6 February 2018

Morgan Lewis & Bockius LLP Submission to the Australian Senate Legal & Constitutional Affairs Legislation Committee

Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017

1. Introduction

1.1 We thank the Committee for the opportunity to make this submission in relation to the proposed amendments in the Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017 (the "**Bill**").

1.2 The responses below are based on our international experience of legislation and enforcement relating to corporate and individual misconduct, with particular reference to the UK, US and Asia.

1.3 We would be happy to provide further submissions as the Committee may find useful.

2. Executive summary

2.1 Our submission focuses on the provisions in the Bill and comparing it to the regimes in the UK, US and Asia. We believe that the Bill will improve the ability of Australian authorities to prosecute serious corporate crime.

2.2 We would encourage the issuance of further guidance in relation to certain aspects of the Bill to provide greater clarity to corporates. For example, corporates would benefit from guidance in relation to how the term "associates" will be applied in practice and the level of cooperation expected from corporates who are seeking to enter into a Deferred Prosecution Agreement ("**DPA**").

2.3 In addition, the Committee should consider whether to clarify its position in relation to facilitation payments, especially in light of countries across the world taking an ever restrictive view of such payments. We would recommend that the Committee follows the more restrictive approach and prohibit facilitation payments.

2.4 We would also encourage the Committee to consider adopting a broader jurisdictional scope to the corporate offence of failing to prevent bribery of foreign public officials (the "**Corporate Offence**"). We recommend that the scope is extended to cover: (i) corporates that carry on business in Australia even if they are incorporated or registered outside of the jurisdiction; and (ii) bribery of domestic public officials and private parties. We believe this would send a message that anyone seeking to do business in Australia is obliged to be proactive in developing a compliance programme to the Australian standard.

2.5 The implementation of DPAs in Australia should promote a coordinated approach between corporations and prosecuting authorities when dealing with instances of corporate crime. Australia will be cooperating with a number of countries globally who are incentivising businesses proactively to enhance their compliance programmes, report misconduct and cooperate with the regulators. We would recommend that the Committee consider: (i) the extent to which monitorships should be an available term of a DPA in appropriate cases; and (ii) issuing guidance in relation to the appointment and methodology of monitors.

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3. Amended definition of foreign public official

3.1 The Bill amends the definition of foreign public official in section 70.1 of the Criminal Code to include an "*individual standing, or nominated (whether formally or informally) as a candidate to be a foreign public official*". Candidates are also included in the definition of foreign officials in the Foreign Corrupt Practices Act 1977 ("**FCPA**"). By contrast, the definition of Foreign Public Official under the UK Bribery Act 2010 ("**UKBA**") is more narrowly defined and does not include candidates. Under UK law, only an individual who either holds a legislative, administrative or judicial position, exercises a public function outside of the UK or is an official or agent of a public international organisation is deemed to be a foreign public official. Singapore has adopted a similar approach to the UK and does not include candidates in its definition of Foreign Public Official. This is thought likely to remain the case after the upcoming review of the anti-bribery laws in Singapore.

3.2 We recognise the rationale for seeking to restrict and prosecute the bribery of individuals who are in the process of running for office and who might in the future make political judgments and be influenced by the payments made prior to their appointment.

3.3 The challenge for the authorities will be considering how broadly the term "candidate" might be interpreted and, in particular, when an individual is deemed to be a candidate for public office. During candidacy, it may be that third party agents or representatives of the candidates are the more likely target for bribes. Based on our experience, it may also be difficult to determine when someone becomes a "candidate" in some jurisdictions, where the process for electing a public official may not be as transparent as in other jurisdictions.

4. Section 70.2 – Bribing foreign public officials

4.1 The Bill introduces the concept of "improper influence" of a foreign public official in order to obtain or retain business or an advantage. The UKBA has adopted a similar approach although it does not specify the non-exhaustive factors that should be taken into account when considering whether improper influence has occurred. The Singapore Prevention of Corruption Act ("**PCA**") uses different wording but, like the UKBA, adopts a high level definition which is meant to cover a broad spectrum of offences. Additionally, the Singapore PCA crystallises the act at the time of receipt of gratification irrespective of whether the corrupt purpose could or could not be carried out.

4.2 Under the FCPA, it is illegal to, with corrupt intent, offer or provide anything of value to a foreign official for the purpose of gaining or retaining a business advantage. The word "corruptly" means an intent or desire to wrongly influence the recipient.

4.3 We suggest that a high level definition of what constitutes improper influence in the legislation may be preferable, as it provides the authorities with greater flexibility when applying the law to the specific fact matrix of each case. The Committee could consider providing ancillary and non-statutory guidance, which can provide insight for corporates and prosecutors as to the factors which will be considered in determining whether there has been "improper influence".

4.4 We agree that the following revisions contained in the Bill should facilitate the prosecution of offences relating to bribing foreign public officials: (i) removing the requirement that a foreign public official must be influenced in the exercise of their duties. The exact nature and scope

of a foreign public official's duties are often difficult to ascertain and prove and so the proposed amendment should alleviate this evidentiary burden; (ii) extending the offence to cover advantages of any kind; and (iii) clarifying that the prosecution does not need to prove the particular business or advantage that is related to the bribery.

4.5 We also believe that the Committee should consider clarifying its position on facilitation payments. The UK and Singapore have adopted the approach that facilitation payments will not be permitted. Facilitation payments are permitted under the US FCPA in specific circumstances, although we have seen that the defence is now being applied much more narrowly by the US authorities. Countries across the world are taking an increasingly restrictive view of facilitation payments. We would suggest that the Committee considers following the more restrictive approach of prohibiting such payments. Facilitation payments can create an evidentiary burden for authorities when they are trying to prosecute individuals for breaching anti-bribery rules. It is often difficult to distinguish between what constitutes a bribe and a facilitation payment. In any case, primarily due to the varying approaches to facilitation payments in different jurisdictions, we have also observed that many corporates (including those based in the US) have decided to enforce in its compliance programme a global ban on facilitation payments to minimise any potential exposure.

5. Section 70.5A - Corporate offence of failing to prevent bribery of foreign public officials

5.1 The new Corporate Offence provision in the Bill broadly follows the UKBA offence of "Failure of commercial organisations to prevent bribery". However, the application of the Corporate Offence is noticeably different between the Bill and the UKBA.

The application of the Corporate Offence

5.2 In the UK, the Corporate Offence relates to all types of bribery, including bribery between two private parties, whereas the Bill restricts the application of the Corporate Offence to bribing foreign public officials, like the FCPA in the US[1]. This means that under the Bill there is currently no provision to encourage corporates to prevent bribery of domestic public officials nor other private parties.

5.3 In addition, the Corporate Offence in the Bill applies to constitutional corporations and corporations either incorporated in a Territory or taken to be registered in a Territory under Section 119A of the Corporations Act 2001. Significantly, under the UKBA the equivalent Corporate Offence applies both to companies incorporated or formed in the UK but also to companies that "carry on business" in the UK (irrespective of the location of the bribery). Under UK law, businesses incorporated outside the UK may be liable under this offence if they are carrying on a business or part of a business in the UK.

5.4 The UK Ministry of Justice issued guidance about the scope of "carrying on business" under the UKBA[2]. The guidance provides that carrying on business requires organisations to have a "demonstrable business presence" in the UK. For example, the mere fact that a company's securities are trading on the London Stock Exchange, in itself, will not be enough to constitute

[1] Although the US does have a books and records offence, which may lead to prosecution of corporations who pay bribes to non-foreign officials.
[2] https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/181762/bribery-act-2010-guidance.pdf

carrying on a business in the UK. Likewise, having a UK subsidiary may not, in itself, mean that a parent company is carrying on a business in the UK, since a subsidiary may act independently of its parent or other group companies. In essence, in developing this framework, the UK authorities reinforced their message that the UK should not permit access to its markets by organisations based outside of the UK for whom corrupt activity is a mode of business. In turn, this approach means that international, non-UK headquartered businesses who seek to operate in the UK are obliged to be proactive in developing compliance programmes to the UK standard.

5.5 To the extent that Australia wishes to send a similar message and create a similar environment, we would encourage consideration of a broader jurisdictional scope of the Corporate Offence to ensure that it creates an onus on all companies carrying out business in Australia to create adequate procedures to prevent bribery of foreign and domestic public officials and bribery between private parties.

5.6 In our view, by extending the scope of the Corporate Offence, the Committee would be enforcing the message to corporates both domestically and overseas that Australia will not tolerate bribery and corruption.

<u>The definition of Associates</u>

5.7 Associates are defined in the Bill as an officer, employee, agent, contractor, subsidiary or controlled corporate or performing services for or on behalf of the other person. Under the UKBA, an "associated person" is defined as a person who performs services for or on behalf of the corporate. The UKBA also provides that all relevant circumstances need to be considered when determining whether a person performs services on behalf of a corporate as opposed to merely looking at the nature of the relationship between the person and the corporate.

5.8 The FCPA similarly prohibits payments through third parties and intermediaries. Third parties include agents, consultants, and distributors, among others, that provide services on behalf of a company. Singapore uses the term "any person" and no distinction is drawn between associates and principals. However, investigations in Singapore do extend to associate third party service providers. We expect that a specific definition of associates is likely to be included in the upcoming PCA review.

5.9 The challenge for corporates subject to the UKBA, has been determining, without further guidance or judicial commentary, the extent to which they may be liable for parties down the 'contractual chain' from their direct counterparty. The UK has issued guidance stating that the way in which commercial organisations may decide to approach bribery risks, which arise as a result of a supply chain is by: (i) employing anti-bribery procedures such as risk based due diligence and using anti-bribery terms and conditions in its relationships with the contracting counterparty; and (ii) requesting that the counterparty adopt a similar approach with the next party in the chain. We would invite the Committee to consider whether it would be helpful to publish guidance on how the definition of "associate" will be applied in practice.

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6. Deferred prosecution agreements

6.1 The DPA framework has long been a feature of the US system and is now being used in an increasing number of countries globally to incentivize corporations and businesses to enhance their compliance programmes, to report misconduct to authorities, and to cooperate at the earliest available opportunity. For example, in late 2017 France issued its first settlement in the context of corporate crime[3]. More recently, the Singapore Minister for Home Affairs and Law K. Shanmugam announced that the government is considering the inclusion of Deferred Prosecution Agreements in the latest round of amendments to the Criminal Procedure Code and Evidence Act[4] in order to give effect to further amendments anticipated in the Singapore PCA.

6.2 In Singapore, for example, the suggested DPA framework represents a significant shift from the perceived reluctance of the Singapore authorities to prosecute corporate offenders for criminal conduct, choosing instead to focus on the main controlling minds and culpable individuals within the organisation. The implementation of the DPA framework highlights the increased sophistication and resources needed to sanction corporations beyond criminal investigation by the police and full prosecution in criminal proceedings. It also reflects the global development of DPA frameworks beyond the US and UK. It is considered a timely and, some would say, overdue formalised development to Singapore's criminal procedure laws given the increasing complexity of business, the increased regulatory environment, and an interconnected commercial world in which the Asia-Pacific region is often a gateway or regional headquarters for multinational corporations' Asian operations.

6.3 The implementation of DPAs by Australia indicates a pan-regional commitment to developing corporate liability frameworks. Corporations with operations in Asia-Pacific will be subject to increasingly sophisticated process to deal with corporate misconduct in the region, and the prevalence of communication and cooperation between Australian, Singaporean, US, and other prosecuting authorities globally. We have already seen multi-jurisdictional settlements involving European, US, and Latin American authorities. We can expect that Australian authorities will continue to participate in this cooperative approach using this new mechanism.

6.4 As demonstrated in the US and UK, the DPA framework promotes a coordinated approach between corporations and prosecuting authorities to detecting and dealing with instances of corporate crime. While full prosecution against corporations remains available to prosecuting authorities, the DPA has become an established regulatory tool in the US and is now an emerging tool for prosecutors in Europe and, potentially, Asia, through which authorities have sanctioned corporate criminal conduct.

6.5 By implementing a DPA framework, Australia is following the international standards in providing its prosecution authorities with a flexible tool to deal effectively with corporate crime while encouraging a transformational shift in approach by corporates towards compliance, and all the while retaining the option for the prosecution of corporates and individuals.

Terms of a DPA

[3] https://www.morganlewis.com/pubs/sapin-ii-law-the-new-french-anticorruption-system
[4] https://www.morganlewis.com/pubs/singapore-expected-to-introduce-deferred-prosecution-agreement-regime

6.6 Similarly to the UK, the Bill specifies the terms which may form part of the DPA and requires the publication of a statement of facts relating to each offence specified in the DPA.

6.7 The authorities should carefully consider the timing of any DPA negotiations. Both the authorities and the corporates should ensure that: (i) they have sufficient certainty over the facts before entering into the DPA; and (ii) they dovetail the DPA as much as possible with the prosecution of any individuals. Corporates which aim to resolve liability as soon as practicable, and enter into a DPA too soon, before a full reconstruction of the facts has occurred, may be left with a conflicting fact matrix between the facts as stated in the DPA and the facts uncovered through the prosecution of any individuals.

6.8 The authorities should also consider what agreed facts should be contained in the DPA, including any potential impact on subsequent prosecutions of individuals.

6.9 The authorities should also consider what ongoing commitments corporates should agree to undertake in exchange for entering into a DPA. In the US, DPAs often require the implementation and maintenance of an effective compliance program, and reporting to authorities of violations, and in some instances, even potential violations of federal US law.

Judicial oversight

6.10 Judicial oversight was seen in the UK as an important step in ensuring public confidence in the use and appropriateness of DPAs. The process for the approval of a DPA is broadly the same under both the UK law and the Bill. One of the main differences is that the approval must come from a judge in the UK and an "approving officer" under the Bill. An approving officer has to be appointed by the Minister and must be either a former judicial officer of a federal court or a court of a State or Territory. The Committee may wish to consider whether there may be a benefit in some level of current judicial input and approval, which could assist with public perception and provide an additional safeguard to ensure that DPAs are the appropriate prosecutorial approach (and support greater public confidence in the process).

6.11 Although details of the proposed Singaporean DPA framework have not yet been published (including for which offences it may apply at this time), it is expected that all DPAs will need to be approved by the High Court in Singapore, which must be satisfied that the DPA is in the interests of justice and that the proposed terms are fair, reasonable, and proportionate

6.12 Under both the UKBA and the Bill, the judge/approving officer must be convinced that the DPA is in the "*interests of justice*" and that the terms are "*fair, reasonable and proportionate*". The Singaporean proposals are expected to be similar. This is an important check and balance which provides independent oversight over the process and requires prosecutors to build a case to meet the necessary evidentiary requirements. The approach is different in the US, where the prosecutors have greater powers to agree to the terms of a DPA before seeking judicial approval. Historically, objections by US judges to DPAs have been relatively rare.

6.13 Since DPAs were introduced into the UK on 24 February 2014, the UK SFO has entered into four DPAs. However, we expect that figure to increase and there are indications from the SFO that further DPAs are in the pipeline. The US has entered into significantly more DPAs compared to the UK in the same time period. It may be that the requirement for judicial oversight in the UK process is a contributing factor to the lower number of DPAs in the UK (in

addition to differing scopes of the US and UK DPAs). The former joint head of the UK SFO's bribery and corruption division stated in March 2017 that: "*you will not find us at the SFO slipping into a casual, commoditised practice of processing DPAs. You will instead find us agonising over the fine detail of each potential candidate – is it really the right thing to do this time?*"[5] The Committee may wish to highlight that once DPAs are implemented, the Australian framework should be used in a cautious and considered fashion, particularly until some precedents have been established in relation to the circumstances in which a DPA will be offered and/or approved.

Self-reporting and co-operation

6.14 For a DPA to be offered by the authorities in the UK, there is an expectation of a high level of cooperation from corporates. Corporates are required to disclose a substantial amount of evidence to the prosecution, without any guarantee that they will be offered a DPA. The "*AFP and CDPP Best Practice Guideline for self-reporting of foreign bribery and related offending by corporations*" dated 8 December 2017 (the "**Self-Reporting Guidelines**") envisages a similarly high level of cooperation from self-reporting firms in Australia.

6.15 In the case of the SFO's landmark DPA with Rolls Royce in 2017[6], the defendant corporate provided the UK SFO with 30 million documents, agreed to an independent review of those records for privilege, reported further areas of concern and made available written accounts of interviews that took place in the fact gathering exercise. This disclosure was made prior to any agreement about whether Rolls Royce would be eligible for a DPA. Rolls Royce was given significant credit for this approach.

6.16 Interestingly, Rolls Royce did not initially self-report its wrongdoing to the SFO. Despite the lack of self-reporting, the Judge approved the DPA due in large part to the extraordinary levels of cooperation the company gave to the SFO. Concerns have been raised in the UK whether, as a result of the Rolls Royce case, companies will be discouraged from self-reporting in the future because there is now a precedent in the UK for DPAs being approved in circumstances where companies are reactive and not proactive with the regulators. However, the SFO has stressed that Rolls Royce could not have done more to address the issues that had been exposed. The SFO has also confirmed after the Rolls Royce DPA that self-reporting is still a "*key feature of the profile of a case suitable for resolution by DPA*"[7].

6.17 A further concern for corporates may be that in circumstances where DPA negotiations fail, the prosecutors may be able to use or share information received from the corporate with international counterparts.

6.18 Notwithstanding the above, DPAs provide an attractive proposition for corporates and prosecutors because they: (i) avoid criminal prosecution; (ii) enable negotiation of the settlement terms with the authorities, which will provide more certainty than a sentence imposed by the court; and (iii) avoid a lengthy and costly criminal trial.

6.19 The Committee may wish to consider extending the Self-Reporting Guidelines to clarify: (i) the levels of expectation for DPAs concerning co-operation and privilege where information may

[5] https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/
[6] SFO v Rolls Royce PLC
[7] https://www.sfo.gov.uk/2017/03/08/the-future-of-deferred-prosecution-agreements-after-rolls-royce/

be privileged in one jurisdiction and not another; and (ii) whether DPAs will be limited to companies who decide to self-report to the authorities. In the US, self-reporting is not a pre-condition to DPA eligibility. It has instead become a pre-condition to declination altogether, along with various other criteria.

Monitorships

6.20 We note that corporate monitorships are not expressly referenced in the Bill as an available term of a DPA. In our view, the Committee should consider providing a legislative basis on which the authorities may impose monitors in the appropriate circumstances.

6.21 Monitorships frequently form part of the DPAs reached in the US. In the UK, the DPA framework provided for the first time a statutory basis on which monitorships could be imposed. To the extent that the Australian authorities seek through the DPA framework to encourage effective and proactive compliance, and to provide the public with confidence that lessons are learned and changes within organisations are made effectively (failing which the DPA may be revisited), the Committee may wish to consider whether the Bill should provide for the statutory imposition of compliance monitors as a term of a DPA in appropriate cases. Monitors have become an important tool for the UK SFO to make sure corporates implement necessary improvements to their compliance programme, reduce the risk of corporate re-offending and ensure compliance with the terms of the DPA.

6.22 The UK DPA Code of Practice specifies that: "*the use of monitors should be approached with care. The appointment of a monitor will depend upon the factual circumstances of each case and must always be fair, reasonable and proportionate*". It is important to ensure that the scope of work, costs and duration of the monitorship is clearly defined. The costs of monitorships have been reported to have spiralled in certain cases due to a lack of clarity over the scope of the monitors work, which can become extremely punitive for the corporates.

6.23 To the extent that monitorships are deemed to be an appropriate term of a DPA, the Committee may wish to consider issuing guidance in relation to the process of appointment and scope and methodology of the monitor. The most effective monitorships are those that have been specifically tailored to the facts of each individual case.

Morgan, Lewis & Bockius LLP