

Coalition Senators Additional Comments

General comments

- 1.1 Coalition Senators note the majority report and the issues raised in the serious matter of foreign bribery.
- 1.2 Coalition Senators note that corporate crime and foreign bribery are critical issues.
- 1.3 Coalition Senators also note the current difficulties in achieving successful prosecutions and the need to strengthen Australia's foreign bribery offences.
- 1.4 Coalition Senators however note that some comments in the minority report represent an overreach in some of its criticisms.
- 1.5 Coalition Senators note the significant reforms by the government to crack down on foreign bribery and note that the government has taken action since 2013 in response to the Phase 3 OECD Report and Phase 3 OECD Follow-up Report in 2012 and 2015 respectively.
- 1.6 Coalition Senators also note that many of the reforms underway were instigated as a result of difficulties faced in attempted prosecutions in recent years.
- 1.7 Coalition Senators note that the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (CCC bill) currently before the Senate seeks to remove impediments to the successful investigation and prosecution of foreign bribery by enhancing Australia's foreign bribery offences and introducing a deferred prosecution agreement (DPA) scheme.
- 1.8 Coalition Senators note that the Phase 4 OECD Report in December 2017 was largely positive.
- 1.9 Coalition Senators also note that the majority of recommendations already reflect the government's stated intention.

Chapter 3—Investigation and enforcement

1.10 Regarding Recommendation 3 and further to the majority report's committee comments, Coalition Senators note the significant resourcing provided to those agencies in recent years, including a \$321 million injection of funding in the 2017—2018 federal Budget to provide the Australian Federal Police (AFP) with the resources necessary to be more agile in responding to emerging criminal threats. This represents the biggest injection into the AFP's domestic capability in over a decade. This is in addition to the \$15 million funding to support the Fraud and Anti-Corruption Centre, announced in 2016.¹

1 Prime Minister Malcolm Turnbull MP, Boosting efforts to tackle foreign bribery, 23 April 2016, <http://www.malcolmturnbull.com.au/media/boosting-efforts-to-tackle-foreign-bribery> (accessed 28 March 2018).

1.11 Coalition Senators note that that the Phase 4 OECD Report into the United Kingdom raised concerns about their blockbuster funding model, with the following commentary:

The lead examiners further consider that blockbuster funding may lead to perceived, if not real, influence of the executive over law enforcement decisions.²

1.12 Taking into account these factors, Coalition Senators note the majority report recommendation that alternative approaches such as this model are worthy of consideration.

Chapter 4—Reforming the foreign bribery offence

1.13 Coalition Senators feel that the following statements in paragraphs 4.13 and 4.37 of the majority report, as well as similar comments made throughout the report, do not provide accurate representations: 'The committee is concerned that the government has delayed taking action to close this potential loophole' and 'the committee considers that the government's action to close this potential loophole is overdue'.

1.14 Coalition Senators note that the previous Labor Government did not amend these specific elements of the foreign bribery offences.

Chapter 5—Encouraging self-reporting by corporations—A deferred prosecution agreement scheme

1.15 Regarding Recommendation 12, Coalition Senators note the recommendation that deferred prosecution agreements (DPAs) be published. However, further consideration should be given by the government as to the specific circumstances where it would be in the public interest to do so.

1.16 Coalition Senators consider that the requirement to publish all details on how a company has complied with the terms and conditions of a DPA, as well as any breach, could place a significant administrative burden on the Commonwealth Director of Public Prosecutions (CDPP).

Chapter 6—Protecting whistleblowers who expose foreign bribery

1.17 Coalition Senators disagree with Recommendations 15 and 16 on the grounds that the government recently introduced Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017 (EWP bill) in the Senate. The Government has consulted with a number of stakeholders, including the expert panel, in forming this legislation.

1.18 Coalition Senators note that the Senate Economics Legislation Committee recently endorsed the passage of the EWP bill in its current form.

2 OECD, The United Kingdom Phase 4 Report, 15 March 2017, p. 35, http://www.oecd.org/mwg-internal/de5fs23hu73ds/progress?id=R_fLwOYRO1ULrZNRMcUCxQSwkHjAqmKm7IYGtdV60wA,&dl (accessed 28 March 2018).

Chapter 7—The facilitation payment defence

1.19 Coalition Senators disagree with Recommendation 18 of the majority report and note the Attorney-General's Department's advice to the Senate Legal and Constitutional Affairs Committee inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (CCC bill), in its answers to questions on notice received on 7 March 2018:

Operational experience has indicated that the facilitation payment defence has not been an impediment to the enforcement of the foreign bribery offence.³

1.20 Coalition Senators also note that facilitation payment defences are not prohibited under the OECD Anti-Bribery Convention and also that the United States and New Zealand retain facilitation payment defences. Further, Coalition Senators note that the facilitation payment defence in Australia is narrower than that of the United States, in that it requires in paragraph 70.4(1)(a) that the value of the benefit is of a 'minor nature' and in paragraph 70.4(1)(b) that the conduct was related to a routine government action of a 'minor nature'.⁴

1.21 Coalition Senators are open to the majority report's view that the facilitation payments defence should be reviewed but also recognise that the government is implementing significant reforms to Australia's foreign bribery legal framework. In particular, the CCC bill contains the introduction of a failure to prevent foreign bribery offence and the broadening of the foreign bribery offence to cover bribery to obtain a personal benefit.⁵

Chapter 8—Other reform options

1.22 Coalition Senators take issue with the statement at paragraph 8.81:

However, the committee is concerned that the government has rushed to issue the long-awaited Guidelines for self-reporting in response to the OECD's feedback in the Phase 4 OECD report.

1.23 Coalition Senators note that:

- the Phase 4 OECD Report was published on 15 December 2017;
- the Guidelines for self-reporting were published by the AFP and CDPP on 7 December 2017;
- this means that the Guidelines for self-reporting were published before the Phase 4 OECD Report was published; and
- therefore the publishing of the guidelines was not a response to the OECD's feedback.

3 Attorney-General's Department, answers to questions on notice, Senate Legal and Constitutional Committee inquiry into the CCC bill 2017, p. 8.

4 See *Criminal Code Act 1995*, paras. 70.4(1)(a) and 70.4(1)(b).

5 See CCC bill, schedule 1.

1.24 Coalition Senators disagree with Recommendation 19 on the grounds that the government is already progressing with a beneficial ownership register for companies.

1.25 Regarding Recommendation 20, Coalition Senators support a requirement for suppliers to disclose convictions for foreign bribery and a power for agencies to debar such firms from future procurement, where appropriate.

1.26 However, procurement rules should not address foreign bribery in isolation, as a distinct element of the procurement framework. It is appropriate that firms found guilty of other high consequence illegal behaviour should also be handled in a consistent way, for instance where they were convicted of commercial fraud, market collusion, and other forms of serious or criminal misconduct.

1.27 Whatever mechanisms are identified to address these issues and concerns, consideration must be given to ensure that any requirement does not unreasonably add burden and red-tape to procurers or businesses, noting the majority of businesses are law-abiding corporations. Accordingly any disclosure obligation built into the procurement process should consistently capture any forms of serious illegal behaviour, not just foreign bribery in isolation. It would not be best regulatory practice to impose red-tape on law-abiding firms requiring them to establish internal processes to prevent remote likelihood events. Conversely, it should be noted that where a firm has conspired with foreign officials to break the law, a self-disclosure regime may not be a reliable mechanism to uncover evidence of such practices.

Senator Jane Hume
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