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Committee Secretary
Legal & Constitutional Affairs Legislation Committee
Department of the Senate
PO Box 6100
Parliament House
CANBERRA ACT 2600

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

Dear Committee Secretary

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

I am a legal academic with research interest in foreign bribery regulation in Australia, and particularly in the contribution that increased provision for corporate whistleblowing can make to the regulation of foreign bribery.[1] My submission focuses on this aspect of the Bill's potential operation.

General comments

In general terms I am very supportive of the *Bill*, and of the introduction of the new offence of failure to prevent bribery of a foreign public official (s70.5A). The difficulties inherent in bringing a successful prosecution under Australia's existing foreign bribery provisions are well known, and have been well documented. In this light the need for reform is clear.

The impact of the new failure to prevent bribery offence

Introduction of an offence of 'failing to prevent bribery of a foreign public official' significantly enhances the likelihood of successful foreign bribery prosecutions in the Australian context, and ought to be supported. However, a number of concerns are likely to be raised by Australian

[1] See for instance Brand, V, 'Still "Insufficient or Irrelevant": Australia's Foreign Bribery Corporate Whistleblowing Regulation', (2016) 39 *UNSWLJ* 1072.

corporations in relation to this proposed offence. Corporations may argue that for the same reasons that foreign bribery prosecutions have proved difficult (the complexities inherent in operating businesses in offshore locations, language and jurisdictional barriers, and the difficulties of obtaining clear evidence), it will similarly be difficult for an Australian corporation to ensure, in practical terms, that it does not fail to prevent bribery of a foreign official by its associates.

The significance of the 'adequate procedures' defence

In this context, the defence contained within the new provisions is significant, as it will allow a corporation to argue that it had adequate procedures in place designed to prevent an associate engaging in foreign bribery (s70.5A(5)). Much will turn on the wording of the proposed Ministerial guidance as to what will constitute 'steps that a body corporate can take to prevent an associate from bribing foreign public officials' (s70.5B(1)), and the guidance could be highly influential in shaping corporate responses to the strengthened foreign bribery regime contemplated by the Bill. If well-drafted and essentially consistent with guidance offered under equivalent regimes (in the United Kingdom, for instance) a number of the wider concerns likely to be expressed by Australian corporations could be allayed. Given the significance of the guidance, the Committee may wish to make recommendations in its report as to the content of the guidance.

The content of the guidance - whistleblowing

I strongly support the inclusion of internal corporate whistleblowing systems as part of any recommended 'adequate procedures designed to prevent' the bribery of a foreign public official. This is for three key reasons: firstly, whistleblowing activity is positively correlated with anticorruption outcomes; secondly, whistleblowing is a relevant factor under the United Kingdom's analagous 'adequate steps' foreign bribery provisions; and thirdly, a significant reform of Australia's corporate whistleblowing regime is currently underway that should lead to increased levels of corporate whistleblowing activity, making this anti-corruption mechanism even more effective.

1. *Whistleblowing as an anti-corruption measure*

Encouragement of whistleblowing forms a core component of effective foreign bribery regulation and has been given increasing recognition in recent years.[2] Particularly relevant in the Australian context, of the five key recommendations made by the OECD's December 2017 Phase 4 Report on Australia's implementation of the OECD Anti-Bribery Convention, whistleblowing processes are directly relevant to two. The Report recommends both enhanced private sector whistleblowing protections, and the need for Australia to '[f]ind additional ways to encourage companies … to

[2] Above, n1, 1074

develop and adopt adequate internal controls, ethics, and compliance programmes, or measures for the purpose of preventing and detecting foreign bribery'.[3]

2. *Approach of the United Kingdom's Bribery Act Guidance*

The United Kingdom's *Bribery Act, 2010* contains provisions that ensure an organisation has a defence to the crime of association with another person who pays a bribe on behalf of the organisation where it can be shown the organisation had 'adequate procedures designed to prevent' the associated person engaging in bribery.[4] The Secretary of State is required to provide published guidance on 'procedures that relevant commercial organisations can put in place to prevent persons associated with them from bribing',[5] and the guidance published by the Secretary of State identifies whistleblowing as a procedure that could be useful in establishing that appropriate steps had been taken.[6]

To the extent that the proposed Australian Ministerial guidance is consistent with the provisions of the UK *Bribery Act* guidance in relation to whistleblowing (and more generally), Australian companies would benefit both from consistency between the Australian and United Kingdom regimes, and some level of predictability based on case law emerging from the United Kingdom (including in relation to the 'adequate procedures' defence).[7] Given that the highly influential United Kingdom reforms in 2011 set a new height for the international anti-corruption bar,[8] this consistency would be desirable.

3. *Australian private sector whistleblowing reform and internal systems*

Wide-ranging reforms of the Australian private sector whistleblowing regulatory regime are currently before Federal Parliament.[9] These reforms will strengthen the existing weak and heavily criticised Australian corporate whistleblowing framework, and are likely to lead to increased whistleblowing activity. Of particular relevance to this submission, the new whistleblowing provisions mandate that all larger companies implement internal whistleblowing policies, and ensure that specific matters are dealt with by those policies. Implementation of policies can be expected to lead to increased rates of whistleblowing: empirical evidence exists to suggest that whistleblowing activity is positively associated with levels of internal support for

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[3] Organisation for Economic Cooperation & Development, Working Group on Bribery in International Business Transactions, *Phase 4 Report on Implementing the OECD Anti-Bribery Convention in Australia*, December 2017, Executive Summary, 7.
[4] *Bribery Act, 2010* (UK), s7.
[5] *Bribery Act, 2010* (UK), s9(1).
[6] Ministry of Justice (UK), '*The Bribery Act, 2010*: Guidance' (March 2011)
[7] See for instance the successful prosecution of Sweett Group Plc: https://www.sfo.gov.uk/2016/02/19/sweett-group-plc-sentenced-and-ordered-to-pay-2-3-million-after-bribery-act-conviction/
[8] Brigid Breslin, Doron Ezickson & John Kocoras, 'The Bribery Act 2010: raising the bar above the US Foreign Corrupt Practices Act', (2010) 31 *The Company Lawyer* 362, above n86, 362.
[9] *Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017* (Cth).

whistleblowing.[10] Further, where internal processes are good, whistleblowers may be more likely to attempt to resolve matters internally before approaching an external government agency.[11] This provides the potential for tips to be 'screened', reducing demand on enforcement agencies (eg the Australian Federal Police) and preserving resources.[12]

There is clear potential for synergy between the forthcoming mandatory internal whistleblowing system requirements and the content of any foreign bribery 'adequate procedures' Ministerial guidance. This potential ought to form part of the considerations to which the Minister has regard in preparing the guidelines, as the positive impact on the effectiveness of the enhanced foreign bribery enforcement regime would be considerable.

Conclusion

The imposition of liability on Australian companies for actions taken by associates under the *Crimes Legislation Amendment (Combating Corporate Crime) Bill 2017* is a positive step in the ongoing improvement of Australia's foreign bribery regime. However, the content of the proposed Ministerial guidance will be a crucial component of making the new provisions workable from the point of view of Australian companies operating in offshore locations. It would be extremely useful if the Committee's Report were to take into account the likely content of the guidance, and give appropriate recommendations. In particular, I strongly support the inclusion of clear guidance on the extent to which good internal whistleblowing systems can be used as evidence of the taking of 'adequate steps' to prevent foreign bribery by an associate.

I would be happy to answer any questions you may have in relation to this submission.

Yours sincerely

V Brand

Dr Vivienne Brand

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[10] See for instance Gladys Lee and Neil Fargher, 'Companies' Use of Whistle-Blowing to Detect Fraud: An Examination of Corporate Whistleblowing Policies' (2013) 114 *Journal of Business Ethics* 283, 284.

[11] Matt A Vega, 'Beyond Incentives: Making Corporate Whistleblowing Moral in the New Era of Dodd-Frank Act "Bounty Hunting" (2012) 45 *Connecticut Law Review* 483, 488, citing the work of Lyn Stout, *Cultivating Conscience*, 2011, 247 – 249; see also Vivienne Brand and Sulette Lombard, Submission to Senate Standing Committee on Economics, *Inquiry into the Performance of ASIC*, 19/2/14.

[12] A point made by Dave Ebersole, 'Blowing the Whistle on the Dodd-Frank Whistleblower Provisions' (2011) 6 *Ohio State Entrepreneurial Business Law Journal* 123, 137, in respect of the SEC in the USA, and equally true in the Australian context.