



**Australian Government**

**Attorney-General's Department**

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# **Attorney-General's Department**

## **Submission to the Senate Legal and Constitutional Affairs Legislation Committee**

**Crimes Legislation Amendment (Combatting Foreign  
Bribery) Bill 2023**

## Introduction

The Attorney-General's Department (the department) welcomes the opportunity to make a submission to the Senate Legal and Constitutional Affairs Legislation Committee (Committee) on the Crimes Legislation Amendment (Combatting Foreign Bribery) Bill 2023 (the Bill). This submission provides further detail to assist this Committee's consideration of the Bill and should be read alongside the Bill and its explanatory materials.

The department previously made a submission to this Committee's inquiry into both the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (introduced in 2019 and lapsed at the end of the 46<sup>th</sup> Parliament) and the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 (introduced in 2017 and lapsed at the end of the 45<sup>th</sup> Parliament). Schedule 1 of the Bill is substantially in the same form as Schedule 1 of the previous Bills.

The department notes that measures contained in Schedule 1 of the Bill were supported by this Committee in their 2018 and 2020 reports. The department's submission reflects information provided to this Committee previously, where it is relevant to Schedule 1 of the Bill. The submission also considers recommendations from previous Committee inquiries and reports in 2017 and 2019, as well as the Senate Economics References Committee Foreign bribery report of March 2018, to inform consideration of the Bill.

Unlike the previous Bills, the Bill does not introduce provisions to support a Commonwealth Deferred Prosecution Agreement (DPA) scheme for serious corporate crime.

### Consultation on reforms

In developing the reforms, the department has worked closely with key agencies responsible for responding to serious corporate crime, including the Australian Federal Police (AFP), the Commonwealth Director of Public Prosecutions (CDPP), the Australian Securities and Investments Commission (ASIC), the Australian Taxation Office (ATO) and the Australian Transaction Reports and Analysis Centre (AUSTRAC).

The reforms follow extensive public consultation since 2016, including through a public consultation paper on the foreign bribery amendments as well as draft provisions released in April 2017 and a draft Adequate Procedures Guidance released in December 2019. As noted in previous Committee submissions, the reforms have been discussed in a range of forums to ensure that concerns from representatives are accounted for. The Bill reflects issues raised throughout consultation processes and is in the same form as Schedule 1 of the previous Bills.

### Consultation on draft Adequate Procedures Guidance

Consistent with recommendations made by both this Committee and the Senate Economics References Committee in its Foreign bribery report of March 2018, the department facilitated public consultation on materials to support the measures in the Bill.

On 2 December 2019, a draft Adequate Procedures Guidance (the Guidance) was released for public consultation, as required by section 70.5B of the 2019 Bill. The Guidance is designed to assist companies in understanding the types of measures a company could implement and steps it could take to prevent an associate from bribing a foreign public official. The consultation process concluded on 28 February 2020, consistent with Recommendation 1 of the 2018 report by this Committee (which recommended allowing a four-week consultation period for corporate stakeholders to provide comment).

Recommendation 2 of the report recommended that the Government include internal corporate whistleblowing systems as part of adequate procedures designed to prevent foreign bribery. The draft Guidance responds to this recommendation by including this requirement.

Noting the passage of time since the previous consultation, the department proposes to further consult on the Guidance to ensure that it is current and reflects international best practices, including with regard to the new standards adopted in the 2021 *OECD Recommendation of the Council for Further Combating Bribery of Foreign Public Officials in International Business Transactions* Recommendation (2021 OECD Anti-Bribery Recommendation). The department expects to consult on an updated Guidance in the coming months and will allow stakeholders, including from the private sector, civil society and academia, ample opportunity to provide comment.

Subject to the passage of the measures in the Bill, feedback received through consultation will inform the finalisation of the Adequate Procedures Guidance.

## Overview of the Bill

The Bill seeks to strengthen the legal framework for investigating and prosecuting foreign bribery. The Bill also strengthens Australia's implementation and enforcement of the *OECD Convention on Combating Bribery of Foreign Public Officials in International Business Transactions* (OECD Convention), as well as the 2021 OECD Anti-Bribery Recommendation. The OECD Convention obliges States party to the Convention to criminalise the bribery of foreign public officials and provides for a host of related measures to make this effective. The 2021 OECD Anti-Bribery Recommendation complements the OECD Convention and includes new measures to assist efforts to prevent, detect and investigate foreign bribery.

The proposed amendments seek to overcome the limitations of the current foreign bribery offence which contain unnecessary impediments to prosecution. The amendments in the Bill are targeted and have been developed to capture typical cases of foreign bribery being encountered by law enforcement. The amendments ensure that the foreign bribery offence keeps pace with the evolving nature of foreign bribery offending.

The amendments within the Bill would deliver improvements to the existing foreign bribery offences in the *Criminal Code 1995* (Cth) (Criminal Code), consistent with the recommendations from the Australian Law Reform Commission report on *Corporate Criminal Responsibility* (Report 136, 2-22).

## Schedule 1 – Amendments relating to foreign bribery

### Amendments to the existing foreign bribery offence

The offence of bribing a foreign public official is contained in Division 70 of the Criminal Code. The Bill seeks to make it easier to investigate and prosecute foreign bribery by amending Division 70 to:

- ensure that the foreign bribery offence extends to the bribery of candidates for public office (not just current holders of public office),
- extend the coverage of the foreign bribery offence to include bribery conducted to obtain a personal advantage (the current offence is restricted to bribery conducted to obtain or retain a *business* advantage),
- replace the existing requirement that the benefit or business advantage be 'not legitimately due' with the broader concept of 'improperly influencing' a foreign public official,
- remove the existing requirement that the foreign public official actually be influenced in the exercise of their official duties for an offence to be established, and
- clarify that the offence does not require the accused to have had a specific business, or business or personal advantage, in mind, and that the business, or business or personal advantage, can be obtained for someone else.

### A new offence: a failure to prevent foreign bribery

The Bill also introduces a new corporate offence of failure to prevent foreign bribery. This new indictable offence will apply where an associate of a body corporate has committed bribery for the profit or gain of the body corporate. However, the offence will not apply if the body corporate can demonstrate that it has 'adequate procedures' in place to prevent the commission of foreign bribery by its associate. To support the introduction of this new offence, the Bill would require the Minister to publish guidance on the types of measures that are likely to constitute 'adequate procedures'. Schedule 1 of the Bill will commence 6 months

after Royal Assent, to allow sufficient time for Government to publish guidance and for companies to implement these procedures.

The department will consult on a revised Adequate Procedures Guidance ahead of finalisation and commencement of the new offence.

### **Other amendments**

Consequential amendments to the *Income Tax Assessment Act 1997* (ITAA) will also be made. These prohibit a person from claiming a deduction for a loss or outgoing the person incurs, that is a bribe to a foreign public official. This is a continuation of the approach of section 26-52 of the ITAA. The amendments also revise the relevant provisions of the ITAA so that the elements of bribery of a foreign public official in that Act is consistent with the elements contained in new section 70.2 of the Criminal Code.

### **Reasons for reform**

Foreign bribery is a serious and insidious problem across the world. At a local level, it can harm communities by increasing the costs and reducing the quality of vital public goods and services for citizens, skewing competition by creating an uneven playing field for Australian businesses doing the right thing when operating overseas. At a macro level, it impedes economic development, corrodes good governance and undermines the rule of law. Further, bribery by Australians and Australian businesses damages our international standing as a corruption-free trading partner and can shrink the global market for Australian exports.

Some of the elements of the current foreign bribery offence contain unnecessary impediments to investigation and prosecution. The amendments proposed in the Bill expand the scope of the offence to cover the broader range of conduct amounting to foreign bribery and to remove undue impediments to a successful prosecution.

#### **Why extend the foreign bribery offence to candidates for office?**

The Bill would amend the definition of foreign public official to include a person standing or nominated as a candidate for public office. Law enforcement experience indicates that individuals or companies may seek to bribe candidates for public office, with the intent of obtaining an advantage if the candidate takes office. 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.

Expansion of the definition of foreign public official to candidates for office was specifically recommended by the Senate Economics References Committee (Recommendation 5) in its Foreign bribery report of March 2018.

#### **Why extend the foreign bribery offence to retain a personal advantage?**

The current offence is limited to the bribery of foreign public officials to obtain or retain business or business advantages. The proposed new offence would also apply where the bribe was to obtain or retain a personal advantage. Law enforcement experience has shown that in some cases foreign bribery can occur where the advantage sought is personal. 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.

This reform was also specifically recommended by the Senate Economics References Committee (Recommendation 6) in its Foreign bribery report of March 2018.

### **Why remove the concept of ‘not legitimately due’ from the offence?**

Under the existing foreign bribery offence, the prosecution must prove that both the benefit offered/provided/promised (i.e. the bribe) and the business advantage sought were ‘not legitimately due’ (sub-paragraphs 70.2(1)(b) and 70.2(1)(c)). In some cases, the threshold of ‘not legitimately due’ can present unnecessary 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.

The Bill would amend the offence to replace these elements with the concept of ‘improperly influencing’ a foreign public official to obtain or retain business or an advantage. This concept would ensure the offence more accurately reflects the conduct of foreign bribery.

It will be a matter for the courts to determine whether there was an intention to improperly influence a foreign public official 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.

### **Why remove the requirement of influencing a foreign public official in the exercise of their official capacity?**

The amendments remove the requirement that the intention to influence the foreign official must be directed towards the exercise of the official’s duties. The requirement puts 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.

The AFP has previously noted 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.

### **Corporate offence of failing to prevent foreign bribery**

Due to the complicated corporate structures of international corporations involved in foreign bribery, it can be challenging to establish criminal liability for corporations particularly where companies seek to avoid liability through wilful blindness to the conduct of their employees.

The Bill would introduce a new offence of failure to prevent foreign bribery. This means that bribery by an associate of a corporation would automatically trigger corporate liability where the bribery was committed for the corporation’s benefit. A similar offence has been successfully implemented in the UK and has reportedly had a significant positive influence on the adoption of effective corporate compliance programs to prevent bribery.

The new corporate offence would incentivise business to implement and maintain adequate internal controls to prevent the commission of foreign bribery by its associates. If passed, this offence would be in line with the relevant standards agreed to in the 2021 OECD Anti-Bribery Recommendation, particularly the recommendation for member countries to implement measures to incentivise companies to develop effective internal controls, ethics and compliance programmes or measures, including as a potential

mitigating factor to a foreign bribery offence.<sup>1</sup> Consistent with the relevant standards in the 2021 OECD Anti-Bribery Recommendation, the mere existence of controls would not be sufficient to satisfy the defence – the company would need to show that these procedures are adequate, and the determination of the adequacy of procedures for the purpose of establishing the defence would ultimately be a matter for the court.

A body corporate will commit the offence of failing to prevent bribery if an associate of the body corporate commits the offence of foreign bribery for the profit or gain of the body corporate. An associate is defined as an officer, employee, agent, contractor or subsidiary of the body corporate or a person who otherwise performs services for the body corporate. The conduct by the associate would automatically trigger the liability of the body corporate. However, as outlined above, the offence will not apply if the body corporate had adequate procedures in place to prevent its associates from committing foreign bribery.

The maximum penalty for the proposed failure to prevent bribery is the same as that for the existing foreign bribery offence and is no more than the highest of either 100,000 penalty units, three times the value of the benefit obtained if the court can determine its value, or 10% of the body corporate's annual turnover (if the value of the benefit cannot be determined) during a 12 month period ending at the end of the month in which the body corporate committed or began committing the offence. In a practical sense, this equates to a maximum penalty of 100,000 penalty units or higher. This reflects the serious nature of bribery and corruption and 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 deterrence. 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 an insufficient deterrent. It is appropriate that companies can be held accountable for bribery by their associates where they do not take steps designed to prevent such conduct from occurring. In the UK, corporations that commit or fail to prevent foreign bribery are punishable by an unlimited fine (noting that the appropriate level of fine is determined by assessing the gross profit from the contract obtained, retained or sought as a result of the bribery offence and multiplying this figure by reference to a culpability category). The penalty is also consistent with Australia's obligations under the OECD Convention which requires that the bribery of a foreign public official is punishable by effective, proportionate and dissuasive criminal penalties.

The introduction of a new corporate offence for failing to prevent foreign bribery was recommended by the Senate Economics References Committee (Recommendation 7) in its Foreign bribery report of March 2018.

### **What will a body corporate need to do to show it had 'adequate procedures'?**

The new failure to prevent offence will not apply if the body corporate had in place adequate procedures designed to prevent an associate from committing foreign bribery. The company would bear a legal burden in

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<sup>1</sup> Recommendation XXIII.D.iii of the 2021 OECD Anti-Bribery Recommendation provides that "*Member countries should nevertheless ensure that the mere existence of internal controls, ethics and compliance programmes or measures does not fully exonerate the legal person from its liability, that the final consideration of such programmes or measures remains the sole responsibility of judicial, law enforcement, or other public authorities, and that sanctions remain effective, proportionate and dissuasive, in accordance with Article 3 of the OECD Anti-Bribery Convention*".

relation to this matter. The standard of proof the defendant would need to discharge in order to prove the defence is the balance of probabilities (section 13.5 of the Criminal Code). The imposition of a legal burden on the body corporate creates a strong positive incentive to adopt measures to prevent foreign bribery.

It is reasonable to expect companies of all sizes to put in place appropriate and proportionate procedures to prevent bribery from occurring within their business. 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 a company would avoid liability is by having adequate procedures in place and to rely on the proposed defence in section 70.5A(5) of the Bill.

As noted in the Explanatory Memorandum to the Bill, what constitutes 'adequate procedures' would be determined by the courts on a case-by-case basis. It is envisaged that this concept would be scalable, depending on the relevant circumstances including the size of the body corporate and the nature of its business and activities.

Proposed new section 70.5B would provide that the Minister must publish guidance on the steps that a body corporate can take to prevent an associate from bribing foreign public officials. This will provide guidance to corporations on appropriate mitigations, and support the development of adequate procedures to prevent foreign bribery. Draft guidance was released on 2 December 2019 for public consultation. Given the passage of time since 2019-20 when consultation last occurred, a revised guidance will be released for further consultation.

This measure is consistent with Recommendation 1 of the 2018 report by this Committee on the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017 and Recommendations 7 and 8 of the Senate Economics References Committee's Foreign bribery report dated March 2018.

The guidance will be similar to that provided by the UK in relation to its offence for failure to prevent foreign bribery. This will address industry stakeholder concerns about the challenges of operating internationally and reconciling even modest variations in legal frameworks. The Government recognises that guidance that is consistent with international models where possible will better contribute to the effective prevention of foreign bribery.

Consistent with Recommendation 9 made by the Senate Economics References Committee in its Foreign bribery report of March 2018, the Government is working to finalise and publish the Guidance with sufficient time before the commencement of the new corporate offence, noting that the offence, if passed, would not commence until six months after passage of the Bill.

### **Improved enforcement of the foreign bribery offence**

While foreign bribery is particularly challenging to detect, investigate and prosecute, Australia's enforcement has improved in recent years. As at July 2023, seven individuals and three corporations have been convicted of foreign bribery offences. A further two individuals have been convicted of false accounting for conduct related to foreign bribery. Other matters are currently before the courts or under investigation. The creation of the AFP's dedicated Corporate Crime and Foreign Bribery Team, and a foreign bribery panel of experts, as



well as close cooperation with domestic and international agencies, have also had a positive effect on addressing and combatting foreign bribery.

### **Why remove a Deferred Prosecution Agreement (DPA) Scheme from the Bill?**

The previous 2019 Bill would have introduced a Deferred Prosecution Agreement (DPA) Scheme, whereas this Bill does not. As noted by the Attorney-General in his second reading speech, the introduction of such a Scheme should only be entertained after the measures in this Bill have been enacted and given time to work.