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Ms Sophie Dunstone  
Committee Secretary  
Senate Legal and Constitutional Affairs Committee  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

**BY EMAIL:** legcon.sen@aph.gov.au

Dear Ms Dunstone

**Crimes Legislation Amendment (Proceeds for Crime and Other Measures Bill 2015  
– Schedule 2)**

This is a submission in relation to the amendments to the Commonwealth Criminal Code proposed to be effected by Schedule 2 of the above Bill - the false accounting provisions.

**Introduction**

The proposed false accounting provisions go much further than is required to meet Australia's obligations under the OECD Anti-Bribery Convention. As a result, there are likely to be significant unintended consequences.

**Submissions**

- 1 The false accounting provisions require no nexus between foreign or domestic corrupt practices for the imposition of criminal responsibility for "false accounting". Neither proposed section 490.1 nor section 490.2 contains a provision equivalent to section 70.2(1)(c) of the Commonwealth Criminal Code which requires that when a benefit is offered that is not legitimately due it is offered with intention of influencing a foreign public official in the exercise of the official's duties. The lack of such a nexus, coupled with the express breadth of application of the provisions, means that the provisions will, if enacted in their current form, have a very wide field of operation, potentially covering activities that are related to financial transactions undertaken by a wide variety of bodies.
- 2 The definition of "accounting document" used in the provisions is extremely broad including any document that may in fact be used for the purpose of preparing financial statements, including many documents that would not be readily thought of as accounting documents in common usage.

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- 3 The expressions "benefit" and "not legitimately due" are not clearly defined and, while they may be appropriate and understandable in the foreign corrupt practices context, given the breadth of operation of the provisions, criminal liability may be imposed in a very wide range of situations.
- 4 Whilst the significant penalties (including up to \$18 million in the case of bodies corporate) might be justified in relation to foreign - or domestic - corrupt practices, those penalties will not be justified in relation to many of the other examples of conduct that could be caught by the provisions.
- 5 The false accounting provisions will impose liability for reckless as well as intentional conduct, and the recklessness threshold under the Commonwealth Criminal Code is not a high threshold. Moreover, it is not a test that is well understood, nor does it apply a concept of "recklessness" that would necessarily be consistent with the common usage of that expression. Conduct concerning accounting documents that is not very much more than carelessness could be criminalised by the new provisions.
- 6 The corporate criminal responsibility and accessorial liability provisions of the Commonwealth Criminal Code may have the effect of imposing on companies criminal liability for unauthorised false accounting conduct by their employees, and potentially impose liability on directors and executives. For example, an employee or executive may be acting in a completely authorised manner but if the employee is regarded as a "high managerial agent" - as that expression has been interpreted by the case law - with respect to the matter in question, the company may be liable - and subject to an \$18,000,000 penalty.

### **Summary**

In summary, the combination of a wide and uncertain field of operation, significant penalties and the potential for corporate attribution of unauthorised conduct, means that the proposed false accounting provisions have the potential for significant and adverse implications for businesses operating in Australia, both local businesses and foreign branches and subsidiaries of international companies.

These potential adverse implications appear to be entirely unintended given the purpose of the amendments proposed by Schedule 2 of the Bill is said to relate to Australia's obligations under the OECD Anti-Bribery Convention.

The proposed provisions should be amended to expressly limit their application to conduct relating to foreign corrupt practices to avoid these adverse unintended consequences.

I would be happy to elaborate on the above submissions if this would assist the Committee.

Yours sincerely

**John Keeves**  
**Practice Group Head – Transactional & Advisory**