Australian Institute of Company Directors

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

Via email: legcon.sen@aph.gov.au

Dear Sir/Madam

Inquiry into the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019

Thank you for the opportunity to provide a submission to the Senate Legal and Constitutional Affairs Committee on the Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2019 (**Bill**).

The Australian Institute of Company Directors (**AICD**) has a membership of more than 45,000 including directors and senior leaders from business, government and the not-for-profit sectors. The mission of the AICD is to be the independent and trusted voice of governance, building the capability of a community of leaders for the benefit of society.

Given our focus on excellence in governance and boardroom practice, the AICD has a strong interest in enhancing the effectiveness of measures to address serious corporate crime. Foreign bribery and corruption causes significant harm to the governance of societies and economies abroad as well as distorting competition and the integrity of markets.

The AICD was actively engaged in the consultation on the *Crimes Legislation Amendment (Combatting Corporate Crime) Bill 2017*, and we welcome the reintroduction of the Bill to the Senate.

1. Executive Summary

The AICD strongly supports efforts to strengthen Australia's foreign bribery laws. Accordingly, this submission seeks to ensure that the amendments proposed by the Bill will achieve legislative reform in a fair, reasonable and effective manner.

In summary, the AICD:

- Supports the amendments proposed to the principal foreign bribery offence in section 70.2 of the Criminal Code. While we have previously favoured the replacement of the 'not legitimately due' requirement with a test of 'dishonesty', we recognise that certain forms of bribery do not always involve dishonesty and introducing the concept of 'improperly influencing' would be appropriate. Further, the non-exhaustive list of matters that a trier of fact may have regard to when determining whether influence is improper includes whether the benefit was provided, offered or promised 'dishonestly';

- Supports the creation of a failure to prevent foreign bribery offence. However, we reiterate our concerns with certain aspects of the new offence, particularly the reversal of the onus

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of proof and the broad definition of 'associate'. Accordingly, we encourage the Committee to reconsider these aspects of the Bill; and

- Endorses the introduction of a deferred prosecution agreement (**DPA**) scheme, although we encourage the Committee to consider the following modifications to encourage uptake of DPAs:
    - clarification that a statement of facts does not require formal admissions of criminal liability to be included in a DPA consistent with the approach under the UK's *DPA Code of Practice*; and
    - an amendment so that information or documents obtained as an indirect result of information disclosed during DPA negotiations are not admissible evidence in relevant proceedings the subject of a new investigation or line of inquiry. This is consistent with the purpose of a DPA scheme, being to encourage corporations to engage openly and honestly in DPA negotiations.

Our position is discussed in further detail below.

2. Proposed failure to prevent foreign bribery offence

We note that the Australian Law Reform Commission's (**ALRC**) consultation on its Discussion Paper – *Corporate Criminal Responsibility* is concurrently considering alternatives to the current attribution model of corporations in Part 2.5 of the Criminal Code. In its paper, the ALRC has preferred a single statutory model for attribution rather than the Bill's proposed 'failure to prevent' formulation. Given the ALRC's proposals are beyond the scope of the Committee's inquiry, it is suffice to note that there is value in having greater consistency across the various acts which impose criminal liability on corporations.

In the current context, the AICD supports the policy intention behind a failure to prevent foreign bribery offence, being the provision of an appropriate deterrent to companies being wilfully blind to corrupt practices within their business. We agree that all companies should be held accountable for bribery of foreign public officials by their associates where they do not take steps, or have adequate procedures in place, to detect, address and prevent such conduct from occurring.

However, we continue to have serious concerns about the reversal of the onus of proof, where a legal burden is placed on the defendant to demonstrate it has adequate procedures in place to prevent foreign bribery. Ordinarily, the rule of law requires that a defendant should only bear the onus of establishing a matter where that matter is within the defendant's knowledge and not available to the prosecution.

As noted in the ALRC Report 129 *Traditional Rights and Freedoms – Encroachments by Commonwealth Laws* in 2015, reversal of the legal burden of proof on an issue essential to culpability in an offence, arguably provides the greatest interference with the presumption of innocence, and its necessity requires the strongest justification.[1]

Our concern with this approach hinges on the practical difficulties of proving an 'adequate procedures' defence in the context of court proceedings (where misconduct by an "associate" has presumably already occurred). Recognising the risks of 20:20 vision when events are

[1] ALRC Report 129, Traditional Rights and Freedoms – Encroachments by Commonwealth Laws, December 2015 at 17.

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considered in hindsight, we consider a reversal of the onus of proof would provide the prosecution with an unfair advantage over a defendant corporation in a court proceeding.

Noting the seriousness of the proposed offence, the degree of potential penalties and the proposal to apply 'absolute liability' to the offence, the AICD urges the Committee to consider restoring the onus of proof so that the prosecution is required to prove that the corporation failed to have adequate procedures in place to prevent foreign bribery by an associate.

Should the Bill retain a reverse onus of proof, then the standard of proof imposed on the defendant should at least be reduced from a *legal* burden to an *evidential* burden. Doing so would still require a defendant corporation to:

- adduce or point to evidence that suggested a reasonable possibility it had adequate procedures in place to prevent an associate committing an offence;
- be proactive and accountable for the actions of their associates; and
- adopt adequate compliance measures to prevent bribery conduct from occurring.

In addition, we are concerned that the definition of 'associate' remains too broad. As currently drafted, the definition captures all employees, agents, contractors and subsidiaries who perform services for or on behalf of the corporation. This definition purports to pierce the corporate veil between a parent and subsidiary company on the basis of simple corporate ownership. However, the fact that a company is a subsidiary to another company is not justification, of itself, to impose liability. For example, in some corporate groups a parent company can have a very limited degree of influence or control over the day-to-day management of a subsidiary, despite being a majority shareholder.

Instead, it would be preferable to limit the definition of 'associate' to those officers, employees, agents and contractors acting under delegation and/or within the actual or apparent scope of their authority, but exclude subsidiaries. This would be consistent with the current approach to corporate criminal liability in Part 2.5 of the Criminal Code.

Nonetheless, if the government proceeds with a definition of 'associate' that includes subsidiaries, then we encourage it to consider adopting an approach that is more consistent with the *Bribery Act 2010* (UK) (**UK Bribery Act**). Although the UK Bribery Act definition of an 'associated person' extends to subsidiaries, their legislation takes a substance over form approach. We note that the *Bribery Act 2010 Guidance* provides an important clarification around the requisite level of control:[2]

> *"Without proof of the required intention, liability will not accrue through simple corporate ownership or investment, or through the payment of dividends or provision of loans by a subsidiary to its parent. So, for example, a bribe on behalf of a subsidiary by one of its employees or agents will not automatically involve liability on the part of its parent company, or any other subsidiaries of the parent company, if it cannot be shown the employee or agent intended to obtain or retain business or a business advantage for the parent company or other subsidiaries. This is so even though the parent company or subsidiaries may benefit indirectly from the bribe."*

[2] 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, at 42-43. See: http://www.justice.gov.uk/downloads/legislation/bribery-act-2010-guidance.pdf.

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We recommend clarification that it is not the intention of the reform to expose Australian corporations to a serious risk of automatic prosecution for the conduct of persons who they are merely associated with through simple corporate ownership.

3. Proposed DPA scheme

The AICD supports the introduction of a DPA scheme. In our view, the proposal strikes an appropriate balance between incentivising corporations to self-report and the need to hold corporations accountable for serious corporate crime. The implementation of a DPA scheme would also bring Australia into line with other jurisdictions such as the UK and USA.

The AICD agrees with the mandatory and optional content to be included in DPAs as set out in the Bill. However, given the importance of an agreed statement of facts in a DPA, we suggest a clarification, consistent with the UK *DPA Code of Practice,* that although a corporation will be required to admit to certain agreed facts detailing the nature and scope of their offending, there is no requirement for formal admissions of criminal liability in respect of offences.[3] In our view, such a requirement would otherwise deter corporations from seeking a DPA.

In addition, we support the Bill's position that the admissibility of certain documents indicating, or created solely for the purpose of, the negotiation of a DPA should be restricted in any proceeding brought by a Commonwealth agency against a party to a DPA.

However, we do not agree with the proposed subsection 17H(4) which could enable any information or document which is brought to the attention of a Commonwealth agency as an indirect result of information disclosed during DPA negotiations to be admissible in evidence in proceedings, the subject of a new investigation or inquiry. In our view, this would not only run counter to principles of natural justice and procedural fairness (including the application of legal professional privilege and privilege against self-incrimination), but also undermine the efficacy of a DPA scheme to incentivise corporations to self-report and engage openly and honestly in DPA negotiations. Rather, we consider the Bill should make clear that information or documents disclosed in this manner are made on a 'without prejudice basis'.

4. Next steps

We hope our comments will be of assistance to you. If you would like to discuss any aspect of this submission further, please contact Christian Gergis, Head of Policy,

Yours sincerely

CHRISTIAN GERGIS
Head of Policy

[3] Serious Fraud Office and Crown Prosecution Service, *Deferred Prosecution Agreements Code of Practice*, 14 February 2014, at 6.3. See: https://www.cps.gov.uk/sites/default/files/documents/publications/DPA-COP.pdf.