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14 July 2023

Committee Secretary
Senate Legal and Constitutional Affairs Committee
PO Box 6100
Parliament House
Canberra ACT 2600

Submission – Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023

Dear Committee Secretary

1. We welcome the opportunity to make a submission to the Committee's inquiry into the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (**the Bill**), which introduces a new indictable corporate offence of failing to prevent foreign bribery.

Executive summary

2. Our submission focuses on the "adequate procedures" defence to the proposed section 70.5A offence (Failing to prevent bribery of a foreign public official) under the *Criminal Code Act 1995* (Cth). We submit that the "adequate procedures" defence in new subsection 70.5A(5) should be recast as a defence of having procedures which were "reasonable in all the circumstances".

"Adequate procedures" defence

3. New subsection 70.5A(5) provides that it is a defence to the new subsection 70.5A(1) offence:

... if the first person proves that the first person had in place adequate procedures designed to prevent:

(a) the commission of an offence against section 70.2 by any associate of the first person; and

(b) any associate of the first person engaging in conduct outside Australia that, if engaged in in Australia, would constitute an offence against section 70.2.

Background and purpose

4. The language of new subsection 70.5A(5) is similar to section 7 of the *Bribery Act 2010* (UK) (**UK Bribery Act**).¹ Notably, in the Second Reading Speech of the UK Bribery Act, the then Secretary of State of Justice, Mr Jack Straw stated that:

[C]lause 7(2), plus the guidance, will give commercial organisations that have acted responsibly, assiduously and in good faith such a complete defence to any prosecution in respect of an individual case that it is unlikely that one would ever be launched ...

This measure is not designed to trip up decent companies that are acting responsibly or in good faith. On the contrary, it is designed to help them, because, as the experience from other countries has shown, the more it is made an imperative that those representing major businesses across the world are themselves under a requirement to act lawfully, the less will be the opportunity for those who are so tempted either to seek or offer bribes.²

5. The UK Law Commission's Report No 313 *Reforming Bribery* (which preceded the introduction of the UK Bribery Act) articulated the purpose of the defence as follows:

A company should not be liable for a serious offence, such as failure to prevent bribery, on the basis of a single instance of carelessness, if it can show that it had robust management systems in place to prevent bribery taking place. Clause 7(6) of the draft Bill makes it a defence to show that there were such systems in place.³

Our concern

6. The statutory language of "adequate", by its plain English meaning, is capable of being interpreted in a way that is outcomes-focussed (i.e. the fact foreign bribery occurred means procedures were not adequate) rather than process focussed (i.e. what is important is whether the procedures in place were appropriate).

¹ See Explanatory Memorandum to the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023, p. 3, para. 7.

² See Second Reading Speech (House of Lords) to the Bribery Bill at Column 951: <https://publications.parliament.uk/pa/cm200910/cmhansrd/cm100303/debtext/100303-0004.htm#10030353000003>.

³ Law Commission Report, *Reforming Bribery* (Report No 313, 19 November 2008) p. 121, para. 6.106: https://assets.publishing.service.gov.uk/government/uploads/system/uploads/attachment_data/file/231183/0928.pdf.

7. The "adequate procedures" defence was tested for the first time in the UK in *R v Skansen Interiors Ltd* (2018, unreported) in a trial court (Southwark Crown Court). In the case, the trial judge directed the jury that proof of adequate procedures was entirely for them to decide and both words were to have their "everyday meaning".⁴ The jury found Skansen Interiors to be guilty and the company, which was in administration, did not appeal.
8. English barrister Allison Clare QC subsequently provided the following commentary about the *Skansen* case, with which we agree:

*A judicial 'hands off' approach as seen in Skansen will fuel concerns that a jury will incorrectly equate the fact of bribery with a lack of adequate procedures.*⁵

Reasonable in all the circumstances

9. In 2019, a House of Lords Select Committee examining the UK Bribery Act published a report entitled *The Bribery Act: Post-Legislative Scrutiny (2019 Report)*.
10. In the 2019 Report, the Committee considered testimony from various witnesses who expressed views similar to those in paragraph [6] above, and noted that it is clearly not the intention of the offence that a single act of bribery in the organisation means that its procedures are inadequate.
11. While the 2019 Report did not go so far as to suggest an amendment of section 7 of the UK Bribery Act, it did recommend that the guidance accompanying that provision be amended to make clear that "adequate" does not mean, and is not intended to mean, anything more stringent than "reasonable in the circumstances".
12. In 2022, the UK Law Commission's *Options Paper for Corporate Liability (2022 Options Paper)* considered that the defence of procedures which were "reasonable in all the circumstances" as preferable to one of "adequate procedures". Quoting the 2019 Report, the 2022 Options Paper remarked:

On the assumption ... that there is no intended or actual difference in meaning between "adequate" procedures and procedures which

⁴ *R v Skansen Interiors Ltd* (2018, unreported) at para. 203.

⁵ Allison Clare QC, 'Bribery-corporate culture in the spotlight' (2021) 171(7940) *New Law Journal* 13.

are “reasonable in all the circumstances”, we believe the latter more clearly gives the intended meaning.⁶

13. Accordingly, the Law Commission's 2022 Options Paper concluded that any future “failure to prevent” offences should include the procedures which were "reasonable in all the circumstances" defence. The 2022 Options Paper noted that this is particularly important if future failure to prevent offences are extended to cover a broader range of conduct.

Our view

14. Considering the above, our concern is that the language of "adequate procedures" may result in a jury incorrectly equating the fact that bribery has occurred with a lack of adequate procedures, which contradicts the intended meaning of the provision.
15. The Bill largely replicates the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (Cth) which was introduced to Parliament in 2019 and lapsed. It does not appear to have been updated in light of subsequent reports on the UK Bribery Act, on which it was modelled.
16. Therefore, in line with the recommendations of the 2019 Report and the 2022 Options Paper, we submit that the defence in new subsection 70.5A(5) should be amended to having procedures which were "reasonable in all the circumstances" instead of "adequate". We also consider that the explanatory materials for the Bill should provide guidance on the meaning of "reasonable in all the circumstances" to clearly articulate the purpose of the provision.
17. Please contact us if you would like to discuss our views or if you have any queries in relation to this submission. This submission was prepared by Rani John (Partner), Edward Elliott (Senior Associate), and Vien Siu (Graduate).

Yours sincerely

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⁶ Law Commission (UK) *Corporate Criminal Liability: An Options Paper* (Paper, 10 June 2022) p. 103, para. 8.71.