Chapter 4

Reforming the foreign bribery offence

4.1 Currently, for someone to be found guilty of the offence of foreign bribery, the prosecution must prove that the accused engaged in the relevant conduct (the offering of an illegitimate benefit) with a *guilty intention* of influencing a foreign public official in order to gain or retain business or a business advantage that *is not legitimately due*.[1]

4.2 The committee heard from stakeholders that, as there is often a lack of written evidence available in foreign bribery cases, establishing the relevant guilty intention by the accused is inherently problematic. Evidence received by the committee suggested that, as bribes are often concealed by corporations as legitimate payments, it is also difficult for the prosecution to show 'beyond reasonable doubt' that both the benefit offered or provided, and the business advantage sought, were not legitimately due. The Australian experience also demonstrates the challenges of establishing criminal liability for companies for the offence of foreign bribery within the current federal statutory framework.

4.3 As discussed in Chapter 2, in April 2017, the Attorney-General's Department (AGD) released draft legislation and a public consultation paper outlining proposed amendments to the foreign bribery offence (2017 consultation paper).[2] Then in December 2017, the government introduced the Crimes Legislation (Combatting Corporate Crime) Bill 2017 (CCC bill) which included some of the amendments proposed in the April 2017 consultation. This bill is currently before the Parliament and subject to inquiry by the Legal and Constitutional Affairs Legislation Committee (L and C committee).[3]

4.4 This chapter examines the amendments proposed in the 2017 consultation paper and the CCC bill. In so doing, it considers how the proposed reforms to the foreign bribery offence may assist Australia to combat the bribery of foreign public officials and ensure individuals and companies are held to account.

Including candidates for office in the definition of foreign public official

4.5 The current definition of 'foreign public official' in section 70.1 of the *Criminal Code Act 1995* (Criminal Code) does not include candidates for office. As such, companies that bribe candidates for public office, with the intent of obtaining

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1 *Criminal Code Act 1995*, Division 70.

2 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 4.

3 On 6 December 2017 the CCC bill was introduced by the government in the Senate. See *Journals of the Senate*, No. 78, 6 December 2017, p. 2484. On 7 December 2017 the Senate referred the bill to the L and C committee for inquiry and report by 20 April 2018. See *Journals of the Senate*, No. 79, 7 December 2017, pp. 2512–2513.

business advantages once the candidate takes office, are not captured by the current foreign bribery offence.

4.6 In line with the amendments proposed in the 2017 consultation paper, the CCC bill seeks to amend the definition of 'foreign public official' to include a person standing or nominated as a candidate for public office.[4]

4.7 As explained in the 2017 consultation paper, the proposed amendment:

> …would not prevent individuals or companies from making legitimate donations to candidates for office, as the amended offence would still require the prosecution to show that the benefit was provided, offered or promised to improperly influence the candidate to obtain/retain an advantage.[5]

4.8 However, the new offence would criminalise individuals or companies where they 'seek to bribe candidates for public office, with the intent of obtaining an advantage if the candidate takes office'.[6] In their submission to the L and C committee's inquiry into the CCC bill, the AGD highlighted that:

> It is appropriate to criminalise this conduct given that it has the potential to undermine good governance and free and fair markets and to otherwise cause the same harm as bribery of a public official.[7]

4.9 In their submission to the 2017 consultation, the Australian Institute of Company Directors (AICD) supported the proposed extension of the definition, emphasising that it would remove:

> …a potential 'loophole' for an accused offender to avoid prosecution, should the bribe have occurred before a public official's formal appointment to office.[8]

4.10 Allens Linklaters also highlighted that '[c]andidates for foreign public office are vulnerable to influence in much the same way as foreign public officials'.[9] Allens Linklaters went on to explain that in their experience:

> …many multinational corporations already prohibit their employees from engaging in such conduct and, as such, we do not consider that this

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4 CCC bill, Schedule 1, item 4.

5 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 4.

6 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 4.

7 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 4.

8 Australian Institute of Company Directors, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

9 Allens Linklaters, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

> amendment would materially, if at all, increase the compliance burden faced by Australian corporations.[10]

4.11 Indeed, in their submission to the 2017 consultation, BHP Billiton supported the amendments and explained that pursuant to their current internal Code Of Business Conduct, they do not contribute funds to any candidate for public office in any country.[11]

Committee view

4.12 The committee considers it essential that Australia's foreign bribery law operate to criminalise individuals and companies who seek to bribe candidates for office, with the intention of obtaining an advantage if the candidate takes office.

4.13 The committee is serious about combatting all types of corruption, including political corruption. In this context, the committee acknowledges that candidates for public office are vulnerable to influence in a similar way to foreign public officials. Therefore, the committee sees no reason why a bribe which occurred before a public official's formal appointment to office should be treated any differently to a bribe received at, or after, such appointment. The committee is concerned that the government has delayed taking action to close this potential loophole.

4.14 The committee acknowledges that the CCC bill that is currently before the Parliament seeks to amend the definition of 'foreign public official' to include a person standing or nominated as a candidate for public office.

Recommendation 5

4.15 The committee recommends that the definition of 'foreign public official' in section 70.1 of the *Criminal Code Act 1995* be amended to include candidates for office.

Clarify offence of 'improperly influencing' a foreign public official

4.16 As noted above, showing that a benefit or business advantage was 'not legitimately due', particularly when payments are disguised as legitimate business transactions, is difficult. Therefore, in line with one of the suggested approaches in the 2017 consultation paper, the CCC bill seeks to amend section 70.2 of the Criminal Code to replace these elements of the offence with the concept of 'improperly influencing' a foreign public official to obtain or retain business or an advantage.[12]

Stakeholder opinion

4.17 While supportive of a move away from the concept of 'not legitimately due', submitters to the inquiry raised concerns about the introduction of the term 'improperly influence'. Indeed, some stakeholders recommended the adoption of one

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10 Allens Linklaters, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

11 BHP Billiton, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 2.

12 CCC bill, Schedule 1, item 6.

of the two alternative approaches considered in the 2017 consultation paper, which would replace the threshold of 'not legitimately due' with the concept of 'dishonesty'.[13]

4.18 Mr Tim Game SC, Co-Chair of the National Criminal Law Committee, Law Council of Australia, raised concerns about the use of the term 'improperly' and informed the committee of the Law Council of Australia's preference for the use of the concept of 'dishonesty'. Mr Game explained:

> When one talks, for example, about improper use of position in the Corporations Act there is usually a fiduciary duty in place against which you can measure the impropriety. There is a real difficulty of measuring, so it would just be left to a jury to decide if that was an impropriety. That is a problem because there is no resting duty with the person that is doing the thing in the first place. That other person, as you know, that could just be their agent and that could be a corrupt agent. There is a problem there that needs to be addressed. Our suggestion is that you use the language of dishonesty.[14]

4.19 While acknowledging merit in the use of both of the concepts 'improperly influence' and 'dishonesty', Mr Robert Wyld, the Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee (IBAACC), told the committee that the IBAACC 'tended to favour the use of the concept of dishonesty, as that is known under Australian criminal law'.[15]

4.20 The AICD agreed, and went so far as to recommend against the introduction of the concept of 'improperly influence', and supported the adoption of a test of dishonesty.[16] AICD explained:

> One of the problems with this jurisdiction and this particular crime is that there hasn't been any case law to assist in interpreting the offences. We came to the view that the dishonesty test in the offence, as opposed to essentially introducing a new concept, would be good, because it would remove some of the uncertainty. It would introduce a concept that is well-known in Australian law while still achieving what we need to achieve under the OECD convention. That was our perspective. We did see that the improvement suggested in the draft legislation had some merit in the sense that it was consistent with the UK, I believe. But on balance, we thought that [the] most quick and efficient way to achieve a good law in this area was to simply use dishonesty, which is so well known and so well tested by the courts…

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13 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, pp. 6–7.

14 Mr Tim Game SC, Co-Chair, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 7 August 2017, p. 44.

15 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 37.

16 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

4.21 However, as acknowledged in the 2017 consultation paper, should the concept of 'dishonesty' be introduced into the foreign bribery offence, it would be necessary to decide which test of dishonesty will apply:

- The *Ghosh* test, as prescribed in the Criminal Code—which provides that the conduct is criminally dishonest if it is both objectively dishonest, according to the standards of ordinary people; and known by the defendant to be dishonest according to the standards of ordinary people;[17] or
- The *Peters* test, as adopted by the High Court—which provides that the conduct is criminally dishonest if the fact-finder concludes that 'ordinary, decent people' would consider the conduct to be dishonest.[18]

4.22 Stakeholders had differing views as to which test of dishonesty ought to be applied.

4.23 The Law Council of Australia suggested that if the concept of 'dishonesty' is introduced, the definition in the Criminal Code (the *Ghosh* test) should be explicitly applied. In this context, Mr Game highlighted that if the term is not defined as such, the test of dishonesty would probably revert to the *Peters* test.[19]

4.24 However, AICD had a preference for the *Peters* test because it is objective and considered the *Ghosh* test to be 'quite convoluted'. AICD commented:

> The Peters test, which simply requires the court to be satisfied that the conduct was dishonest by the standards of an ordinary person—in Australia, we might add—is a satisfactory and clear test. I understand it's also consistent with the test of dishonesty in section 184 of the Corporations Act. I would finally add that there has been some judicial commentary in relation to the Ghosh test which points out its problems and its confusing nature for juries. So in short, when you're trying to instruct the jury as to the dual-part test, it's quite a difficult task. That's our position. We think that that would be the clearest way forward.[20]

4.25 Mr Wyld also informed the committee that IBACC tended to favour the present certainty of the *Peters* test because it had been set by the High Court.[21]

Why 'improper influence' and not 'dishonesty'?

4.26 The AGD considered that the proposed approach of 'improper influence' as set out in the CCC bill 'is preferable'.[22] They explained:

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17 *Criminal Code Act 1995*, s. 130.3.

18 *Peters v R* (1998) 192 CLR 493 at 504 [18].

19 Mr Tim Game SC, Co-Chair, National Criminal Law Committee, Law Council of Australia, *Committee Hansard*, 7 August 2017, pp. 44–45.

20 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 34.

21 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 37.

> Some bribery does not involve dishonesty. For instance, where a company provides an open 'scholarship' to the child of a foreign public official. The scholarship is not necessarily intended to have a 'dishonest' influence, if it is done transparently. However, it could still be done with the intention of improperly influencing the foreign public official in favouring the company when business is being awarded.[23]

4.27 Subsection 70.2A(3) of the CCC bill lists matters that a trier of fact may have regard to when determining whether influence is improper (the list is non-exhaustive). The AGD clarified that:

> It will be a matter for the trier of fact to determine whether there has been improper influence on a case-by-case basis. The explanatory memorandum provides a number of examples, in addition to explaining the list of factors included in subsection 70.2A(3).[24]

4.28 This list includes at paragraph 70.2A(3)(f) that a possible factor for determining improper influence is whether the benefit was provided, offered or promised *dishonestly*.[25] In response to questions on notice posed by the Senate L and C committee, the AGD explained that:

> …dishonesty in this context would be determined according to the standards of ordinary people and whether the defendant must have realised what they were doing was dishonest according to those standards (i.e. the Ghosh test)…[and] that dishonesty is not to be assessed by reference to the standards in the location of the foreign public official.[26]

4.29 The AGD argued that the *Peters* test is not appropriate because:

> …it would be inconsistent with the definition of dishonesty as it applies to other offences in the Criminal Code, for example bribery of Commonwealth officials, abuse of office, forgery, fraud and general dishonesty offences. In addition, given the gravity of the offence of intentionally bribing a foreign public official, it is appropriate to have regard to both the subjective and objective standard when considering whether the defendant behaved dishonestly.[27]

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22 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 5.

23 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 5.

24 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill 2017, p. 4.

25 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 5 [emphasis added].

26 Attorney-General's Department, answers to questions on notice, to the L and C committee's inquiry into the CCC bill 2017, p. 4.

27 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill 2017, p. 4.

Committee view

4.30 The committee acknowledges the concerns raised by stakeholders regarding the challenges of proving the current element of the foreign bribery offence that a benefit or business advantage was 'not legitimately due'.

4.31 The committee observes that stakeholder opinion was divided as to whether the current threshold of 'not legitimately due' should be replaced with the concept of 'dishonesty' or to provide that the benefit must be 'improper'. However, the committee notes that the proposed amendments in the CCC bill adopt the latter approach because some foreign bribery does not involve dishonesty. The committee also notes that 'dishonesty' is included as a relevant factor for determining whether influence is improper under the proposed new offence.

Extend the offence to cover bribery to obtain a personal advantage

4.32 The current foreign bribery offence applies to bribery of foreign public officials to obtain or retain business or business advantages.[28] However, as suggested in the 2017 consultation paper, the proposed new offence in the CCC bill would also apply where the bribe was to obtain or retain a personal advantage.[29]

4.33 In their submission to the L and C committee's inquiry into the CCC bill, the AGD explained that '[l]aw enforcement experience has shown in some cases, foreign bribery can occur where the advantage sought is personal'.[30] By way of example, the AGD stated that:

> Personal advantages could include influencing a foreign public official to bestow a personal title or honour, or in relation to reducing personal tax liability. It is appropriate to criminalise this conduct given that it equally undermines good governance.[31]

4.34 The 2017 consultation paper clarified that if the offence was extended in this way, 'the existing defences would be available' and '[t]he CDPP [Commonwealth Director of Public Prosecutions] would retain the discretion to prosecute matters which are in the public interest.'[32]

28 *Criminal Code Act 1995*, s. 70.2.

29 CCC bill, Schedule 1, item 6.

30 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 4.

31 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 4.

32 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 7.

4.35 The majority of submissions to the 2017 consultation paper supported this proposed amendment.[33] For example, the IBACC described the proposed amendment as:

> …a sensible extension of liability to ensure that there is a prohibition of payment of bribes to foreign public officials for personal as well as business purposes.[34]

Committee view

4.36 The committee is of the view that bribery of a foreign public official to obtain or retain business or business advantage should be treated in the same manner as bribery of a foreign public official to obtain or retain personal advantage.

4.37 The committee recognises the importance of prohibiting all conduct that undermines good governance, including foreign bribery where the advantage sought is personal. The committee considers that the government's action to close this potential loophole is overdue.

4.38 The committee acknowledges that the proposed new offence in the CCC bill would also apply where the bribe was to obtain or retain a personal advantage.

Recommendation 6

4.39 The committee recommends that the foreign bribery offence apply in circumstances where the bribe of a foreign public official was to obtain or retain a personal advantage.

Corporate criminal liability in Australia

4.40 The Criminal Code provides for corporate criminal responsibility at the federal level;[35] with liability usually only resulting where both the physical element (the conduct) and the fault element (the intention, knowledge, recklessness or negligence) of an offence are satisfied.

4.41 The physical element of an offence will be attributed to a corporation where it was committed by an employee, agent or officer acting within the actual or apparent scope of his or her employment.[36]

4.42 The fault element of an offence (for foreign bribery, a guilty intention) will be attributed to the corporation where it is proved that:

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33 Control Risks, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 3; Law Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 3.

34 International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 6.

35 *Criminal Code Act 1995*, Division 12.

36 *Criminal Code Act 1995*, s. 12.2.

> (i) the corporation's board of directors intentionally or knowingly carried out the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
>
> (ii) a high managerial agent of the corporation intentionally or knowingly engaged in the relevant conduct or expressly, tacitly or impliedly authorised or permitted the commission of the offence;
>
> (iii) a corporate culture existed within the body corporate that directed, encouraged, tolerated or led to noncompliance with the offence provision; or
>
> (iv) the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[37]

4.43 'High managerial agent' is defined in the Criminal Code to mean an employee, agent or officer of the body corporate with duties of such responsibility that his or her conduct may fairly be assumed to represent the body corporate's policy.[38] 'Corporate culture' is defined in the Criminal Code to mean an attitude, policy, rule or practice existing in the corporation generally or in the part of the corporation where the relevant offence was committed.[39]

4.44 While the committee notes that each state and territory has its own anti-bribery laws which, for the most part, cover private sector bribery and have uncertain extraterritorial application,[40] the Australian experience demonstrates the challenges of establishing criminal liability for companies for the offence of foreign bribery within the federal statutory framework.

New corporate offence of failing to prevent foreign bribery

4.45 Under the proposed new corporate offence of failing to prevent foreign bribery, as set out in the CCC bill, a company will be criminally liable where, for the profit or gain of the company, an 'associate':

- commits an offence under section 70.2 (the intentional bribery of a foreign public official); or
- engages in conduct outside Australia that would constitute an offence under section 70.2.

4.46 Of note is the exclusion in the CCC bill of the proposed foreign bribery offence based on the fault element of recklessness as set out in the 2017 consultation paper. This is discussed in more detail below. However, it should be noted that the 2017 consultation paper envisaged that such an offence would have also applied to the new corporate offence of failing to prevent foreign bribery; that is, a company would

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37 *Criminal Code Act 1995*, ss. 12.3(2).

38 *Criminal Code Act 1995*, ss. 12.3(6).

39 *Criminal Code Act 1995*, ss. 12.3(6).

40 Allens Linklaters, *Corporate criminal liability: A review of law and practice across the globe*, 2016, p. 8, https://www.allens.com.au/pubs/pdf/ibo/CorporateCriminalLiabilityPublication_2016.pdf (accessed 20 March 2018).

have been criminally liable where, for the profit or gain of the company, an 'associate' recklessly bribed a foreign official.[41]

4.47 'Associate' is defined in the CCC bill as an officer, employee, agent, contractor, subsidiary or controlled entity of the person/company.[42] However, the explanatory memorandum to the CCC bill states that:

> The definition of associate is also intended to have broad application to a person who provides services for or on behalf of another person. Such a person would not necessarily need to be an officer, employee, agent, contractor, subsidiary or controlled entity.[43]

4.48 'Subsidiary' is defined in Division 6 of the *Corporations Act 2001* (Corporations Act). Pursuant to section 46 of the Corporations Act, a subsidiary includes a body corporate that is incorporated outside of Australia and otherwise meets the definition of subsidiary in the Act. Control of a body corporate is also defined in Division 6 of the Corporation Act. Section 50AA provides that an entity controls a second entity if the first entity has the capacity to determine the outcome of decisions about the second entity's financial and operating policies.

4.49 Importantly, under the new offence, corporate criminal liability will be automatic, regardless of whether the persons involved are convicted; and a defence will be available where a company can prove it had adequate procedures to prevent and detect foreign bribery.[44]

4.50 The 2017 consultation paper explained that this proposal is similar to that which is provided for in section 7 of the UK *Foreign Bribery Act 2010* and that the provision would operate such that:

> …a company would be automatically [strictly] liable for bribery by employees, contractors and agents (including those operating overseas), except where they can show they had a proper system of internal controls and compliance in place to precent the bribery from occurring [adequate procedures].[45]

Stakeholder opinion

4.51 The majority of submitters supported the proposed corporate offence of failing to prevent bribery of a foreign public official. For example, the Australian Council of Superannuation Investors suggested that Australia harmonise its legal and enforcement framework for foreign bribery with key international peer jurisdictions, such as the UK, and recommended:

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41 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

42 CCC bill, Schedule 1, item 2.

43 CCC bill, explanatory memorandum, p. 12.

44 CCC bill, explanatory memorandum, p. 18.

45 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

> That an offence of 'failure to prevent a culture of bribery', or equivalent, be introduced into Australian law, in a manner consistent with the overall corporate and director liability framework.[46]

4.52 Mr Neville Tiffen agreed, arguing that holding a company liable for an offence of failure to prevent foreign bribery, unless it can show it has implemented 'adequate procedures', would help to create a corporate culture of compliance in Australia.[47]

4.53 Mr David Lehmann of KordaMentha Forensic also offered his support for the new corporate offence of failing to prevent foreign bribery, noting that:

> Aside from responsible ethical leaders setting and reinforcing acceptable standards of business conduct, creating an incentive for corporations to implement better, more effective antibribery compliance systems is the key to organisational cultural change Implementing the proposed offence of failing to prevent bribery of a foreign public official, with its exception of adequate procedures, should go a long way to creating this incentive.[48]

4.54 Mr Mark Pulvirenti of Control Risks, explained that under the failure to prevent foreign bribery offence in the UK (to which the proposed new corporate offence in Australia would be similar):

> …there is a strict [automatic] liability, corporate-level offence for which the only defence is the ability to demonstrate that adequate procedures to prevent those things from happening were put in place. In essence, it reverses the burden of proof. It puts it back onto the organisation to demonstrate that proper practices and procedures were put in place to try and prevent it. You're not going to always mitigate 100 per cent, but, certainly in the circumstances, on the risks that a certain business faces, proper procedures should be put in place and, if they're not, those criminal charges at the corporate level should stand.[49]

4.55 While offering their in-principle support for the introduction of a corporate offence of the failure to prevent foreign bribery, some submitters raised concerns about the reverse onus of proof and the extent to which corporations can be held liable for the conduct of its subsidiaries.[50]

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46 Australian Council of Superannuation Investors, *Submission* 8, p. 17.

47 Mr Neville Tiffen, *Submission 46*, p. 2.

48 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 15.

49 Mr Mark Pulvirenti, Partner, Control Risks, *Committee Hansard*, 7 August 2017, p. 30.

50 See, for example, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, pp. 32–36; Law Council of Australia, *Committee Hansard*, 7 August 2017, pp. 45–46.

Reverse onus of proof

4.56 Generally, the prosecution will bear the legal and evidential burdens of proof and, unless otherwise provided, the standard of proof is beyond reasonable doubt.[51]

4.57 A legal burden requires proof of the existence of a matter; and the evidential burden requires adducing or pointing to evidence that suggests a reasonable possibility that a matter exists or does not.[52] As proposed, the failure to prevent foreign bribery offence places the legal and evidential burdens of proof on the company, not the prosecution (this is often referred to as a reverse burden).

4.58 The AICD expressed the view that the failure to prevent foreign bribery offence should include only a reverse evidentiary burden of proof, arguing that it 'would still be a very serious offence with a substantial burden of proof on the corporation' which '[c]ombined with the other offence proposals that are suggested…would definitely be a significant improvement from where we are now, from a prosecution point of view'.[53]

4.59 The AICD argued that the failure to prevent foreign bribery offence places an unnecessarily onerous burden of proof on corporations—requiring a company to satisfy the legal burden that it has adequate procedures in place to prevent the commission of a foreign bribery offence, combined with a reverse onus of proof and absolute liability. The AICD stated:

> Given that the purpose of the offence is to encourage corporations to adopt processes to prevent bribery rather than to simply punish corporations for the wrongdoing of their associations, the AICD recommends imposing the evidential burden rather than the legal burden in this circumstance.[54]
>
> We are naturally hesitant around reversing the onus of proof. Our suggestion in our submission to the Attorney-General's Department recommended that, if that is the path that the government chooses to go down, instead of the legal burden being attached to the defendant it be an evidentiary burden. We believe that would, in fact, incentivise corporates more effectively to be able to demonstrate fulsomely the compliance systems and arrangements that they have in place…it would still be a very serious offence that internal compliance frameworks would need to be constructed around.[55]

51 *Criminal Code Act 1995*, s. 13.2.

52 *Criminal Code Act 1995*, s. 13.1.

53 Ms Louise Petschler, General Manager, Advocacy, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 33.

54 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

55 Ms Louise Petschler, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 36.

4.60 The Law Council of Australia also raised concerns about attaching absolute liability to a corporation unless they can satisfy the legal and evidentiary onus. The Law Council of Australia suggested that:

> If one is going to penalise this conduct, one has to penalise it at a significantly lower level than one does the other conduct.
>
> …the thing is that the corporation is made liable by the other person's conduct, full stop. They have to bring themselves out of it by persuasive onus...
>
> …If you're going to have a persuasive onus on the defendant, then you should recognise that this is a state of criminality that is satisfied as an absolute offence. That should be reflected in penalty, because it's a far less serious offence. I would look at that provision and I would think I'm looking at a regulatory offence, but then I get to the end and I see you can get fined a tenth of the company's turnover. That could be hundreds of millions of dollars.[56]

4.61 In their submission to the L and C committee inquiry into the CCC bill, the AGD explained that it:

> …is not persuaded by arguments that the offence should be characterised as a regulatory breach (i.e. failure to implement adequate procedures) and the penalty lowered accordingly.[57]

4.62 The AGD reasoned that the policy intention of encouraging corporations to adopt measures to prevent bribery is a sufficient justification for departing from the generally accepted approach to framing offences because:

> The new failure to prevent offence is intended to encourage corporations to adopt adequate compliance measures to prevent bribery and to more effectively address situations of wilful blindness on the part of corporations' senior management…corporations will only be able to avoid liability for this offence by proving that they had adequate procedures in place designed to prevent an associate from committing foreign bribery. The corporation would bear a legal burden in relation to this matter. The standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities (section 13.5 of the Criminal Code)…Placing a legal burden on corporations to prove the existence of adequate procedures will enable prosecuting authorities to deal more appropriately with corporations where senior management turn a blind eye to bribery occurring in their businesses.[58]

4.63 The AGD defended the application of absolute liability to the offence, arguing that it will:

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56 Mr Tim Game SC, Law Council of Australia, *Committee Hansard*, 7 August 2017, pp. 45–46.

57 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill 2017, p. 8.

58 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill 2017, p. 16.

> …create a strong positive incentive for corporations to adopt measures to prevent foreign bribery. Applying absolute liability to certain elements of the new offence is necessary to ensure the effectiveness of the new offence and the enforcement regime.
>
> The government considers that there is a risk that requiring the prosecution to prove specific fault elements in relation to this offence may involve unnecessary complexity, also noting the traditional difficulties in prosecuting foreign bribery offences…Specifically, it is necessary to overcome challenges in establishing liability of corporate entities for foreign bribery, and to ensure that corporations are not able to avoid liability through wilful blindness. Attaching fault elements to this offence may also have the potential to undermine the broad policy objectives of this legislation—which is aimed at bringing about a shift in compliance culture across Australian industry.[59]

4.64 With respect to the penalties that apply to the new offence, the AGD's submission to the L and C committee's inquiry into the CCC bill advised that:

> The maximum penalty for the proposed failure to prevent bribery is the same as that for the existing foreign bribery offence (100 000 penalty units (currently $21 million), three times the value of the benefit obtained if the court can determine its value, or 10% of the company's annual turnover (if the value of the benefit cannot be determined)). This reflects the serious nature of bribery and corruption. It will ensure that the offence serves as an appropriate deterrent to companies being wilfully blind to corrupt practices within their business.[60]

4.65 With reference to the AGD *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers*, the AGD highlighted that in some circumstances, a specified maximum penalty may not provide a sufficient deterrent. AGD observed:

> It reflects that, in such circumstances, a maximum penalty expressed as a multiple of the gain obtained through wrongdoing may be more appropriate. This rationale applies to foreign bribery, where wrongdoing can lead to substantial financial benefits and could involve large corporations, for whom a specified maximum penalty may be insufficient deterrent. It is appropriate that all companies can be held accountable for bribery by their associates where they do not take steps designed to prevent such conduct from occurring. In the United Kingdom, corporations that commit or fail to prevent foreign bribery are punishable by an unlimited fine.[61]

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59 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 17.

60 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 16.

61 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 16.

Extent of corporate liability

4.66 Some stakeholders drew the committee's attention to the potential impact of the failure to prevent a foreign bribery offence on parent companies for the conduct of their subsidiaries; in particular, regarding the proposal in the 2017 consultation paper that the charge would also relate to the reckless conduct of an 'associate'. As noted above, this proposal to include a foreign bribery offence which would require a lower fault element of recklessness was omitted from the CCC bill, and is discussed in more detail later in this chapter.

4.67 AICD expressed concern that the proposed offence for failure to prevent foreign bribery by a subsidiary purports to pierce the corporate veil. AICD observed that:

> In some corporate groups a parent company has very limited control over the day-to-day management of the subsidiary. You might even see the situation where policies that are adopted by the parent company may be deemed unsuitable by the directors of the subsidiary and rejected.[62]

4.68 In light of this, AICD recommend that the offence 'be constructed so that it would impose liability on a parent company for the conduct of its subsidiary only where elements of control and fault are established';[63] and that 'the corporate veil should be lifted only where there is a compelling justification'.[64]

4.69 Dr Mark Zrisnak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, informed the committee:

> I have heard from corporates that want to argue that it's more difficult for them to keep control of all their employees, contractors and subcontractors down the chain, but surely you should be accounting for where your money's going at the end of the day, and a defence here would obviously be that you reasonably took steps to know. If someone's clearly gone outside their instructions in deliberate contravention of what you've asked them to do and what they've agreed to do then clearly that would be a defence against a recklessness charge…[65]

4.70 Indeed, Dr Zirsnak's view was that 'where effectively the company is prosecuted and the individuals don't get the deterrent effect that you are seeking…You need individual accountability'.[66]

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62 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

63 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

64 Mr Matthew McGirr, Policy Adviser, Australian Institute of Company Directors, *Committee Hansard*, 7 August 2017, p. 32.

65 Dr Mark Zrisnak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 2.

66 Dr Mark Zrisnak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 7

4.71 Others also suggested that having the ability to pierce the corporate veil and hold to account those who create corporate structures is essential to helping address the issue of foreign bribery. For example, Mr Wyld stated that IBAACC's view is that:

> …for too long corporate structures have been used to effectively hide and facilitate conduct which is improper. That's not to say that in a vast majority of sound commercial transactions there cannot be, and in fact should be and is, a proper relationship of parent, subsidiaries, regional entities, joint ventures, other companies and agents and incorporated associations, which act perfectly legally and do so quite properly. But, unfortunately, the complexity of the type of foreign bribery that we continue to see internationally is facilitated and generated by opaque financial and corporate structures. Unfortunately, the reality is unless you start having a philosophy that you pierce and are able to pierce that veil in a manner that targets that sort of behaviour, we think it will not change….[67]

4.72 Mr Tiffen also expressed concern about the way the draft legislation is currently framed with respect to holding corporations to account. Mr Tiffen stated:

> I'm not quite sure that, in the way the draft legislation is currently framed, it clearly picks up that a parent company is liable for its subsidiaries, and I think it could be made clearer if that is the intention. The other aspect is, as I said, the liability of directors for not having a culture of compliance, or whatever words we end up with.[68]

4.73 The AGD explained in their answers to questions on notice posed by the L and C committee that the new offence of failing to prevent foreign bribery by a corporation is similar to an offence that has been successfully implemented in the UK. The AGD clarified that the offence:

- will be automatically triggered where an associate of the corporation commits bribery for the profit or gain of the corporation. Attaching absolute liability to the offence will address the issues Australian prosecuting agencies have previously experienced with the lack of written evidence to establish intention in foreign bribery cases; and
- creates an incentive for corporations to implement measures to prevent bribery, because the only way for corporations to avoid liability is to show that they had adequate compliance procedures in place. It will also serve as a deterrent to corporations being wilfully blind to corrupt practices within their business.[69]

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67 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 37.

68 Mr Neville Tiffen, Private capacity, *Committee Hansard*, 31 October 2017, p. 3.

69 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

4.74 The AGD submitted that the objective of the CCC bill is not 'to impose criminal sanctions against corporations with well-integrated compliance regimes that experience an incident of corruption on their behalf'.[70] The AGD explained:

> …to achieve an appropriate balance between the objectives of the legislation and the burden placed on corporations, a full defence is available to corporations with adequate procedures under proposed subsection 70.5A(5). The Attorney-General will publish guidance under proposed section 70.5B to assist corporations to implement appropriate mitigation strategies, and support the development of adequate procedures to prevent foreign bribery.
>
> The thorough implementation of robust and effective steps to prevent foreign bribery should result in a strong and genuine culture of integrity. The government considers it reasonable to expect corporations of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their businesses and to be required to prove the existence of these procedures in instances of non-compliance.[71]

Adequate procedures

4.75 As stated above, a company will not be liable under the new failure to prevent foreign bribery offence where it can prove it had adequate procedures in place to prevent and detect foreign bribery. Evidence to the committee suggested that a company should be able to raise the defence where it took 'reasonable steps' to prevent their 'associates' from engaging in bribery and had an established system in place to ensure 'associates' are using funds in the way in which they were intended.[72]

4.76 In terms of guidance that should be put in place to inform companies about the types of systems that would be required to satisfy the defence, the committee heard evidence about the US hallmarks, UK principles and International Standards Organisation Standard ISO 37001—Anti-bribery management systems (ISO 37001).

4.77 The US hallmarks are part of the Resource Guide to the US *Foreign Corrupt Practices Act* of 1977 (FCPA). The Resource Guide does not include any mandatory standards or form of compliance programs, but stresses that compliance programs are an essential component of internal risk management and identifies the following 'hallmarks' of an effective compliance program:

- commitment from senior management and a clearly articulated policy against corruption;
- a code of conduct and compliance policies and procedures;

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70 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 17.

71 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 17.

72 See, for example, Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, pp. 2–3.

- assignment of responsibility for oversight to a person with adequate autonomy from management and sufficient resources to ensure effective implementation of the compliance program;
- risk assessments of particular transactions so that unnecessary resources are not devoted to low risk projects;
- training and continual advice for directors, officers, employees, agents and business partners;
- inclusion of incentives and disciplinary measures that are commensurate with the violation and apply across the organisation;
- education of third parties of internal policies and assurances of reciprocal commitments and appropriate due diligence in relation to third parties;
- reporting of misconduct internally and a procedure for internal investigations;
- periodic testing and review to ensure continuous improvement of the compliance program; and
- FCPA due diligence in a mergers and acquisition context, including incorporation of the acquired company into the acquiring company's compliance framework.[73]

4.78 The UK principles were released by the UK Ministry of Justice as part of its guidance to accompany the then new *Bribery Act 2010* (UK).[74] The six principles outline procedures which commercial organisations can put into place to prevent persons associated with them from bribing and should be a crucial focus for organisations of any size. The principles are:

- Proportionate procedures: The policies and procedures a commercial organisation has in place to prevent bribery should be proportionate to the bribery risks the organisation faces. Procedures should be aligned to the nature, scale and complexity of the organisation's activities, while also being clear, practical, accessible and effectively implemented and enforced.
- Top-level commitment: The top-level management of a commercial organisation is defined by the nature of the individual company. It can be the board of directors, the owners of the company or any other equivalent body or person. Top-level management should be demonstrably committed to preventing bribery by a person associated with it, fostering a culture within the organisation in which bribery is never acceptable.

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73 Criminal Division of the US Department of Justice and the Enforcement Division of the US Securities and Exchange Commission, *A Resource Guide to the U.S. Foreign Corrupt Practices Act*, pp. 57–60, https://www.justice.gov/sites/default/files/criminal-fraud/legacy/2015/01/16/guide.pdf (accessed 1 December 2017).

74 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*, pp. 20–31, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 20 March 2018).

- Risk assessment: For any anti-bribery process to be consistently effective, the organisation must assess the nature and extent of its exposure to potential external and internal risks of bribery on its behalf by persons associated with it. The assessment should be periodic, informed and well documented. As business operations change and evolve, so will the risk facing the organisation, and it is therefore imperative for regular re-assessment to be undertaken.
- Due diligence: Due diligence procedures must be applied, taking a proportionate and risk based approach, with regard to the individuals who perform or will perform services for or on behalf of the organisation. This is crucial if identified bribery risks are to be mitigated.
- Communication: Organisations need to ensure that bribery prevention policies and procedures are embedded and understood throughout the organisation, via both internal and external communication. Communication should include training that is proportionate to the risks the organisation faces.
- Monitoring and review: As an overarching principle, organisations should monitor and review procedures designed to prevent bribery by persons associated with it and make improvements where necessary.[75]

4.79 ISO 37001 specifies requirements and provides guidance for establishing, implementing, maintaining, reviewing and improving an anti-bribery management system.[76]

4.80 Mr Greg Golding of the Law Council of Australia suggested that the US hallmarks and the UK principles are a 'very good starting point', and indicated that most Australian companies already conduct themselves in accordance with these standards.[77]

4.81 Transparency International Australia favoured the UK principles approach and recommended that Australia's guidance 'should in fact be a replica of what the UK has, as a first step, because it's much more important to have uniformity of approach'.[78]

4.82 With regard to ISO Standards generally, Mr Wyld informed the committee that:

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75 Lexis Nexis, *Six principles for bribery prevention*, Sam Hemmant (5 August 2015), https://bis.lexisnexis.co.uk/blog/posts/anti-bribery-and-corruption/six-principles-for-bribery-prevention (accessed 1 December 2017).

76 International Organization for Standardization, *ISO 37001:2016, Anti-bribery management systems—Requirements with guidance for use*, https://www.iso.org/standard/65034.html (accessed 1 December 2017).

77 Mr Greg Golding, Chair, Foreign Corrupt Practices Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 7 August 2017, p. 46.

78 Mr Michael Ahrens, Director, Transparency International Australia, *Committee Hansard*, 7 August 2017, p. 23.

> The ISO standards themselves are very thorough and very detailed, and they're quite expensive and time-consuming for companies to undertake the process and comply with them.[79]

4.83 With respect to ISO 37001, the Law Council of Australia stated at a public hearing in August 2017:

> That [it] was only promulgated at the end of last year. There are very few companies globally that are currently certified under that standard. It's a very good standard, but internationally it is very early days with that standard.[80]

4.84 In discussing the copious amounts of guidance available to companies and the key elements of a compliance program, Mr David Lehmann of KordaMentha Forensic told the committee:

> I don't necessarily think that just because you have an ISO certification means you're making your best efforts to deal with the issues specifically. I think what it gets back to is senior management and the board setting the tone and the culture within their organisation…[81]

4.85 Mr Lehmann suggested that:

> What we should be doing is leveraging off the guidance that is there already but making it relevant to our corporations—adopt the best of the best that's going around but have our Australian emphasis on any guidance that's provided to corporations.[82]

4.86 Noting that the 2017 consultation paper suggested that the minister issue guidance on what are, in effect, to be regarded as adequate procedures, Mr Wyld commented:

> …I'm not sure you can go into too much detail, because the more detail you have the more prescriptive it becomes and then it becomes a tick-the-box mentality—'I've done this and done this' and therefore I have adequate procedures…it's far better to have broader concepts and to address the fundamental issues of behaviour and characteristics.[83]

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79 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 38.

80 Mr Greg Golding, Chair, Foreign Corrupt Practices Committee, Business Law Section, Law Council of Australia, *Committee Hansard*, 7 August 2017, p. 46.

81 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 15.

82 Mr David Lehmann, Director, KordaMentha Forensic, *Committee Hansard*, 7 August 2017, p. 18.

83 Mr Robert Wyld, Partner, Johnson Winter & Slattery; and Immediate Past Co-Chair, International Bar Association Anti-Corruption Committee, *Committee Hansard*, 7 August 2017, p. 38.

4.87 Other submitters also emphasised the importance of avoiding a tick-the-box mentality. For example, Transparency International Australia cautioned:

> The tick box is absolutely the bare minimum, but, if you tick the box, you behave badly and you are still a corporate hero, then you've [the government] achieved nothing.[84]

4.88 Some stakeholders also suggested that internal corporate whistleblowing systems should form part of the adequate procedures designed to prevent foreign bribery.[85] This is discussed in detail in Chapter 6.

Minister's guidance on adequate procedures

4.89 Proposed section 70.5B of the CCC bill provides that the minister must publish guidance on the steps a body corporate can take to prevent an associate from bribing foreign public officials. As discussed above, under proposed section 70.1 of the CCC bill, an associate includes a person who is an officer, employee, agent, contractor, subsidiary, or a person who otherwise provides services for or on behalf of the corporation.

4.90 To assist body corporates to determine the extent to which they may be liable for parties 'down the supply chain', the AGD explained that they anticipate that the ministerial guidance:

> …will discuss the concept of 'associate' and its practical application to measures that a body corporate can take to prevent foreign bribery by its associates. The timing for issuing the guidance will be a matter for government, but will occur prior to the commencement of the 'failing to prevent' offence (which will commence 6 months after Royal Assent).[86]

4.91 In addition, AGD confirmed that it 'intends to publicly consult on the draft guidance'.[87]

4.92 In response to questions on notice posed by the L and C committee in relation to the inquiry into the CCC bill, the AGD explained that the ministerial guidance:

> …will be principles-based, aimed at helping corporations understand the steps they can take to prevent bribery of a foreign public official. The guidance will help corporations understand the policies and procedures they may put in place to implement robust and effective steps to prevent foreign bribery, according to their specific circumstances.

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84 Mrs Rebecca Davies, Director Transparency International Australia, *Committee Hansard*, 7 August 2017, p. 22.

85 See, for example, Associate Professor Vivienne Brand, *Submission 4* to the L and C committee's inquiry into the CCC bill, p. 2.

86 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 7.

87 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, pp. 8–9.

> Corporations that are able to point to the existence of effective and well-integrated compliance regimes would be able to establish the defence in proposed subsection 70.5A(5).D.[88]

4.93 In addition, the AGD confirmed that, in line with the preference of industry stakeholders to the 2017 consultation, the guidance will be informed by the guidance issued by the UK Ministry of Justice in relation to section 9 of the *Bribery Act 2010* (UK).[89] Further, AGD advised that:

> In preparing this guidance, the department will also have regard to other existing guidance, including that published by the Australian Trade Commission; United States Department of Justice; International Organization for Standardization; and OECD, UNODC [United Nations Office on Drugs and Crime] and World Bank.[90]

4.94 The AGD suggested that, while it is reasonable to expect corporations of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their business, the application of steps to prevent foreign bribery will differ substantially from corporation to corporation:

> It is not reasonable to expect small and medium-sized enterprises to put in place a compliance program of the same size that would be required of a large multi-national corporation. Similarly, a corporation with limited exposure to foreign bribery risk should not be expected to take mitigation measures as extensive as another corporation that has a significantly greater risk profile. [91]

Committee view

4.95 The committee notes that evidence presented demonstrates that foreign bribery often occurs in instances of wilful blindness by senior management to activities occurring within their corporations. In addition, the committee observes the difficulties surrounding proving intention where there is often a lack of readily available written evidence.

4.96 The committee considers that introducing a corporate offence of failing to prevent foreign bribery in Australia is overdue. Where corporations fail to take steps to prevent foreign bribery from occurring, they should be held to account for foreign bribery by their associates. For too long the law has protected those who facilitate and generate opaque financial and corporate structures from being criminalised for corrupt behaviour.

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88 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 10.

89 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 12.

90 Attorney-General's Department, answers to questions on notice L and C committee's inquiry into the CCC bill, p. 12.

91 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 12.

4.97 The committee acknowledges that the CCC bill proposes a new corporate offence of failing to prevent foreign bribery, where a company will be criminally liable when, for the profit or gain of the company, an 'associate': commits an offence under section 70.2 (the intentional bribery of a foreign public official) of the Criminal Code; or engages in conduct outside Australia that would constitute an offence under section 70.2 of the Criminal Code.

4.98 The committee notes concerns raised by industry stakeholders that the failure to prevent foreign bribery offence places a heavy burden of proof on corporations—requiring a company to satisfy the legal burden that it has adequate procedures in place to prevent the commission of a foreign bribery offence, combined with a reverse onus of proof and absolute liability. However, in the committee's view it is appropriate to require corporations to prove the existence of an adequate compliance regime. In this context, the committee notes that introducing such an offence would simply be bringing Australia in line with comparator jurisdictions, such as the UK—only nearly a decade later.

4.99 The committee also notes that wrongdoing can lead to substantial financial benefits and could involve large and lucrative corporations. It is therefore important for the available penalties to be a sufficient deterrent.

4.100 With respect to the minister's guidance that is to be issued on adequate procedures, the committee is of the opinion that a principles-based approach is preferable to a tick-a-box checklist. The committee also cautions that it is important for the minister's guidance be designed such that it is of general application to corporations of all sizes and in all sectors. To ensure the minister's guidance will achieve its stated objective, the committee is of the opinion that adequate consultation must be undertaken on any draft guidelines. In addition, to allow companies sufficient time to implement the appropriate changes and to help encourage a culture of compliance, the minister's guidance should be finalised and published well in advance to the commencement of the new failing to prevent foreign bribery offence.

4.101 The committee acknowledges that the CCC bill provides that the minister must publish guidance on the steps a body corporate can and should take to prevent an associate from bribing foreign public officials.

Recommendation 7

4.102 The committee recommends that the *Criminal Code Act 1995* be amended to include a new corporate offence of failing to prevent foreign bribery, and that principles-based guidance be published as to the steps companies need to take in order to establish and implement adequate procedures in relation to the new failing to prevent foreign bribery offence.

Recommendation 8

4.103 The committee recommends that as part of the public consultation on the minister's guidance on adequate procedures in relation to the new failing to prevent foreign bribery offence, the government publish an exposure draft of the guidance and allow a period of no less than four weeks for stakeholders to provide comment.

Recommendation 9

4.104 The committee recommends that the minister finalise and publish the guidance on adequate procedures with sufficient time before the commencement of the new failing to prevent foreign bribery offence to allow companies to implement the necessary compliance measures.

Other reforms to the foreign bribery offence

Remove the requirement of influencing a foreign official 'in their official capacity'

4.105 The current foreign bribery offence requires that the bribe be provided, promised or offered with the intention of influencing a foreign public official 'in the exercise of their duties as foreign public official' to obtain or retain business or an advantage that is not legitimately due.[92]

4.106 The amendments proposed in the 2017 consultation paper and the CCC bill remove the requirement that the foreign official must be influenced in the exercise of the official's duties.[93] The AGD explained that this requirement placed:

> …an unnecessary burden on the prosecution to prove the scope of a foreign public official's duties. Additionally, proof of foreign official duties relies on international legal assistance processes, which can be protracted or unsuccessful.[94]

4.107 In submissions to the 2017 consultation, the Export Council of Australia and Control Risks supported the proposed amendment.[95] Control Risks explained that:

> …it is irrelevant whether the official is improperly influenced either within or beyond their official duties. The current wording simply provides one more hurdle for the prosecution to overcome, which does not contribute to the intention of the legislation.[96]

4.108 However, the Law Council of Australia and IBACC[97] suggested that further consideration should be given to removing the requirement of influencing a foreign public official 'in their official capacity', and that widening the definition of the

92 *Criminal Code Act 1995*, ss. 70.2(c).

93 CCC bill, s. 70.2

94 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 6.

95 Export Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 3.

96 Control Risks, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 4.

97 Law Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 6; International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9.

foreign public officials capacity may be better course of action.[98] In this context, IBACC urged caution:

> to ensure that the criminal nature or otherwise of the bribe in a personal or business matter does not depend on the status of the recipient as a public official or private individual.[99]

Clarify that business or business advantage can be obtained for someone else

4.109 In its current form, the Australian foreign bribery offence is ambiguous as to whether it covers instances where a person provides, promises or offers a benefit in order to secure business or a business advantage for another person.[100] As acknowledged by the government in the 2017 consultation paper:

> The Anti-Bribery Convention clearly intends to criminalise bribery of foreign public officials where bribery is carried out by one person to secure business for another person. The Commentaries to the Anti-Bribery Convention note that 'the conduct … is an offence whether the offer or promise is made, or the pecuniary or other advantage is given, on the person's own behalf or on behalf of any other natural person or legal entity.'[101]

4.110 The US, UK, Canada and New Zealand all explicitly provide that a person who obtains the business does not have to be the same person who provides or offers the benefit.[102]

4.111 In submissions to the 2017 consultation, Control Risks, Australia-Africa Minerals & Energy Group (AAMEG), and Allens Linklaters were among those

98 Law Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 6.

99 International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9.

100 See *Criminal Code Act 1995*, subpara. 70.2(1)(c)(ii); Control Risks, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 4; Australia-Africa Minerals & Energy Group, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9; Allens Linklaters, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act* 1995, p. 5.

101 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 9.

102 For instance, the US *Foreign Corrupt Practices Act 1977*, the UK *Bribery Act 2010*, the Canadian *Corruption of Foreign Public Officials Act 1998* and the New Zealand *Crimes Act 1961*.

stakeholders who endorsed the proposed change to clarify that business or business advantage can be obtained for someone else.[103]

Clarify that the accused need not have a specific business or business advantage in mind

4.112 Both the 2017 consultation paper and the CCC bill propose amendments to clarify that there need not be a specific business or business advantage intended to be secured when providing or offering the bribe.[104]

4.113 The majority of submitters to the 2017 consultation process supported the proposed amendment to clarify that the payer of a bribe does not need to intend to obtain or retain any specific business or business advantage.[105] The IBAACC explained that as a result of the proposed change:

> …the offence would cover situations where a person is, for example 'currying favour' with the intention that a foreign public official would assist in providing an unspecified, undue or improper advantage in the future.[106]

Committee view

4.114 The committee agrees with stakeholders that in determining whether a foreign public official is improperly influenced, it is irrelevant whether the official is improperly influenced within or beyond their official duties. To ensure Australia's foreign bribery legislation is operating as intended, and that prosecution of foreign bribery matters are not unnecessarily protracted, the committee believes consideration should be given to removing the requirement that the foreign public official must be influenced in the exercise of the official's duties.

4.115 The committee notes that the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions clearly intends to criminalise bribery of foreign public officials where bribery is carried out by one person to secure business for another person—whether the offer or promise is made, or the pecuniary or other advantage is given, on the person's own behalf or on behalf

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103 Control Risks, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 4; Australia-Africa Minerals & Energy Group, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9; Allens Linklaters, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

104 See CCC bill, Schedule 1, item 6.

105 International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 10; Law Council of Australia, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act* 1995, p. 6.

106 International Bar Association Anti-Corruption Committee, submission to Attorney-General's Department 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9.

of any other natural person or legal entity. The committee also notes that the US, UK, Canada and New Zealand have explicitly provided that a person who obtains the business does not have to be the same person who provides or offers the benefit. In this context, the committee is disappointed the government has delayed taking action on this uncontroversial issue, to clarify that a person is prohibited from bribing a foreign public official to obtain a business advantage for someone else.

4.116 The committee is of the view that there is no reason why the Criminal Code should not be amended to make it clear that the payer of a bribe does not need to intend to obtain or retain any specific business or business advantage to be guilty of the foreign bribery offence. As stated above, the committee is very concerned that the government has delayed taking action to clarify the operation of the law.

4.117 The committee acknowledges that the CCC bill proposes to remove the requirement that a foreign official must be influenced 'in their official capacity'. In addition the CCC bill clarifies that the business or business advantage can be obtained for someone else; and that the payer of a bribe does not need to intend to obtain or retain any specific business or business advantage to be guilty of the foreign bribery offence.

Recommendation 10

4.118 The committee recommends that the foreign bribery offence be amended to clarify that:

- **a person is prohibited from bribing a foreign public official to obtain a business advantage for someone else; and**
- **the payer of a bribe does not need to intend to obtain or retain any specific business or business advantage to be guilty of the foreign bribery offence.**

Introducing a lesser offence of recklessness

4.119 Given the difficulties that arise in proving direct criminal liability under Australia's foreign bribery provisions, for the most part, submitters welcomed the suggestion of a foreign bribery offence which would require a lower fault element of recklessness as proposed in the 2017 consultation paper (but omitted from the CCC bill). However, concern was noted with regard to how it would operate with the proposed new corporate offence of failing to prevent foreign bribery.

4.120 While the proposed recklessness offence would still require the prosecution to prove intention as to the conduct of providing, promising or offering the benefit, it would only require proof that a person was reckless as to the circumstance; that is, the person was aware of a substantial (and unjustifiable) risk that the conduct of providing the benefit would improperly influence a foreign public official in relation to obtaining or retaining business or an advantage.[107]

107 *Criminal Code Act 1995*, s. 5.4.

4.121 The penalty for the new recklessness offence proposed in the 2017 consultation paper was half of the corresponding intention offence.[108] The 2017 consultation paper also noted that these penalties are comparable to those imposed under the Criminal Code for money laundering and false accounting offences.[109] The paper explained that the recklessness offence was aimed to:

- ensure that foreign bribery offences are of greater utility in addressing foreign bribery (which often occurs in situations where it is difficult to establish intention) while at the same time differentiating between differing degrees of culpability; and
- serve as a deterrent and encourage greater vigilance in providing, offering or promising benefits in circumstances where there is a substantial risk that a foreign public official will be improperly influenced by this conduct.[110]

4.122 Mr Shane Kirne of CDPP commented that 'from a prosecutor's perspective, obviously, it's a lower test'. However, Mr Kirne went on to state that:

> It's still quite a high test—an awareness 'of a substantial risk that the circumstance exists' and 'it is unjustifiable to take that risk'.[111]

4.123 Dr Cindy Davids, Associate Professor, School of Law, Deakin University, argued that 'there is practical value in extending the fault element for the conduct component…to include recklessness as a less serious alternative'.[112] Mr Mark Pulvirenti, Control Risks, agreed, explaining that he saw the new offence based on the fault element of recklessness working in a situation 'where an organisation allows a payment to be made and intent can't necessarily be proved but, in the circumstances, it was reckless for the amount to have been paid'.[113]

4.124 Dr Zirnsak of the Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, reflected on how the proposed recklessness offence would operate with the existing intention offence:

> I think you normally would have both categories, so intentionality would normally attract a greater penalty than 'reckless', if the state's able to prove there was an intention to pay a bribe to achieve an outcome, or to pay a bribe even while being uncertain about the outcome, versus simply being

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108 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

109 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

110 Attorney-General's Department, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, Public Consultation Paper, April 2017, p. 8.

111 Mr Shane Kirne, Commonwealth Director of Public Prosecutions, *Committee Hansard*, 31 October 2017, p. 38.

112 Dr Cindy Davids, Associate Professor, School of Law, Deakin University, Melbourne, *Submission 34*, p. 19.

113 Mr Mark Pulvirenti, Partner, Control Risks, *Committee Hansard*, 7 August 2017, p. 29.

> reckless in the payments. I think in this case Australia should lead with this. I think it would send a signal to companies about being more cautious when they make payments and about the way they do business…[114]

4.125 Indeed, Mr Wyld, representing the IBAACC, suggested that creating two levels of offences, 'one an intentional offence and the other a reckless offence', would be a 'significant improvement'.[115]

Why the fault of element or recklessness was excluded from the CCC bill

4.126 The AGD stated that the rationale for excluding the fault element of recklessness in section 70.2 of the CCC bill was:

> …after considering the benefits and disadvantages of an offence of recklessly bribing a foreign public official, including views expressed in submissions received in response to the April 2017 discussion paper, the government elected not to proceed with a recklessness offence.[116]

4.127 The AGD's submission to the L and C committee's inquiry into the CCC bill detailed the following benefits which would be achieved as a result of the introduction of a recklessness offence:

- address challenges in obtaining necessary and sufficient evidence from overseas to prove intention—due to the nature of foreign bribery, relevant conduct almost exclusively occurs overseas; the target of the bribe may also be located in a country that is unwilling to cooperate in relation to the bribery of one of its public officials;
- address challenges in establishing intention where the conduct is historical—in the foreign bribery context, investigations most often commence after a company has self-reported, after media reporting, or after a whistleblower has come forward;
- overcome instances where it is difficult to obtain sufficient documentary evidence—as foreign bribery usually occurs in a business setting, persons involved exercise great caution and transact verbally or face-to-face, again usually overseas, with witnesses also overseas; and
- serve as a greater deterrent and encourage greater vigilance in providing, offering or promising benefits in circumstances where there is a substantial risk that a foreign public official will be improperly influenced by this conduct.[117]

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114 Dr Mark Zirnsak, Director, Justice and International Mission, Synod of Victoria and Tasmania, Uniting Church in Australia, *Committee Hansard*, 7 August 2017, p. 2.

115 Mr Robert Wyld, Co-Chair, Anti-Corruption Committee, International Bar Association, *Committee Hansard*, 22 April 2016, p. 23.

116 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

117 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 6.

4.128 The AGD's submission to the L and C committee's inquiry into the CCC bill also noted that both the Australian Federal Police and the CDPP supported the creation of a recklessness offence as 'it would effectively capture instances of wilful blindness by suspects, including senior company officers (such as directors)'.[118] The submission explained:

> Most foreign bribery cases involve bribes paid by third parties in circumstances where the suspects (individuals and companies) are wilfully blind as to the activities of their agents (including employees, subsidiaries and third party agents).[119]

4.129 However, the AGD stated that:

> After balancing these arguments against other views expressed in submissions received in response to the April 2017 discussion paper, the Government elected not to proceed with a recklessness offence.[120]

4.130 In response to questions notice posed by the L and C committee regarding the CCC bill inquiry, the AGD noted the following concerns expressed by stakeholders in response to the 2017 discussion paper:

- the offence would set too low a standard for culpability;[121]
- it would be difficult for corporations to develop policies and procedures that govern the assessment of an unjustified substantial risk in the context of foreign bribery, which is complex by nature and can be particularly difficult to identify and easy to conceal;[122] and
- a recklessness offence would be inconsistent with international standards.[123]

4.131 The AGD also defended the decision not to adopt a recklessness offence based on the fact that comparator jurisdictions, such as the US and the UK, had also not adopted such an offence. The AGD observed that:

> The US and UK have not adopted a recklessness offence. The US Congress has previously considered and rejected a 'reckless disregard' fault standard with respect to the Foreign Corrupt Practices Act 1977, and in 2008 the UK

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118 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 6.

119 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, pp. 6–7.

120 Attorney-General's Department, *Submission 7* to the L and C committee's inquiry into the CCC bill, p. 7.

121 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

122 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

123 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 1.

Law Commission rejected the inclusion of recklessness as a fault element for foreign bribery in the now Bribery Act 2010.[124]

Committee view

4.132 The committee notes that the proposal in the 2017 consultation paper to include a foreign bribery offence which would require a lower fault element of recklessness is omitted from the CCC bill.

4.133 The committee acknowledges that the offence of failing to prevent foreign bribery will go some way to addressing wilful blindness on the part of companies. However, without a recklessness offence, it is possible that companies and individuals may still be able to structure their affairs in ways which allow them to limit or avoid exposure to criminal liability for conduct that should be criminalised.

4.134 It is apparent to the committee that Australia's current laws are not operating to effectively criminalise and deter companies and individuals who are engaging foreign bribery. While the committee notes that neither the US nor the UK, have progressed a recklessness offence, it should not be ruled out.

4.135 The committee notes that the proposal to introduce a new separate foreign bribery offence based on recklessness is not required for Australia to meet its obligations under the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions. However, upon such time that a future review is undertaken of Australia's foreign bribery regime, the committee suggests that a new separate foreign bribery offence based on recklessness, with the proposed maximum penalty being half that of the corresponding intention offence, be further explored.

124 Attorney-General's Department, answers to questions on notice, L and C committee's inquiry into the CCC bill, p. 2.