



Australian Government

Australian Government response to the
Senate Legal and Constitutional Affairs Committee report:

*Crimes Legislation Amendment (Combatting Corporate Crime) Bill
2019*

FEBRUARY 2021

Australian Government response to the Senate Legal and Constitutional Affairs Legislation Committee report

Inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019

The Government thanks the Committee for its consideration of the provisions of the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019.

The Government provides the following responses to the Committee's recommendations.

Recommendation 1:

The committee recommends that the Senate pass the bill.

Response:

The Government agrees with the recommendation and notes that the bill is currently before the Senate.

Dissenting Report — Labor Senators

Recommendation 1:

Schedules 2 and 3 should be deleted from the bill.

Response:

The Government does not accept the recommendation.

Schedule 2 — introduction of a deferred prosecution agreement scheme

The Dissenting Report raises concerns that the proposed deferred prosecution agreement (DPA) scheme is not supported by a considered rationale and does not contain sufficient safeguards to prevent companies from “buying their way” out of meaningful punishment for corporate crime.

The Government does not agree with this assessment. The proposed DPA scheme will provide an important tool for law enforcement agencies to address the difficulties of detecting, investigating and prosecuting serious corporate crime. This type of crime is inherently complex to investigate as it often involves offending underpinned by complex legal structures and fraudulent transactions, evidence held overseas and no easily identifiable victims. The scheme will address these challenges by providing incentives to corporations to self-report misconduct and cooperate with agencies to uncover the scope of the corporation’s offending and related misconduct, including by culpable individuals. Importantly, DPAs will be an additional tool for law enforcement; they will not be a substitute for prosecution if prosecution would be in the public interest and consistent with the Prosecution Policy of the Commonwealth.

The Government has reviewed the DPA scheme against the findings of the Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry. While DPAs and enforceable undertakings both provide an alternative course of action to immediate prosecution where a corporation undertakes to comply with certain conditions, the Government is confident the proposed DPA scheme incorporates robust and effective safeguards that distinguish it from enforceable undertakings. These safeguards will ensure that the scheme is transparent, subject to appropriate oversight and that every DPA is in the interests of justice and cannot be used by corporations to evade punishment.

Unlike enforceable undertakings, the DPA scheme is specifically designed to uncover and address offending that would not otherwise come to the attention of law enforcement. Cooperation with law enforcement agencies will be a key public interest factor in determining whether a corporation is a suitable candidate for a DPA. A corporation that adopts a genuine proactive approach in cooperating with law enforcement, including in relation to uncovering offending by individuals, is more likely to be invited to enter into DPA negotiations.

The proposed DPA scheme will not only support increased detection and investigation of serious corporate crime, but will also ensure that corporations are held to account for their misconduct. Corporations will be required to comply with the terms contained in the DPA including payment of a financial penalty of appropriate severity and agreement to a statement of facts relating to their misconduct. The scheme also provides scope to include any further terms as appropriate, such as removal of the profits of the corporation’s misconduct and requiring the corporation to consent to orders under the *Proceeds of Crime Act 2002*. The DPA may also require the corporation to address the particular harms to the community caused by the corporation’s misconduct, such as requiring payment of compensation to victims or donation to a charity. If the corporation materially contravenes the DPA, the agreed statement of facts can be used in any subsequent legal proceedings against the corporation.

All DPAs will need to be approved by an external approving officer—a former judge—with the necessary knowledge and experience, who must be satisfied that the proposed DPA is in the interests of justice and is fair, reasonable and proportionate. Approved DPAs will generally be published in full. Where it would not be in the interests of justice to do so, it will be open to the CDPP to redact sensitive parts of the relevant DPA (for example, parts that if publicly disclosed might jeopardise an individual prosecution related to matters in the DPA) or to not publish the DPA. Where the CDPP does not publish a DPA in full, it will be open to the CDPP to publish the DPA at a later time. In practice, the CDPP will seek to publish previously redacted or court-suppressed information as soon as the grounds for redaction or suppression are no longer relevant.

To strengthen the transparency of the DPA scheme, the Government will look to introduce amendments to the bill to explicitly require the approving officer to provide reasons for their approval to the CDPP and the corporation, and, if the DPA is approved, require the CDPP to publish the approving officer's reasons for approving the DPA on the CDPP's website within 10 business days.

The safeguards listed above—requiring a corporation's agreement to a statement of facts that can be used in subsequent prosecution, oversight by an approving officer, and publication of DPAs—in addition to cooperation with law enforcement as a key public interest factor, distinguish DPAs from enforceable undertakings. The DPA scheme will incentivise corporations to self-report and cooperate with law enforcement, while holding corporations to account for serious corporate crime.

The implementation of similar schemes overseas has demonstrated the effectiveness of DPA schemes in combatting corporate crime and have led to greater, not lesser, enforcement outcomes. For example, in early 2020, DPAs (or DPA equivalents) between Airbus and UK, French and US law enforcement authorities relating to alleged foreign bribery resulted in a total fine of €3.6 billion (approximately \$AUD6 billion) across these jurisdictions. This followed extensive cooperation between Airbus and investigative agencies which provided agencies with evidence which might otherwise not have come to their attention. The OECD recognises the value of DPAs as an enforcement tool against corporate crime and has welcomed the measures contained in the bill as a mechanism to increase Australia's enforcement against corporations.

Schedule 3 – definition of 'dishonest'

The Dissenting Report raised concerns that amendments to the definition of 'dishonest' in the schedule to the *Criminal Code Act 1995* (Cth) (Criminal Code) proposed in Schedule 3 of the bill were not accompanied by sufficient justification or explanation.

The current definition of 'dishonest' in the Criminal Code requires a defendant to have been dishonest according to the standards of ordinary people, and to have *known* that their conduct was dishonesty according to the standards of ordinary people. The amendments proposed in Schedule 3 will amend the definition to remove the requirement that the defendant must have known that their conduct was dishonest according to the standards of ordinary people. This will bring the definition into alignment with the approach taken by High Court jurisprudence (*Peters v The Queen* (1998) 192 CLR 493) and provide consistency with 2019 amendments to dishonesty offences in the *Corporations Act 2001* (Corporations Act).

The Government considers the proposed amended definition of 'dishonest' to be the preferred test for determining dishonesty under the Criminal Code and that there is sound policy justification for these amendments. The question of whether a defendant subjectively knew their conduct was dishonest according to the standards of ordinary people should be an irrelevant consideration in determining whether behaviour was dishonest or in establishing the relevant intention. Furthermore, law enforcement and prosecutorial experience has shown that it can be difficult to obtain sufficient admissible evidence to establish that the defendant was aware or knew that they were dishonest according to the standards of ordinary people. This means that even if

a person was aware that their conduct fell short of community standards, practical difficulties in finding and adducing evidence means a person may too readily escape liability.

Bringing the definitions of 'dishonest' under the Criminal Code and Corporations Act into line would also address practical challenges that can arise where dishonesty offences under the Corporations Act and the Criminal Code are brought together. There is a high risk of confusion where juries are required to apply two different tests of dishonesty which can lead to severance of indictments or charges being dropped altogether. For example, it might be possible for directors' duties offences under the Corporations Act to be prosecuted alongside other dishonesty-based offences, such as domestic bribery or general dishonesty offences, which could create difficulties for a jury where the tests for dishonesty are different. If the tests for dishonesty are aligned, then it will be less complicated for a jury should various dishonesty offences be included in the same indictment.

While the new definition would define dishonesty by reference to a single objective standard, the application of the test for dishonesty by a court would necessarily involve an assessment of the defendant's subjective state of mind against the standard. In other words, a prosecution would still need to prove that the defendant has the subjective knowledge, belief or intention that rendered the relevant conduct dishonest.

Consistent with the amended definition of dishonesty, the trial judge would need to:

- identify the knowledge, belief or intent which is said to render the relevant conduct dishonest;
- instruct the jury to decide whether the accused had that knowledge, belief or intent and, if so, to determine whether, on that account, the act was dishonest; and
- direct the jury that, in determining whether the conduct of the accused was dishonest, the standard is that of ordinary decent people.

The bill would not change the application of dishonesty as a fault element. Furthermore, the defence for mistake or ignorance of fact in section 9.1 of the Criminal Code will continue to apply to protect defendants who are under a mistaken belief about, or ignorant of, facts, where that mistaken belief or ignorance negates any dishonesty applying to the relevant physical element of the offence. For example, a person accused of dishonestly causing a loss to the Commonwealth under section 135.1(5) of the Criminal Code could avail themselves of this defence if they were under a genuine but mistaken belief that they were entitled to certain benefits from the Commonwealth.

The Government further notes that there are currently 56 offences in the Criminal Code that rely on this definition of dishonesty. These include the general dishonesty offences (sections 135.1 and 474.2), offences for the bribery of a Commonwealth public officials (section 141.1) and for dishonestly obtaining or dealing in personal financial information (section 480.4).

The Government will provide an Addendum to the Explanatory Memorandum to incorporate additional explanation and justification for the proposed amendment to the Criminal Code definition of 'dishonest'. The Addendum will further explain how the new definition of dishonest will operate and clarifies that the new definition will still require a subjective assessment of the defendant's state of mind. The Addendum will also provide an example of how the new definition of dishonest will be interpreted in relation to a dishonesty offence.

Additional comments – Australian Greens

Recommendation 1:

That the Senate suspend consideration of this bill until after the Attorney-General has tabled the Australian Law Reform Commission's (ALRC) report into Australia's corporate criminal responsibility.

Response:

The Government tabled the ALRC's final report on 31 August 2020.

The final report endorsed measures in the bill to introduce a new corporate offence for 'failure to prevent' foreign bribery and to amend the Criminal Code definition of dishonesty. The report also noted that submissions to the ALRC's inquiry were broadly supportive of the introduction of a deferred prosecution agreement scheme.

As noted above, the Government will look to introduce amendments to the bill to explicitly require the approving officer to provide reasons for their approval to the CDPP and the corporation, and, if the DPA is approved, require the CDPP to publish the approving officer's reasons for approving the DPA on the CDPP's website within 10 business days. These amendments would partially implement Recommendation 20 of the ALRC's final report which recommended the bill be amended to require judicial oversight of DPAs and publication of the reasons for any DPA approval in open court.