Export Council of Australia

Submission on the proposed amendments to the foreign bribery offence in the Criminal Code Act 1995
RE: Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995

Dear Sir/Madam,

The Export Council of Australia (ECA) welcomes the opportunity to provide a submission on the proposed amendments to the foreign bribery offence.

The ECA is the peak industry body for Australia’s exporters and importers, particularly small and medium-sized enterprises (SMEs). With a membership base of around 1,000 and a reach of over 15,000, the ECA represents companies of all sizes and across a wide range of industries.

The ECA’s core activities include research, advocacy, skills development and events. The ECA collaborates with a number of government agencies, both Commonwealth and state, to advance the interests of its members and support SMEs. These agencies include the Department of Foreign Affairs and Trade, Austrade, Efic, the Department of Immigration and Border Protection, the Department of Industry, Innovation and Science, and the Department of Agriculture.

General comments

The ECA supports the policy objective of eliminating the incidence of bribery, and welcomes the Australian Government’s move to review the foreign bribery offence.

The ECA notes that foreign bribery can present disproportionately large challenges to SMEs. The consultation paper states that it can be difficult for the Australian Government to “obtain evidence about foreign laws and the duties of the official in the country where bribery allegedly took place”. Similarly, it is difficult for SMEs to find out what payments are legitimately due. SMEs can also be seen as soft targets by foreign officials seeking bribes, as the greater resources, market position and/or connections of larger corporations act as deterrents. Further, SMEs have fewer resources with which to monitor the actions of overseas staff and agents.

Overall, the ECA supports the intent of most of the amendments but urges caution in their drafting. The government should take care not to significantly shift the balance of the legislation to favour prosecutors over companies—and it should ensure it is not perceived to be doing so. The consequences of doing so will be to impose significant costs on companies that are not involved in foreign bribery.

The ECA does not support the absolute liability provision of s70.5A, which prescribes that a body corporate would be liable for bribery of its employers, contractors and agents (except where it can be established that the company had implemented a proper system of internal controls and compliance in place to prevent the bribery from occurring). Unlike bigger corporations, SMEs have a very limited ability to control and oversee the behaviour of an overseas agent or contractor. Making SMEs liable for the actions of overseas agents and
contractors will substantially increase the risks of exporting, and will act as a significant disincentive for SMEs to engage in international trade.

The costs of increasing the risk of exporting will not only involve the obvious increases in compliance costs, but also the opportunity costs of trade foregone. Legislation that materially increases the risks of international business may see some established exporters cease to trade. It will likely create an additional deterrent to companies expanding into new international markets, and it will likely deter some companies from entering international trade at all.

As the intent of these amendments is to reduce bribery rather than increase convictions, on passage of any amended legislation the ECA strongly recommends the government make a substantial effort to educate SMEs. It should educate SMEs not only about the impact of these changes, but more broadly about how to recognise and avoid bribery. This education must be coupled with clear guidance about what actions would be eligible to be prosecuted under the various offences under the amended act and the criteria by which the adequacy of a company’s monitoring procedures will be adjudged.

The ECA also recommends the government should not communicate the amendments as toughening foreign bribery legislation or making it easier to prosecute foreign bribery offences. Instead, communications should bring together as a package the changes to the foreign bribery offence and the deferred prosecution scheme. This package should be presented as measures to reward companies with a culture of integrity.

**Comments on proposed amendments one, three, six and seven**

The ECA supports the following changes to the foreign bribery offence:

1. extending the definition of ‘foreign public official’ to include candidates for office
2. extending the offence to cover bribery to obtain personal advantage
3. remove the requirement of influencing a foreign public official in the exercise of their official capacity
4. clarifying that the offence does not require the accused to have a specific business advantage in mind, that business or an advantage can be obtained for someone else.

**Comments on amendment two: clarifying the offence is about improperly influencing a foreign official**

The ECA does not take a position on amendment two, to remove the requirement that the benefit/business advantage must be ‘not legitimately due’ and replace it with the concept of ‘improperly influence’ a foreign public official. The ECA understands there are technical legal difficulties with basing bribery offences on the test of ‘not legitimately due’ and ‘improperly influence’, as well as the concept of dishonesty. The ECA urges the government ensure that simplicity and predictability are key factors in determining which test to use. If these tests are not simple, or their application not predictable, there will be significant costs to business.
Comments on amendment four: creating a new offence based on the fault element of recklessness

The ECA recognises that Australian companies should not turn a blind eye to questionable actions by their partners or subsidiaries in market. The ECA supports the policy rationale for amendment four, to create a new separate foreign bribery offence based on recklessness. But size, experience and cultural awareness are important factors when assessing whether a company can determine the risk of bribery. In an situation when one company turned a blind eye to bribery, a different company could be totally oblivious to it. In legislating (and subsequently prosecuting) this offence, the government must be careful to recognise that there are a range of factors that will determine the ability of companies to determine the risk that foreign bribery is occurring, or will occur.

Comments on amendment five: creating a new corporate offence of failing to prevent foreign bribery

The ECA believes that sustainable success in international markets depends on ethical business practices and a culture of integrity. The ECA believes that companies that have these characteristics should not be punished for the actions of rogue employees, contractors and agents that commit foreign bribery. The ECA does not support the imposition of absolute liability on companies creating a new corporate offence of failing to prevent foreign bribery.

In-market, SME exporters heavily depend on contractors and agents. (They might also depend heavily on distributors.) While SMEs can and do emphasise their opposition to bribery, this is usually done through one-on-one engagement. SMEs may not have the capacity to develop systems of internal controls and compliance. For those that do, it may be difficult to bring their contractors and agents within those formal internal systems due to language and cultural reasons. For example, many cultures value trust over contracts— in these cultures, agents and contractors may see attempts to impose formal systems as demonstrating a lack of trust and there may be negative commercial outcomes as a result of doing so.

It is also important to note that agents and contractors working with Australian SME exporters may work with a number of different companies, and might only represent the Australian company a small amount of the time, particularly if it is a small company. This means the Australian company may have very limited capacity to control or influence the actions of its contractor or agent.

If a corporate offence of failing to prevent foreign bribery is introduced as per the consultation paper, an SME exporter will be faced with three choices:

i. pay the cost to introduce systems of internal control and compliance to prevent bribery from occurring, plus engage in rigorous record-keeping

ii. accept liability for the actions of rogue agents or contractors if they engage in bribery, even if it’s contrary to the company’s culture and wishes

iii. cease exporting.

Faced with these choices, the ECA expects a number of SMEs will choose to cease exporting.
For these reasons, the ECA opposes the imposition of an absolute liability provision for bribery by contractors and agents per s70.5A(2) of the amendments.

The focus of the legislation should be to ensure companies have cultures of integrity—not their ability to keep records. While it is reasonable to expect companies to promote a culture of anti-bribery and business integrity, the government should not expect small companies to maintain thorough records of these measures. The ECA therefore strongly suggests that for instances where the contractors or agents of SMEs engage in foreign bribery, the legislation put the onus of proof on the prosecutor. That is, prosecutors should bear the burden to prove that the SME’s culture tolerated bribery. In determining whether a company had a culture that tolerated bribery, a court should be able to take into account the size and resources of the company and the relevant market in which they operated.