



26 April 2017

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

Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995

The Red Flag Group (RFG) would like to thank the Minister for Justice Mr Hon. Michael Keenan MP for providing us with the opportunity to comment upon the proposed reforms to the bribery provisions of the Australian Criminal Code Act.

The Red Flag Group is generally very supportive of the reforms that have been proposed within the consultation paper. From an overall perspective, most of the reforms that are proposed will bring Australia's anti-bribery legislation into line with the two most significant international pieces of legislation, that being the United States' Foreign Corrupt Practices Act (FCPA) and the United Kingdom's Bribery Act (the Bribery Act). We will limit our comments to only a number of the proposed amendments.

The RFG is supportive of the extension of the definition of bribery of a foreign official as outlined in the proposed amendments to s.70.2B as opposed to the possible suggestion to make use of the term "dishonest" as suggested in the consultation paper. The aforementioned approach, including the provision for the courts to consider additional factors of improper influence not covered in the Act, should produce a less ambiguous outcome for industry and the judicial system.

Support is also provided for the introduction of the concept of recklessness and failure to prevent bribery. Both concepts are related and require both individuals and corporations to act upon what would be perceived to be reasonable expectations as to the likelihood of bribery of a foreign public official occurring as a consequence of their actions or decisions. The proposed reforms removes any possibility that individuals or corporations can hide from their actions under a veil of ignorance. The proposed amendments are also in keeping with the Bribery Act and therefore promotes regulatory harmonization for Australian firms operating in international markets.

However, we are concerned that the financial penalties that will be imposed are not a significant enough deterrent for some organisations. At present the value of a Commonwealth Penalty Unit stands at \$180 AUD. It is proposed under the reforms that either \$18 million AUD or \$9 million AUD could be the maximum financial fine imposed by the courts (depending upon the offence, the value of the bribe or the organisation's turnover).



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Unfortunately experience has shown that financial penalties are treated as a cost of doing business by some organizations and are factored into the financial decision making process. Therefore we would recommend that reference to penalty units be removed as a consideration or that the number of units the offences attracts are significantly increased. When compared to the fines that are imposed in the USA by the DOJ and SEC for FCPA sanctions and breaches, what is being recommended in this proposal represents a significant discount in comparative terms.

Again we thank you for the opportunity to comment upon the proposed reforms. Should you require any additional comment or clarification, please contact me on either 041 601 2162 or martin.tolar@redflaggroup.com or.

Yours sincerely

A handwritten signature in black ink, appearing to read "M. Tolar".

Martin Tolar
General Manager, Australia & New Zealand