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**International Bar Association
Anti-Corruption Committee
Submission to
Australian Senate Legal & Constitutional Affairs
Legislation Committee
Legislative Reforms Combating Corporate Crime
2017**

23 January 2018

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International Bar Association Anti-Corruption Committee

Submission to Australian Senate Legal & Constitutional Affairs Legislation Committee on Legislative Proposals Combatting Corporate Crime

1 Introduction

1.1 *International Bar Association*

- (a) The International Bar Association (**IBA**) is the global voice of the legal profession and includes over 80,000 of the world's leading lawyers and 190 Bar Associations and Law Societies worldwide as its members.
- (b) The IBA has had a longstanding interest in, and advocacy of, issues concerning transparency and probity in the public and private sectors and steps that countries around the world can take to combat foreign bribery and corruption and serious financial crime. Critical to this work is the manner by which governments and business respect and treat those (employees and others) who blow the whistle on suspected corporate or financial crime.

1.2 *IBA Anti-Corruption Committee*

- (a) The IBA's Anti-Corruption Committee (the **Committee**) draws its members from around the world made up of anti-corruption lawyers (in private practice and in the public sector), academics, prosecutors, investigators, judges and forensic accountants with legal qualifications. This membership gives the Committee a unique opportunity to comment upon important initiatives that affect anti-bribery and anti-corruption laws, policies and how they are implemented and enforced around the world and in particular countries.
- (b) The Committee is pleased to take this opportunity to make a submission to the Australian Senate Legal and Constitutional Affairs Legislation Committee on the proposed reforms to combat corporate crime set out in the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*.
- (c) The Committee members are made up of experienced practitioners practicing in the area of foreign bribery and anti-corruption compliance, investigation, prosecution and defence. The spread of the group cover the expertise both the common law and civil jurisdictions.
- (d) The Committee has made a number of submissions to the Australian Government and to Senate and Parliamentary Committee that are relevant to this submission. They include the following:
 - (i) Amended Submission to the Australian Senate Economics Reference Committee on Australia's Foreign Bribery Laws dated 24 August 2015;
 - (ii) Submission to the Australian Attorney General's Department on a proposed model for a Deferred Prosecution Agreement Scheme in Australia dated 26 April 2017;
 - (iii) Submission to the Australian Attorney General's Department on Proposed Amendments to the Foreign Bribery Offences dated 26 April 2017; and

- (iv) Supplementary Submission to the Australian Senate Economics Reference Committee on Australia's Foreign Bribery Laws dated 4 August 2017.

2 Executive Summary

2.1 *Proposed New Foreign Bribery Offence*

- (a) Subject to the comments in this Submission, the Committee supports the proposed legislative amendments to amend section 70.2 of the Criminal Code Act 1995 (Cth) (**Criminal Code**).

2.2 *Proposed Corporate Offence of Failing to Prevent Foreign Bribery*

- (a) Subject to the comments in this Submission, the Committee supports the proposed legislative amendment by the addition of the new corporate offence of failing to prevent bribery of a foreign public official.
- (b) The Committee encourages the Government (the relevant Minister) to publish the guidance required under the proposed section 70.5B of the Criminal Code for consultation.

2.3 *Proposed Commonwealth Deferred Prosecution Deferment Scheme*

- (a) Subject to the comments in this Submission, the Committee supports the proposed legislative amendments to the Director of Public Prosecutions Act 1983 (Cth) (**DPP Act**) to create a statutory framework for a deferred prosecution agreement (**DPA**) scheme for nominated Commonwealth offences.

3 Detailed Review of Proposed Legislative Reforms

3.1 *Previous IBA Anti-Corruption Committee Submissions*

- (a) The Committee has made of number of earlier submissions on these matters, see clause 1.2(d) above.
- (b) These submissions have each supported changes to, relevantly, the Criminal Code foreign bribery offence and for the introduction of a DPA scheme in Australia.

3.2 *Proposed New Foreign Bribery Offence*

- (a) Without repeating the matters set out in the April 2017 Submission, the Committee wishes to note the matters listed below.
- (b) While the Committee previously expressed caution about the introduction of the concept of "improperly influence", the draft Bill has kept that concept. The Committee remains of the view that there will continue to be uncertainty as to what that concept will mean, as a matter of fact and of law, for some years until there are authoritative appellate judgments which consider the phrase. In addition, proposed section 70.2A(4) of the draft Bill makes it clear that the matters to which a trier of fact may have regard in determining whether a person has or has not sought to improperly influence another person, are not in any way limited. Indeed, it seems the trier of fact may have regard to any matter, but particularly those matters listed in the proposed section 70.2A(3) of the draft Bill. A general discretion may be warranted in addressing

corporate crime. The Committee remains of the view that the use of “dishonesty” as an alternative concept is to be preferred. The Committee notes that the terms of Article 1 of the OECD Convention do not suggest any qualification is required to the intentional conduct to be prohibited (the bribery of a foreign public official). The Committee believes the inclusion of the concept of “improperly influence” is likely to create uncertainty moving forward.

- (c) The Committee has noted that the draft Bill does not include any offence for reckless conduct constituting the bribery of a foreign public official. While the Committee originally supported such an offence, it questioned the extent to which it would in practice be used if the proposed strict liability corporate offence of failing to prevent bribery was enacted. On balance, the Committee supports dropping the proposed reckless foreign bribery offence on the basis of the proposed corporate offence, discussed below.

3.3 Proposed New Corporate Offence of Failing to Prevent Foreign Bribery

- (a) In the Committee April 2017 Submission, it noted that the definition of “associate” for the purposes of the new corporate offence might be seen as too limited. The Committee is concerned to ensure that the legal status of an “associate” is in no way limited, and should clearly and unambiguously capture conduct by and natural or incorporated person, including any association (incorporated or unincorporated) or persons operating through a trust or any other structure designed or created to facilitate the relevant conduct in a manner to shield others from potential liability. As the Committee noted in its April 2017 Submission, the question of whether the payer of the bribe performs services on behalf of a company should be determined by reference to all the relevant circumstances rather than what appears to be an exclusive list.

3.4 Proposed Commonwealth DPA Scheme

- (a) Without repeating the matters set out in the April 2017 Submission, the Committee wishes to note the matters listed below.
- (b) The Committee has noted the publication on 17 December 2017 by the office of the CDPP of the *Best Practice Guidelines* setting out the principles and process that the Australian Federal Police (**AFP**) and the CDPP will apply where a company self-reports conduct involving a suspected breach of Division 70 of the Criminal Code (Cth) or a related offence. The Committee considers these Guidelines are a good start for companies (and their advisers) to understand how the CDPP will exercise its discretion in terms of whether or not to initiate negotiations for a DPA.
- (c) The Commonwealth offences to which the DPA scheme will apply are outlined in section 17B of the proposed DPP Act. The Committee supports the inclusion of the identified offences (as primary offences) and the application of the secondary liability offences under section 11 of the Criminal Code.
- (d) The Committee supports the identified terms of a DPA set out in the proposed section 17C of the DPP Act (both as to the mandatory terms (in section 17C(1)) and the optional terms (in section 17C(2))).
- (e) The approval process for a DPA is set out in the proposed section 17D of the DPP Act (and in section 17F to the extent that a DPA may be varied). The Committee supports the process with one caveat. It is not clear that the decision (or reasons) of the approving officer) are to be

published. Section 17D(6) states, relevantly, that “the approving officer must give written notice of the decision to the person (the company) and the Director” and section 17D(7) thereafter requires the Director to publish the DPA or a suitable version. The Committee is concerned that all that will or may be published is the terms of the DPA and the “decision” whether or not a DPA will or will not be approved, absent reasons. The Committee strongly believes that the approving officer must give reasons for making a decision and those reasons, together with the DPA (to the extent the Director does so without prejudice to any other ongoing investigation) must both be published. This will enhance the integrity of the process, it will ensure that Australia follows the UK model with reasons, orders and the DPA being published) so the community can see the system working transparently.

- (f) The Committee supports the provisions set out in the proposed section 17H of the DPP Act outlining how evidence concerning the negotiation of a DPA will be dealt with.

4 Other Matters

4.1 *AFP and CDPP Best Practices Guideline – Self Reporting by Companies*

- (a) The Committee has noted the publication on 17 December 2017 by the office of the CDPP of the *Best Practice Guidelines* setting out the principles and process that the Australian Federal Police (**AFP**) and the CDPP will apply where a company self-reports conduct involving a suspected breach of Division 70 of the Criminal Code (Cth) or a related offence.
- (b) The Committee considers these Guidelines are a good start for companies (and their advisers) to understand how the CDPP will exercise its discretion in terms of whether or not to initiate negotiations for a DPA.

4.2 *Other Matters*

- (a) The Committee has noted and supports the proposed consequential amendments to other laws to give effect to the substantive amendments.