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Our reference: 1400356669

4 May 2017

Public Consultation: Foreign bribery amendments
Criminal Law Policy Branch
Attorney-General's Department
3-5 National Circuit
BARTON ACT 2600
By email: foreign.bribery@ag.gov.au

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Dear Sir/Madam

PUBLIC CONSULTATION PAPER – COMBATting BRIBERY OF FOREIGN PUBLIC OFFICIALS – PROPOSED AMENDMENTS TO THE FOREIGN BRIBERY OFFENCE IN THE CRIMINAL CODE ACT 1995

I refer to Government's Public Consultation Paper dated 4 April 2017 (Paper), inviting comments on its proposed amendments to the foreign bribery offence in the Criminal Code Act 1995 (Criminal Code).

As set out in Woodside Petroleum Ltd's (Woodside's) submission of 20 August 2015 to the Senate Economics References Committee's Inquiry into Foreign Bribery, Woodside considers that Australia's foreign bribery laws play a vital role in helping to ensure that host communities and economies derive genuine and lasting benefit from foreign investment by Australian business. Woodside believes that Australia's foreign bribery laws, and their enforcement, play a dual role in both deterring offenders and in supporting Australian companies which seek to do business overseas in a legal and ethical way. Woodside also considers that the effectiveness of Australia's foreign bribery laws can potentially be enhanced where there is consistency between these laws and the laws of other key jurisdictions to which Australian companies operating globally may become subject.

Woodside is therefore supportive of efforts by Government to strengthen Australia's foreign bribery legislative regime, and is pleased to have this opportunity to respond to Government's Paper. Woodside makes the following submissions in relation to a number of proposed measures set out in the Paper:

- Woodside supports Government's proposal to extend the definition of 'foreign public official' in section 70.1 of the Criminal Code, to include candidates for office. Woodside notes that this amendment would align the Criminal Code definition with the articulation of key offences in the US Foreign Corrupt Practices Act (FCPA), and would also be consistent with the definition of 'government official' set out in Woodside's Anti-Bribery and Corruption Policy.
- To the extent that it would simplify and clarify the foreign bribery offence, Woodside considers there would be merit in the removal from the offence of the requirement for the relevant benefit to be 'not legitimately due', and the replacement of this element with the concept of 'improperly influencing' a foreign public official to obtain or retain business or an advantage. Woodside agrees with Government's view, expressed in the Paper, that the concept of 'improper influence' more closely reflects the conduct of foreign bribery than the concept of a benefit being provided which is 'not legitimately due'. Woodside considers that the provision of statutory guidance on the factors to be considered in determining 'improper influence', which the Paper contemplates, would also assist in the interpretation of the offence and provide information which could potentially assist proactive businesses to monitor and enhance their compliance programs.
- As indicated in its August 2015 submission, Woodside would support the introduction of a specific corporate offence of 'failing to prevent foreign bribery', with a statutory defence of

'adequate procedures' designed to prevent bribery. Woodside's view remains that incorporating such an offence, and related defence, into the Criminal Code would further serve to dissuade Australian companies and individuals from engaging in bribery of foreign public officials, as well as provide a further incentive to develop and implement robust governance processes for the prevention of bribery. If this offence is introduced, Woodside would strongly support Government's proposal that the Criminal Code include a requirement for the Minister of Justice to publish guidance on the steps that companies can take to prevent bribery of foreign public officials. As set out in its August 2015 submission, Woodside believes that the UK Ministry of Justice's official guidance as to the principles informing 'adequate procedures' to prevent bribery and the US Department of Justice's *A Resource Guide to the U.S. Foreign Corrupt Practices Act* are examples of the type of guidance from which Australian businesses could benefit through equivalent guidance from Government.

- Woodside notes Government's proposal to also create a new, lesser, foreign bribery offence of 'recklessly bribing a foreign public official'. Woodside notes that this proposed new offence would differ from the existing foreign bribery offence in that it would not require a prosecutor to establish intention on the part of a company or individual to influence a foreign public official. Instead, the relevant element of the offence would be made out where a company or individual was reckless as to whether their conduct would improperly influence a foreign public official in relation to the obtaining or retaining of business or an advantage.

Woodside notes that under the Criminal Code definition, a person is considered to be reckless with respect to a circumstance if he or she is aware of a substantial risk that the circumstance exists or will exist, and having regard to the circumstances known to him or her, it is unjustifiable to take the risk.

While Woodside supports the strengthening of Australia's foreign bribery laws, it is concerned that the creation of an offence of recklessness in this context could create significant uncertainty for responsible Australian companies investing in foreign countries with higher levels of bribery and corruption risk. Such companies may feel compelled to decline legitimate investment opportunities out of concern that if a foreign public official was indirectly and unintentionally to receive an improper benefit from the company, then the company could still face criminal liability based on an allegation that it had (despite having a robust compliance program) taken an unjustified risk.

Woodside also notes that a foreign bribery offence based on a fault element of recklessness would go beyond the language used in the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions (which is directed against the intentional bribery of foreign public officials) as well as the foreign bribery laws of both the UK and the US. Once again, Woodside considers that there is merit in the alignment of Australia's foreign bribery laws with those of other jurisdictions to which Australian companies operating globally may become subject.

Woodside suggests that between them, the intention-based foreign bribery offence in the Criminal Code and the proposed new corporate offence of failing to prevent bribery (both of which are also broadly consistent with UK and US law and/or prosecutorial practice) would provide effective deterrence and the encouragement to companies to exercise greater vigilance in providing or offering benefits in circumstances where there is a substantial risk that a foreign public official will be influenced by the conduct.

Thank you once again for the opportunity to make this submission.

Yours faithfully



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