Court in Hong Kong as an expert witness in money laundering investigations and prosecution cases.

Mark also works with clients in an advisory capacity to assess fraud and corruption risks and to ensure that internal controls, as part of wider fraud and corruption compliance programs, are robust and successfully mitigate risks and detect issues.

Our Comments

We have set out our comments in sections that reflect the seven Proposed Amendments set out in the PCP. We note that, while we are not lawyers, we have worked closely with external counsel and regulators in multiple jurisdictions, forensically supporting global corruption investigations (and in performing subsequent monitor roles) over the past ten years in particular. Our comments are therefore provided on this basis.

In our view:

Extend the definition of foreign public official to include candidates for office

- We consider it appropriate to extend the definition of foreign public official to include candidates for office.

  Whilst we welcome a broader definition of foreign public official, we also see merit in extending bribery offences more broadly to any other person (similar to section 1 of the UK *Bribery Act 2010* (**UKBA**)) in addition to a discrete offence for bribing a foreign public official (similar to section 6 of the UKBA).

- We see merit in possibly re-drafting the entire definition of foreign public official, which currently provides 13 particular examples running from paragraphs (a) to (l)(ii) in section 70.1 of the Criminal Code. The definition could perhaps be more inclusive, and open to less challenge, if it were to be a broader (and more succinct) definition, similar to subsection 6(5) of the UKBA.

Clarify the offence is about 'improperly influencing' a foreign public official

- We agree that the references in section 70.2 of the Criminal Code to 'not legitimately due' (regarding the benefit provided and the advantage obtained) should be repealed and the concept of 'improperly influence' introduced.

- While the proposed factors to be considered when determining 'improper influence' appear appropriate, in our view, these need not be included into the body of the Criminal Code. We consider that these would be best offered as "guidance" while the legislation should afford the maximum extent of discretion to the court in its determination of the term.

- We are not in favour of the proposed alternative "dishonesty" approach. Aside from the dichotomy between "dishonest" and "reckless", we foresee difficulties for the CDPP in obtaining sufficient evidence to satisfy the requisite level of dishonesty.

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Extend the offence to cover bribery to obtain a personal advantage

- We agree that the offence should be extended to cover bribery to obtain a personal advantage.

Create a new separate foreign bribery offence based on recklessness

- We agree with, and would indeed recommend, the proposed introduction of a new offence based on recklessness.

  Obtaining sufficient evidence from foreign jurisdictions appears to be a significant current impediment to proving intention in relation to both the conduct of providing/promising the benefit and also for influencing foreign public officials. We suspect that this is preventing a number of cases from currently being prosecuted.

  We agree that the introduction of this offence would act as a deterrent and encourage greater risk awareness and mitigation to prevent underlying corruption.

- We agree that various degrees of culpability for corruption-related offences should follow the approach with money laundering and false accounting offences in the Criminal Code.

- Our main question vis-à-vis recklessness is "how far does (or should) the 'recklessness' go when an illegal payment is made?". Is it just the person responsible for the payment? Is it also those who authorise the payment? Is it also senior management or board members who know (or ought to have known in the circumstances) of the payment but allowed it to be made? Much has been made of the concept of "wilful blindness" in the US and we consider that this type of issue could be well addressed by the proposed new offence.

Create a new corporate offence of failing to prevent foreign bribery

- We consider that the introduction of a strict-liability corporate offence, of failing to prevent bribery, to be critical in addressing the issue of foreign bribery in Australia.

  We have seen the positive effect that section 7 of the UKBA has had on the approach to foreign bribery in the UK. Companies are now taking very seriously the risks associated with foreign bribery and are taking appropriate steps in identifying the relevant risks and implementing the required "adequate procedures" necessary, in terms of corruption compliance programs, to protect the corporation against the actions of 'rogue employees'.

  We see Australian companies, as part of their corporate cultures, take very seriously issues such as workplace health and safety and we would like to see anti-corruption measures adopted in a similar way. The introduction of this sort of failure-to-prevent offence will have the effect of positively shifting corporate culture, which is required to curb foreign bribery.

- We agree that it is currently challenging to attribute to a corporation the illegal actions of its employees and/or senior management. We see this type of offence as an effective way to deal with those challenges.

- We agree that the Minister for Justice will need to issue relevant guidance to outline what type of 'adequate procedures' (or equivalent term) will be required to justify a defence. There is currently available guidance issued by the US Department of Justice and Securities Exchange Commission (https://www.justice.gov/criminal-fraud/fcpa-guidance) and the UK Ministry of Justice and Serious Fraud Office (https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/). We would recommend that guidance issued by the Australian government be as consistent as possible with this guidance. This is particularly relevant to multi-national companies that

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are required to comply with not only the Criminal Code but also the FCPA and the UKBA, so having consistent guidance as to the application of various legislation will be welcomed by those companies.

- We welcome the concept of "associate" and consider that this will address previous difficulties in attributing liability for actions of subsidiaries and other parties to parent companies in Australia.

  We do not consider attributing liability to an Australian parent company for the actions of its subsidiaries and those other parties acting on its behalf, to be "piercing the corporate veil". Subsidiaries and other entities exist and operate in foreign jurisdictions on behalf, and for the benefit, of the Australian parent entity. It is therefore right, in our view, that the parent, having control over its subsidiaries and agents, be held accountable for the actions of those parties. To enable an Australian entity to hide behind a corporate veil and disavow actions of those acting on its behalf or in accordance with its instructions would defeat the intention of the legislation. This will also address the concept of "wilful blindness" that has been a focus of US authorities.

Remove the requirement of influencing a foreign official 'in their official capacity'

- We agree that the term "(in the exercise of the official's duties)" should be repealed.

  In our view, it is irrelevant whether the official is improperly influenced either within or beyond their official duties. The current wording simply provides one more hurdle for the prosecution to overcome, which does not contribute to the intention of the legislation.

Clarify that business or advantage can be obtained for someone else

- We agree that the current wording of subparagraph 70.2(1)(c)(ii) is ambiguous and agree with the proposed wording in paragraph 70.2(1)(b) contained in the Exposure Draft – i.e. "(whether or not for the first-mentioned person)".

Clarify that the accused does not need to have specific business or advantage in mind

- We agree with the proposed subsection 70.2(2) contained in the Exposure Draft.

Other issues – facilitation payments

- We note that it is not currently proposed that the existing facilitation payment defence in the Criminal Code be amended. We strongly disagree with this position.

- We do not consider that the Australian government can be credible in its attempts to reform anti-bribery legislation without having regard to repealing the facilitation payment defence set out in section 70.4 of the Criminal Code.

- We consider a facilitation payment to be a bribe – period. This position is shared by the UK Serious Fraud Office (**SFO**), which states: "A facilitation payment is a type of bribe and should be seen as such."[1] Obviously, the UK prohibits facilitation payments.

- The SFO goes on to say: "Facilitation payments were illegal before the Bribery Act came into force and they are illegal under the Bribery Act, regardless of their size or frequency."[2]

[1] https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/
[2] https://www.sfo.gov.uk/publications/guidance-policy-and-protocols/bribery-act-guidance/

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- In our experience, a majority of Australian companies currently prohibit facilitation payments. Whether this is because those companies also fall under the jurisdiction of the UKBA or whether it is due to good corporate governance, is irrelevant.

- Also, in our experience, where companies are permitted to make such payments, those companies are not maintaining the various detailed records as required by section 70.4 of the Criminal Code, thereby rendering the defence of little consequential value.

- It sends a mixed message, at best, to the community if the government's position is, in effect, "you can bribe someone as long as it is a small amount, but otherwise it is illegal". At what point does it become illegal? This is just one more uncertainty that should be removed from the Criminal Code.

Other issues – whistleblowing

- We consider it imperative to Australia's efforts in fighting foreign bribery that whistleblowers be protected when reporting illegal corporate behaviour and that they also be incentivised to do so.

  The Office of the Whistleblower (**OWB**) in the US has seen success in attracting tips from members of the public, which have led to substantial settlements and convictions involving companies as well as the resulting bounties being paid to the whistleblowers.

  It is noteworthy that in 2016, 53 reports were made to the OWB from Australia.[3] This was the third highest number of reports made from countries outside the US during the year and a significant increase on previous years. On a cumulative basis, Australia ranks 5th in the world with a total of 150 reports having been made to the OWB however we expect, on its current trajectory, that this ranking will increase in 2017. There are clearly matters affecting Australian parties that are currently being reported to foreign regulators. This would seem to be due to:

  (i) A lack of available reporting avenues in Australia;

  (ii) A lack of protection for whistleblowers in Australia, resulting in job losses and litigation for whistleblowers; and

  (iii) The significant incentives being offered by the OWB (10% to 30% of any penalty in excess of USD1m that arises from new information provided by the whistleblower).

  We recommend that a similar program be introduced in Australia.

Should you have any queries in relation to any of the above, please do not hesitate to contact me via email at mark.pulvirenti@controlrisks.com or by telephone on 0414 236919.

Yours faithfully

Mark Pulvirenti
Partner

[3] https://www.sec.gov/whistleblower/reportspubs/annual-reports/owb-annual-report-2016.pdf