Chapter 2

Views on the bill

2.1 Submitters to the inquiry acknowledged the difficulties faced in investigating and prosecuting the foreign bribery offence, and welcomed the proposals in the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (the bill) to introduce reforms to effectively address foreign bribery and change corporate culture.

2.2 This chapter examines the proposed amendments to the foreign bribery offence and the introduction of a new corporate offence of failing to prevent foreign bribery. It then outlines the issues raised by submitters in relation to the introduction of a deferred prosecution agreement scheme in Australia. In so doing, it looks at the evidence received in this inquiry as well as submissions made in relation to the government's 2017 consultations on the amendments proposed in the bill.

Proposed amendments to the foreign bribery offence

2.3 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]

Extending the definition of foreign public official to include a candidate for office

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

2.5 In line with the amendments proposed in the 2017 consultation, the bill seeks to amend the definition of 'foreign public official' to include a person standing or nominated as a candidate for public office.[2] 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'.[3] The Attorney-General's Department (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.[4]

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1 *Criminal Code Act 1995*, Division 70.

2 Schedule 1, item 4.

3 Attorney-General's Department, *Submission 7*, p. 4.

4 Attorney-General's Department, *Submission 7*, p. 4.

2.6 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.[5]

2.7 Allens Linklaters also highlighted that '[c]andidates for foreign public office are vulnerable to influence in much the same way as foreign public officials'.[6] Allens Linklaters explained 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 amendment would materially, if at all, increase the compliance burden faced by Australian corporations.[7]

2.8 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.[8]

2.9 While recognising the government's rationale—restricting and prosecuting the bribery of individuals who are in the process of running for office and who might in the future make political judgments and be influenced by the payments made prior to their appointment—Morgan Lewis & Bockius LLP (ML & B) observed that the definition of foreign public official in the United Kingdom's *Bribery Act 2010* does not include candidates for office.[9] ML & B went on to suggest that:

> The challenge for the authorities will be considering how broadly the term 'candidate' might be interpreted and, in particular, when an individual is deemed to be a candidate for public office. During candidacy, it may be that third party agents or representatives of the candidates are the more likely target for bribes. Based on our experience, it may also be difficult to determine when someone becomes a 'candidate' in some jurisdictions, where the process for electing a public official may not be as transparent as in other jurisdictions.[10]

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5 Australian Institute of Company Directors, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

6 Allens Linklaters, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

7 Allens Linklaters, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 5.

8 BHP Billiton, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 2.

9 Morgan Lewis & Bockius LLP, *Submission 3*, p. 2.

10 Morgan Lewis & Bockius LLP, *Submission 3*, p. 2.

2.10 By contrast, the definition of foreign officials in the United States' *Foreign Corrupt Practices Act 1977* includes candidates for office.[11]

Removing the requirement that a foreign official must be influenced in the exercise of the official's duties

2.11 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.[12]

2.12 In line with the amendments proposed in the 2017 consultation, the bill removes the requirement that the foreign official must be influenced in the exercise of the official's duties.[13] 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.[14]

2.13 The AGD also indicated that the Australian Federal Police (AFP) had noticed that foreign public officials can be bribed to act outside of their official duties to secure business or an advantage:

> For example investigations have identified instances where senior ministers in foreign countries may have been bribed to act beyond their official duties. The foreign public official's position of power within the foreign country, or candidacy for such a position, is the relevant consideration in criminalising conduct amounting to foreign bribery.[15]

2.14 The Law Council of Australia (the Law Council) also recognised that foreign public officials can be bribed to act outside their official duty to secure a business or an advantage, and that the proposed amendment would remove the limitation imposed by the concept of 'in their official capacity'.[16] However, the Law Council suggested that widening the definition of the foreign public official's capacity, similar to the formulation in the United Kingdom's *Bribery Act 2010*, may be preferable to the omission currently proposed:

> Subsection 6(4) of the UK Bribery Act provides that references to influencing a foreign public official in their capacity as a foreign public official includes any omission to exercise those functions and any use of the foreign public official's position as such an official, even if not within their authority. This wide definition permits prosecution without needing

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11 15 U.S.C. § 78dd-1(a)(1)-(3).

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

13 Schedule 1, item 3.

14 Attorney-General's Department, *Submission 7*, p. 6.

15 Attorney-General's Department, *Submission 7*, p. 6.

16 Law Council of Australia, *Submission 6*, p. 9.

> evidence of fact from the jurisdiction concerned as to the precise scope of the official's duties. As this need for evidence of fact is invariably one of the difficulties in establishing the foreign bribery offence under the current law in the Criminal Code, expanding the definition along the lines of the UK Bribery Act formulation may be a more effective solution.[17]

2.15 In their submission to the 2017 consultation the International Bar Association Anti-Corruption Committee (IBAACC) also 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 foreign public officials capacity may be better a course of action.[18] In this context, IBAACC 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.[19]

2.16 By comparison, ML & B and the Uniting Church in Australia welcomed the proposed amendment to remove the requirement that the foreign public official must be influenced in the exercise of the official's duties.[20] ML & B commented that:

> The exact nature and scope of a foreign public official's duties are often difficult to ascertain and prove and so the proposed amendment should alleviate this evidentiary burden.[21]

2.17 In submissions to the 2017 consultation, the Export Council of Australia and Control Risks also supported the proposed amendment.[22] 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.[23]

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17 Law Council of Australia, *Submission 6*, p. 9.

18 Law Council of Australia, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 6.

19 International Bar Association Anti-Corruption Committee, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9.

20 Morgan Lewis & Bockius LLP, *Submission 3*, p. 2; Uniting Church in Australia, *Submission 1*, p. 2.

21 Morgan Lewis & Bockius LLP, *Submission 3*, pp. 2–3.

22 Export Council of Australia, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 3.

23 Law Council of Australia, submission to AGD 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 AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 9.

Introducing the concept of 'improperly influencing' a foreign public official

2.18 The current foreign bribery offence requires the prosecution to show that a benefit or business advantage was 'not legitimately due'.[24] The bill seeks to replace the 'not legitimately due' requirement with the concept of 'improperly influencing' a foreign public official to obtain or retain business or an advantage.[25] This was one of two alternative approaches considered by the AGD in the 2017 consultation to replace the 'not legitimately due' requirement; the other was 'dishonesty'.

2.19 The AGD explained that introducing the concept of 'improperly influencing' a foreign public official will ensure the offence more accurately reflects the conduct of foreign bribery. AGD observed that:

> In some cases, the threshold of 'not legitimately due' presents challenges. Bribes can be concealed by disguising them as contractual obligations (for instance, commissions pursuant to contractual arrangements with third party agents) making it difficult to prove, beyond a reasonable doubt, that the payments are not legitimately due.

2.20 The bill includes a non-exhaustive list of matters that a trier of fact may have regard to when determining whether influence is improper.[26] The matters included in the list are based on the experience of foreign bribery investigators and prosecutors, and provide the trier of fact with relevant factors on which to inform his or her determination.[27] The AGD explained:

> It will be a matter for the courts to determine whether there has been improper influence on a case-by-case basis and the amendments set out factors that are relevant. For example, a payment to a foreign public official made through unofficial or undisclosed accounts, or a payment that is not properly recorded in a company's records could indicate an intention to improperly influence a foreign public official.[28]

2.21 While supportive of a move away from the requirement of 'not legitimately due', stakeholders were divided as to whether the concept of 'improperly influence' as set out in the bill, or 'dishonesty' was preferable.

2.22 For example, the IBAACC preferred the use of the concept of 'dishonesty' and was of the view that as a result of the introduction of the concept of 'improper influence':

> …there will continue to be uncertainty as to what that concept will mean, as a matter of fact and of law, for some years until there are authoritative appellate judgments which consider the phrase.[29]

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24 *Criminal Code Act 1995*, s. 70.2

25 Schedule 1, item 6.

26 Schedule 1, item 6.

27 Attorney-General's Department, *Submission 7*, p. 5.

28 Attorney-General's Department, *Submission 7*, p. 5.

29 International Bar Association Anti-Corruption Committee, *Submission 2*, p. 2.

2.23 The AICD agreed, and suggested that 'the revised offence would be improved by replacing its novel 'improperly influencing' test with a more established dishonesty-based test'.[30] The AICD expressed concern that the non-exhaustive list of matters that a trier of fact may have regard to when determining whether influence is improper:

> …would, contrary to the intention of the drafters, add additional complexity to the offence. This is because each individual matter could be the subject of judicial interpretation and explanation. Each factor would likely cause an expansion of the evidence required for a prosecution and a defence.[31]

2.24 The Law Council was also of the view that 'introducing this novel and undefined concept will serve only to create more uncertainty and unnecessary complexity in the foreign bribery offence',[32] highlighting that:

> Absent statements from courts to clarify the concepts, which will not be available for several years and only after concluded prosecutions, effective advice and proper management of business dealings will be made more difficult and costly.[33]

2.25 ML & B observed that the concept of 'improper influence' introduced by the bill was similar to that adopted in the United Kingdom's *Bribery Act 2010*, although 'it does not specify the non-exhaustive factors that should be taken into account when considering whether improper influence has occurred'.[34] ML & B went on to suggest that in addition to the non-exhaustive factors:

- A high level definition of what constitutes improper influence may be included in the legislation to provide the authorities with greater flexibility when applying the law to the specific fact matrix of each case.
- Consideration could be given to providing ancillary and non-statutory guidance, which can provide insight for corporates and prosecutors as to the factors which will be considered in determining whether there has been 'improper influence'.[35]

2.26 However, in addition to the non-exhaustive list of factors included in the bill, the Explanatory Memorandum (EM) provides a number of examples to assist corporates to understand how the factors will be applied.[36]

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30 Australian Institute of Company Directors, *Submission 5*, p. 1.

31 Australian Institute of Company Directors, *Submission 5*, p. 2.

32 The Law Council of Australia, *Submission 6*, p. 6.

33 The Law Council of Australia, *Submission 6*, p. 7.

34 Morgan Lewis & Bockius LLP, *Submission 3*, p. 2.

35 Morgan Lewis & Bockius LLP, *Submission 3*, p. 2.

36 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 4; EM, pp. 15–16.

2.27 The AGD informed the committee that, together with the AFP and CDPP the proposed approach of 'improperly influence' is preferable because '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. The UK Law Commission has observed that not all bribes are 'dishonest' in the sense required. An advantage conferred may be 'illegitimate, unreasonable, disproportionate or otherwise "improper" without being dishonest'.[37]

2.28 The AGD also noted that while the offence is founded on the concept of 'improper influence', the non-exhaustive list of matters that a trier of fact may have regard to when determining whether influence is improper includes whether the benefit was provided, offered or promised *dishonestly*.[38] 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.[39]

Extending the offence to cover bribery to obtain a personal advantage

2.29 The current foreign bribery offence applies to bribery of foreign public officials to obtain or retain business or business advantages.[40] However, in line with the 2017 consultation, the proposed new offence in the bill would also apply where the bribe was to obtain or retain a personal advantage.[41]

2.30 The EM to the bill explains that:

> Law enforcement experience has shown in some cases, foreign bribery can occur where the advantage sought is personal. These could include instances where a foreign official is improperly influenced in the bestowal of personal titles or honours or in relation to the processing of visa or immigration request.[42]

2.31 By way of example, the AGD specified 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.[43]

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37 Attorney-General's Department, *Submission 7*, p. 5.

38 Attorney-General's Department, *Submission 7*, p. 5 [emphasis added].

39 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 4.

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

41 Schedule 1, item 6.

42 EM, p. 12.

43 Attorney-General's Department, *Submission 7*, p. 4.

2.32 The 2017 consultation paper clarified that if the offence was extended in this way, 'the existing defences would be available' and '[t]he CDPP would retain the discretion to prosecute matters which are in the public interest'.[44]

2.33 The Uniting Church in Australia welcomed the proposed change to the existing offence to cover bribery to obtain a personal advantage 'so that the bribery offence applies to where the bribe was paid to obtain or retain an advantage of any kind'.[45]

2.34 The majority of submissions to the 2017 consultation paper also supported this proposed amendment.[46] For example, the IBAACC 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.[47]

Committee view

2.35 The committee notes that in the main, the bill implements the proposed changes to the offence as outlined in the AGD's March 2017 consultation paper.

2.36 The committee acknowledges the inherent difficulties in determining when someone becomes a 'candidate for office' in other jurisdictions. However, it considers that Australia's foreign bribery laws should 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. The committee is of the view 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.

2.37 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. The committee notes the suggestion that widening the definition of the foreign public official's capacity similar to the formulation in the United Kingdom's *Bribery Act 2010* may be preferable to the omission currently proposed. However, the committee believes that removing the requirement that the foreign public official must be influenced in the exercise of the

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

45 Uniting Church in Australia, *Submission 1*, p. 2.

46 Control Risks, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 3; Law Council of Australia, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 3.

47 International Bar Association Anti-Corruption Committee, submission to AGD 2017 consultation, *Proposed amendments to the foreign bribery offence in the Criminal Code Act 1995*, p. 6.

official's duties will ensure that Australia's foreign bribery legislation is operating as intended, and that prosecution of foreign bribery matters is not unnecessarily protracted.

2.38 The committee considers it essential that the challenges of proving the current element of the foreign bribery offence that a benefit or business advantage was 'not legitimately due' be eliminated. 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 is of the view that because some foreign bribery does not involve dishonesty, introducing the concept of 'improper influence' is appropriate. The committee also notes that 'dishonesty' is included as a relevant factor for determining whether influence is improper under the proposed new offence.

2.39 The committee recognises the importance of prohibiting all conduct that undermines good governance, including foreign bribery where the advantage sought is personal. The committee therefore agrees with stakeholders 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.

Introducing a new corporate offence of failing to prevent foreign bribery

2.40 The Criminal Code currently provides for corporate criminal responsibility at the federal level;[48] 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.

2.41 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.[49]

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

> (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 non-compliance with the offence provision; or
>
> (iv) the body corporate failed to create and maintain a corporate culture that required compliance with the relevant provision.[50]

48 *Criminal Code Act 1995*, Division 12.

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

2.43 '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.[51] '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.[52]

The new offence

2.44 In line with the 2017 consultation proposal, the bill introduces a new corporate offence of failing to prevent foreign bribery. Under the new offence, 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.

2.45 'Associate' is defined in the bill as an officer, employee, agent, contractor, subsidiary or controlled entity of the person/company.[53] The EM explains 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.[54]

2.46 '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.

2.47 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.[55]

2.48 The proposed maximum penalty for the new offence is the same as that for the existing foreign bribery offence. The AGD clarified that:

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

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

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

53 Schedule 1, item 2.

54 EM, p. 12.

55 EM, p. 18.

> 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. The *Guide to Framing Commonwealth Offences, Infringement Notices and Enforcement Powers* recognises that in some circumstances, a specified maximum penalty may not provide sufficient deterrent. 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.[56]

2.49 The AGD also explained that the United Kingdom has successfully implemented a failure to prevent foreign bribery offence, similar to that proposed in the bill, and that it 'has reportedly had a significant positive influence on the adoption of effective corporate compliance programs to prevent bribery'.[57]

Stakeholder opinion

2.50 The majority of submitters supported the introduction of the new offence.[58] For example, in offering clear support for the new offence, Dr Vivienne Brand, an Associate Professor of Law at Flinders University, commented that:

> The difficulties inherent in bringing a successful prosecution under Australia's existing foreign bribery provisions are well known, and have been well documented. In this light the need for reform is clear…Introduction of an offence of 'failing to prevent bribery of a foreign public official' significantly enhances the likelihood of successful foreign bribery prosecutions in the Australian context, and ought to be supported.[59]

2.51 The Uniting Church in Australia also endorsed the new offence, and suggested that it:

> …will help deter those businesses that set up intermediaries to make business arrangements through which bribes are paid. Under the current law it is very difficult to gain a prosecution in such [a] case as the company can always argue they did not know what their intermediary was doing.[60]

2.52 However, while offering their in-principle support for the new offence, some submitters raised concerns about the breadth of the definition of 'associate', the reversal of the onus of proof, and the imposition of absolute liability.

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56 Attorney-General's Department, *Submission 7*, p. 8.

57 Attorney-General's Department, *Submission 7*, p. 7.

58 See for example, Uniting Church in Australia, *Submission 1*; International Bar Association Anti-Corruption Committee, *Submission 2*; Dr Vivienne Brand, *Submission 4*.

59 Dr Vivienne Brand, *Submission 4*, p. 1.

60 Uniting Church in Australia, *Submission 1*, p. 4.

2.53 AICD commended the policy intention of the proposed new failure to prevent foreign bribery offence,[61] but recommended that the following amendments be implemented to improve the fairness and proportionality of the bill:

> Limit the definition of 'associates' so that it only captures a corporation's officers, employees and agents. In this context it is important to recognise that subsidiaries, independent contractors, and other entities 'controlled' by the corporation may themselves be subject to the revised foreign bribery offence and, if they are a corporation, the failure to prevent foreign bribery offence.
>
> Restore the onus of proof so that the prosecution needs to prove the corporation failed to have adequate procedures in place to prevent the commission of a foreign bribery offence by an associate. Given the seriousness of the offence and penalties for breach, the onus of proof should rest with the prosecution, as is ordinarily the case. Failing that, at the very least, the standard of proof imposed on the defendant should be reduced from the legal burden to the evidential burden. This would still require a corporation to adduce or point to evidence that suggested a reasonable possibility that it had adequate procedures in place to prevent an associate committing an offence, but would diminish the likelihood of an unfair result.
>
> Replace the 'absolute liability' nature of the offence with a requirement that the prosecution prove that the corporation failed to prevent foreign bribery intentionally, knowingly or recklessly.[62]

2.54 Similarly, the Law Council suggested that the government reconsider the definition of 'associate', the reversal of the onus of proof, and the imposition of absolute liability.[63]

2.55 While observing that there are strong reasons to support the inclusion of the new failure to prevent foreign bribery offence, Professor Simon Bronitt and Research Assistant, Ms Zoe Brereton, also raised concerns about the imposition of absolutely liability. Professor Bronitt et al suggested that:

> Framed as a form of absolute liability, the FPFB [failure to prevent foreign bribery] offence is a blunt 'catch all' provision that does not differentiate between different degrees of corporate culpability. There is a risk that the FPFB offence undermines a fundamental tenet of criminalisation that requires distinctions to be drawn between types of crime and penalties based on different levels of culpability…there is a risk that this absolute liability 'failure to prevent' offence will become the default Catch-All charge for all cases of foreign bribery. As a broad 'fallback' offence, the FPFB offence is likely to assume a key role in DPA negotiations in foreign bribery cases. It is vital that negotiations over foreign bribery allegations do not inappropriately divert away from criminal prosecution cases of serious

61 Australian Institute of Company Directors, *Submission 5*, p. 2.

62 Australian Institute of Company Directors, *Submission 5*, p. 4.

63 The Law Council of Australia, *Submission 6*, pp. 7–9.

> bribery (determined by assessing blameworthiness and harm) that would properly merit investigation, prosecution and punishment through the criminal justice system.[64]

2.56 The definition of 'associate', the reversal of the onus of proof, and the imposition of absolute liability proposed in the bill are explored below.

Definition of 'associate'

2.57 The AGD made clear that it is appropriate for a corporation to consider its associates as part of any foreign bribery risk assessment and to ensure that any identified risk is mitigated appropriately. The AGD explained that:

> ….operational experience has demonstrated that associates not controlled by the corporation (but that provide services for it) are still in a position to commit foreign bribery for the profit or gain of the corporation.[65]

2.58 Moreover, in the absence of this expanded definition, the AGD suggested that:

> …corporations may be able to structure their affairs in ways which allow them to improperly limit or avoid exposure to criminal liability. Noting the serious nature of foreign bribery and the identified barriers to successful prosecutions, the proposed broad definition of 'associate', balanced by the limitations on corporate criminal liability, is reasonable and appropriate.[66]

2.59 The Uniting Church in Australia welcomed the definition of associate contained in the bill because it 'is broad to capture any person who provides services for or on behalf of another person, not limiting the definition to an officer, employee, agent, contractor, subsidiary or controlled entity'.[67]

2.60 Indeed, IBAACC went so far as to suggest 'that the definition of 'associate' for the purposes of the new corporate offence might be seen as too limited'. IBAACC was particularly concerned:

> …to ensure that the legal status of an 'associate' is in no way limited, and should clearly and unambiguously capture conduct by [a] natural or incorporated person, including any association (incorporated or unincorporated) or persons operating through a trust or any other structure designed or created to facilitate the relevant conduct in a manner to shield others from potential liability…the question of whether the payer of the bribe performs services on behalf of a company should be determined by reference to all the relevant circumstances rather than what appears to be an exclusive list.[68]

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64 Professor Simon Bronitt and Ms Zoe Brereton, *Submission 8*, pp. 7–8

65 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 8.

66 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 8.

67 Uniting Church in Australia, *Submission 1*, p. 4.

68 International Bar Association Anti-Corruption Committee, *Submission 2*, p. 3.

2.61 However, the AGD considered that the proposed definition of 'associate' which includes any person who 'otherwise performs services for or on behalf of the other person [i.e. the corporation]':

> …appropriately captures, in addition to the expressly listed categories of person, any natural or legal person who is effectively acting for or on behalf of the company.[69]

2.62 Noting the United Kingdom's experience with a similar 'failure to prevent foreign bribery' offence, ML & B suggested that further guidance may be required in relation to how the term 'associate' will be applied in practice:

> The challenge for corporates subject to the UKBA [United Kingdom's *Foreign Bribery Act 2010*], has been determining, without further guidance or judicial commentary, the extent to which they may be liable for parties down the 'contractual chain' from their direct counterparty. The UK has issued guidance stating that the way in which commercial organisations may decide to approach bribery risks, which arise as a result of a supply chain is by: (i) employing anti-bribery procedures such as risk based due diligence and using anti-bribery terms and conditions in its relationships with the contracting counterparty; and (ii) requesting that the counterparty adopt a similar approach with the next party in the chain.

2.63 The AGD indicated that it anticipates that guidance will be published that:

> …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.[70]

Imposition of absolute liability

2.64 As stated above, under the new offence of failing to prevent bribery, a corporation will be automatically liable where an associate of the corporation commits bribery for the profit or gain of the corporation. The AGD explained that:

> Prescribing absolute liability with respect to the company's state of mind towards the actions of its associate means the prosecution would not need to prove a fault element, and removes the ability for a company to avail itself of the honest and reasonable mistake of fact defence (section 9.2 of the Criminal Code) in relation to the associate's actions. This is designed to capture circumstances where a company is wilfully blind towards the wrongful conduct of its associates, and encourage companies to be proactive and accountable and to adopt effective anti-bribery compliance measures. The only way for them to avoid liability is to have adequate procedures in place…[71]

2.65 The AGD informed the committee that attaching absolute liability to the offence will:

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69 Attorney-General's Department, *Submission 7*, p. 8.

70 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 7.

71 Attorney-General's Department, *Submission 7*, p. 9.

- address the issues Australian prosecuting agencies have previously experienced with the lack of written evidence to establish intention in foreign bribery cases;[72]
- create a strong positive incentive for corporations to adopt measures to prevent foreign bribery;
- overcome challenges in establishing liability of corporate entities for foreign bribery;
- ensure that corporations are not able to avoid liability through wilful blindness; and
- bring about a shift in compliance culture across Australian industry.[73]

2.66 The AGD also noted that the objective of the bill is not 'to impose criminal sanctions against corporations with well integrated compliance regimes that experience an incident of corruption on their behalf', and that:

> …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. [74]

2.67 With respect to adequate procedures, the AGD confirmed that the Attorney-General will publish guidance:

> …to assist corporations to implement appropriate mitigation strategies, and support the development of adequate procedures to prevent foreign bribery.[75]

2.68 Adequate procedures are discussed in more detail below.

Reversal of the onus of proof

2.69 Ordinarily, the defendant should bear an evidential, not legal, burden of proof. The new failing to prevent foreign bribery offence proposed in the bill reverses the onus of proof, placing the 'legal burden' on the defendant corporation to prove that it had adequate procedures in place to prevent an associate's commission of the foreign bribery offence.

2.70 Corporations will only be able to avoid liability for this new 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, and the standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities.[76]

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72 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 3.

73 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 17.

74 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 17.

75 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 17.

76 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 16.

2.71 The AGD emphasised to the committee that the policy intention of the new offence is:

> …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.[77]

2.72 Noting that foreign bribery often occurs in instances of recklessness or wilful blindness by senior management to activities occurring within their corporations and a lack of readily available written evidence to establish intention, the AGD explained that:

> The government considers it appropriate to require corporations to prove existence of a robust and well-integrated compliance regime, rather than to point to evidence that suggests a reasonable possibility that such a situation exists (as would be the case if the 'evidential burden' defence was prescribed instead)…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.[78]

Adequate procedures

2.73 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.

2.74 The 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.[79]

2.75 The Law Council emphasised the importance for detailed guidance to be developed as to what constitutes an effective compliance program and the steps that should be taken to properly implement such a program. The Law Council suggested that 'alignment between international standards in this area would be important to ensure effective compliance for those operating across jurisdictions' and that:

> An adequate opportunity for review and consultation on any proposed guidelines prior to publication and to the introduction of any new corporate offence for 'failing to prevent' foreign bribery would be critical.[80]

2.76 The AGD confirmed that it 'intends to publicly consult on the draft guidance',[81] and 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

77 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 16.

78 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 16.

79 Schedule 1, item 8.

80 Law Council of Australia, *Submission 6*, p. 9.

81 Attorney-General's Department, *Submission 7*, pp. 8–9.

> 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.
>
> 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.[82]

2.77 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 United Kingdom's Ministry of Justice in relation to section 9 of the *Bribery Act 2010*.[83] Further, the 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.[84]

2.78 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. [85]

Whistleblower protections

2.79 Dr Brand suggested that internal corporate whistleblowing systems should form part of the adequate procedures designed to prevent foreign bribery.[86] Dr Brand argued that including clear guidance on the extent to which good internal whistleblowing systems can be used as evidence of the taking of 'adequate steps' to prevent foreign bribery by an associate is important because:

- whistleblowing activity is positively correlated with anticorruption outcomes;
- whistleblowing is a relevant factor under the United Kingdom's analogous 'adequate steps' foreign bribery provisions; and

82 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 10.

83 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 12.

84 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 12.

85 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 12.

86 Associate Professor Vivienne Brand, *Submission 4*, p. 2.

- a significant reform of Australia's corporate whistleblowing regime is currently underway that should lead to increased levels of corporate whistleblowing activity, making this anti-corruption mechanism even more effective.[87]

2.80 The reforms to Australia's corporate whistleblowing regime which are currently before the Parliament are contained in the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017.

2.81 The United Kingdom's guidance about procedures which relevant corporations can put in place to prevent persons associated with them from bribing, includes a non-exhaustive list of the topics that bribery prevention procedures might embrace depending on the particular risks faced. This non-exhaustive list includes 'the reporting of bribery including 'speak up' or 'whistle blowing' procedures.[88]

2.82 In addition, the United Kingdom's guidance also provides that, as a 'top-level commitment', commercial organisations should include 'internal and external communication' of their 'commitment to zero tolerance to bribery'.[89] The guidance specifically provides that:

> This could take a variety of forms. A formal statement appropriately communicated can be very effective in establishing an anti-bribery culture within an organisation. Communication might be tailored to different audiences. The statement would probably need to be drawn to people's attention on a periodic basis and could be generally available, for example on an organisation's intranet and/or internet site.[90]

2.83 The United Kingdom's guidance also provides examples of what effective formal statements that demonstrate top level commitment are likely to include, such as:

87 Associate Professor Vivienne Brand, *Submission 4*, pp. 2–3.

88 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 22, paragraph 1.7, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

89 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 23, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

90 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 23, paragraph 2.3, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

> …reference to the range of bribery prevention procedures the commercial organisation has or is putting in place, including any protection and procedures for confidential reporting of bribery (whistle-blowing).[91]

2.84 The AGD indicated that 'the department intends to consider' including internal corporate whistleblowing systems as part of any recommended adequate procedures 'designed to prevent the bribery of a foreign public official.'[92]

Committee view

2.85 The committee acknowledges the complex nature of foreign bribery and the challenges faced by prosecutors to establish criminal liability for companies under the current offence. In particular, the difficulties surrounding proving intention.

2.86 The committee is of the view that the introduction of the new corporate offence of failing to prevent foreign bribery will capture circumstances where a company is wilfully blind towards the wrongful conduct of its associates. In this context, the committee considers the reforms proposed in the bill will also encourage companies to be proactive and accountable for the actions of their associates and to adopt effective anti-bribery compliance measures. The committee also believes it is reasonable to expect corporations of all sizes to put in place appropriate and proportionate procedures to prevent foreign bribery from occurring within their businesses, and to be required to prove the existence of these procedures in instances of non-compliance.

2.87 The committee recognises that there is a risk that the new offence of failing to prevent foreign bribery could become a broad 'catch all' offence for all cases of foreign bribery. The committee considers it vital that the new offence does not become the default charge, and encourages authorities to continue to prosecute the primary foreign bribery offence where appropriate.

2.88 The committee acknowledges concerns raised by stakeholders about the proposed definition of 'associate' in the bill. However, the committee considers that the definition contained in the bill appropriately captures, any natural or legal person who is effectively acting for or on behalf of the company. Given the serious nature of foreign bribery and the identified barriers to successful prosecutions, the committee suggests that that the proposed broad definition of 'associate', balanced by the limitations on corporate criminal liability, is reasonable and appropriate.

2.89 The committee recognises that the new offence places a heavy burden of proof on corporations, but notes that the new offence simply brings Australia into line with similar jurisdictions, such as the UK. In particular, the committee considers it appropriate to require corporations to prove the existence of an adequate compliance regime.

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91 UK Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant corporations can put in place to prevent persons associated with then from bribing* (section 9 of the Bribery Act 2010), p. 23, paragraph 2.3, https://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf (accessed 14 March 2018).

92 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 15.

2.90 The committee notes that wrongdoing in the foreign bribery space can lead to substantial financial benefits and could involve large and lucrative corporations. With this in mind, the committee is of the opinion that the available penalties for the new offence are appropriate, and will act as sufficient deterrent.

2.91 The committee welcomes the AGD's advice that it intends to publicly consult on the minister's guidance that is to be issued on adequate procedures. In addition, the committee is encouraged by the advice that the AGD anticipates that the minister's 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.

2.92 The committee also notes the AGD's evidence that the government will consider including internal corporate whistleblowing systems as part of any recommended adequate procedures designed to prevent the bribery of a foreign public official. The committee fully supports the inclusion of internal corporate whistleblowing systems as part of the adequate procedures a corporation can take to prevent an associate from bribing foreign public officials. The committee considers that such measures—together with the reforms to Australia's corporate whistleblowing regime which are currently before the Parliament in the Treasury Laws Amendment (Enhancing Whistleblower Protections) Bill 2017—should lead to increased levels of corporate whistleblowing activity.

Recommendation 1

2.93 The committee recommends that as part of the public consultation on the minister's guidance that is to be issued on adequate procedures, the government consider publishing an exposure draft which allows corporate stakeholders a four week period to provide comment.

Recommendation 2

2.94 The committee recommends that the government include internal corporate whistleblowing systems as part of any recommended adequate procedures designed to prevent foreign bribery by its associates.

Introducing a deferred prosecution agreement scheme

2.95 Under a deferred prosecution agreement (DPA), a company is charged with an offence, but prosecution is deferred for a period of time agreed by the parties. Within that timeframe, the company must meet certain conditions. For example, the payment of a financial penalty, admission of material facts and establishment of measures to prevent future offending. If the company meets these conditions, the prosecutor will move to dismiss the charges. DPA schemes have been implemented in the United Kingdom and the United States.

The proposed scheme

2.96 The bill introduces a DPA scheme for companies (not individuals);[93] and applies only to listed Commonwealth 'serious corporate crime' offences, such as:

93 Schedule 2, item 7, ss. 17A(1).

fraud, false accounting, foreign bribery, money laundering, dealing with proceeds of crime, forgery and related offences, and the exportation and/or importation of prohibited or restricted goods.[94] It also prescribes secondary liability offences under section 11 of the Criminal Code to which a DPA may apply which are likely to arise out the same conduct that constitutes or may constitute the primary 'serious corporate crime' offence.[95]

2.97 Under the proposed scheme, the Director of the CDPP (Director) will have discretion to negotiate and enter into a DPA on behalf of the Commonwealth.[96]

2.98 The bill prescribes the following mandatory terms for all DPAs:

- a statement of facts relating to each offence specified in the DPA;
- the last day for which the DPA will be in force;
- the requirements to be fulfilled by the person under the DPA;
- the amount of financial penalty to be paid by the person to the Commonwealth;
- the circumstances which constitute a material contravention of the DPA; and
- consents to the Director instituting a prosecution of the person on indictment for an offence specified in the DPA without the person having been examined or committed for trial in circumstances where the party to the DPA provided inaccurate, misleading or incomplete information to a Commonwealth entity in connection with the agreement; and the party knew, or ought to have known that the information was inaccurate, misleading or incomplete.[97]

2.99 In addition, the bill provides a non-exhaustive list of terms and features that may be included in a DPA.[98]

2.100 The bill also outlines the process by which a DPA must be approved.[99] This includes a process for the appointment of 'approving officers' by the minister who must approve a DPA if they are satisfied that its terms are in the interests of justice, and are fair, reasonable and proportionate.[100] The process by which a DPA may be varied is also set out in the scheme. Ultimately, after the company and the Director

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94 Schedule 2, item 7, ss. 17B(1) includes a table that lists the offences to which a DPA may relate.

95 Schedule 2, item 7, ss. 17B.

96 Attorney-General's Department, *Improving enforcement options for serious corporate crime: Consideration of a Deferred Prosecution Agreements scheme in Australia*, March 2016, p. 9, https://www.ag.gov.au/consultations/Pages/Deferred-prosecution-agreements-public-consultation.aspx (accessed 11 December 2017).

97 Schedule 2, item 7, ss. 17C(1).

98 Schedule 2, item 7, ss. 17C(2).

99 Schedule 2, item 7, ss. 17D(1)—(6).

100 Schedule 2, item 7, ss. 17D(1)—(2).

consent to a variation, the varied DPA then follows a process that is similar to that by which a DPA must be approved.[101] Once it is approved the CDPP must publish a DPA unless it would not be in the interests of justice to do so.[102]

2.101 The DPA scheme limits the use of material generated or provided to Commonwealth agencies during the course of DPA negotiations, and/or in compliance with a DPA in subsequent criminal proceedings.[103]

2.102 Should a DPA be breached, the CDPP may commence prosecution or renegotiate the terms of the DPA.[104] Absent a breach, the DPA would be concluded by fulfilment of its terms, and the company will not subsequently be prosecuted in relation to the offences specified in the DPA.[105]

Stakeholder opinion

2.103 Submitters to the inquiry, as well as the majority of responses to the 2017 and 2016 consultations endorsed the introduction of DPAs in Australia. For example, ML & B observed that 'the DPA has become an established regulatory tool in the US and is now an emerging tool for prosecutors in Europe and, potentially, Asia, through which authorities have sanctioned corporate criminal conduct'. In this context, ML &B suggested that:

> By implementing a DPA framework, Australia is following the international standards in providing its prosecution authorities with a flexible tool to deal effectively with corporate crime while encouraging a transformational shift in approach by corporates towards compliance, and all the while retaining the option for the prosecution of corporates and individuals.[106]

2.104 While cautioning the need to ensure that individuals or corporations do not escape being held to account for serious criminal activity, the Uniting Church in Australia also welcomed the introduction of a DPA scheme, explaining that it:

> ..sees DPA'' as part of a suite of measures needed to deter, detect and prosecute corporate criminal behaviour with additional measures being whistleblower protection and reward in the private sector, a public beneficial ownership register and making it easier to for law enforcement agencies to prosecute money laundering offences. [107]

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101 Schedule 2, item 7, s. 17F.

102 Schedule 2, item 7, ss. 17D(7)—(10). See also Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 29.

103 Schedule 2, item 7, s. 17H.

104 Schedule 2, item 7, s.17A. See also, EM, p. 3.

105 EM, p. 3.

106 Morgan Lewis & Bockius LLP, *Submission 3*, p. 5.

107 Uniting Church in Australia, *Submission 1*, pp. 5–6.

2.105 The IBAACC and the Law Council also supported the introduction of a DPA scheme in Australia, and specifically endorsed the offences to which a DPA may relate, and the identified mandatory and optional terms of a DPA proposed in the bill.[108]

2.106 Simon Bronitt et al also supported the introduction of a DPA scheme in Australia; however, recommended that the bill be amended to insert a purpose/object clause into the relevant part of the Criminal Code. Simon Bronitt et al argued that such a clause should expressly provide 'that the aims of the DPA are preventive and restorative' and that 'the DPA is not intended to be a vehicle for punishment or preliminary determination of criminal guilt'.[109]

Content of DPAs

2.107 The Uniting Church in Australia, suggested that the following terms and features should be included in the bill as mandatory terms for all DPAs:

> Details of any financial gain or loss, with supporting material, in the statement of facts relating to each offence specified in the DPA; and
>
> The company's formal admission of criminal liability for specified offences, consistent with any relevant laws of evidence.[110]

2.108 However, the non-exhaustive list of terms that may be included in a DPA set out in the bill includes requiring a corporation to forfeit any likely benefits (including profits) accrued as a result of the misconduct specified in a DPA. The AGD also explained that as the bill requires the terms of a DPA to be in the interests of justice, and to be fair, reasonable and proportionate:

> [i]nformation detailing any financial gain or loss incurred by the corporation may often be highly relevant to determining whether the terms of a DPA fulfil these criteria.[111]

2.109 With respect to mandating that companies formally admit criminal liability for specified offences in a DPA, the AGD cautioned that:

> The success of the DPA scheme is contingent on the scheme striking an appropriate balance between the need to encourage corporations to self-report serious offending and the need to hold corporations accountable for serious corporate crime.[112]

2.110 In addition, the AGD drew the committee's attention to the fact that the feedback in relation to the government's 2017 DPA model suggested that corporations would be deterred from seeking a DPA if they were required to formally admit

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108 International Bar Association Anti-Corruption Committee, *Submission 2*, p. 3; Law Council of Australia, *Submission 6*, p. 10.

109 Professor Simon Bronitt and Ms Zoe Brereton, *Submission* 8, p. 3.

110 Uniting Church in Australia, *Submission 1*, pp. 1 and 11.

111 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 25.

112 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 26.

criminal liability to obtain a DPA.[113] Similar to the approach taken by the UK,[114] the bill requires a corporation to admit to agreed facts detailing the nature and scope of their offending, which, if a company subsequently materially contravenes the DPA, will be taken to be the agreed facts for the purposes of the criminal proceeding.[115]

The approval process

2.111 ML & B observed that one of the main differences between the DPA scheme in the United Kingdom, and that proposed in the bill, was that in the United Kingdom approval of a DPA 'must come from a judge' not an 'approving officer'.[116]

2.112 In this regard, the AGD assured the committee that under the scheme proposed in the bill DPAs in Australia will be subject to independent and expert scrutiny as all DPAs will need to be approved by a DPA 'approving officer' before entering into force. The AGD explained that:

> DPA approving officers will be former judges, with relevant expertise and knowledge (for example, in business or corporate law). Approving officers will bring expertise in fair and impartial adjudication to the DPA process, and provide independent assurance that all DPAs are in the interests of justice.[117]

2.113 The IBAACC raised concerns about whether the decision (or reasons) of the 'approving officer' of a DPA are going to be published.[118] IBAACC argued that:

> …the approving officer must give reasons for making a decision and those reasons, together with the DPA (to the extent the Director does so without prejudice to any other ongoing investigation) must both be published. This will enhance the integrity of the process, it will ensure that Australia follows the UK model with reasons, orders and the DPA being published) so the community can see the system working transparently.[119]

2.114 The AGD explained that in circumstances where a DPA is not approved, the bill does not require the 'approving officer' or any person or authority to publish a notification or reasons.[120] The AGD emphasised that:

> The terms of the approving officer's appointment would specify that this information should not be disclosed by the approving officer to anyone

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113 Attorney-General's Department, answers to questions on notice, p. 26.

114 In the United Kingdom the statement of facts is treated as an admission of fact by the corporation in any criminal proceedings brought against a corporation for the offences specified in the DPA. See s. 10 of the United Kingdom's *Criminal Justice Act 1967* and Schedule 17, s. 13 of the United Kingdom's *Crime and Courts Act 2013*.

115 Schedule 2, ss. 17H(5).

116 Morgan Lewis & Bockius LLP, *Submission 3*, p. 6.

117 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 30.

118 International Bar Association's Anti-Corruption Committee, *Submission 2*, p. 3.

119 International Bar Association's Anti-Corruption Committee, *Submission 2*, p. 4.

120 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 28.

> other than the parties to DPA negotiations. The non-disclosure of this particular information is appropriate because the CDPP and corporation may elect to continue to negotiate the DPA and submit a new draft DPA for the approving officer's consideration. The parties should be able to continue negotiations with the same level of confidentiality that attaches to DPA negotiations before an approving officer has considered a draft DPA. This will encourage corporations to continue to engage openly and honestly in DPA negotiations. Further, corporations are unlikely to enter into DPA negotiations if there is a risk that the existence and content of these negotiations may be made public in the event that DPA negotiations fail.[121]

2.115 Likewise, the AGD highlighted that the bill does not require the reasons for approving a DPA to be published because:

> [i]t is proposed that the terms of the approving officer's appointment and/or engagement will specify that this information may be published if the parties to the DPA agree. This will ensure that an approving officer may write and publish reasons where appropriate.[122]

Monitoring compliance

2.116 ML & B observed that 'monitors' are an important tool in the United Kingdom to ensuring compliance with the terms of the DPA and that corporates implement necessary improvements to their compliance programmes (thereby reducing the risk of corporate re-offending).[123] In this context, ML & B suggested that consideration be given to:

> (i) the extent to which monitorships should be an available term of a DPA in appropriate cases; and
>
> (ii) issuing guidance in relation to the appointment and methodology of monitors.[124]

2.117 However, the AGD informed the committee that the bill:

> Does not limit the terms that might be included in a DPA, and the government envisages that it will often be appropriate for DPAs to include terms requiring the engagement of an independent monitor to carry out particular functions in a manner that is adapted to the circumstances of the case at hand. These functions may include assessing the effectiveness of a corporation's existing compliance program, advising on how a corporation can develop an effective (or more effective) compliance program and monitoring a corporation's compliance with DPA terms.[125]

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121 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 28.

122 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 28.

123 Morgan Lewis & Bockius LLP, *Submission 3*, p. 8.

124 Morgan Lewis & Bockius LLP, *Submission 3*, pp. 1 and 8.

125 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 33.

2.118 The AGD also advised that information on the possible roles and appointment of independent monitors will be included in the DPA Code of Practice which is currently being developed.[126] This is discussed in more detail below.

Guidance to assist corporates

2.119 The DPA model proposed in the 2017 consultation contemplated that detailed guidance would be issued outlining when a prosecutor is likely to offer DPA negotiations. A number of stakeholders to the consultation emphasised the importance of the quality and clarity of this guidance in setting out when a company may be invited to enter into DPA negotiations.[127]

2.120 For example, in recommending that clear guidance should be made available on the benefits of entering into DPA negotiations and the factors the prosecutor will take into account, King & Wood Mallesons suggested that:

> In order to encourage companies to self-report actual or suspected misconduct, the legislation or a supporting policy document should contain clear criteria which will be considered when deciding whether to enter into DPA negotiations.[128]

2.121 With respect to self-reporting, following the introduction of this bill, the AFP and the CDPP issued Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations* (Guidelines for self-reporting).[129] These guidelines set out the principles and process that the AFP and the CDPP will apply if a company self-reports conduct involving a suspected breach of Division 70 if the Criminal Code (foreign bribery).[130] The IBAACC noted that:

> …these Guidelines are a good start for companies (and their advisers) to understand how the CDPP will exercise its discretion in terms of whether or not to initiate negotiations for a DPA.[131]

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126 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 33.

127 King & Wood Mallesons, Mr Neville Tiffen, Norton Rose Fulbright, Responses to AGD, *Proposed model for a deferred prosecution agreement scheme in Australia, 2017*, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2017).

128 King & Wood Mallesons, Response to AGD, *Proposed model for a deferred prosecution agreement scheme in Australia, 2017*, p. 2, https://www.ag.gov.au/Consultations/Pages/Proposed-model-for-a-deferred-prosecution-agreement-scheme-in-australia.aspx (accessed 4 January 2018).

129 AFP and CDPP Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations*, 8 December 2017, https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf (accessed 12 February 2018).

130 CDPP, *Best Practice Guideline: Self-reporting of foreign bribery and related offending by corporations*, 8 December 2017, https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf (accessed 13 March 2018).

131 International Bar Association's Anti-Corruption Committee, *Submission 2*, p. 3.

2.122 The Guidelines for self-reporting state that:

> AFP and the CDPP will review the operation of this Guideline within two years or earlier in the event that a Deferred Prosecution Agreement Scheme commences.[132]

2.123 Further, in addition to the Guidelines for self-reporting, the AGD has indicated that it 'is currently developing a draft DPA Code of Practice for public consultation'.[133] The AGD explained that:

> The purpose of the Code is to provide detail on the practical operation of the DPA scheme, including on the types of matters that might be included in a DPA.[134]

2.124 The AGD also indicated that the Code of Practice would include:

- information on how the CDPP would consult with other government agencies throughout the DPA process to ensure relevant matters are included in the DPA (either in the DPA's terms or in the DPA's statement of facts);[135] and
- guidance on the level of cooperation expected from corporations seeking a DPA, and on the steps corporations may be expected to take to meet the required degree of cooperation.[136]

Committee view

2.125 The committee notes that DPA schemes have been implemented in the United Kingdom and the United States. The committee also notes that in the main, the bill implements the DPA model as outlined in the government's public consultation in March 2017. Evidence presented to the inquiry, as well as the majority of responses to the March 2017 consultation endorsed the introduction of DPAs in Australia.

2.126 The committee recognises that the success of the DPA scheme is contingent on striking an appropriate balance between the need to encourage corporations to self-report serious offending and the need to hold corporations accountable for serious corporate crime. The committee considers that the measures proposed in the bill will foster a greater willingness on the part of corporations to appropriately and effectively investigate alleged bribery and self-report it to regulators when there is evidence to support the alleged misconduct.

2.127 The committee endorses the offences to which a DPA may relate, and the identified mandatory and optional terms of a DPA proposed in the bill.

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132 AFP and CDPP Best Practice Guidelines, *Self-reporting of foreign bribery and related offending by corporations*, 8 December 2017, p. 2, paragraph 3, https://www.cdpp.gov.au/sites/g/files/net2061/f/20170812AFP-CDPP-Best-Practice-Guideline-on-self-reporting-of-foreign-bribery.pdf (accessed 12 February 2018).

133 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 25.

134 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 25.

135 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 25.

136 Attorney-General's Department, answers to questions on notice (received 7 March 2018), p. 38.

2.128 The committee acknowledges stakeholders comments regarding the content of DPAs. However, the committee considers that the bill provides adequate detail in this regard, as it: specifies that the terms of all DPAs must be in the interests of justice, fair, reasonable and proportionate; and requires that a corporation admit to agreed facts detailing the nature and scope of their offending, which, should they subsequently materially contravene the DPA, will be taken to be the agreed facts for the purposes of the criminal proceeding.

2.129 The committee is of the view that as DPA approving officers will be former judges with relevant knowledge, they will bring appropriate expertise in fair and impartial adjudication to the DPA process.

2.130 The committee agrees with stakeholders that ensuring compliance with the terms of a DPA (including that corporates implement necessary improvements to their compliance programs and thereby reduce the risk of corporate re-offending) is critical to the success of the scheme. In this context, the committee is encouraged by the AGD's advice that information on the possible roles and appointment of independent monitors will be included in the DPA Code of Practice which is currently being developed.

2.131 The committee notes the Best Practice Guidelines issued by the AFP and the CDPP—*Self-reporting of foreign bribery and related offending by corporations*. The committee believes these guidelines are a positive step toward encouraging corporates to self-report foreign bribery. However, in addition to this guidance, the committee considers it essential that the DPA Code of Practice (which is currently being developed) clearly set out when a company may be invited to enter into DPA negotiations to give certainty to those corporations who self-report. In this context, the committee encourages the government to engage with the corporate sector on the Draft DPA Code of Practice as part of the public consultation process.

Recommendation 3

2.132 The committee recommends that as part of the public consultation on the draft Deferred Prosecution Agreement Code of Practice, the government consider publishing an exposure draft which allows corporate stakeholders a four week period to provide comment.

Recommendation 4

2.133 The committee recommends that the bill be passed.

Senator the Hon. Ian Macdonald

Chair