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Dear Committee Members

Senate inquiry into foreign bribery

We refer to the terms of reference for the inquiry into foreign bribery moved by the Australian Senate on 24 June 2015 and the invitation that we have received to make submissions on the terms of reference.

We welcome the opportunity to make a submission to the inquiry, particularly given the importance of the issue to Australian businesses.

1 Executive Summary

In summary, we recommend that the federal government introduce enhanced guidelines on:

- corporate culture and what constitutes an effective compliance program;
- the benefits of self-reporting and co-operating with the authorities;
- acceptable gift and hospitality offerings in Australia; and
- the facilitation payments defence and its elements.

As part of this guidance, we also recommend that the government consider the potential for Australia to adopt an opinion procedure similar to that which currently exists in the United States.

2 Overview

We consider that the community would benefit from increased guidance around Australia's anti-bribery laws. Given that the legislature is actively considering reform in this area, it is an ideal opportunity to also publish enhanced guidelines on some of the more opaque concepts under the current laws.

Australian companies continue to expand their international operations and activities. A number of Australian companies have recently been investigated in relation to allegations of bribery involving foreign officials.

KING&WOOD MALLESONS

Certain aspects of corporate legal obligations in this field do not appear to be well-understood. This is particularly because many of the concepts embodied in the anti-bribery and corruption provisions in Division 70 of Chapter 4 of the *Criminal Code*, Schedule to the *Criminal Code Act 1995* (Cth) are of uncertain scope and reach and have not been the subject of any clarifying judicial consideration.

The federal government has produced a number of relevant fact sheets and has recently launched an online education tool for general consumption. We encourage these developments, although consider that there is room for further publications of this nature, particularly to guide participants in Australia's corporate sector.

Enhanced guidelines accompanying the *Criminal Code* provisions, while not binding, would be a simple and effective way of providing clarity to the community about how the provisions work. The current lack of guidance in this field creates risks for companies, particularly given the severe legal and reputational consequences of contravening anti-bribery and corruption laws. Clear guidelines would also discourage equivocal or ambiguous business development activities.

Government guidelines would be published for information purposes only and should be drafted in a practical, common-sense way. They would be most useful if drafted in a comprehensive manner, making use of hypothetical case studies and short, simple checklists. A good example is provided by the *FCPA: Resource Guide to the U.S. Foreign Corrupt Practices Act* (***FCPA Resource Guide***).[1] This is a joint publication of the United States Department of Justice (***DOJ***) and the United States Securities Exchange Commission (***SEC***), which contains comprehensive guidance on compliance with the *Foreign Corrupt Practices Act 1977* (US) (***FCPA***).

The guidelines should be updated on an annual or bi-annual basis to ensure hypothetical examples, checklists and other information continue to reflect legislative and judicial developments, contemporary business practices, technology and commerce.

Our submissions focus on several specific areas in which the community would benefit from greater guidance.

- We recommend that the federal government publish guidelines about how Australian companies and foreign corporations conducting business in Australia can establish an effective corporate culture that protects against liability under Division 70 of the *Criminal Code*. At present there is very little guidance as to what effectively constitutes a compliant corporate culture. This can be contrasted to the United States and United Kingdom where guidance in this area is extensive.

- We also recommend that there be improved guidance on the benefits of self-reporting. The Australian Federal Police (***AFP***) continue to encourage Australian companies to self-report and co-operate with authorities. However, there is no formal guidance for companies on the precise benefits of self-reporting in Australia. In the absence of a scheme of deferred or non-prosecution agreements, it would be desirable to have formalised guidance on the incentives for a company to self-disclose.

- There is a need for guidance on the limits of acceptable gift and hospitality offerings in Australia. This area has been in the spotlight recently given BHP Billiton's recent settlement with United States authorities around hospitality offerings at the Beijing Olympic Games in 2008. While there is some guidance for Australian public servants, there is very little information for corporations which provide gifts, travel and hospitality to public officials as to acceptable levels of gift giving and hospitality.

- Guidance on the facilitation payments defence under s 70.4 of the *Criminal Code* and, in particular, how to satisfy the various elements of the defence is also desirable. While the elements of the defence

[1] Department of Justice and Securities and Exchange Commission, *FCPA: Resource Guide to the U.S. Foreign Corrupt Practices Act* (November 2012) <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf>.

KING&WOOD MALLESONS

are set out in the *Criminal Code*, there is no case law on how to satisfy the elements. In the absence of guidance from government, businesses have been left to rely on very conservative legal advice.

- Finally, we recommend the Committee consider the benefits of adopting an opinion procedure similar to that established by the DOJ in the United States. The DOJ's FCPA Opinion Procedure allows corporations to apply for the Attorney-General's written opinion about whether proposed conduct would violate the FCPA. If a favourable opinion is returned, it creates a rebuttable presumption in the applicant's favour that the conduct complies with the FCPA. The DOJ also makes versions of its opinions publicly available on its website to provide guidance more broadly to the public. This model could be implemented in Australia and provide a mechanism for removing some of the uncertainty surrounding Australia's anti-bribery framework.

3 Corporate culture and compliance programs

- **The Commonwealth should develop guidelines to accompany the anti-bribery provisions contained in Division 70 of the *Criminal Code*.**
- **Guidelines should align with international best practice and should include:**
  - **(a) practical case studies;**
  - **(b) checklists; and**
  - **(c) suggested preventative strategies, including appropriate company policies and reporting procedures.**
- **The guidelines should include specific hypothetical applications of Division 70 of the *Criminal Code*.**
- **Clear guidance should be included about how companies can establish an effective corporate culture that protects against liability under Division 70 of the *Criminal Code* including how companies should go about developing, implementing and monitoring compliance programs.**
- **Rather than a "one-size-fits-all" approach, guidance should be framed around the key principles that apply uniformly to corporate culture, with practical steps and hypothetical examples provided in relation to each.**

1.2 Corporate culture and the Criminal Code

Attributing liability to a corporate for an offence under the *Criminal Code* requires the corporate to have expressly, tacitly or impliedly authorised or permitted the commission of the relevant offence.[2] The means by which such authorisation or permission is to be established include proving that:

a. a corporate culture existed that directed, encouraged, tolerated or led to non-compliance; or

b. the corporate failed to create and maintain a corporate culture that required compliance.[3]

2 *Criminal Code*, Schedule to the *Criminal Code Act 1995* (Cth), s 12.3(1).

3 *Criminal Code*, Schedule to the *Criminal Code Act 1995* (Cth), s 12.3(2).

KING&WOOD MALLESONS

It is trite to say that establishing and maintaining a corporate culture that promotes compliance with anti-bribery laws, and prevents contravention of them, will help protect a corporation from liability under s 70.2 of the *Criminal Code*. This begs the question: what is an appropriate corporate culture?

At present, there is very little guidance in Australia as to what effectively constitutes a compliant 'corporate culture'. This can be contrasted to the United States and the United Kingdom, where guidance in this area is comprehensive.

1.3 *Guidance in the United Kingdom*

A particularly onerous approach has been adopted by the United Kingdom legislature regarding the enforcement and prosecution of bribery and corruption offences. Corporations are strictly liable for the bribery of foreign public officials by persons associated with the corporation[4] and no mental element (knowledge or intent) need be proven. However, the *Bribery Act 2010* (UK) provides an 'adequate procedures defence' if a corporation can establish that it had implemented adequate procedures designed to prevent associated persons from undertaking bribery of a foreign official.[5]

To assist corporations in understanding how to obtain the benefit of this defence, the United Kingdom Ministry of Justice published *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)*[6] (***UK Guidance***).

The UK Guidance is intended to assist corporations to understand what types of procedures may be established to prevent bribery. It is designed to be of general application and is based on six key principles that are illustrated by commentary and examples.[7]

The UK Guidance is not prescriptive and does not adopt a one-size-fits-all approach. While ultimately only the courts can determine whether the adequate procedures defence will be made out, the UK Guidance provides a good place to start.

1.4 *Guidance in the United States*

Unlike the United Kingdom, the United States does not adopt strict liability for corporates or offer an adequate procedures defence. In the United States, a corporation will be criminally liable if its officers, employees or agents engage in corrupt conduct and the corporation has authorised, has knowledge of or is wilfully blind to such conduct.[8] Despite the absence of an adequate procedures defence, corporate culture is an important aspect of prosecuting a company for bribery offences and impacts on the DOJ's prosecutorial discretion. The FCPA Resource Guide provides information about how companies can implement an effective compliance program. While a "check-the-box" approach is rejected, the FCPA Resource Guide sets out ten hallmarks of effective compliance programs.[9]

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4 *Bribery Act 2010* (UK), s 6-7.

5 *Bribery Act 2010* (UK), s 7(2).

6 Ministry of Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)* (March 2011) <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf>.

7 Ibid, at 20-31.

8 *Foreign Corrupt Practices Act 1977* (US), § 78dd-1, § 78dd-3.

9 Department of Justice and Securities and Exchange Commission, *FCPA: Resource Guide to the U.S. Foreign Corrupt Practices Act* (November 2012) <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> at 57- 63.

KING&WOOD MALLESONS

Corporate culture is also a factor taken into account in sentencing. The United States Sentencing Guidelines provide that in sentencing a corporation, whether an effective compliance and ethics program has been established will be taken into account when attributing culpability to the organisation[10] and determining what sentence should be imposed.[11] The minimum requirements for a corporate culture that encourages ethical conduct and is committed to preventing and detecting criminal conduct are set out in the United States Sentencing Guidelines.[12]

Additional guidance in the United States context is provided by the United States Department of Commerce's International Trade Administration, which has published *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies.*[13] The Department of State has also published *Fighting Global Corruption: Business Risk Management.*[14]

1.5 *International guidelines*

In the international sphere, consensus is emerging about what constitutes best practice. Several non-governmental and inter-governmental organisations have issued guidance about best practice for compliance. Some of the more prominent guidance includes the following.

- The *Anti-Bribery Recommendation* published by the Organisation for Economic Co-operation and Development (***OECD***), particularly its Annex II, *Good Practice Guidance on Internal Controls, Ethics, and Compliance*, adopted on 18 February 2010.[15] This guide acknowledges contributions from the private sector and civil society through the Working Group on Bribery in International Business Transactions.

- The *Anti-Corruption Code of Conduct for Business* published by the Asia-Pacific Economic Cooperation (***APEC***) in 2007.[16]

- The International Chamber of Commerce (***ICC***) *Rules on Combating Corruption* published in 2011,[17] especially part III which lists suggested elements of an effective compliance program.

- Transparency International's *Business Principles for Countering Bribery* published in 2013.[18]

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10 United States Sentencing Commission, *Guidelines Manual*, § 8C2.5.

11 Ibid, § 8D1.4.

12 Ibid, § 8B2.1.

13 U.S. Department of Commerce, *Business Ethics: A Manual for Managing a Responsible Business Enterprise in Emerging Market Economies* (2004) <http://ita.doc.gov/goodgovernance/business_ethics/manual.asp>.

14 U.S. Department of State, *Fighting Global Corruption: Business Risk Management* (29 May 2001) <http://2001-2009.state.gov/p/inl/rls/rpt/fgcrpt/2001/index.htm>.

15 OECD, *Good Practice Guidance on Internal Controls, Ethics and Compliance* (18 February 2010) <http://www.oecd.org/daf/anti-bribery/44884389.pdf>.

16 Asia-Pacific Economic Cooperation, *APEC Anti-Corruption Code of Conduct for Business* (September 2007) <http://publications.apec.org/publication-detail.php?pub_id=269>.

17 International Chamber of Commerce, *Rules on Combating Corruption* (2011) <http://www.iccwbo.org/Data/Policies/2011/ICC-Rules-on-Combating-Corruption-2011/>.

18 Transparency International, *Business Principles for Countering Bribery* (October 2013) <http://files.transparency.org/content/download/707/3036/file/2013_Business%20Principles_EN.pdf>.

KING&WOOD MALLESONS

- The summary of the World Bank Group's *Integrity Compliance Guidelines*,[19] which incorporate standards that are acknowledged as good governance and anti-corruption practices.

- *Partnering Against Corruption: Principles for Countering Bribery*, prepared by the World Economic Forum in partnership with Transparency International and the Basel Institute on Governance and published in 2005.[20]

1.6 *Recommended Australian approach*

We recommend that the federal government publish guidelines about how Australian companies and foreign corporations conducting business in Australia, can establish an effective corporate culture. Guidelines published by the United States and United Kingdom governments have disavowed a "one-size-fits-all" approach. This is also appropriate for the Australian corporate landscape. In the manner adopted by the United States and the United Kingdom, we suggest that the federal government draft guidelines based on several key principles and provide theoretical examples relevant to each. In addition to providing guidance on practical steps for companies to take, the guidelines should emphasise that a program will only be effective if it is abided by and respected at all levels of the corporation and is thoroughly implemented, monitored and updated.

4 Improved guidance on self-reporting

- **The Australian government should publish clear guidelines on the benefits of self-reporting suspicions of bribery and cooperating in investigations, including in relation to how this conduct will impact:**
  - **(a) the decision of the Commonwealth Director of Public Prosecutions to prosecute;**
  - **(b) charge negotiations with the prosecution; and**
  - **(c) a sentence imposed by a court.**
- **The CDPP and AFP are collaboratively developing a presentation for industry on the benefits of self-reporting and the availability of charge negotiations and this should be made widely available when it is completed.**
- **In preparing guidance on self-reporting and cooperation with authorities, regard should be had to the FCPA Resource Guide.**

[19] World Bank Group, *Integrity Compliance Guidelines* (2 January 2011) <http://siteresources.worldbank.org/INTDOII/Resources/IntegrityComplianceGuidelines_2_1_11web.pdf>.

[20] World Economic Forum, *Partnering Against Corruption Principles for Countering Bribery* (2013) <http://www.weforum.org/pdf/paci/PACI_PrinciplesWithoutSupportStatement.pdf>.

KING&WOOD MALLESONS

4.1 Context

The AFP continue to encourage Australian companies to self-report and cooperate with authorities. Commander Linda Champion, manager of the AFP's Fraud and Anti-Corruption Business Area, was recently quoted in the *Australian Financial Review* as having said that:[21]

> *We want to show we are very serious about this, we want to enforce it, we do want to see some good prosecutions for those who deserve it, but at the same time we do want to reach out our hand and say that if you do come forward, we will do the best that we can to achieve the best outcome for you as a company and your shareholders.*

Despite similar comments made by members of the federal government and the AFP in the past, there is little guidance for companies about the consequences of voluntarily reporting suspicions of bribery to Australian authorities. In particular, there is no clear guidance about the extent to which self-reporting will:

- influence the a decision of the Commonwealth Director of Public Prosecutions (***CDPP***) to prosecute a company;
- impact on the prospects of a company engaging in successful charge negotiations with authorities; or
- impact on the penalty that a court may impose if a company is ultimately found to have engaged in bribery.

4.2 Decision to prosecute

Australia has not adopted a formal scheme of deferred or non-prosecution agreements. There is, accordingly, little scope for these types of negotiations with prosecutors which are common in the United States. That said, the *Prosecution Policy of the Commonwealth: Guidelines for the making of decisions in the prosecution process*[22] (***Prosecution Policy***) provides that various factors may be considered in determining whether it is in the public interest to prosecute an offence. These factors include whether the alleged offender is willing to cooperate in the investigation or prosecution of others, or the extent to which the alleged offender has already done so.[23] Aside from this small amount of guidance in the Prosecution Policy, there is limited information about the extent to which self-reporting and cooperating in an investigation will affect the CDPP's decision whether to bring charges.

This can be contrasted to the FCPA Resource Guide. Chapter 7 outlines the factors that will be considered by the DOJ and SEC when deciding whether to bring an enforcement action under the FCPA. While the FCPA Resource Guide notes that reasons for declining to prosecute are not published by the authorities, several recent examples of matters that the DOJ and SEC have declined to pursue are provided. Voluntary disclosure of misconduct and cooperation with investigators are common themes across the case examples.

Guidance about the impact of voluntary disclosure and cooperation with investigations is needed in the Australian context. Presently, companies have scarce information on the benefits of disclosing bribery offences and whether this has any impact on a decision to prosecute. Clearer guidance would

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21 Patrick Durkin, 'AFP ramps up probes into foreign bribes', *Australian Financial Review,* 10 August 2015 at 3.

22 Commonwealth Department of Public Prosecution, *Prosecution Policy of the Commonwealth* <http://www.cdpp.gov.au/wp-content/uploads/Prosecution-Policy-of-the-Commonwealth.pdf>.

23 Ibid, at [2.10(r)].

KING&WOOD MALLESONS

reduce the current uncertainty surrounding the consequences of self-reporting for corporations and may encourage greater cooperation with prosecutors.

4.3 Charge negotiations

As outlined by the Prosecution Policy:[24]

> *Charge negotiation involves negotiations between the defence and prosecution in relation to the charges to be proceeded with. Such negotiations may result in the defendant pleading guilty to fewer than all of the charges he or she is facing, or to a lesser charge or charges, with the remaining charges either not being proceeded with or taken into account without proceeding to conviction.*

The Prosecution Policy provides that any decision whether to agree to a charge negotiation proposal must take into account all circumstances of the case, including whether the defendant is willing to cooperate in the investigation or prosecution of others, or the extent to which the defendant has done so.[25]

More guidance is needed on how these considerations will impact on the CDPP's decision to agree to a charge negotiation proposal. As was acknowledged by the OECD in its recent report, *Australia: Follow-up to the Phase 3 Report & Recommendations*[26] (***Phase 3 Follow-up Report***), the CDPP and the AFP have been working together to develop an external presentation for industry on the benefits of self-reporting and the availability of charge negotiations. However, the Phase 3 Follow-up Report does not provide specific details on how the CDPP conducts charge negotiations, except to say that they are conducted in accordance with paragraphs 6.14 to 6.21 of the Prosecution Policy. To the extent that this presentation provides more detail on the processes and considerations of the CDPP, it should be made publically available.

4.4 Penalties

In October 2012, the OECD recommended that Australia develop a clear framework that addresses, among other things, the nature and degree of cooperation expected of a company and the credit given for such behaviour.[27] In line with this recommendation, more guidance is needed on the impact that plea bargaining and self-reporting may have on a penalty imposed if a company is found to have engaged in corrupt conduct.

The Phase 3 Follow-Up Report[28] noted that section 16A of the *Crimes Act 1914* (Cth) sets out the matters to which a court must have regard when determining the sentence to be imposed for a federal offence. These include whether the person has pleaded guilty to the charge and the degree to which the person has cooperated with law enforcement agencies.[29] However, a court's sentencing discretion

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24 Ibid, at [6.14].

25 Ibid, at [6.18(a)].

26 OECD Working Group on Bribery, *Australia: Follow-Up to the Phase 3 Report & Recommendations* (3 April 2015) <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf> at 17.

27 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in Australia* (12 October 2012) <http://www.oecd.org/daf/anti-bribery/Australiaphase3reportEN.pdf> at 50[9].

28 OECD Working Group on Bribery, *Australia: Follow-Up to the Phase 3 Report & Recommendations* (3 April 2015) <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf> at 17-18.

29 *Crimes Act 1914* (Cth), s 16A(g),(h).

KING&WOOD MALLESONS

is absolute, within the confines of the law. In *Barbaro v R* (2014) 253 CLR 58, the High Court observed that:[30]

> *neither the prosecution nor the offender's advisers can do anything more than proffer an opinion as to what might reasonably be expected to happen… it is for the sentencing judge, alone, to decide what sentence will be imposed.*

The decision in *Barbaro* has ramifications across a wide range of disciplines. One possibility for the federal government is to consider whether the decision is appropriate or whether legislation should be enacted to allow parties to make submissions on penalty. However, as *Barbaro* extends well beyond the scope of anti-bribery and corruption laws, consideration of whether to reform this area of law would need to take place in a wider forum that this.

Given that prosecutors can no longer make submissions to a sentencing judge about the appropriate sentencing range, companies should be given guidance on the precise benefits, for sentencing purposes, of self-disclosure and cooperating with investigations.

By way of contrast, the United States Sentencing Guidelines provide a comprehensive guide to the factors which will be considered by a court in imposing sentences and penalties. Those guidelines were developed for a different legal framework, and may not be entirely suitable in Australia, but they do provide a useful example for consideration by the Australian government in publishing the benefits of voluntarily disclosing suspicions of bribery.

5 Hospitality, gifts and tourism

- **The Australian government should develop guidelines on appropriate hospitality, gifts, travel and gratuities.**
- **The guidelines should provide discrete examples of appropriate and inappropriate hospitality, gifts, gratuities and travel that may contravene Division 70 of the *Criminal Code*.**

5.1 Context

Australian companies have recently attracted scrutiny on suspicion of corruption relating to gifts and hospitality provided to foreign officials. In particular, BHP Billiton was pursued by United States authorities for gifts and hospitality offered by BHP Billiton at the 2008 Beijing Olympic Games to Chinese public officials. The settlement of this matter for US$25 million likely exacerbates concerns about falling foul of anti-bribery laws through hospitality extended to clients and business partners. At the same time, gifts and hospitality are a part of conducting modern business.

What constitutes an acceptable gift or an appropriate level of hospitality is not well-understood in the context of Australia's anti-bribery provisions. This issue is all the more complicated because the appropriateness of hospitality, gifts, travel or gratuities often involves questions of context (including cultural context) and degree.

Hospitality is a common element in business interactions. It is often instrumental in developing or initiating business relationships. Cultural norms vary from country to country and are frequently

30 *Barbaro v R* (2014) 253 CLR 58 at 76 [47].

KING&WOOD MALLESONS

misunderstood and, even if understood, may be difficult to reconcile with the norms which underpin the Australian legislation. Lack of guidance as to when hospitality, gifts and travel amount to bribery or corrupt conduct creates risks for companies, particularly as the legal, financial and reputational consequences of contravening anti-bribery laws are grave. Clear guidelines would discourage equivocal or ambiguous business development activities.

5.2 *Australian Public Service guidelines*

While there is no clear guidance for corporate Australia about appropriate hospitality and gifts, the Australian public service can refer to the *APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads*[31] (***APS Code***). In relation to providing hospitality, the APS Code provides that:[32]

> *Agencies may provide official hospitality if it furthers the conduct of public business. Expenditure on official hospitality must be publicly defensible on the basis that the primary purpose of the event is work-related.*

On when hospitality might be accepted, the APS Code states that:[33]

> *When developing policies, agencies should consider issues that will help employees judge when it is appropriate to accept hospitality. For example, the person may wish to consider the scale of the hospitality offered, and whether it is proportional to that which the agency would provide under similar circumstances.*

There is currently no equivalent for the corporate sector in Australia.

5.3 *United States guidelines*

The FCPA Resource Guide offers an excellent example of specific, yet accessible, guidance on hospitality and gifts. The guide acknowledges that providing gifts, travel or entertainment can be appropriate ways for business people to display respect and build important networks. It provides that:[34]

> *Some hallmarks of appropriate gift-giving are when the gift is given openly and transparently, properly recorded in the giver's books and records, provided only to reflect esteem or gratitude, and permitted under local law.*

The FCPA Resource Guide explains that the larger or more extravagant the gift, the more likely it is to have been given with an improper purpose. Examples of FCPA enforcement actions brought by the DOJ and SEC for improper travel and entertainment expenses are set out in the guide. These are

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31 Australian Public Service Commission, *APS Values and Code of Conduct in practice: A guide to official conduct for APS employees and agency heads – Sect 4.12 Gifts and benefits* (7 August 2015) <http://www.apsc.gov.au/publications-and-media/current-publications/aps-values-and-code-of-conduct-in-practice/gifts-and-benefits>.

32 Ibid.

33 Ibid.

34 Department of Justice and Securities and Exchange Commission, *FCPA: Resource Guide to the U.S. Foreign Corrupt Practices Act* (November 2012) <http://www.justice.gov/criminal/fraud/fcpa/guidance/guide.pdf> at 15.

followed by a list of hypothetical examples about whether the FCPA would be contravened by various offers of gifts, travel and entertainment.[35]

5.4 United Kingdom guidelines

The UK Guidance provides a further example of guidance for companies about hospitality, promotional and other business expenditure.[36] The guidance makes clear that the UK government did not intend that the *Bribery Act 2010* (UK) would criminalise bona fide hospitality or proportionate promotional business expenditure when it is:

- designed to improve a company's image;
- in promotion of a company's services and products; or
- to establish corporate relations.

To amount to a bribe, a connection must be established between the advantage offered and the intention to influence or secure business. Relevant to this enquiry is that:[37]

> *[T]he more lavish the hospitality or the higher the expenditure in relation to travel, accommodation or other similar business expenditure provided to a foreign public official, then, generally, the greater the inference that it is intended to influence the official to grant business or a business advantage in return.*

The UK Guidance goes on to provide examples of hospitality and gifts that may contravene the *Bribery Act*.

5.5 Examples from other jurisdictions

A number of other jurisdictions have published guidance documents to accompany anti-bribery and corruption regulations. The Singapore Corrupt Practice Investigation Bureau publishes, by category, case studies and suggested preventative measures on its website.[38]

5.6 Australian guidelines

Australian guidelines on appropriate hospitality, gifts, travel and gratuities should align with international best practice and should include:

- practical case studies;
- checklists; and

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35 Ibid, at 17 – 18.

36 Secretary of State for Justice, *The Bribery Act 2010: Guidance about procedures which relevant commercial organisations can put into place to prevent persons associated with them from bribing (section 9 of the Bribery Act 2010)* (2011) <http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf> at 12 – 14.

37 Ibid, at 13.

38 Corrupt Practices Investigation Bureau, *Cases of Interest* (5 August 2015) <https://www.cpib.gov.sg/cases-interest/introduction>.

KING&WOOD MALLESONS

- suggested preventative strategies, including appropriate company policies and reporting procedures.

As the United States and the United Kingdom have done, the guidelines should explain that companies are not to be discouraged from appropriate hospitality and entertaining. However, practical guidance on what may constitute inappropriate promotional activities would be welcomed, including information about how the magnitude of benefits provided may affect a company's liability.

6 Facilitation payments defence

- **The Australian government should provide clear guidance on the operation of the facilitation payments defence under s 70.4 of the *Criminal Code*.**
- **Guidelines should address:**
  - **(a) when a benefit's value will be of a minor nature under s 70.4(1)(a); and**
  - **(b) when routine government action will be of a minor nature under s 70.4(1)(b).**

6.1 Context

Division 70 of the *Criminal Code* currently provides that a person will not be guilty of bribing a foreign public official under s 70.2 if the person made a facilitation payment under s 70.4. To establish the facilitation payments defence, a person must prove (among other things) that:

- the value of the benefit was of a minor nature;
- the benefit was given solely to expedite performance of a routine government action of a minor nature; and
- the person made a record of the conduct as soon as practicable afterwards.

Despite the elements of the defence being set out in s 70.4 of the *Criminal Code*, there is no clear guidance, and no judicial authority, on how to satisfy the elements. This issue is one of the more conceptually complex arising from Australia's anti-bribery legislation.

Whether the facilitation payments defence should be repealed is a focus of this Senate inquiry. The defence was previously considered by the Joint Standing Committee on Treaties in its inquiry into the OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions and the draft implementing legislation. At that time, the majority of submissions on the issue favoured the facilitation payments defence.[39] The Australian government issued a public consultation paper on the facilitation payments defence in November 2011, which canvassed the

[39] Commonwealth Government, '*Government Response to the Joint Standing Committee on Treaties Report: OECD Convention on Combating Bribery and Draft Implementing Legislation*' (11 March 1999) <http://www.aph.gov.au/parliamentary_business/committees/house_of_representatives_committees?url=jsct/governmentresponses/16th.pdf> at 11[6.3].

question whether the defence should be removed to improve the operation of the laws and bring the Australian legislation into line with the *Bribery Act 2010* (UK).

If, on this occasion, the Senate Economics Legislation Committee determines that the defence should retained, there is no doubt that the corporate sector would benefit from formal guidance on its practical application. This is particularly because the defence has yet to be considered by the courts.

6.2 *"Minor nature"*

Sections 70.4(1)(a) and 70(1)(b) require that the value of the benefit offered, and the routine government action that the benefit was intended to secure, be of a "minor nature". There is no clear guidance about what this phrase means.

The Explanatory Memorandum to the *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999* (Cth) explains that the term "minor nature", as used in relation to routine government action, was intended to be similar to "minor benefit", which is used in the *Fringe Benefits Tax Assessment Act 1986* (Cth). The Explanatory Memorandum recognises that it was not possible to set a dollar limit that would be appropriate in all circumstances. This was particularly because international transactions involve currency differences and fluctuations.[40]

The legislature deliberately designed the facilitation payments defence to account for the particular circumstances of different transactions. However, in so drafting, there is uncertainty about when a person or company can take the benefit of the defence. Determining whether a payment is of a minor nature is a decision for the court in light of all the surrounding circumstances. In the absence of judicial authority on this point, there remain many questions in practice.

One such question is whether the value of a benefit can be assessed relative to the size of the transaction, or the relative wealth of the recipient. The following examples illustrate the uncertainty.

- A payment by a large multinational corporation of what it considers to be of a minor nature could be characterised very differently if the same payment is made by a small family business.
- A payment of $10,000 might, generally speaking, be considered significant; however, it may be perceived as relatively minor if millions of dollars were at stake if the routine governmental action were not secured.
- Payments considered to be of a minor nature in a corporation's home country may be viewed differently in the recipient's country depending on typical living standards, incomes and variations in cultural and business practices.
- Payments may need to be made to a number of officials to achieve routine government action. The payments may be small when considered individually but may be substantial once aggregated.

6.3 *Guidance in the United States*

There are two areas where Australia can look to the United States for examples of guidance on the facilitation payments defence.

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[40] Explanatory Memorandum, *Criminal Code Amendment (Bribery of Foreign Public Officials) Bill 1999* (Cth) at [45].

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First, United States companies considering a prospective payment to foreign public officials may apply to the Attorney-General for an opinion on whether the conduct would violate the FCPA. A consequent opinion must be issued within 30 days and be published online. There is a rebuttable presumption that a company which has acted in accordance with an opinion of the U.S. Attorney-General has complied with the FCPA. Advance clearance of prospective transactions provides legal certainty to companies and the security to proceed without concern for the risk of potential criminal prosecution. In Australia, a similar service is already provided by the Australian Taxation Office. The development of a service for foreign bribery laws was discussed in the debates before the Joint Standing Committee on Treaties but never implemented.[41] This is discussed further below.

Secondly, the FCPA Resource Guide discusses what falls within the ambit of the facilitation payments defence under the FCPA. Helpful analysis of real and hypothetical case studies are provided.

6.4 Australian approach

Corporations currently face difficulties in understanding how the facilitation payments defence applies. Formal guidance from the Australian government, by way of official guidelines or an authorised opinion service to assess prospective payments, would provide the corporate sector with much-needed support. This would give Australian companies confidence when relying on the defence in the conduct of international business.

7 Opinion procedure

- **The Attorney-General's Department should consider adopting an opinion procedure in the manner of the United States Attorney-General to facilitate feedback on proposed transactions.**
- **A positive opinion should give rise to a rebuttable presumption that the applicant has complied with Division 70 of the *Criminal Code*.**
- **An opinion should be provided within seven days of a written application being received to maximise the utility of the procedure.**

7.1 Context

The final issue we would like to focus our submission on is the adoption of a process similar to the DOJ's FCPA Opinion Procedure. A comparable process would assist companies to determine whether proposed conduct would violate the anti-bribery provisions of the *Criminal Code*.

Although the OECD has recognised Australia's efforts to raise awareness of foreign bribery and corporate compliance in the private sector, it has noted residual problems with Australia's efforts to publicise its anti-bribery and corruption framework, including the distinction between facilitation payments and bribes and the limit of appropriate gifts and hospitality.[42]

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41 Joint Standing Committee on Treaties, *OECD Convention on Combating Bribery*, Official Hansard Report (17 April 1998) at 43 (Dr Chaikan).

42 OECD Working Group on Bribery, *Australia: Follow-Up to the Phase 3 Report & Recommendations* (3 April 2015) <http://www.oecd.org/daf/anti-bribery/Australia-Phase-3-Follow-up-Report-ENG.pdf> at [5].

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We consider that the adoption of a process similar to that of the DOJ's FCPA Opinion Procedure process would:

(a) provide individuals and companies with greater certainty as to whether proposed conduct would comply with Australia's anti-bribery framework; and

(b) encourage transparency and honesty by Australian individuals and companies.

7.2 DOJ FCPA Opinion Procedure

The purpose of the DOJ's FCPA Opinion Procedure is to enable companies to obtain an advisory opinion from the United States Attorney-General as to whether certain specified, prospective conduct conforms with the DOJ's anti-bribery enforcement policy under the FCPA. Since this system was established, the DOJ has issued over 60 opinions[43] and the number of opinions released each year has remained relatively stable.[44]

Once a person makes a written request for an advisory opinion, the United States Attorney-General is required to respond within 30 days with an opinion on whether the prospective conduct would violate the FCPA.[45]

If the United States Attorney-General issues a positive opinion and concludes that the applicant's proposed conduct conforms to the DOJ's enforcement policy, this gives rise to a rebuttable presumption that the applicant has complied with the FCPA.[46] However, an opinion will not bind or obligate any agency other than the DOJ. An applicant's obligations to any other agency remain unchanged and the operation of any statutory or regulatory provision (other than those specifically cited in the particular opinion) is unaffected.

The presumption can be rebutted by evidence that the information submitted to the United States Attorney-General was inaccurate or incomplete, or that the conduct was not within the scope of that outlined in the request.

For sake of completeness, we note that some commentators have criticised the system as particularistic and reactive and only useful in limited circumstances where the prospective transaction is narrow and will not change.[47]

7.3 Australian approach

Despite some of the limitations of the DOJ's FCPA Opinion Procedure, it has merit in that it provides tailored assessments of future conduct. In the Australian context, where there is little clear guidance on how Division 70 of the *Criminal Code* applies, adopting a similar procedure is worth considering.

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43 United States Department of Justice, *Opinion Procedure Releases* (17 June 2015) <http://www.justice.gov/criminal-fraud/opinion-procedure-releases>.

44 Ibid.

45 28 C.F.R. Sec 80.8.

46 28 C.F.R. Sec. 80.10.

47 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (October 2010) <http://www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf> at [94].

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Prior to the implementation of the OECD Convention on Combating Bribery, it was noted that this model of prospective advice had been effective in relation to the ACCC and tax rulings.[48] The ATO as an example, issues public and private rulings which express its interpretation of the laws as it administers them in order to assist taxpayers and practitioners. It has been said that tax rulings rank just behind tax legislation in frequency of use among tax practitioners.[49] The development of such a service was discussed in the Joint Standing Committee on Treaties debates on the OECD Convention on Combating Bribery but was, ultimately, never implemented.[50]

Some aspects of the DOJ's FCPA Opinion Procedure would work well in the Australian context. The rebuttable presumption is recommended because it would encourage companies to engage in open communication with Australian authorities. It would also encourage companies to use the service.

The timing of providing opinions would need to be carefully considered if this process was adopted. The 30-day timeframe under the DOJ's FCPA Opinion Procedure may be too long. Commercial decisions often need to be made at a rapid pace and the agent in the field may not be able to wait 30 days to obtain an opinion. Similarly, corporate transactions, particularly corporate mergers and acquisitions, have relatively short lifecycles. Counterparties typically have much less than 30 days to conclude a transaction and will usually not be able to wait for an opinion before proceeding.[51] This means it would be difficult for a company to delay a transaction while waiting for an opinion from the Attorney-General's Department. The timeframe for returning an opinion may be more appropriately limited to seven days. We appreciate that there may be some practical and resource difficulties with this proposal, but a longer timeframe may limit the utility of the procedure.

Adopting an opinion procedure in Australia would demonstrate the Australian government's commitment to enforcing the anti-bribery provisions of the *Criminal Code* and encourage the voluntary disclosure of potential bribery issues by corporate Australia. Opinions would benefit the corporate sector by providing valuable guidance, although privacy considerations of the applicant would need to be considered and consent obtained prior to wide publication. Providing an opportunity to an applicant to object to wide publication would limit a company's exposure to the possibility of competitors gaining knowledge of prospective business activities and negative public perception should a transaction be deemed illegal.[52]

The government needs to consider whether a request for an opinion may expose the applicant to liability if the opinion is not binding on other government departments. If an opinion requires the applicant to describe the transaction in detail, there is a risk that the applicant could be implicated in criminal conduct. The procedure would need to carefully manage the distinction between:

(a) using the process to encourage transparency and to eliminate corruption; and

(b) using the process to alert law enforcement to potential illegal bribery identified through the disclosure of information by an applicant.

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48 Joint Standing Committee on Treaties, *OECD Convention on Combating Bribery*, Official Hansard Report (17 April 1998) at 43 (Dr Chaikan).

49 Diana Scolaro, 'Tax Rulings: Opinion or Law? The Need for an Independent 'Rule-Maker' (2006) 16(1) *Revenue Law Journal* 1 at 2.

50 Joint Standing Committee on Treaties, *OECD Convention on Combating Bribery*, Official Hansard Report (17 April 1998) at 43 (Dr Chaikan).

51 OECD Working Group on Bribery, *Phase 3 Report on Implementing the OECD Anti-Bribery Convention in the United States* (October 2010) <http://www.oecd.org/unitedstates/UnitedStatesphase3reportEN.pdf> at [95].

52 Ibid.

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8 Next Steps

We would be more than happy to answer any queries the Committee may have in relation to our submissions. We would also be happy to assist in progressing draft guidelines should our recommendations be acted upon.

Yours faithfully,