

Foreign Bribery Amendments
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**Uniting Church in Australia, Synod of Victoria and Tasmania
Submission to Inquiry into Proposed amendments to the Foreign Bribery
Offence in the *Criminal Code Act 1995*
1 May 2017**

The Uniting Church in Australia Synod of Victoria and Tasmania welcomes the opportunity to provide this submission to the inquiry into proposed amendments to the foreign bribery offence in the *Criminal Code Act 1995*.

The Synod strongly welcomes the amendments to:

- Extend the definition of foreign public official to include candidates for office;
- Remove the requirements that the benefit/business advantage must be 'not legitimately due' and replace it with the concept of 'improperly influence' a foreign public official;
- Extend the offence to cover bribery to obtain a personal advantage;
- Create a new foreign bribery offence based on the fault element of recklessness;
- Create a new corporate offence of failing to prevent foreign bribery;
- Remove the requirement of foreign public official in the exercise of their official capacity; and
- Clarify that the offence does not require the accused to have a specific business or advantage in mind, that business or an advantage can be obtained for someone else.

In addition to the reforms listed above, the Synod strongly supports that it be criminal to pay bribes to third parties in order to win government contracts in foreign jurisdictions. Rolls Royce used intermediaries to pay bribes to competitors to ensure they submitted an uncompetitive bid.¹ In 2007 Rolls Royce employees engaged an intermediary to act in relation to an open competitive tender for a energy-related Long Term Service Agreement on Samarinda Island. Through the intermediary a commission was paid to a member of a competitor consortium to ensure that it submitted an uncompetitive bid.² In addition, the intermediary was used to pay bribes to employees working for the state-owned customer.³ Rolls Royce won the contract.

Rolls Royce between 2009 and 2013 also made corrupt payments to a Nigerian partner company in order to receive confidential information (including competitor pricing) about the bidding processes and influence over the requirements of the customer in the tendering process.⁴

An example of the case where there have been allegations that an Australian company made bribes to opposition parliamentarians to influence their behaviour when they formed government is the case of Australian phosphate company Getax. It was named by *The Sunday Age* in January 2013 as one of the 28 companies that the OECD had identified as

¹ EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, p. 16.

² EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, p. 17.

³ EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, p. 17.

⁴ EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, p. 17.

having allegations of foreign bribery made against it.⁵ *The Sunday Age* reported that the AFP had interviewed two complainants on claims that Getax had bribed parliamentarians in Nauru in order to obtain a phosphate mining permit, but that the investigation could not continue due to lack of jurisdiction.⁶ Leaked emails to the Australian Broadcasting Corporation (ABC) alleged to show hundreds of thousands of dollars being paid to current Nauruan politicians whilst they were in opposition to allegedly help install a government amenable to allowing Getax to buy phosphate at prices below market value.⁷

In September 2016, the ABC made a further report about e-mails from 2009 and 2010 which suggested Getax was sending money to Nauru a number of politicians, including Nauru's current President Baron Waqa and Justice Minister David Adeang.⁸ From 2008 amounts of \$10,000 were transferred on several occasions from Getax's Westpac account into the ANZ bank account of Madelyn Adeang, the late wife of Minister David Adeang.⁹ The payments were described as "Consultancy fees", or "Fees for Adeang". The transactions included:

\$20,000 in April 2008
\$10,001 in June 2008
\$10,000 in July 2008
\$10,000 in September 2008
\$10,000 in October 2008.

This case also highlights an alleged attempt to disguise payments as a legitimate business expense.

Another case where bribes were concealed as legitimate payments is that of Layne Christenson. The Securities and Exchange Commission (SEC) in the United States charged Layne Christenson more than \$US5 million (\$A5.7 million) for violations of foreign bribery laws in 2014.¹⁰ Layne Christenson is a construction, drilling and water management company based in Texas, USA, with subsidiaries worldwide, including Australia. The SEC found that Layne Christenson, through Stanley Mining Services, a company wholly owned by Layne Christenson Australia - a subsidiary of Layne Christenson - had moved money through its US bank account to Stanley Mining Services to reduce its tax bill in numerous African nations, including Mali and Guinea, and to pass bribes to customs for equipment

⁵ Maris Beck and Ben Butler, 'Police reopen OZ, Cochlear bribery cases', *The Sunday Age*, 13 January 2013, <http://www.smh.com.au/business/police-reopen-oz-cochlear-bribery-cases-20130112-2cmrt.html>

⁶ Maris Beck and Ben Butler, 'Bribery Cases Reopened', *The Sunday Age*, 13 January 2013.

⁷ Hayden Cooper and Alex McDonald, 'Narua President and Justice Minister face bribery allegations involving Australian company', 7:30 Report, ABC, 8 June 2015, <http://www.abc.net.au/7.30/content/2015/s4251115.htm>

⁸ Hayden Cooper, 'Money trail from Australian phosphate company Getax leads to Nauru minister David Adeang', 7:30 ABC, 14 September 2016, <http://www.abc.net.au/news/2016-09-14/australian-phosphate-company-getax-payments-to-nauru-minister/7838170>

⁹ Hayden Cooper, 'Money trail from Australian phosphate company Getax leads to Nauru minister David Adeang', 7:30 ABC, 14 September 2016, <http://www.abc.net.au/news/2016-09-14/australian-phosphate-company-getax-payments-to-nauru-minister/7838170>

¹⁰ Georgia Wilkins, 'Subsidiaries Snared in Bribe Case' *The Age*, 29 October 2014, p. 27, http://newsstore.fairfax.com.au/apps/viewDocument.ac;jsessionid=BCDEE9D378F8A30D1582FB8A2CAE396C?sy=af&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=1637&clsPage=1&docID=AGE141029CI4J35L4A88

clearance.¹¹ Some of the payments were falsely reported – being recorded as payment for “freight services” or described as “legal commissions”.¹²

Rolls Royce also used false invoices for “consultancy fees” as a means of concealing bribes.¹³ The company also backdated paperwork for corrupt payments to make them appear as relating to sales that had already been closed.¹⁴

The Synod strongly supports that a company be held automatically liable for bribery carried out by employees, contractors and agents (including those operating overseas), except where the company can show it had proper systems of internal controls and compliance in place to prevent the bribery from occurring. It will help deter those businesses that set up intermediaries to make business arrangements through which bribes are paid. Under the current law it is very difficult to gain a prosecution in such as case as the company can always argue they did not know what their intermediary was doing.

A relevant case is that of Rolls Royce that used a network of intermediaries and agents to pay bribes, with apparent knowledge by some employees inside Rolls Royce that an intermediary was acting corruptly on behalf of the company.¹⁵ An intermediary was classified as customer to allow it to earn substantial mark-ups, far in excess of the commissions allowed under Rolls Royce’s policy on intermediaries.¹⁶ In Indonesia, Rolls Royce used an intermediary to bribe employees of Garuda International in respect of contracts for engines and maintenance.¹⁷

It also helps to deal with cases where there is no prosecution of the bribe in the jurisdiction in which it was paid. Under the current law, a company can have a high degree of confidence they will not be prosecuted in Australia for paying bribes to foreign officials in jurisdictions that fail to prosecute foreign officials that accept bribes.

A relevant case of a company being forced to enter into a settlement based on their failure to maintain internal controls to prevent bribery is that involving Alcoa. Alcoa and a joint venture it controlled agreed to pay US\$384 million to resolve charges around the bribing officials of a Bahraini state-controlled aluminium smelter, marking one of the largest US anti-corruption settlements of its kind.¹⁸ It was alleged that officials were bribed for years so Alcoa could supply raw materials to Aluminium Bahrain, or Alba.¹⁹ Alcoa’s mining operations in Australia were the source of the alumina that Alcoa supplied to Alba.²⁰

¹¹ Georgia Wilkins, ‘Subsidiaries Snared in Bribe Case’ *The Age*, 29 October 2014, p. 27, http://newsstore.fairfax.com.au/apps/viewDocument.ac;jsessionid=BCDEE9D378F8A30D1582FB8A2CAE396C?sy=afr&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=1637&clsPage=1&docID=AGE141029CI4J35L4A88

¹² Georgia Wilkins, ‘Subsidiaries Snared in Bribe Case’ *The Age*, 29 October 2014, p. 27, http://newsstore.fairfax.com.au/apps/viewDocument.ac;jsessionid=BCDEE9D378F8A30D1582FB8A2CAE396C?sy=afr&pb=all_ffx&dt=selectRange&dr=1month&so=relevance&sf=text&sf=headline&rc=10&rm=200&sp=brs&cls=1637&clsPage=1&docID=AGE141029CI4J35L4A88

¹³ EY, ‘Fraud Investigation & Dispute Services. UK Bribery Digest’, February 2017, p. 16.

¹⁴ EY, ‘Fraud Investigation & Dispute Services. UK Bribery Digest’, February 2017, p. 16.

¹⁵ EY, ‘Fraud Investigation & Dispute Services. UK Bribery Digest’, February 2017, p. 15.

¹⁶ EY, ‘Fraud Investigation & Dispute Services. UK Bribery Digest’, February 2017, p. 15.

¹⁷ EY, ‘Fraud Investigation & Dispute Services. UK Bribery Digest’, February 2017, p. 17.

¹⁸ Allison Martell, ‘Alcoa to pay \$384 million to settle Bahrain bribery charges’, *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

¹⁹ Allison Martell, ‘Alcoa to pay \$384 million to settle Bahrain bribery charges’, *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

²⁰ US Securities and Exchange Commission, ‘SEC charges Alcoa with FCPA violations’, 9 January 2014, <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936>

Alcoa failed to maintain adequate internal controls to prevent or detect more than US\$110 million in improper payments funnelled to Alba through a consultant between 1989 and 2009, according to the US Securities and Exchange Commission (SEC), which brought civil charges under the *Foreign Corrupt Practices Act*. In the words of the SEC:²¹

An SEC investigation found that more than \$110 million in corrupt payments were made to Bahraini officials with influence over contract negotiations between Alcoa and a major government-operated aluminum plant. Alcoa's subsidiaries used a London-based consultant with connections to Bahrain's royal family as an intermediary to negotiate with government officials and funnel the illicit payments to retain Alcoa's business as a supplier to the plant. Alcoa lacked sufficient internal controls to prevent and detect the bribes, which were improperly recorded in Alcoa's books and records as legitimate commissions or sales to a distributor.

The Department of Justice brought criminal charges under the same law.²²

The US SEC said Alcoa's subsidiaries used a London-based consultant to funnel the payments to officials. The subsidiaries cited by the US SEC were Alcoa World Alumina and Alcoa of Australia, both of which were parts of the joint venture.²³ The SEC stated:²⁴

According to the SEC's order, Alcoa's Australian subsidiary retained a consultant to assist in negotiations for long-term alumina supply agreements with Alba and Bahraini government officials. A manager at the subsidiary described the consultant as "well versed in the normal ways of Middle East business" and one who "will keep the various stakeholders in the Alba smelter happy..." Despite the red flags inherent in this arrangement, Alcoa's subsidiary inserted the intermediary into the Alba sales supply chain, and the consultant generated the funds needed to pay bribes to Bahraini officials. Money used for the bribes came from the commissions that Alcoa's subsidiary paid to the consultant as well as price markups the consultant made between the purchase price of the product from Alcoa and the sale price to Alba.

The Department of Justice's settlement was with Alcoa World Alumina LLC, a joint venture with Australia's Alumina Ltd. The venture, 60 percent-owned by Alcoa, agreed to plead guilty to a single count of violating the *Foreign Corrupt Practices Act* and pay US\$223 million in five installments over four years.²⁵

There is a wealth of corporate guidance materials that already exist for companies to develop compliance regimes to prevent bribery, so the imposition of an offence for failing to prevent foreign bribery is completely reasonable. For example, Transparency International UK has produced a booklet on 'Countering Small Bribes' to assist businesses. Guidance is also provided by the large accountancy firms, for a fee.

Other existing guidance materials include:

²¹ US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936>

²² Allison Martell, 'Alcoa to pay \$384 million to settle Bahrain bribery charges', *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

²³ Allison Martell, 'Alcoa to pay \$384 million to settle Bahrain bribery charges', *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

²⁴ US Securities and Exchange Commission, 'SEC charges Alcoa with FCPA violations', 9 January 2014, <https://www.sec.gov/News/PressRelease/Detail/PressRelease/1370540596936>

²⁵ Allison Martell, 'Alcoa to pay \$384 million to settle Bahrain bribery charges', *Reuters Business News*, 9 January 2014, <http://www.reuters.com/article/us-alcoa-settlement-idUSBREA080PN20140109>

- Guidance to the UK *Bribery Act 2010* at: <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>
- 'Adequate Procedures – Guidance to the UK *Bribery Act 2010*' from Transparency International UK at: <http://www.transparency.org.uk/our-work/publications/10-publications/95-adequate-procedures-guidance-to-the-uk-bribery-act-2010>
- 'A Resource Guide to the US Foreign Corrupt Practices Act' at: <http://www.sec.gov/spotlight/fcpa/fcpa-resource-guide.pdf>
<http://www.justice.gov/criminal/fraud/fcpa/guide.pdf>
- The OECD 'Recommendations for further combating bribery' includes as Annex II the 'Good Practice Guidance on Internal Controls, Ethics and Compliance', and can be found at: <http://www.oecd.org/corruption/governmentsagreetostepupfightagainstbribery.htm>
- Transparency International 'Business Principles for Countering Bribery' which can be downloaded from www.transparency.org
- OECD 'Anti-corruption and Ethics and Compliance Handbook' at: <http://www.oecd.org/g20/topics/anti-corruption/anti-corruption-ethics-and-compliance-handbook-for-business.htm>
- 'Small Bribes Buy Big Problems' at: www.cipe.org/publications/fs/pdf/092107.pdf
- 'Diagnosing Bribery Risk' by Transparency International UK which can be found at: <http://www.oecd.org/investment/anti-bribery/anti-briberyconvention/44884389.pdf> or <http://www.transparency.org.uk/our-work/publications/10-publications/678-diagnosing-bribery-risk>
- 'Guide for Anti-Corruption Risk Assessment, UN Global Compact 2013'
- 'RESIST: Resisting Extortion and Solicitation in International Transactions' by Transparency International which can be found at: www.transparency.org
- 'Doing Business without Bribery' by Transparency International UK which can be found at: <http://www.transparency.org.uk/our-work/publications/94-ti-uk-doing-business-without-bribery-trainers-handbook> or <http://www.doingbusinesswithoutbribery.com/>
- 'Fighting Corruption through Collective Action: A Guide for Business' which can be found at: http://info.worldbank.org/etools/docs/antic/Whole_guide_Oct.pdf

There is a British Standard companies can get to demonstrate their systems oppose bribery, BS 10500 Anti-Bribery.²⁶

There is also an international standard, ISO 37001 Anti-bribery management.²⁷ EY has provided a comparison between ISO 37001 and the UK Ministry of Justice Adequate Procedures Guidance for anti-bribery programs.²⁸ ISO 37001 is explicit about the need for formal documentation, while the Ministry of Justice Guidance is quite loosely structured around six principles. As a result of these differing approaches the ISO 37001 provides a fuller presentation of:²⁹

- What a complete bribery management program comprises, being more descriptive of the component policies, procedures and controls; and
- How the component parts interrelate and how one might go about building an effective compliance system over time.

²⁶ <http://www.bsigroup.com/en-AU/BS-10500-Anti-Bribery/>

²⁷ <https://www.iso.org/standard/65034.html>

²⁸ EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, pp. 2-4.

²⁹ EY, 'Fraud Investigation & Dispute Services. UK Bribery Digest', February 2017, p. 3.

AUSTRAC has issued advice to businesses to avoid being caught up in laundering money related to foreign bribery, including cases of Australian companies paying bribes to foreign officials, through their strategic analysis brief *Politically exposed persons, corruption and foreign bribery*.³⁰

The City of London Police run an Economic Crime Academy which provides an extensive range of courses on all aspects of economic crime, and tailors training to fit a relevant company or sector.³¹

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³⁰ AUSTRAC, 'Politically exposed persons, corruption and foreign bribery', July 2015.

³¹ UN Convention Against Corruption Civil Society Coalition, 'Interview with Mark Lugton, Detective Constable, Operations, UK Overseas Anti-Corruption Unit', 23 July 2015, http://uncaccoalition.org/en_US/interview-with-mark-lugton-detective-constable-operations-uk-overseas-anti-corruption-unit/