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Mr Fraser Brindley
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Office of Senator Peter Whish-Wilson
Australian Greens Senator for Tasmania

Dear Fraser

PROPOSED AMENDMENTS TO THE CRIMINAL CODE ACT 1995 (CTH)
CRIMES LEGISLATION AMENDMENT (PROCEEDS OF CRIME AND OTHER MEASURES) BILL 2015: SCHEDULE 2 FALSE ACCOUNTING

The Uniting Church in Australia Synod of Victoria and Tasmania (**Uniting Church**) appreciates the opportunity to provide further input into Schedule 2 of the *Crimes Legislation Amendment (Proceeds of Crime and Other Measures) Bill 2015* (Cth) (the **Proposed Law**), which is the subject of the report of the Senate Legal and Constitutional Affairs Legislation Committee released February 2016.

1. Sections 490.1(1)(a) and 490.2(1)(a) of the Proposed Law

Sections 490.1(1)(a) and 490.2(1)(a) of the Proposed Law provide that (among other things) a person commits an offence if the person:

(a) makes, alters, destroys or conceals an accounting document; or

(b) fails to make or alter an accounting document that the person is under a duty under a law of the Commonwealth, a State or Territory or at common law, to make or alter.

The first limb identified in paragraph (a) above applies to circumstances where a potential wrongdoer by their own volition makes, alters, destroys or conceals an accounting document. The legislative regimes of the United States, the United Kingdom and Canada do not contain a comparable provision, presumably based on the hypothesis that, a potential wrongdoer will seldom, if ever, choose to voluntarily create a paper-trail which evidences their own unlawful conduct.

Based on the enforcement experience of regulators in the comparative jurisdictions considered[1], the second limb is more likely to form the basis upon which the Proposed Law would be enforced in Australia. This limb presupposes that a person is subject to a duty under a law of the Commonwealth, a State or Territory or at common law, to make or alter an accounting document. This element requires careful consideration and must be harmoniously integrated with related laws in order to ensure that the Proposed Law is effective and practically enforceable by the Australian Federal Police.

[1] That is, the US, the UK and Canada.

2. Comments from an international comparative perspective

Schedule 1 of this letter contains a comparison of anti-bribery and corruption laws in relation to the legal obligations placed upon companies to prepare and maintain books and records which accurately record the transactions to which companies are a party. Given the effectiveness of the US *Foreign Corrupt Practices Act* of 1977 (**FCPA**), it is particularly insightful to eviscerate its fundamental legislative components.

The FCPA books and records and internal controls provisions apply only to issuers, whether based in the United States or elsewhere. An "issuer" is a company that registers securities under section 12 of the *Securities and Exchange Act* of 1934 or is required to file reports under section 15(d) of that Act, and also extends to the officers, directors, employees, agents, and stockholders of such entities, irrespective of their nationality or place of residence. Issuers include not only US companies, but also foreign corporations that list shares on US stock exchanges.

The FCPA accounting obligations apply broadly to all books, records, and accounts that "reflect the transactions and disposition of the assets of the issuer" and any inaccurate or misleading entry, even those unrelated to alleged bribery and corruption. The obligations extend to include financial reports, management accounts and fundamental underlying documents such as itineraries, reimbursement claims, invoices and receipts.

The related FCPA internal controls provisions (which are entirely absent from the Proposed Law) require issuers to devise and maintain a system of accounting controls to monitor company conduct in order to ensure that all transactions are accurately recorded.

The FCPA's accounting provisions also make issuers responsible for the books and records (and indirectly) the conduct of their subsidiaries and affiliates, wherever they might be located in the world. When an issuer holds or otherwise controls at least half of a subsidiary's stock, the subsidiary must also comply with the FCPA record-keeping requirements in the same manner as the parent corporation. In other words, the FCPA holds a US issuer parent responsible for the conduct of any majority owned subsidiaries or affiliates, located anywhere in the world, eliminating the potential for jurisdictionally delimited accounting practices which are not otherwise congruous with the underlying framework and intent of US anti-bribery and corruption regulation.

Liability under the FCPA books and records provisions allows the US government to capture payments far down the corporate chain within its jurisdictional net and to enforce improperly recorded payments to non-governmental entities anywhere in the world. As a nation perceived itself to be relatively free bribery and corruption, the accounting provisions of the FCPA effectively bring focus on the conduct of US corporations in other jurisdictions around the world who do not necessarily share comparable standing in this regard. The position of Australia on this front is analogous.

The FCPA books and records provisions also allow regulators to impugn foreign payments by foreign parties in circumstances where the US government likely could not otherwise likely meet the jurisdictional threshold to which the anti-bribery provisions are subject. A widely publicised example of this lies in the Dow Chemical settlement achieved by the US Securities Exchange Commission in 2007. The enforcement action was based on allegations that Dow's "fifth-tier foreign subsidiary" in India, De-Nocil Crop Protection Ltd, made approximately $39,700 in improper payments to an official in India's Central Insecticides Board to expedite the registration of certain products.

The Dow Chemical Indian subsidiary allegedly did not accurately record these payments in its books and records. On first glance, the US government lacked jurisdiction to bring to make any claim against the Indian subsidiary in respect of the payments which were allegedly made by Indian employees of an Indian corporation outside of the United States. However, the failure of the subsidiary to record the

payments accurately, and in turn, for Dow Chemical to consequently also fail to do so, allowed the SEC to penalize the issuer for the conduct of its subsidiary.

Where an issuer does not exercise control over a foreign subsidiary, the FCPA accounting provisions require it to use its influence, to the extent reasonable under the issuer's circumstances, to cause such domestic or foreign firm to devise and maintain a system of internal accounting controls. What is "reasonable under the circumstances" will vary depending on the degree of control and the laws and practices of the country in which the subsidiary or affiliate is located.

The US FCPA accounting provisions are enmeshed with the related internals control provisions, of which there is no equivalent in the Proposed Law. In turn these provisions are closely tied with (among others):

(a) the requirements of the *Sarbanes-Oxley Act* of 2002, which was introduced by Congress to strengthen the accounting requirements of issuers, several of which have FCPA implications such as:

  (i) Section 302 - responsibility of corporate officers for the accuracy and validity of corporate financial reports;

  (ii) Section 404 - reporting on the state of a Company's internal controls over each reporting period; and

  (iii) Section 802 - criminal penalties for altering documents.

(b) the *Dodd-Frank Wall Street Reform and Consumer Protection Act* which was designed to promote the financial stability of the United States by improving accountability and transparency in the financial system, and in particular, contains a regime to incentivise whistle-blowers to come forward.

3. The duty to make an accounting document under Australian law

The Proposed Law seeks to piggyback upon the patchwork of existing laws in Australia which require corporations (and other business structures) to create and maintain proper accounting records but without the level of detail and supportive provisions which are otherwise critical aspects of the US FCPA regime.

In respect of companies, section 286 of the *Corporations Act* 2001 (Cth) requires that companies (other than small proprietary companies) keep written financial records that correctly record and explain their transactions and financial position and performance and would enable true and fair financial statements to be prepared and audited.

However, the precise scope of section 286 is not certain - the Corporations Act prescribes what companies are to do, but not how they ought to do it. A breach of section 286 is a strict liability office enforced by the Australian Securities and Investments Commission (and not the Australian Federal Police). Further, Australian accounting standards are principles-based and not prescriptive about the financial records to be maintained to enable true and fair financial statements to be prepared and audited.

This uncertainty has the potential to undermine the intended effect of the Proposed Law. It may be the case that a failure to accurately describe the payment of a bribe in a company's accounts may not be material to the company's financial position, and further, there may be no prima facie obligation to identify a bribe in such terms under section 286 or otherwise.

The House of Representatives' explanatory memorandum in relation to the Proposed Law relevantly states that[2] "[t]he reference to a duty 'under the law of the Commonwealth, a State or Territory or at common law, to make or alter' in subparagraph 490.2(1)(a)(ii) is inserted to ensure that the offence is consistent with the finding of the majority of the High Court of Australia in *Commonwealth DPP v Poniatowska* (2011) 282 ALR 200, that criminal liability does not attach to an omission, save the omission of an act that a person is under a legal obligation to perform."

This approach is understandable but presupposes that a relevant duty under a law of the Commonwealth, a State or Territory or at common law, to make or alter an accounting document exists and is capable of precise identification with the level of specificity required to allege that, for example, a specific payment has not been properly or accurately recorded in the company's books and records.

On one view, this approach expects section 286 to do work for which it was never intended and that it is poorly equipped to handle. It also makes no allowance for those legal structures which fall outside the scope of section 286 in relation to which there may be no comparable duty (that is, business structures not regulated by the *Corporations Act* 2001 (Cth)).

4. Refinement of the Proposed Law

From the outset, we observe that there has been some refinement of the Proposed Law compared to the exposure draft upon which we originally commented. Consequently, we accept that our previous comments (together with these further observations) are now of different pertinence.

We appreciate that the Proposed Law is not intended to introduce a suite of regulations that mirror the ancillary and related legislation that exists in the US and which help to ensure that the FCPA accounting provisions are practicable and enforceable.

That said, to obviate the need to identify a duty at law to make or alter an accounting document in order to found the prosecution of the Proposed Law, an express duty to maintain proper accounting records for the purposes of demonstrating compliance with Australia's foreign bribery law may be a pragmatic approach to take. The introduction of accounting standards around the topic will not in and of themselves achieve this outcome as they are not mandatory in their application. Further, reliance upon section 286 of the *Corporations Act* to impose a duty to make or alter an accounting document requires that provision to do work which was never expected of it.

The simplicity of the US approach is compelling. The duty to make and keep books, records, and accounts is expressly unequivocal, in simple terms and in the same location as the balance of the accounting and internal controls provisions. The advantages of this approach are obvious and its success in achieving its intended purpose have been demonstrated .

As bribery and corruption are increasing cross-boarder issues, combative laws must maximise their jurisdictional reach in order to be effective as demonstrated by the FCPA. For this reason, section 2 of this letter outlines the scope of the FCPA in some detail. Insofar as it is possible and reasonable to do so, we are strongly supportive of Australia adopting an analogous stand alone legislative approach.

If there is concern about the introduction of a duty of broad application, parameters could readily be devised. For example, in the same way that the FCPA differentiates issuers from other companies in relation to its books and records provisions, it may be appropriate that such a duty be cast in terms

[2] at [214].

applying only to publicly listed companies or alternatively that small proprietary companies be excluded (as it is the case in relation to section 286 of the Corporations Act).

The effectiveness of the Proposed Law could also be enhanced with the addition of provisions relating to internal controls as exists in the FCPA. In particular, the FCPA requires issuers to devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that:

(a) transactions are executed in accordance with management's general or specific authorisation;

(b) transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and to maintain accountability for assets;

(c) access to assets is permitted only in accordance with management's general or specific authorisation; and

(d) the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any difference.

The inclusion of a similar collection of provisions would assist to ensure that the Proposed Law can be effectively enforced by the Australian Federal Police by providing breath to the scope of the law.

5. Concluding remarks

The Uniting Church continues to be highly supportive of the moves by the Australian Parliament to more extensively implement Australia's obligations under the OECD Convention in a considered, robust and effective manner. It shares the Greens' desire that the Proposed Law be clear and capable of being practically enforceable without imposing a prohibitive regulatory burden.

We are grateful for the opportunity to provide further feedback in relation to the Proposed Law and invite you to contact us if you would like to consult further with us on this important topic.

Yours faithfully

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Enclosure: Schedule 1 - International comparison of the obligation to maintain books and records

Schedule 1: International comparison of the obligation to maintain books and records

	Australia[3]	US[4]	UK[5]	Canada[6]
Obligation to maintain books and records	Section 286 of the *Corporations Act* 2001 (Cth) requires (among other things) a company to keep written financial records that: 1. correctly record and explain its transactions and financial position and performance; and 2. would enable true and fair financial statements to be prepared and audited. A breach of section 286 is a strict liability offence[7]. Section 9 of the *Corporations Act* defines "financial records" to include: 1. invoices, receipts, orders for the payment of money, bills of exchange, cheques, promissory notes and vouchers; and 2. documents of prime entry; and 3. working papers and other documents needed to explain: – the methods by which financial statements are made up; and – adjustments to be made in preparing financial statements. Further, section 1307 of the *Corporations Act* makes it an offence for an officer, former officer, employee, former employee, member or former member of a company who engages in conduct that results in the concealment, destruction, mutilation or falsification of any securities of or belonging to the company or any books affecting or relating to affairs of the company. False accounting offences also exist in State and Territory legislation, such as section 83 of the *Crimes Act* 1958 (Vic). For individuals, this offence has a maximum penalty of 10 years imprisonment or a fine of approximately $169,000. For corporations, this offence bears a maximum fine of approximately $845,000.	Issuers are required to:[8] 1. make and keep books, records, and accounts, which, in reasonable detail, accurately and fairly reflect the transactions and dispositions of the assets of the issuer; and 2. devise and maintain a system of internal accounting controls sufficient to provide reasonable assurances that: – transactions are executed in accordance with management's general or specific authorization; – transactions are recorded as necessary to permit preparation of financial statements in conformity with generally accepted accounting principles or any other criteria applicable to such statements and to maintain accountability for assets; – access to assets is permitted only in accordance with management's general or specific authorization; and – the recorded accountability for assets is compared with the existing assets at reasonable intervals and appropriate action is taken with respect to any difference.	In general terms, section 386 of the UK *Companies Act 2006* requires companies to keep proper accounts requiring that: 1. Every company keep adequate accounting records; 2. Accounting records must, in particular, contain: – entries from day to day of all sums of money received and expended by the company and the matters in respect of which the receipt and expenditure takes place; and – a record of the assets and liabilities of the company. Section 387 makes it clear that failure to comply with this regulation is a criminal offence which is punishable with imprisonment for a term not exceeding two years or a fine (or both). The offence is committed by every officer of the company.	In general terms, pursuant to section 20(2.1) of the *Canada Business Corporations Act RSC 1985*, a corporation shall prepare and maintain, adequate accounting records. Every person who, without reasonable cause, contravenes the requirement to prepare and maintain adequate accounting records, is guilty of an offence and liable on summary conviction to a fine not exceeding CAD 5,000 or imprisonment up to six months, or both (section 22 *Canada Business Corporations Act*).

[3] All references are to the provisions of the Proposed Law unless otherwise indicated.
[4] All references are to the provisions of the FCPA unless otherwise indicated.
[5] All references are to the provisions of the UK *Bribery Act 2010* unless otherwise indicated.
[6] All references are to the provisions of the *Corruption of Foreign Public Officials Act, S.C. 1998* unless otherwise indicated.
[7] Section 286(3). Strict liability is defined in section 6.1 of the Criminal Code.
[8] §78m(b).