

8 February 2018

Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
CANBERRA ACT 2600

via email: economics.sen@aph.gov.au

Dear Secretary

Inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee inquiry into the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (Bill)* and the associated explanatory material.

The Australian Institute of Company Directors (**AICD**) is committed to excellence in governance. We make a positive impact on society and the economy through governance education, director development and advocacy. Our membership of more than 42,000 includes directors and senior leaders from business, government and the not-for-profit sectors.

The AICD supports the Bill's broad aim of overcoming the challenges currently associated with detecting and addressing serious corporate crime. This submission seeks to ensure that the changes proposed in the Bill will achieve the reform objective in a fair, reasonable and effective manner, and in accordance with generally accepted legal principles.

1. Summary

The AICD broadly supports the amendments proposed to the foreign bribery offence in s 70.2 of the Criminal Code. In our view though, the revised offence would be improved by replacing its novel 'improperly influencing' test with a more established dishonesty-based test (see Section 2 below).

The AICD commends the policy intention of the proposed new failure to prevent foreign bribery offence, being the provision of more incentives for companies to implement measures to prevent foreign bribery. However, we are concerned with various aspects of proposed s 70.5A, particularly its imposition of absolute liability and the reversal of the onus of proof. Our recommendations for the proposed offence include revisiting the definition of 'associate', introducing a fault element and placing the onus of proof on the prosecution (see Section 3). In any event, it will be critically important for the s 70.5C Ministerial guidance on preventing foreign bribery to be consulted on extensively before the failure to prevent offence comes into effect.

The AICD generally endorses the introduction of a deferred prosecution agreement (**DPA**) scheme for certain corporate crimes, although we recommend that determinations of a material contravention of a DPA be subject to merits review (see Section 4).

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2. Proposed revised foreign bribery offence

The AICD supports the proposed replacement of the 'not legitimately due' test which underpins the current foreign bribery offence in s 70.2 of the Criminal Code. We acknowledge the difficulties faced in investigating and prosecuting this offence, and welcome the government's efforts to improve its construction.

In our 5 May 2017 submission to the Attorney-General's consultation on the foreign bribery offence, the AICD advocated for the 'not legitimately due' test to be replaced with a 'dishonesty' test (specifically the *Peters* test), rather than the 'improperly influencing' test outlined in the consultation paper. Our concern was that, unlike 'dishonesty', the concept of 'improperly influencing' does not have a well-established legal meaning. While the phrase 'improper influence' can be found in some (relatively limited) State and Commonwealth statutes, it does not appear to have been judicially considered.

We are also concerned that the factors in proposed s 70.2A(2) would, contrary to the intention of the drafters, add additional complexity to the offence. This is because each individual matter could be the subject of judicial interpretation and explanation. Each factor would likely cause an expansion of the evidence required for a prosecution and a defence.

Accordingly, the AICD remains of the view that a test based solely on dishonesty is preferable to the multi-factorial 'improperly influencing' test. A dishonesty-based test would provide a greater degree of certainty to those dealing with foreign officials, given that it is so well established.

Further, a dishonesty-based offence would broadly align the foreign bribery provisions with the domestic bribery provisions in the Criminal Code as they require proof of dishonesty. To enhance the cohesion and certainty of our legal framework, it is desirable for the test for bribery offences to be the same, irrespective of whether the person being bribed is a foreign, or local, public official.

Additionally, we recommend the inclusion of a three-year review requirement to ascertain whether the revised offence is effective.

3. Proposed failure to prevent foreign bribery offence

The AICD has serious reservations about the proposed failure to prevent foreign bribery offence. While we endorse the offence's objective of creating 'a strong positive incentive to encourage corporations to adopt measures to prevent foreign bribery,'¹ we are concerned that proposed s 70.5A is unfair, as it would expose companies endeavouring to comply with the law to a disproportionately high risk of criminal liability on account of the conduct of their associates.

Our concern is based on the following factors.

- The definition of 'associate' is very broad – The proposed definition of 'associate' extends beyond officers and employees to capture agents and contractors, subsidiaries, controlled persons, and persons who perform services for or on behalf of the corporation. Use of such a broad concept is a departure from the existing approach to corporate criminal responsibility found in the Criminal Code. Part 2.5 of the Criminal Code attributes to corporations the conduct of officers, employees or agents acting within the actual or apparent scope of their authority.

Significantly, a corporation may have little practical control or influence over its contractors or service providers, particularly if those contractors or service providers have superior bargaining power. Nor does a parent company necessarily control the activities of a

¹ Explanatory Memorandum, *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, 18 at [95].

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subsidiary merely because it is the majority owner of the subsidiary. In many corporate groups, a parent may have a limited degree of control over the day-to-day management of the subsidiary, despite being able to control the composition of the subsidiary's board.

Defining the term 'associate' so broadly exposes Australian corporations to a serious risk of prosecution for the conduct of persons with which they have an association but not necessarily any actual or effective influence or control over.

- The offence reverses the onus of proof by placing a legal burden on the defendant corporation to show that it had adequate procedures in place to prevent foreign bribery by its associates. The rule of law requires that the defendant should only bear the onus of establishing a matter where that matter is within the defendant's knowledge and not available to the prosecution. Reversing the onus of proof carries a significant risk of hindsight review in a court proceeding. It will require a corporation facing prosecution to prove (to the legal burden) that it had adequate procedures in place, notwithstanding that it will be self-evident that those procedures did not prevent an associate from bribing a foreign official for the profit or gain of the corporation. A corporation accused of this offence would be faced with an 'up-hill' evidential battle of proving that it had adequate procedures in place notwithstanding the occurrence of the bribe. For this reason, in a court proceeding, the prosecution will have a strong and unfair evidential advantage over the defendant corporation.

In addition to reversing the onus of proof, the proposed offence places the 'legal burden' on the defendant corporation to prove that it had adequate procedures in place to prevent an associate's commission of the foreign bribery offence. Ordinarily, the defendant should bear an evidential, not legal, burden of proof.² The policy intention of encouraging corporations to adopt measures to prevent bribery is, in our view, insufficient justification for departing from this generally accepted approach to framing offences.

- 'Absolute liability' applies to the offence – The 'absolute liability' nature of the offence (imposed under s 70.5A(2)) means that, in the absence of demonstrating adequate procedures to prevent foreign bribery of associates, a corporation will be liable under s 70.5A without the need for the prosecution to establish any culpability on the part of the corporation. Legislative use of 'absolute liability' requires strong justification and should only occur in limited circumstances.³ Given the seriousness of the proposed offence, its broad application, and the potential penalty and stigma of a conviction, the application of absolute liability to the offence is not adequately justified.
- The offence element requiring that the associate engaged in the bribery 'for the profit or gain of the body corporate' does not include a materiality threshold.

In our view, these features of the offence create an unduly onerous and punitive law. They create a real risk that the proposed failure to prevent offence would become the 'default' or 'go to' offence, used to prosecute all instances of corporate failure to prevent foreign bribery, rendering the primary s 70.2 offence redundant. This is particularly problematic and unjust considering that both offences attract the same penalties, and yet the failure to prevent offence does not require a finding of fault on the part of the corporation.

We urge the Committee to consider whether the primary foreign bribery offence in s 70.2 of the Criminal Code (as amended under the Bill), together with the existing ancillary offences of promoting, aiding and abetting, or conspiring to commit the foreign bribery, are sufficient to incentivise corporations to adopt adequate measures to prevent foreign bribery.

² Attorney-General Department's *Guide to Framing Commonwealth Offences*, 51 at [4.3.2].

³ Attorney-General Department's *Guide to Framing Commonwealth Offences*, 22 at [2.26].

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Should the government proceed with introducing a failure to prevent offence, the AICD recommends the following amendments to improve its fairness and proportionality:

- Limit the definition of ‘associates’ so that it only captures a corporation’s officers, employees and agents. In this context it is important to recognise that subsidiaries, independent contractors, and other entities ‘controlled’ by the corporation may themselves be subject to the revised foreign bribery offence and, if they are a corporation, the failure to prevent foreign bribery offence.
- Restore the onus of proof so that the prosecution needs to prove the corporation failed to have adequate procedures in place to prevent the commission of a foreign bribery offence by an associate. Given the seriousness of the offence and penalties for breach, the onus of proof should rest with the prosecution, as is ordinarily the case. Failing that, at the very least, the standard of proof imposed on the defendant should be reduced from the legal burden to the evidential burden. This would still require a corporation to adduce or point to evidence that suggested a reasonable possibility that it had adequate procedures in place to prevent an associate committing an offence, but would diminish the likelihood of an unfair result.
- Replace the ‘absolute liability’ nature of the offence with a requirement that the prosecution prove that the corporation failed to prevent foreign bribery intentionally, knowingly or recklessly.

Furthermore, if the offence proceeds, it is essential that any compliance guidance provided by the Minister under proposed new 70.5C be consulted on prior to the offence commencing. The offence should also be reviewed for effectiveness within a reasonable period, say three years.

4. Proposed Commonwealth DPA scheme

The AICD recognises that the proposed DPA scheme is intended to assist in addressing serious corporate crime by encouraging companies to self-report misconduct by offering greater certainty of outcome when compared to litigation. We further note that it aims to enhance the accountability of Australian business for serious corporate crime and to support improved corporate culture. The AICD supports these objectives and broadly endorses the proposed DPA scheme.

While this submission does not address the DPA provisions of the Bill in detail, we do recommend an amendment so that determinations of a material contravention of a DPA by the Director of the CDPP are subject to merits review. It is in the interests of fairness and justice that a mechanism exists to confirm that determinations are correct and preferable.

5. Conclusion

We hope our comments will be of assistance to the government. If you would like to discuss any aspect of this submission, please contact me on _____ or at _____

Yours sincerely

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