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Senate Standing Committees on Economics
PO Box 6100
Parliament House
Canberra ACT 2600

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

Dear Sir/ Madam

Senate Economics References Committee inquiry into foreign bribery

CPA Australia represents the diverse interests of more than 150,000 members in 120 countries, including more than 25,000 members working in senior leadership positions. Our vision is to make CPA Australia the global accountancy designation for strategic business leaders. CPA Australia takes an active and positive interest in a wide range of regulatory matters including corporate law and corporate governance.

Against this background we provide this submission in response to the Senate Economics References Committee inquiry into foreign bribery.

Specific comments in response to the terms of reference:

a. the measures governing the activities of Australian corporations, entities, organisations, individuals, government and related parties with respect to foreign bribery

Australia's slowness in implementation of the OECD Anti-Bribery Convention has been well publicised and acknowledged in certain levels of Government[1]. Likewise, the criticism arising out of OECD Working Group progress evaluations have been well canvassed, particularly in terms of the very limited track-record of enforcement.

Some evidence of these matters being addressed is apparent with a number of examinations afoot. It is nonetheless regrettable that in a number of instances of alleged endemic bribery, activities come to light through journalist investigation and the courage of individual whistle-blowers. Slowness here is indicative of a shortage of dedicated resources and investigative expertise. CPA Australia urges a serious reappraisal of these capabilities,

[1] See for example the comments of Catherine Barker, Foreign Affairs, Defence and Security Section, 7 February 2012:
http://parlinfo.aph.gov.au/parlInfo/download/library/prspub/1403446/upload_binary/1403446.pdf;fileType=application/pdf#search=%222010s%20background%20note%20(parliamentary%20library,%20australia)%22

save possible suggestion of an institutional unwillingness to comply with OECD and UNCAC obligations with consequent damage to Australia's reputation.

Broadly then, CPA Australia supports the relevant statutory rules within the Schedule to the Criminal Code Act 1995 (Division 70 and Part 2.5) though we seriously question what has been a very protracted and poorly supported implementation. Moreover, we suggest there to be a significant lack of understanding within the business community of both the nature of the obligations and the consequent governance implications.

b. possible improvements to existing Commonwealth legislation governing foreign bribery, including:

i. Commonwealth treaties, agreements, jurisdictional reach, and other measures for gathering information and evidence

CPA Australia would like to draw the Committee's attention to the Cross-Border Insolvency Act 2008 (Cth). This legislation which is Australia's adoption of UNICTRAL's Model Law on Cross-Border Insolvency contains Chapter IV – *Cooperation with Foreign Courts and Foreign Representative*. The style of judicial rapprochement established and encouraged in the bilateral multi-jurisdiction setting, might be drawn upon as a practical and highly effective means of combatting the various legal abuses used to disguise bribery and frustrate prosecution.

ii. the resourcing, effectiveness and structure of Commonwealth agencies and statutory bodies to investigate and, where appropriate, prosecute under the legislation, including cooperation between bodies

Refer our response to Term of Reference a. above, to which we would add that there is apparent confusion in the business community, and some parts of the media, regarding agency demarcation of responsibility on criminal matters affecting corporations. This circumstance points to the need for formal articulation of cooperation and information sharing arrangements, along with an educative exercise to reach out to the business community.

iii. standards of admissible evidence

CPA Australia has no specific comment other than to urge consistency of approach across the various heads of criminal liability.

iv. the range of penalties available to the courts, including debarment from government contracts and programs

Whilst on their face these seem effective measures of deterrent adding to the punitive penalties in 70.2, we question the manner by which what are largely civil penalties might be translated into a criminal context.

v. the statute of limitations

CPA Australia has no specific comment.

vi. the range of offences, for example

A. false accounting along the lines of the books and records' head in the US Foreign Corrupt Practices Act

In response to xiv below, CPA Australia has urged due regard being given to avoiding overlap between the Criminal Code and the Corporations Act 2001 and that the purpose of each be clearly applied by regulators and understood by those who are subject to the numerous statutory rules. Nevertheless, two related provisions within the Corporations Act which might be adapted and applied to the specific ill of foreign bribery are s 1307 (Falsification of books) and s 1309 (False information etc.). These provisions have proven to be robust in addressing a range of serious misconduct relating to the affairs of, and securities in, a corporation. The purposes and structure of these provisions may form a valuable augmentation to Division 70 of the Criminal Code. Such adaptation also has the advantage avoiding the risks of 'cherry-picking' from another jurisdiction's statute.

B. increased focus on the offence of failure to create a corporate culture of compliance

C. liability of directors and senior managers who do not implement a corporate culture of compliance

CPA Australia deals here with Terms of Reference vi. B and C together.

A paper prepared for the Centre for Corporate Law and Securities Regulation, Melbourne Law School by Andrew Blunt in 2013[2] provides a comprehensive analysis of the corporate culture of compliance within a context of bribery of foreign public officials. The technical question considered is the nature of the friction between Division 70 and the common law principle for attribution of criminal liability to corporations developed in the English case *Tesco Supermarkets Ltd v Nattrass* [1972] AC 153. Whether or not the introduction of Division 70 signifies the "wholesale adoption of vicarious liability agency principles" (Blunt p 24 of 42) might be subject to debate. What however is very apparent is that with a lesser regard being given to the offending employee in isolation, corporate internal practices, procedures and culture will be of paramount importance, along with the ability to demonstrate the presence of effective programs for risk analysis and compliance.

On this matter, CPA Australia regards the interaction between Division 70 and the broader statutory rules in Criminal Code Part 2.5 (Corporate criminal liability) to be particularly unclear making the law very confused and inaccessible to those seeking to abide by what is otherwise well intentioned legislation. The development and implementation by a company of a robust anti-bribery compliance program needs to reflect an understanding of Criminal Code section 12.3. This provision, as a fault element in authorising or permitting the commission of an offence, identifies the character of a corporate culture that directed, encouraged, tolerated or led to non-compliance. Borrowing language from the law of equity, it needs to be understood when section 12.3(c) dealing with culture, is to be applied as a sword compelling recognition of fault where this led to non-compliance. This, in turn, contrasted with the circumstances where the existence of a compliance program might act as a shield against the attribution of liability through ameliorating the element of fault.

To conclude, CPA Australia believes it incumbent on the appropriate agency within Government to provide comprehensive guidance on the scope and content of an anti-bribery corporate compliance program. It should discuss in detail the relevant legislative setting which, as we have observed, is highly complicated. The need for such guidance is all the more crucial, given first, the absence of judicial authority on the matter, and secondly, the practical implications arising out of the mooted removal of the facilitation payment defence.

[2] http://www.law.unimelb.edu.au/files/dmfile/201345.pdf

D. liability of parent companies for subsidiaries and intermediaries, including joint ventures

The judiciary in both England and Australia have been reluctant to develop a coherent basis of corporate veil piercing across a range of possible abuses of the separate corporate legal personality. In Australia there has been a particularly strong adherence to recognising the separate legal personality of parent and subsidiary companies. CPA Australia believes that the practice of quarantining suspect or high risk activities within artificial arm's-length subsidiaries should be seen as grounds for development of a targeted legislative basis for corporate veil piercing.

vii. measures to encourage self-reporting, including but not limited to, civil resolutions, settlements, negotiations, plea bargaining, enforceable undertakings and deferred prosecution agreements

Referring our response to term of Reference iv, we caution against extensive widening of remedial responses. It may well be that in an endeavour to broaden the armoury for the early combatting foreign bribery through providing avenues for parties to 'come clean', there is a loss of transparency and profile necessary to deter actions by others. Similarly, there is potentially the need to address regulatory trade-off between flexible targeted responses and the administrative cost of such flexibility.

viii. official guidance to corporations and others as to what is a culture of compliance and a good anti-bribery compliance program

Refer our comments in response to Terms of Reference vi. B and C.

ix. private sector whistleblower protection and other incentives to report foreign bribery

CPA Australia acknowledges the importance and urges greater prominence being given to guidance such as Australian Standard AS 8004-2003 *Corporate governance – Whistleblower protection programs for entities* and the ASX Corporate Governance Council's Principles and Recommendation (3rd edition 2014) which under Recommendation 3.1, suggests that a listed company code of conduct "Identify the measures the organisation follows to encourage the reporting of unlawful or unethical behaviour."

CPA Australia also suggests that the Committee explore the scope for either adopting the thrust and structure of Corporations Act Part 9.4AAA (Protection for whistleblowers) within Division 70 of the Criminal Code or broadening the scope of Part 9.4AAA (s 1317AA(1)(d)) to cover specific matters additional to suspected contravention of Corporations legislation. In this latter regard we acknowledge the disclosures are anticipated to be made in the main to ASIC (s 1317AA(b)(i)), necessitating the type of improved agency cooperation contemplated through the above Term of Reference b(ii).

x. facilitation payment defence

CPA Australia in its December 2011 submission to Attorney-General's Department on its Consultation Paper assessing the facilitation payment defence, was emphatic in supporting the removal of such defence within Division 70 of the Criminal Code. We reiterate this stance and commend Government on its determined moves in this direction. CPA Australia nevertheless recognised the existence of contrary views (refer Andrew Blunt 2013) and concerns raised around threats to competitiveness and uncertainty of control, particularly where foreign agents are

involved. It is thus incumbent upon the relevant agency administering these provisions to provide appropriate guidance to Australian business and that the Government assert in its international engagement the paramountcy of the rule of law which underlie concerted action against bribery of foreign public officials.

xi. use of suppression orders in prosecutions

CPA Australia has no specific comment.

xii. foreign bribery not involving public officials, for example, company to company or international sporting bodies

In an environment of government activities and services increasingly being corporatised into government business enterprises (GBEs), supposedly at arm's-length from the executive branch of government, CPA Australia believes it vital that the scope of Division 70 of the Criminal Code develop and maintain appropriate reach. Concerning the specific matter of company to company foreign bribery, we believe this best dealt with through the various parts of transnational private law as they have continued to evolve. With respect to international sporting bodies, the dramatic instances of governance failure are of wide notoriety and deep concern; particularly where there has been involvement of public monies.

On this final point, we have little to suggest within the scope of the Committee's Reference, other than to urge the type of professionalisation and transparency which are the hallmark of well managed companies, and that attitudes of contractual dealing in good faith are put to the fore. National governments at a minimum should express such expectation of sporting bodies, many of which would have not-for-profit status, and that their own dealings around international sporting events adhere to the highest standards of transparency and sound fiscal administration.

xiii. the economic impact, including compliance and reporting costs, of foreign bribery

Whether issues of proper conduct, attributes of the rule of law and the law's approach to morality in commercial deals can, and should be, subject to notions of 'economic impact' are highly questionable. Notions of any trade-off between compliance and reporting cost, and the impact of foreign bribery, are spurious. CPA Australia has consistently observed that foreign bribery impedes economic development and participation, along with seriously undermining institutional capacity and confidence in markets. It is thus beholden on Government to clearly articulate its views and intentions on this serious matter and, in a collaborative manner, determine the most effective paths to transformation.

xiv. any other related matters

We believe it appropriate to make some concluding reference to the outcomes of the 2005 report of the Independent Inquiry Committee into the United Nations Oil-for-Food Programme centring on the activities of staff of the Australian Wheat Board (AWB) (the Cole Inquiry). Catherine Barker in her February 2012 Foreign Affairs report noted that "Commissioner Cole recommended the establishment of a task force comprising the AFP, the Australian Securities and Investments Commission (ASIC) and the Victoria Police to consider possible prosecutions in consultation with Commonwealth and Victorian prosecution agencies. The task force was formed in December 2006, and in July 2007, ASIC also commenced a separate investigation into possible civil and/ or criminal breaches of the Corporations Act. No criminal prosecutions eventuated, with the AFP and Victoria Police both discontinuing their investigations in 2009 and ASIC dropping criminal charges in 2010. However, as of July 2011, ASIC was still pursuing civil penalty proceedings against six former senior officers of AWB for breaches of the Corporations Act."

As a postscript to this drawn out process, ASIC in 2012 did succeed in two cases in having the Supreme Court of Victoria declaring contraventions of Corporations Act s 180(1) of the Corporations Act, thus applying pecuniary penalties and disqualification from managing a corporation (*ASIC v Lindberg* [2012] VSC 332 and *ASIC v Ingleby* [2012] VSC 339). Whilst the s 180(1) duty of care and diligence has proven in its judicial application to be adaptable to changing circumstances, its necessarily belated application to the AWB facts does raise, in CPA Australia's view, a number of concerns.

In particular, the significant lapse in time in bringing a matter to a satisfactory close substantially undermines any deterrent objective. Likewise, eventual success pursued through a negligence head within the civil law is symptomatic of forcing corporate law to a purpose outside of its primary design. These observations are made to reiterate our initially stated view that the Criminal Code provisions against foreign bribery are largely sound such that matters of responsible agency resource and reach ought, as a priority, be addressed in the first instance.

If you have any questions regarding this submission, please contact Dr John Purcell FCPA, Policy Advisor ESG on [redacted] or via email at [redacted]

Yours faithfully

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